Compendium of Judicial Verdicts in Arbitration Cases

December 2020

Indian Railways Institute of Civil Engineering
Pune - 411001

FOREWORD

Proper presentation of any arbitration case before the Arbitral Tribunal, by the Defending Officer from Railway side, is very crucial for safeguarding Railway's interests in the case. The arbitration case is presented based on facts of the case and concerned provisions in the relevant acts like Indian Contract Act, the Arbitration and Conciliation Act, Limitation Act etc. It is well established principle of law that the interpretation given by the Supreme Court to the earlier judgments is also law under Article 141 of the Constitution and binding on High Courts and Subordinate Courts. The Defending Officers from Railway Side, mostly being the executive officers handling the contract under dispute, are not fully aware or updated about the judgements of High Court(s) and the Supreme Court on various issues in arbitration cases. On the other hand, the claimant side can have the benefit of legal expertise.

To correct the aforesaid imbalance and to empower the officials from Railway side with the judgments of High Court(s) and the Supreme Court on the common issues in arbitration cases, it was decided by IRICEN to publish a "Compendium of Judicial Verdicts in Arbitration Cases". This has been done by Shri. R. K. Shekhawat, Senior Professor/IRICEN. In this compendium, one issue has been covered in each Chapter with various judgments on that issue listed in chronological order. For each of the verdict, the brief facts of the case, gist of submissions made by both the parties, relevant observations of the Court, verdict of the Court and conclusions based on the said verdict have been presented. In the printed version, full text of the judgment is not included for the sake of brevity; but full text of all the judgments have been incorporated in the e-version of the compendium uploaded on the IRICEN Website, and the same may be referred whenever needed.

The aim of this compendium is to present judgments of the High Courts and the Supreme Court for reference in arbitration cases. It does not aim or intend to give any verdict different from what was intended by the Court in the said judgment or to give any official ruling on any subject. It is expected that this compendium will be helpful to all the officials dealing with arbitration cases.

I put my appreciation on record for wonderful job done by Shri R. K. Shekhawat, Senior Professor/IRICEN, for bringing out this publication within a short span of less than 3 months.

Suggestions for improvement, if any, are welcome and may be forwarded to IRICEN. These suggestions will be considered in future revision of this compendium.

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PREFACE

In any arbitration case, the pleadings and presentation before the Arbitration Tribunal are equivalent to the trial in a Court Case, where all the facts & evidence are presented and are made part of the case records. All further petitions in the higher courts are appeals, where no new fact or evidence can be introduced. If any fact/point/evidence is not pleaded before the Arbitral Tribunal at right time, then the right to make this pleading is waived off by Section 4 of the Arbitration and Conciliation Act, 1996. Therefore, proper and timely action by the HQ Office while dealing the demand for arbitration by the contractor and by the Defending Officer while presenting the case before Arbitral Tribunal, are very crucial in getting a favourable verdict from the Arbitral Tribunal. Challenging the award of Arbitral Tribunal, under Section 34 of the Arbitration and Conciliation Act, is very difficult as there are very few grounds on which this challenge can be made. This makes, proper presentation of the case before arbitral Tribunal, all the more important.

The general experience in arbitration cases was that the claimant side, having benefit of the legal expertise, is well equipped with the legal position on the issues involved in the form of provisions of relevant act(s), duly supplemented/interpreted by the judgments of High Court(s) and the Supreme Court on the issue concerned. The Railway side is represented by the concerned executive handling the contract, who is not a legal person by either qualification or profession. The Defending Officer from Railway side acquaint themselves with the provisions of relevant act(s) but it is not always possible for them to be fully aware/updated about the judgments of High Court(s) and the Supreme Court on the issue concerned; whereas these are quoted in abundance by the claimant side. Thus, the dice is generally loaded against the Defending Officers from Railway side.

The ideal solution to the aforesaid problem is to have an institutional legal setup in every Division Office/Dy.CE Office/HQ Office etc., where the judicial verdicts by the High Courts and the Supreme Court are catalogued and updated, for benefit of all the Defending Officers in the arbitration cases. But this is a long-term issue and, therefore, to empower the officials from Railway side with the judgments of High Court(s) and the Supreme Court on the issues commonly occurring in arbitration cases, it was decided by IRICEN to publish a "Compendium of Judicial Verdicts in Arbitration Cases" and this Compendium is an outcome of this. In this compendium, one issue has been covered in each Chapter, with various judgments on that issue listed in chronological order.

No two cases dealt by Courts may be exactly same and every case has to be seen in the context of the facts of the case, presentations made by the parties and other nuances of the case. Therefore, each judgement needs to be read carefully to understand the final verdict in the right perspective. In this compendium, brief facts of the case, gist of submissions made by both the parties, relevant observations of the Court, verdict of the Court and conclusions based on the said verdict have been presented for each of the verdict. In the printed version, full text of the judgments is not included for the sake of brevity; but full text of all the judgments have been incorporated in the e-version of the compendium uploaded on the IRICEN Website, and the same may be referred whenever needed.

The purpose of publishing this compendium is to present judgments of the High Courts and the Supreme Court for reference in arbitration cases. This compendium does not attempt to give any verdict different from what was pronounced by the Court in the said judgment or to give any official ruling or direction on the subject.

Assistance rendered by Shri Harish Kumar Trivedi, Sr. Technical Assistant, in the form of downloading the judgments from website and formatting them, was very helpful in finalizing this compendium in a short period of time and the same is acknowledged.

It is expected that this compendium will be helpful to all the Railway officials dealing with arbitration cases. However, there is always scope for improvement in any publication. Therefore, suggestions for improvement are welcome and the same may please be forwarded for incorporation in the future editions.

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Chapter – 1

Appointment of Arbitrator(s)

1.1 Bombay High Court Verdict dated 22.04.1997, Union of India and Others Vs. Seth Construction Company

(A) Full text of the Verdict: Annexure - 1.1

(B) Facts of the case, in Brief:

(i) Military Engineering Services (hereinafter referred as "MES") awarded two contracts of value approximately Rs. 55 lakhs and Rs. 1 Crore, to M/s. Seth Construction Company (hereinafter referred as "contractor"). As per conditions of contract "*all disputes are to be referred to the sole arbitrator, an Engineer Officer, to be appointed by Engineer-in-Chief; whose decision shall be final, conclusive and binding*".

(ii) During final bill, certain claims were denied by MES and the contractor, therefore, gave a notice dated 20.9.1993 for appointment of arbitrator in both these contracts. The contractor was informed by MES vide letter dated 31.01.1994 that there was no objection to the appointment of the arbitrator but no arbitrator was appointed, which should have been made within 15 days of the notice of claims. The contractor filed an application under Section 20 of the Arbitration Act-1940, on 05.05.1995, and the Civil Judge, Senior Division, Chandrapur, appointed an independent Sole Arbitrator in both the cases. This appointment was challenged by MES under the present appeals.

(C) Gist of submissions made by the MES:

(i) The Court cannot appoint an arbitrator of its' choice when the arbitrator was to be appointed by the Engineer-in-chief as per arbitration agreement. Even if the application with Court, by the contractor, was filed on 05.05.1995, the subsequent appointment of arbitrator by the MES on 28.08.1995 would render the said application infructuous.

(ii) Even if it is held that no arbitrator was appointed by the Engineer-in-Chief, as per Section 20(4) of the Arbitration Act, the Court could appoint only such arbitrator as already agreed by both the parties. The parties had consented in the contract agreement that arbitrator would be appointed by the Engineer-in-Chief and it will be an Engineering Officer. When such a person was available, then there would be no question of the Court appointing arbitrator of its' choice.

(iii) Since the appointment of arbitrator was already made on 28.08.1995, there is no question of the Court appointing anybody else excepting the one who has been appointed by the Engineer-in-Chief.

(D) Gist of submissions made by the Contractor: As held in *Ram Chandra Reddy & Co. Vs Chief Engineer M. E. S. Madras Zone*, if no arbitrator is appointed in terms of the contract when the notice for the same is given by the other party, the administrative head who is authorized to appoint the arbitrator is deemed to have abdicated himself of the power given to him by the contract to appoint

arbitrator and as such the Court, before whom an application under Section 20 is made, is entitled to appoint the arbitrator of its choice.

(E) Some relevant observations of the Hon'ble High Court:

(i) It is an admitted position that a notice to appoint an arbitrator was given on 20.09.1993 and till 05.05.1995 nothing was done by the Engineer-in-Chief. Because of this inaction, the contractor proceeded to file an application under Section 20. It was only after the notice was given on this application that the Engineer-in-Chief appointed an arbitrator of his choice on 28.08.1995.

(ii) The contractor has not stopped with his letter dated 20.09.1993 but has also given a 15 days' notice for the appointment of arbitrator. However, even that notice was ignored completely for a period of almost 1 year and 8 months and it is then that the party has approached the Court. To say then that still the appointing authority would retain its power to appoint an arbitrator of its choice would be a sheer injustice. Further to say that the Court would have no choice but to simply appoint an arbitrator strictly in terms of the arbitration agreement would also render the further clause as a mere legislative surplusage. The correct interpretation, therefore, would be that under such circumstances where the contractor is required to proceed under Section 20 and where the opposing party cannot give any sufficient cause for not filing the agreement in the Court, there lies a discretion with contractor not to agree upon an arbitrator whether named in the agreement or otherwise.

(iii) It does not mean that the contractor cannot agree on the named arbitrator in the agreement. It would be a matter of the choice of the contractor, but where there is no agreement upon an arbitrator, the Court would have the power to appoint any arbitrator of its' choice or at least it would not be bound to appoint an arbitrator named in the agreement. The existence of the sub-clause (4) in Section 20 itself suggests that the parties could have a discretion not to agree upon an arbitrator in which case the Court would proceed to appoint an arbitrator.

(iv) It has to be borne in mind that in the matters of arbitration, the agreement between the parties is of essence. But when the differences arise and the parties to a contract ignore the agreement, the Court intervention would be the only possible result.

(F) Verdict of Hon'ble High Court: In the result for the reasons stated, the appeals are dismissed with costs.

(G) Conclusions based on the verdict of Hon'ble High Court: Even if the contract conditions provide for appointment of Arbitrator by an Authority of the department, with certain qualifications mentioned therein, if the designated authority unduly delays the appointment of arbitrator; then this may lead to the Court appointing any person of its' choice or as suggested by the contactor as the arbitrator, when the court is approached by the aggrieved party.

1.2 Supreme Court Verdict dated 18.10.2000, Appeal (Civil) 5986 of 2000, Datar Switchgears Ltd Vs. Tata Finance Ltd. & Others

(A) Full text of the Verdict: Annexure - 1.2

(B) Facts of the case, in Brief:

(i) Datar Switchgears Limited (hereinafter referred as "appellant") had entered into a lease agreement with Tata Finance Limited (hereinafter referred as "respondent") in respect of certain machineries. Clause 20.9 of the Agreement is the Arbitration clause, which mentioned that *"…. in case of any dispute under this Lease the same shall be referred to an Arbitrator to be nominated by the Lessor and the award of the Arbitrator shall be final and binding on all the parties concerned …"*.

(ii) Dispute arose between the parties and the respondent sent a notice to the appellant on 05.08.1999 demanding payment of Rs. 2,84,58,701 within 14 days and stating that in case of failure to pay this amount, this notice be treated as one issued under Clause 20.9 of the Lease Agreement. The appellant did not pay the amount as demanded by the respondent. The respondent did not appoint an Arbitrator even after the lapse of 30 days, but filed Arbitration Petition on 26.10.1999 under Section 9 of the Act for interim protection. On 25.11.1999, the respondent appointed the Sole Arbitrator by invoking Clause 20.9 of the Lease Agreement and the Arbitrator in-turn issued a notice to the appellant, asking them to appear before him on 13.03.2000.

(iii) The appellant filed application before Bombay High Court for appointment of another Arbitrator. This petition was rejected by the High Court holding that as the Arbitrator had already been appointed by the respondent, the petition was not maintainable. This order is challenged before Supreme Court in the present appeal.

(C) Gist of submissions made by the Appellant:

(i) The power of appointment should have been exercised within a reasonable time. The unilateral appointment of Arbitrator was not envisaged under the Lease Agreement and the respondent should have obtained the consent of the appellant by proposing the name of the Arbitrator before appointment.

(ii) The respondent did not appoint the Arbitrator within a reasonable period and that amounts to failure of the procedure contemplated under the Agreement. Even though Section 11(6) of the Act does not prescribe a period of 30 days, it must be implied that 30 days is a reasonable time for purposes of Section 11(6) and thereafter, the right to appoint is forfeited. Three judgments of the High Courts' from Bombay, Delhi and Andhra Pradesh were relied upon in this connection.

(D) Gist of submissions made by the Respondent: The Bombay, Delhi and Andhra Pradesh High Court cases relied upon are distinguishable. Under Section 11(6), no period of time is prescribed and hence the opposite party can make an appointment even after 30 days, provided it is made before the application is filed to the Court under Section 11.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) Section 11 of the Arbitration and Conciliation Act, 1996 deals with the procedure for appointment of Arbitrator. Section 11(2) says that the parties are free to agree to any procedure for appointing the Arbitrator. If there is any failure of that procedure, the aggrieved party can invoke sub-clause (4), (5) or (6) of Section 11, as the case may be. If the parties fail to reach any agreement as referred to in Sub-Section (2), or if they fail to agree on the Arbitrator within 30 days from receipt of the request by one party, the Chief Justice can be moved for appointing an Arbitrator either under sub-clause (5) or sub-clause (6) of the Act.

(ii) Sub-clause (5) of Section 11 can be invoked by a party who has requested the other party to appoint an Arbitrator and the later fails to make any appointment within 30 days from the receipt of the notice. In the instant case, the appellant has not issued any notice to the respondent seeking appointment of an Arbitrator. An application under sub-clause (6) of Section 11 can be filed when there is a failure of the procedure for appointment of Arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an Arbitrator refuses to appoint the Arbitrator or where two appointed Arbitrators fail to appoint the third Arbitrator. If the appointment of Arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of Arbitrator.

(iii) The appellant in his application did not mention under which sub- section of Section 11 the application was filed. Evidently it must be under Sub-section (6) (a) of Section 11, as the appellant has no case that a notice was issued but an Arbitrator was not appointed or that there was a failure to agree on certain Arbitrator. The contention of the appellant might be that the first respondent failed to act as required under the procedure.

(iv) In all the three High Court verdicts relied upon by the appellant, the appointment of the arbitrator was not made by the opposite party before the application was filed under Section 11. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Hence, these cases are not directly in point.

(v) In our view, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In our view, therefore, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

(vi) Therefore, we do not think that the respondent, in appointing the Arbitrator, failed to follow the procedure contemplated under the Agreement or acted in contravention of the Arbitration clause.

(vii) We do not find any force in the contention of the appellant that the word "nomination" mentioned in the arbitration clause gives the respondent a right to suggest the name of the Arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant because in legal lexicon the "nomination" virtually amounts to "appointment" for a specific purpose.

(F) Verdict of Hon'ble Supreme Court: The appellant, while filing the application under Section 11 of the Act had no cause of action to sustain the same as there was no failure of the agreement or that the respondent failed to act in terms of the agreement. The application was rightly rejected. The appeal deserves to be and is accordingly dismissed, however, without any order as to costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) Section 11(2) of the Arbitration and Conciliation Act, 1996, stipulates that the parties are free to agree to any procedure for appointing the Arbitrator. Based on this, procedure has been framed in Clause 64(3) of Railway's General Conditions of Contract (GCC) for appointment of Arbitrator, with timelines.

(ii) If the timelines given in Clause 64(3) of GCC are not followed for appointing an Arbitrator, the right of Railway to appoint arbitrator does not get automatically forfeited after expiry of the time period given therein; if the appointment is done before the contractor has moved the court under Section 11(6) of the Act. It is only after the contractor approaches the Court under this section that the right of Railway to appoint an arbitrator ceases.

1.3 Delhi High Court Verdict dated 03.10.2006, Arbitration Petition No. 129/2006, Cdr. S. P. Puri (Retd.), Sole Prop. Spiral Services Vs. Agriculture Produce Market Committee

(A) Full text of the Verdict: Annexure - 1.3

(B) Facts of the case, in Brief:

(i) An agreement was signed between Cdr. (Retired) S. P. Puri, Sole Proprietor of M/s. Spiral Services (hereinafter referred as "Contractor') and the Agriculture Produce Market Committee (hereinafter referred as "APMC"), on 29.12.2000, for "Conversion of 125 MT fruit and vegetable waste generated in fruit and vegetable markets of APMC, Azad Pur, Delhi into organic manure", for a period of 30 years. As per Clause 5.2 (Arbitration Clause) of the Agreement, *"…all questions and disputes …. arising during the progress of the work or after the completion or abandonment shall be referred to the sole arbitrator …. who shall be appointed with mutual consent of both the parties by the administrative head of APMC at the time of such appointment …."*.

(ii) The total supply of garbage received by the contractor, between July'2001 and Jan'2006, was 610.88 MT, as against the quantity of 2 lakh MT to be supplied during these 4½ years as per contract. The waste was to comprise of only biodegradable material but it contained non-biodegradable material such as heavy stones, tyres, polythene bags, malba, etc. This required segregation of the waste also. The contractor sent a bill for segregation costs incurred by him, compensation for short supply of raw material vis-a-vis meeting the fixed costs for running the system and anticipated loss of profits and other issues. The contractor vide letter dated 31.03.2004, addressed to Secretary/APMC, served notice for appointment of an arbitrator, with a copy to Chairman/APMC. The APMC did not appoint any arbitrator. The contractor vide his letter dated 30.08.2004 sent a reminder to the administrative head of APMC for appointment of an arbitrator, but without any result.

(iii) The contractor approached Delhi High Court, on 13.02.2006, for appointment of an arbitrator to adjudicate the claims preferred by him. Notice of the petition was served to APMC on 31.03.2006.

(iv) The APMC, vide their letter dated 01.05.2006, offered names of 3 arbitrators, but the contractor refused to give his sanction and, therefore, the APMC nominated a retired Additional D.G./CPWD as Arbitrator.

(C) Gist of submissions made by the APMC:

(i) The notice dated 31.03.2004 invoking the arbitration clause, was abandoned by the contractor as seen from the following facts:

(a) The contractor had approached the Minister for redressal of his grievance and consequently a committee was constituted which accepted certain suggestions from contractor, including his suggestion to install a new segregating plant. The contractor, however, asked for a loan of Rs. 50 lakhs for installation of the segregating plant, which was declined by the committee.

(b) The contractor thereupon asked the respondent to treat the segregation of non-biodegradable material as an additional service and desired payment of reasonable segregation charges. This plea was also not accepted by APMC.

(ii) The petition became infructuous after appointment of arbitrator by APMC.

(D) Gist of submissions made by the Contractor:

(i) The notice dated 31.03.2004 was never given up, waived or abandoned by him. Had it been so, the APMC would not have nominated an arbitrator after the filing of the present petition. The very fact that the APMC has nominated the arbitrator, belies this contention of APMC.

(ii) The alleged appointment of arbitrator itself is not in accordance with the law as enunciated by the Apex Court in the case of *Datar Switchgear Ltd. Vs. Tata Finance Ltd. and Anr.*

(E) Some relevant observations of the Hon'ble High Court:

(i) The court is inclined to agree with the contention of the contractor that he had not abandoned the notice dated 31.03.2004, as it was followed by another letter dated 30.08.2004, sent to the administrative head of the APMC. When the committee constituted by APMC declined the proposal for a loan of Rs. 50 lakhs for installation of a Segregation Plant, the contractor vide his letter dated 27.03.2006 asked for re-consideration of the decision. Thus, the contractor who had filed the present petition on 13.02.2006 was simultaneously making efforts to settle the matter with the APMC. Had the APMC considered the demand for arbitration abandoned, it would not have extended to the petitioner the names of three arbitrators and thereafter nominated an arbitrator.

(ii) The ratio of *Datar Switchgear* was affirmed by the Apex Court in many other cases, and it was held that once the party conferred with the power to appoint the arbitrator fails to respond to the request of the aggrieved party to appoint the arbitrator, it ceases to have an authority to appoint the arbitrator after the aggrieved party approaches the court for the appointment of the arbitrator.

(iii) Continued obduracy and nonchalance of government authorities and semi-government bodies must not be countenanced by the courts as the same defeats the very purpose of the enactment of Arbitration Act viz., expeditious settlement of disputes between the parties. The nomination of an arbitrator by the APMC after the Chief Justice has been approached for such appointment makes mockery of the system, and renders at naught the whole purpose of setting up an Alternate Dispute Resolution System.

(F) Verdict of Hon'ble High Court:

(i) The nomination of arbitrator, by the APMC, after the filing of the present petition and after the APMC had forfeited all right to nominate an arbitrator deserves to be set aside. The same is accordingly set aside, and a retired Judge of this Court, is appointed as sole arbitrator to adjudicate upon the disputes/ claims raised by the contractor as detailed in the petition. The arbitrator shall fix his own fees as he deems fit. The parties shall appear before the arbitrator on

16.10.2006 or on any date and time convenient to the arbitrator. The arbitrator will dispose of the disputes set out in the petition, preferably within a period of 4 months from the date of entering upon the reference.

(ii) The petition is disposed of accordingly, leaving the parties to bear their own costs.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) Section 11(2) of the Arbitration and Conciliation Act, 1996, stipulates that the parties are free to agree to any procedure for appointing the Arbitrator. Based on this, procedure has been framed in Clause 64(3) of Railway's General Conditions of Contract (GCC) for appointment of Arbitrator, with timelines.

(ii) But if the arbitrator is not appointed in time by the General Manager (the *person designaata* for appointment of arbitrator as per GCC), then appointment of arbitrator during the pendency of the petition in the Court is invalid and any person appointed as arbitrator during this period cannot be recognised as a duly appointed arbitrator.

1.4 Supreme Court Verdict dated 08.05.2007, Appeal (Civil) 2386 of 2007/Special Leave Petition (Civil) No. 26108 of 2005, the Iron and Steel Co. Ltd Vs. M/s Tiwari Road Lines

(A) Full text of the Verdict: Annexure - 1.4

(B) Facts of the case, in Brief:

(i) The Indian Iron and Steel Co. Ltd. (hereinafter referred as "IISCO") awarded a contract for "transportation of pig iron and steel material from Burnpur/Kolkata stockyard to different locations in the country", to M/s. Tiwari Road Lines (hereinafter referred as "contractor"), on 14.05.2003, for a period of two years from 17.05.2003. As per contract conditions "… *All disputes or differences … between the parties ….. shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration* …".

(ii) As per IISCO, there was failure on the part of the contractor to comply with the terms of the agreement and the bank guarantee of the contractor was encashed on 16.09.2003. Feeling aggrieved by this, the contractor filed an application before the Chief Judge, City Civil Courts, Hyderabad, under Section 11 of the Arbitration and Conciliation Act-1996, for appointment of an arbitrator. IISCO contested this application on two grounds, viz., the City Civil Court at Hyderabad had no territorial jurisdiction to entertain the application and, secondly, as per agreement between the parties the dispute is to be resolved in accordance with the Rules of Arbitration of the Indian Council of Arbitration. The Chief Judge, City Civil Courts, Hyderabad, allowed the application by order dated 31.03.2004 and appointed a retired judge as arbitrator.

(iii) The order of City Civil court was challenged by IISCO, by filing a petition before the Andhra Pradesh High Court, which was allowed and matter was remanded to City Civil Court, Hyderabad, to consider the question of jurisdiction. The City Civil Court allowed the application filed by contractor, by order dated 27.12.2004 and appointed a retired judge as arbitrator.

(iv) This order was challenged by IISCO, by filing a writ petition in the Andhra High Court. The High Court dismissed this petition. This order of High court were subject-matter of challenge in the present appeal before Supreme Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) The contractor did not make any effort to have the dispute settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. It straightaway moved application under Section 11 of the Arbitration and Conciliation Act, 1996, before the City Civil Court, Hyderabad.

(ii) Section 11(2) of the Arbitration Act provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator. In present case, the agreement between the parties contains an arbitration clause which provides that all disputes and differences shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

(iii) As per Section 11(6) of the Arbitration act, the request to Court for appointing the arbitrator can be made only where the parties have agreed on a procedure for appointment of an arbitrator but if (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. In this case, the stage for invoking Section 11(6) had not arrived. In these circumstances, the application moved by the contractor before the City Civil Court, Hyderabad, was not maintainable and the Court had no jurisdiction or authority to appoint an arbitrator. Thus, the order dated 31.03.2004 passed by the City Civil Court, Hyderabad, appointing a retired judge as arbitrator is without jurisdiction and has to be set aside.

(iv) In the matters of arbitration, the agreement between the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that Section 11(8)(a) of the Act specifically provides that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties.

(D) Verdict of Hon'ble Supreme Court: For the reasons discussed above, the appeal is allowed with costs throughout. The judgment and order dated 09.09.2005 of the High Court of Andhra Pradesh and the judgment and order dated 27.12.2004 of the City Civil Court, Hyderabad, appointing an arbitrator are set aside. It will be open to the parties to get the dispute decided by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) As per the provisions of Section 11(2) of the Arbitration & conciliation Act, if the parties have agreed on a procedure for appointing the arbitrator(s), then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightaway. In Railways, the procedure for appointing the arbitrator(s) and dealing other related activities is stipulated as Clause 63 & 64 of GCC. Therefore, for settling any disputes, the contactor straightaway cannot approach the court for appointment of arbitrator. In case the contractor approaches the court directly, Railway should defend the case quoting the provisions of Section 11(2) & 11(6) of the Arbitration Act and request the court to direct the contractor for following the procedure given in Clause 63 & 64 of GCC regarding appointment of arbitrator.

(ii) In cases of Railway, the contractor can approach the Court under Section 11(6) of the Act only when Railway fails to act as required under the agreed procedure or fails to perform any function entrusted to Railway under the agreed procedure. Therefore, it is very important that the appointment of arbitrator(s) is done within the time frame specified in the Clause 63 & 64 of GCC.

1.5 Delhi High Court Verdict dated 06.12.2007, W. P. No. 514 of 2006, Sarvesh Chopra Builders Pvt. Ltd. Vs. Union of India

(A) Full text of the Verdict: Annexure – 1.5

(B) Facts of the case, in Brief:

(i) M/s Sarvesh Chopra Builders Pvt. Ltd. (hereinafter referred as "Contractor") was awarded a contract of civil construction by Northern Railway (hereinafter referred as "Railway"). The contractor raised certain disputes and invoked arbitration agreement on 20.10.1997 and sent notice for appointing the arbitrators. The Arbitrators were appointed by Railway and claims were referred to the Arbitrators. However, the contractor approached High Court claiming that only a part of the claims were referred to the Arbitrators and Claim Nos. 3, 5, 6 and 7 were not referred to the Arbitrators. Vide order dated 28.8.2000, the High Court directed that Claim Nos. 3, 5, 6 and 7 be also referred to the Arbitrators and these claims were also referred to the Arbitrators.

(ii) The contractor filed another petition alleging that Railway had failed to Act as per order of the High Court. When confronted with Railway's letter dated 12.5.2004, conveying three names to him and asking him to choose one of them as his nominee for Arbitrator, the contractor prayed for disposing this petition. The petition was disposed of by the High Court, vide order dated 27.9.2004

(iii) Railway filed a counter claim before the Arbitrators claiming liquidated damages. The petitioner filed an OMP before the High Court claiming that liquidated damages were not permissible and the counter claim was not as per the conditions of the contract and therefore, Arbitrators should be told not to decide the counter claim. This petition was withdrawn by the contractor on 24.5.2005, after arguing the matter at some length, with liberty to raise this issue before the Arbitrators.

(iv) The present petition has been filed by the contractor stating that the Arbitrators have not entered upon the reference and they have failed to adjudicate upon the disputes for the last one year and, therefore, this Court should appoint a sole arbitrator to adjudicate upon his claims.

(C) Some relevant observations of the Hon'ble High Court:

(i) A perusal of facts right from year 1998 show that it is the contractor who had been rushing to the Court without any cause. Such court proceedings filed by the contractor wasted a lot of time. The Arbitrators appointed by the Railway could not act and adjudicate the claim because of the pendency of petitions in the Court. The contractor's claim that Arbitrators had not entered upon reference is belied by his own pleading that the Arbitrators had entertained the counter claim filed by Railway. If no reference had been entered into, the counter claim could not have been entertained.

(ii) It is well settled law that the parties are bound by the arbitration agreement and who shall be the Arbitrators, is also the subject matter of agreement between the parties. It is not possible for one party to arbitration agreement to resile from the agreement and say that the matter be not adjudicated by the Arbitrators as

provided in the agreement and another sole arbitrator should be appointed. The Court can only interfere where there is legal misconduct of the Arbitrator or Arbitrator appointed was not competent and disqualified in terms of the agreement. The Court can appoint an Arbitrator different from one as stated in the agreement in those cases only where the designated party do not agree to appoint the person named in the contract as Arbitrator. The Court would not be justified to appoint a different person as sole arbitrator unless the Arbitrators named in the arbitration agreement had refused to act and adjudicate the claim or he had neglected to enter upon the reference.

(D) Verdict of Hon'ble High Court: In the present case the Arbitrators were not allowed to act upon by filing one or another petition by the contractor in the Court. The petition is not maintainable and is hereby dismissed. However, the Arbitrators appointed under the agreement are directed to expedite and adjudicate upon the claim and pass an award, as far as possible, within four months of communication of this order to them.

(E) Conclusions based on the verdict of Hon'ble High Court:

(i) Both the parties are bound by the arbitration agreement regarding appointment of the Arbitrator(s). The Court can interfere in this matter only when where there is legal misconduct of the Arbitrator or Arbitrator appointed is not competent/disqualified as per terms of the contract agreement.

(ii) The Court can appoint an Arbitrator different from one as stated in the agreement in those cases only where the designated party does not agree to appoint the person named in the contract as Arbitrator.

(iii) However, it is relevant to note that this case pertains to and is governed by the pre-2015 amendment of the Arbitration & Conciliation Act, wherein both the parties were having choice to mutually decide about the Arbitrator. Accordingly, the General Conditions of Contract (GCC) stipulated appointment of both serving as well as retired Railway officers as Arbitrator (s). However, the amended act has put certain pre-conditions regarding appointment of any person as arbitrator.

1.6 Supreme Court Verdict dated 19.07.2007, Civil Appeal No. 6324 of 2004, Union of India and Others Vs. Krishna Kumar

(A) Full text of the Verdict: Annexure - 1.6

(B) Facts of the case, in Brief:

(i) Shri Krishna Kumar (hereinafter referred as "contractor") was awarded a civil construction work, on 19.05.1995, by South Eastern Railway (hereinafter referred as "Railway"), for an amount of Rs. 33,40,268/-, with completion period of 8 months. As per the arbitration clause in the contract, in the event of disputes involving a claim below Rs. 5 lakhs, a sole arbitrator shall be appointed by the General Manager and in the case of claim above Rs. 5 lakhs, the claim shall be adjudicated by two arbitrators. With regard to the qualification of the arbitrators the contract provided that *"… no person other than a Gazetted Railway Officer should act as an arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all"*.

(ii) The contractor failed to start the work and, therefore, the contract was terminated on 13.10.1995. The contractor approached the High Court of Calcutta on 01.12.1997, under Section 11 of the Act, requesting for appointment of Arbitrator. The said application was disposed of by an order dated 10.07.1998 appointing a retired judge of High Court as Arbitrator, but he expressed his inability to act as an arbitrator. A further order dared 05.08.1999 was passed appointing another retired judge of High Court as sole arbitrator.

(iii) On 26.08.1999, Railway challenged the arbitral tribunal under Section 12(3)(b) of the Act on the ground that the arbitral tribunal did not possess the qualification agreed to between the parties. The learned arbitrator rejected the aforesaid challenge in the first meeting of the arbitration dated 10.09.1999 mentioning that *"Having heard both sided I do not find any merit in the submission of the Railway and, as such I am not taking any cognizance of the said application of the Railway"*.

(iv) The arbitrator proceeded to issue direction for filling pleadings, held 10 sittings and passed the award directing Railway to pay a sum of Rs. 14,35,497/- and in default to pay interest thereon at the rate of 10% per annum from the date of the award until the date of payment.

(v) The award was challenged before the High Court of Calcutta under Section 34 of the Act, which was allowed by the learned Single Judge setting aside the award. Aggrieved thereby, the contractor preferred an appeal before the Division Bench and the judgment rendered by the learned Single Judge was overruled by the Division Bench. The present appeal in the Supreme Court was filed by the Railway, against this verdict of division bench of the High Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) The learned Division Bench repealing the contention of the Railway that the appointment of Arbitrator was not in accordance with law has held that the order of the learned Chief Justice being an administrative in nature the contention raised by the Railway was not tenable. When the learned Division Bench

rendered that order, judgment of the Constitution Bench of this Court in *SBP & Co. Ltd. v. Patel Engineering Ltd. [2005 (7) SCJ 461 (2005) 8 SCC 618]* was not available. Be that as it may, in the Constitution Bench Judgment this Court has held that the order passed by the learned Chief Justice appointing the Arbitrator is a judicial order. Having regard to this judgement, the observations of the Division Bench of the High Court that the order of the learned Chief Justice is administrative in nature are no longer held to be appropriate and valid in the eyes of law.

(ii) Regarding Clause 64 of GCC, the three Judge Bench of this Court has held in the case *Union of India and another vs. M. P. Gupta [(2004) 10 SCC 504]* that " …. *In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators. Justice P. K. Bahri could not be appointed by the High Court as the Sole Arbitrator …".* The decision rendered in this case is squarely covered in the case at hand. In view thereof, the order passed by the Division Bench of the Calcutta High Court is not tenable in law.

(D) Verdict of Hon'ble Supreme Court:

(i) The order passed by the Division Bench of the Calcutta High Court is accordingly set aside. The order of the learned Single Judge is restored. The appeal is allowed. No costs.

(ii) Considering that the matter has been pending for quite long time, we direct the Railway to appoint an arbitrator in terms of Clause 64 of GCC, within 3 weeks from today. The Arbitrator thereafter shall make an award within 30 days from the date of entering into reference.

(iii) Pursuant to our order dated 24.09.2007 the awarded amount appeared to have been deposited before this Court. This Court further directed that the contractor is permitted to withdraw on furnishing bank Guarantee of a Nationalised Bank within six weeks from the date of deposit. It is submitted that the amount could not be withdrawn by the contractor as they are not able to furnish Bank Guarantee of a Nationalised Bank. In such event, this Court directed that the Registry shall keep the amount in the Fixed Deposit in a Nationalised Bank for an initial term of one year. It appears that the Registry has deposited the amount in a Nationalised Bank for one year and by another order 16.12.2005 the FDR is extended for a further period of one year. The FDR was extended for a further period of 6 months each on 07.12.2006 and 29.05.2007 by orders passed by the Registrar of this Court. Let the FDR remain in deposit as it is as ordered by the Registrar of this Court.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In conformity with provisions of Section 11(2) of the Arbitration and Conciliation Act, 1996, the procedure for appointment of Arbitrator(s) and their qualifications have been detailed in Clause 63 & 64 of Railway's GCC. Therefore, whenever any contractor approaches the Court straightaway, without asking the General Manager for appointment of Arbitrator(s), it must be presented to the court that as per the arbitration agreement between both the parties, the contractor should be directed to approach General Manager for appointment of Arbitrator(s).

(ii) If the Court still appoints the arbitrator, then in the beginning of the arbitration proceedings itself, the appointment of arbitrator should be challenged before the Arbitrator, by Railway's Defending Officer, under Section 12(3)(b) and 16(3) of the Act. The arbitrator(s) may still choose to proceed ahead with the arbitration proceedings, under Section 16(5) of the Act, after passing a speaking order on this challenge. But in that case, the arbitration award can be challenged, for setting it aside, under Section 16(6) and 34(2)(v) of the Act.

1.7 Supreme Court Verdict dated 18.08.2008, Civil Appeal no. 5067 of 2008, Northern Railway Vs. Patel Engineering Company Ltd.

(A) Full text of the Verdict: Annexure - 1.7

(B) Facts of the case, in Brief: Noticing two different views in two decisions of the Supreme Court in *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [2007 (5) SCC 304]* and *Union of India v. Bharat Battery Mfg. Co. (P) Ltd. [2007 (7) SCC 684]* the matter was referred to a larger Bench. In both the decisions, the question was related to appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the `Act'). The bench combined about 16 appeals with the Supreme Court on this issue and dealt them together. The scope and ambit of Section 11(6) of the Act relating to appointment of arbitrator was considered in this case.

(C) Gist of submissions made by the Railway/UOI:

(i) The true scope and ambit of Section 11(6) has to be considered in the background of Section 28(3) and Section 34 of the Act. The agreed procedure referred to in Section 11(2) has an exception in sub-section (6) i.e. where the agreed procedure fails. There are three clauses in Section 11(6). Clause (c) relates to failure to perform function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. There is a statutory mandate to take necessary measures, unless the agreement on the appointment procedure provided other means for securing the appointment. It is, therefore, submitted that before the alternative is resorted to agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort.

(ii) While appointing an Arbitrator in terms of Section 11(8), the Court has to give due regard to any qualification required for the Arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is pointed out that both these conditions are cumulative in nature. Therefore, the Court should not directly make an appointment. It has to ensure first that the provided remedy is exhausted and the Court may ask to do what has not been done.

(D) Gist of submissions made by the Contractor(s): The expression "due regard" relates to some of the factors which have to be considered and it is not mandatory that the qualifications and the considerations as referred to in Section 11(8) perforce have to be applied. It is a question of degree of the parameters of consideration.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) In Section 11 of the Act, Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request Court to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (a) a party fails to

act as required under agreed procedure or (c) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators.

(ii) A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators, but at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. The expression "due regard" means that proper attention to several circumstances have been focused. The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

(F) Verdict of Hon'ble Supreme Court: In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) This is a landmark judgment of the Apex Court on the issue of appointment of Arbitrator(s) by the Court, when approached by the contractor under Section 11(6) of the Act, after failure of the Railway to appoint Arbitrator as per the agreed procedure framed based on the Section 11(2) of the Act.

(ii) While appointing Arbitrator(s) in such cases, it must be presented to the Court that the twin requirements of Section 11(8), one of which is that any qualification required for the arbitrator by the agreement of the parties, have to be kept in view, considered and taken into account by the Court. If it is not done, the appointment by the Court becomes vulnerable.

1.8 Supreme Court Verdict dated 11.09.2008, Civil Appeal No. 5605 of 2008, Union of India & Others Vs. M/s Talson Builders

(A) Full text of the Verdict: Annexure - 1.8

(B) Facts of the case, in Brief:

(i) M/s Talson Builders (hereinafter referred as "contractor") was awarded a contract by Military Engineering Service (hereinafter referred as "MES") in year 1996-97. After completion of work, the contractor submitted final bill wherein it was specifically certified that the final bill included all claims raised by it from time to time irrespective of the fact whether they were admitted by the department or not and that there were no more claims in respect of the contract and the amount so claimed must be held to be full and final settlement of the claim of the contractor under the contract agreement. The contractor received full payment without any protest. However, on 14.08.2000, the contractor sent a letter to the MES asking for appointment of an Arbitrator. This was not agreed to by the MES with the observation that the final bill in respect of the subject work had been signed and the amount had already been paid in full and final settlement and therefore, there was no dispute to be referred to the Arbitrator as prayed for by the contractor.

(ii) The contractor filed an Arbitration Petition in High Court of Allahabad and the court in its' order dated 24.02.2006 appointed a retired Judge of the High Court as Arbitrator to decide the dispute raised by the parties. Against this order of the High Court, MES filed appeal in the Supreme Court, which is the subject matter of this case.

(C) Some relevant observations of the Hon'ble Supreme Court: Now, the question is - when such objections were raised against the appointment of an arbitrator on the ground that the claim could not be referred to the Arbitrator because of full and final settlement and the claim stood liquidated, the High Court ought not to have referred such dispute by appointing an Arbitrator without deciding the objections so raised, or it would be left open to the Arbitrator to go into this question after the parties had entered appearance before him. This question has already been decided by a three-Judge Bench of this Court in Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd. dated 18th of August, 2008. This Court after giving due consideration of the expression "due regard" has observed in paragraph 13 as follows:

"In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

(D) Verdict of Hon'ble Supreme Court: We have no other alternative but to set aside the order of the High Court and request the High Court to go into the dispute and then dispose of the application for appointment of an Arbitrator under Section 11(6) of the Act in accordance with law. It is expected that the High Court shall decide the said application as early as possible preferably within 3 months from the date of supply of a copy of this order to it. The impugned order is thus set side. The appeal is allowed to the extent indicated above. There will be no order as to costs.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In this case, the Supreme Court reiterated verdict of a Decision Bench of the Supreme Court dated 18.08.2008 in "*Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd.*".

(ii) On being approached by the contractor under Section 11(6) of the Act, due to failure of the Railway to appoint Arbitrator, it must be presented to the Court that while appointing the Arbitrator(s) the twin requirements of Section 11(8), one of which is that any qualification required for the arbitrator by the agreement of the parties have to be kept in view, considered and taken into account by the Court. If it is not done, the appointment by the Court becomes vulnerable.

1.9 Supreme Court Verdict dated 29.03.2019, Civil Appeal No. 3303 of 2019, Union of India and Vs. Parmar Construction Company

(A) Full text of the Verdict: Annexure - 1.9

(B) Facts of the case, in Brief:

(i) North Western Railway (hereinafter referred as "Railway") awarded a work of "Construction of office accommodation for officer and rest house at Dungarpur in the State of Rajasthan" to Parmar Construction Company (hereinafter referred as "contractor"), 21.12.2011. Extension of time was granted to complete the work by 31.03.2013. The measurement was accepted by the contractor under protest. Railway officials did not clear 7th and Final bill until the contractor puts a line over "under protest" and signs no claim certificate. The total value of the work executed was of Rs. 58.60 lakhs against which Rs. 55.54 lakhs was paid, excluding the escalation cost. On 23.12.2013, the contractor sent notice to appoint an arbitrator invoking Clause 64(3) of the GCC to resolve the disputes/differences. When the Railway failed to appoint the arbitrator in terms of Clause 64(3), the contractor filed an application with High Court, under Section 11(6) of the Act, for appointment of an independent arbitrator. The High Court of Rajasthan, allowed the application of the contractor and appointed a retired judge of the High Court as arbitrator to arbitrate the proceedings.

(ii) Against this order of the High Court, Railway filed an appeal in Supreme Court. A two-judge bench of the Supreme Court heard this appeal along with a batch of appeals on the same issue.

(C) Gist of submissions made by the Railway:

(i) Section 12 (5) and the Fifth & Seventh Schedule, has come into force by the Amendment Act-2015 w.e.f. 23.10.2015. In the instant case, request for referring to the arbitration was received by the Railway much prior to 23.10.2015. In view of Section 21 read with Section 26 of the Amendment Act-2015, where the request has been sent to refer the dispute to arbitration and it is received by the other side before the amendment Act-2015 has come into force, the proceedings will commence in accordance with the pre-amended provisions of the Act. In the given circumstances, apparent error has been committed by invoking Section 12(5) of the Amendment Act-2015 for appointment of an independent arbitrator without resorting to the clause 64(3) of GCC as agreed by the parties.

(ii) The contractor had not made any allegation of bias to the arbitrator who was likely to be appointed by the Railway in terms of the agreement. The said issue would have cropped up only when the appointment of arbitrator was made by the Railway. It was required in the first instance to make every possible attempt to respect the agreement agreed upon by the parties in appointing an arbitrator and only when there are allegations of bias or malafide, or the appointed arbitrator has miserably failed to discharge its obligation in submitting the award, the Court is required to examine those aspects and to record a finding as to whether there is any requirement in default to appoint an independent arbitrator invoking Section 11(6) of the Act, 1996.

(D) Gist of submissions made by the Contractor:

(i) As held by this Court in many cases cited therein, once the designated party (Railway in this case) fails to appoint an arbitrator before an application under Section 11(6) of the Act being filed before the Court, Railway would lose its right of appointing Arbitrator(s) as per the terms of the contract and it is for the Court to appoint an independent arbitrator.

(ii) While dealing with Section 11(6), the Court can even overlook the qualification of the arbitrator under the agreement. Since the Railway failed to appoint an arbitrator until the application was filed, Section 11(6) empowers the Court to deviate from the agreed terms if required by appointing an independent arbitrator and by virtue of operation of Section 12(5) of the Amendment Act, 2015, the employee of the railway establishment became ineligible to be appointed as arbitrator. In the given circumstances, the authority is vested with the Court to appoint an independent arbitrator under Section 11(6) of the Act and the same has been held by this Court in many cases cited therein.

(iii) The primary object by introducing the remedy of arbitration is to have a fair, speedy and inexpensive trial by the Arbitral Tribunal. The arbitrator should always be impartial and neutrality of the arbitrator is of utmost importance and that has been noticed by the Parliament in amending Section 12(5) of the Act, 1996 which came into force on 23.10.2015, and when the matters have been taken up for hearing by the High Court after the amendment has come into force, the effect of the amended provisions would certainly be taken note of and in the given circumstances, if an independent arbitrator has been appointed, the amended provision has been rightly invoked by the High Court in the appointment of an independent arbitrator invoking Section 11(6) of the Act, 1996.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The request of the contractor was rejected by the railway on the premise that with "no claim certificate" being furnished, arbitral dispute does not survive for sending it to arbitration.

(ii) As on 01.01.2016, the Amendment Act-2015 was gazetted and according to Section 1(2) of this Act, it deemed to have come into force on 23.10.2015. Section 21 of the Act-1996 clearly envisages that unless otherwise agreed by the parties, the arbitral proceedings in respect of a dispute shall commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the Amendment Act-2015 shall not apply to such of the arbitral proceedings which has commenced in terms of the provisions of Section 21 of the Principal Act, unless the parties otherwise agree. In the instant case, the request was made and received by the railway much before the Amendment Act-2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of "no claim certificate" given by the contractor, would not be of any legal effect for invoking the provisions of Amendment Act-2015, in terms of Section 21 of the principal Act-1996. In our considered view, the application/request made by

the contractor deserves to be examined in accordance with the principal Act-1996 without taking resort to the Amendment Act-2015 which came into force from 23.10.2015.

(iii) Section 11(6)(c) of the Act relates to failure to perform any function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. This relates to a person which may not be a party to the agreement but has given his consent to the agreement and what further transpires is that before any other alternative is resorted to, agreed procedure has to be given its precedence and the terms of the agreement has to be given its due effect as agreed by the parties to the extent possible. The corrective measures have to be taken first and the Court is the last resort. It is also to be noticed that by appointing an arbitrator in terms of Section 11(8) of Act-1996, due regard has to be given to the qualification required for the arbitrator by the agreement of the parties. It is advisable for the Court to ensure that the remedy provided as agreed between the parties in terms of the contract is first exhausted.

(iv) In many verdicts on this issue, this Court has put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must, but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible.

(v) In the present batch of appeals, independence and impartiality of the arbitrator has never been doubted but where the impartiality of the arbitrator in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned, or has to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, the Court in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act.

(F) Verdict of Hon'ble Supreme Court:

(i) In our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

(ii) Consequently, the orders passed by the High Court are quashed and set aside. Railway is directed to appoint the arbitrator in terms of clause 64(3) of the agreement within a period of 1 month from today under intimation to contractor and since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator, the statement of claim be furnished by the contractor within 4 weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties expeditiously without being influenced/inhibited by the observations made independently in accordance with law.

(iii) The batch of appeals are accordingly disposed of. No costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In this case, the Supreme Court reiterated/amplified its' verdict in many cases earlier related to appointment of Arbitrator, when being approached by the contractor under Section 11(6) of the Act, due to failure of the Railway to appoint Arbitrator.

(ii) In such cases, it must be presented to the Court that while appointing the Arbitrator(s) the twin requirements of Section 11(8), one of which is that any qualification required for the arbitrator by the agreement of the parties have to be kept in view, considered and taken into account by the Court. If it is not done, the appointment by the Court becomes vulnerable.

(iii) But it is to be noted in the cases where the request of contractor for referring the case to arbitration has been received by the Railway after the Arbitration Amendment Act-2015 came into force w.e.f. 23.10.2015, provisions of Section 12(5) read with Seventh and Fifth Schedule of the amended Act-2015 must be kept in kind, regarding impartiality and neutrality of the arbitrator, while appointing the Arbitrator(s).

1.10 Supreme Court Verdict dated 14.11.2019, Civil Appeal No. 6400 of 2016 and Civil Appeal No. 6420 of 2016, Union of India and Others Vs. Pradeep Vinod Construction Company

(A) Full text of the Verdict: Annexure-1.10

(B) Facts of the case, in Brief:

(i) In CA No. 6400 of 2016: On 14.07.2010, Northern Railways (hereinafter referred as "Railway") awarded a contract for "Misc. Civil Engineering works such as construction of duty huts at Level Crossing, water supply arrangements, provision of station name boards etc. in connection with Rewari-Rohtak New Line" to Pradeep Vinod Construction Company (hereinafter referred as "contractor"). The total cost of the work was Rs. 5,30,31,369.30. The work was completed on 31.03.2012. Final payments were made to the contractor on 06.05.2014. On the same day i.e. on 06.05.2014, parties also entered into a supplementary agreement which recorded full accord and satisfaction as on 06.05.2014. In the meanwhile, on 05.05.2014, the contractor had sent a letter to Railway alleging that under the compulsion of circumstances, he had to sign the so-called final bill without protest as desired by the administration, otherwise heavy financial loss would have been caused to him. The contractor averred that a sum of over Rs. 1.50 crores still remain to be paid and called upon the Railway to make the payment within 90 days. The contractor vide its letter dated 05.05.2014 invoked arbitration clause under Clause 64 of GCC.

Railway issued a reply dated 25.07.2014 rejecting the claim of the contractor, on the ground that contractor had signed the final bill and the supplementary agreement which clearly stipulates that it was agreed between the parties that the contractor has accepted the said sums mentioned therein in full and final satisfaction of all dues and claims under the principal agreement.

The contractor filed Arbitration Petition, under Section 11 of the Act, before the High Court for appointment of an arbitrator. The High Court held that since the Railways failed to appoint an arbitrator, the Railways forfeited its right under the arbitration clause and appointed a retired District and Sessions Judge as the sole arbitrator.

(ii) In CA 6420 of 2016: On 17.01.2012, Northern Railways (hereinafter referred as "Railway") awarded a contract for "Construction of two-lane road over bridge in lieu of Level Crossing near Muradnagar Railway Station" to Pradeep Vinod Construction Company (hereinafter referred as "contractor"), at a cost of Rs. 4,21,69,176.25/-. The work was completed on 03.08.2013. The Contractor received final payment on 29.01.2014 and also signed a supplementary agreement dated 01.03.2014 acknowledging full and final settlement of all claims. The contractor vide letter dated 15.01.2014 raised two claims and requested for appointment of arbitrator. The Railways informed the contractor that his claims are not referable to arbitration as the same are covered under "excepted matter". On 28.08.2014, the contractor sent a "No Claim" letter to the Railway stating that it has no claim towards the Railways and requested for release of their security deposit.

The contractor thereafter filed Arbitration Petition with High Court, under Section 11 of the Arbitration and Conciliation Act-1996, seeking appointment of an arbitrator. The High Court held that though the appellant claims that the disputes raised by the respondent are in the nature of "excepted matters" but this issue can be examined by the arbitrator. With these findings, the Court appointed an advocate as Sole Arbitrator and directed that arbitration shall take place under the aegis of the Delhi International Arbitration Centre.

(iii) Against the above two orders of the Delhi High Court, Railway filed an appeal in the Supreme Court which was heard by a three-judge bench of the Supreme Court.

(C) Gist of submissions made by the Railway: The request for appointment of arbitrator was made before the Amendment Act, 2015 (w.e.f. 23.10.2015) and hence, the proceedings will have to be proceeded in accordance with the pre-amended provision of the Act, 1996. The High Court erred in appointing an independent arbitrator instead of directing the General Manager, Railway administration to appoint an arbitrator as per the terms and conditions of Clause 64 of GCC which stipulates that "excepted matters" cannot be referred to arbitration.

(D) Gist of submissions made by the Contractor: Once the Railway has failed to appoint arbitrator under the terms of the agreement before the petition under Section 11(6) of the Arbitration Act-1996 being filed before the Court, the Railway forfeits its right of appointing an arbitrator and it is for the Court to appoint an independent arbitrator under Section 11(6) of the Act. Section 11(6) empowers the court to deviate from the terms of the agreement, if required, by appointing an independent arbitrator. The "No Claim" certificate was issued under compulsion and it was due to undue influence by the Railway and it is open to the arbitrator to adjudicate by examining the bills which is furnished for payment and in such circumstances, it cannot be said to be an "excepted matter".

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The request for referring the dispute was made much prior to the Amendment Act-2015 came into force w.e.f. 23.10.2015. Therefore, the request by the contractor is to be examined in accordance with the Principal Act-1996 without taking resort to the Amendment Act-2015.

(ii) It is seen that under Clause 64(1) of GCC, if there is any dispute or differences between the parties, then in any such case, but except in any of the "excepted matters", the General Manager may nominate the officer by designation as referred to under Clause 64(3)(a)(i) and a(ii) respectively with further procedure being prescribed for the sole arbitrator or the Arbitral Tribunal to adjudicate the dispute/differences arising under the terms of the contract between the parties. In a catena of judgments, this court held that whenever the agreement specifically provides for appointment of named arbitrators, the appointment of arbitrator should be in terms of the contract.

(iii) Insofar as the plea of the Railway that there was settlement of final bill/ issuance of "No Claim" letter, the our attention has been drawn to Clause 43(2) – Signing of the "No Claim" as per which the contractor signs a "No Claim"

certificate in favour of the railway in the prescribed format after the work is finally measured up and the contractor shall be debarred from disputing the correctness of the items covered under the "No Claim" certificate or demanding a clearance to arbitration in respect thereof. On behalf of the contractor it was seriously disputed that issuance of "No Claim" certificate and the supplementary agreement recording accord and satisfaction on 06.05.2014 (CA No. 6400/2016) and issuance of "No Claim" certificate on 28.08.2014 (CA No. 6420/2016) were under compulsion and due to undue influence by the Railway authorities. We are not inclined to go into the merits of the contention of the parties. It is for the arbitrator to consider the claims of the contractor and the stand of the Railways. This contention raised by the parties are left open to be raised before the arbitrator.

(F) Verdict of Hon'ble Supreme Court: The impugned judgments of the High Court of Delhi are set aside and these appeals are allowed. The Railway is directed to appoint the arbitrator in terms of Clause 64(3) of the agreement within a period of 1 month from today under intimation to the contractor. As soon as the communication of the appointment of arbitrator is made to the contractor, the statement of claim be filed by the contractor within 6 weeks thereafter and the reply of the Railway to be filed within 4 weeks thereafter. The arbitrator shall proceed with the matter in accordance with law and decide the claim after affording sufficient opportunity of hearing to both parties expeditiously preferably within a period of 4 months.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) This is another recent judgment of a three-judge bench of the Supreme Court related to appointment of Arbitrator, when being approached by the contractor under Section 11(6) of the Act, due to failure of the Railway to appoint Arbitrator.

(ii) In such cases, it must be presented to the Court that while appointing the Arbitrator(s) the twin requirements of Section 11(8), one of which is that any qualification required for the arbitrator by the agreement of the parties have to be kept in view, considered and taken into account by the Court. If it is not done, the appointment by the Court becomes vulnerable.

(iii) But it is to be noted in the cases where the request of contractor for referring the case to arbitration has been received by the railway after the Arbitration Amendment Act-2015 came into force on 23.10.2015, provisions of Section 12(5) read with Seventh and Fifth Schedule of the amended Act-2015 must be kept in kind, regarding impartiality and neutrality of the arbitrator, while appointing the Arbitrator(s).

1.11 Delhi High Court Verdict dated 23.07.2020, Arbitration Petition No. 32/2020, N. K. B. Infrastructure Pvt. Ltd. Vs. Northern Railway

(A) Full text of the Verdict: Annexure-1.11

(B) Facts of the case, in Brief: Northern Railway (hereinafter referred as "Railway") awarded a contract to NKB Infrastructure Pvt. Ltd. (hereinafter referred as "Contractor") and the contract agreement was signed on 18.07.2014. Certain disputes having arisen between the parties with respect to the said Agreement, the contractor sent a notice to the Railway on 22.11.2019 invoking Arbitration in terms of Clause 64 of the GCC. Receiving no response towards appointment of the Arbitrator, the contractor filed a petition with Delhi High Court, under Section 11(6) read with Section 11(10) of the Arbitration and Conciliation Act-1996 (hereinafter referred to as the 'Act') for appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

(C) Gist of submissions made by the Contractor: After going through the judgment of the Supreme Court in *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) [2019 SCC OnLine SC 1635]*, wherein the Supreme Court has upheld the power of the Railways to appoint an Arbitral Tribunal in terms of Clause 64 of the GCC, which envisages the appointment through a panel of officers, the contractor submitted that he has no objection if the Arbitral Tribunal was to be constituted as per the procedure laid down under the provisions of Clause 64(3)(a)(ii) of the GCC.

(D) Gist of submissions made by the Railway: Since the contractor is agreeable to the appointment of Arbitral Tribunal by the Railways in terms of Clause 64(3)(a)(ii) of the GCC, they do not oppose the petition.

(E) Some relevant observations of the Hon'ble High Court:

(i) With the consent of the parties, following directions are passed:

(a) Railway shall send a panel of 3 Officers, which shall include a retired Officer, in terms of Clause 64(3)(a)(ii) of GCC, within a period of 30 days from today to the Petitioner.

(ii) Contractor shall suggest two names as his nominees to the General Manager, from the suggested names, and shall communicate the same to the General Manager, within 30 days from the date of receipt of the names.

(iii) General Manager shall thereafter appoint at least one Arbitrator from the names so suggested, as Contractor's nominee and shall simultaneously appoint the balance 2 Arbitrators duly indicating the "Presiding Arbitrator" from amongst the 3 Arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Petitioner's nominees.

(ii) The contractor submits that in the Notice invoking Arbitration, he has suggested the name of one Ex-Chief Engineer of Indian Railways and the Railway be directed to take into consideration the name of the said Officer while

constituting the Tribunal. It is open to the Railway to take into consideration the request made by the Contractor.

(F) Verdict of Hon'ble High Court: Petition is disposed of in the above terms.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) In this case, the High Court was approached by the contractor under Section 11(6) of the Act, due to failure of the Railway to appoint Arbitrator.

(ii) After going through the judgment of the Supreme Court in *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) [2019 SCC OnLine SC 1635]*, wherein the Supreme Court has upheld the power of the Railways to appoint an Arbitral Tribunal in terms of Clause 64 of the GCC, which envisages the appointment through a panel of Railway officers, the contractor submitted that he has no objection if the Arbitral Tribunal was to be constituted as per the procedure laid down under the provisions of Clause 64(3)(a)(ii) of the GCC.

(iii) But the request of contactor for appointment of a specific person only (a retired Chief Engineer of Indian Railway) as arbitrator was not agree by the Court and it was left to the Railway to take into consideration this request made by the Contractor. Therefore, the contractor cannot insist for appointment of any specific person only as the Arbitrator.

Chapter – 2

Appointment of Railway Officer(s) as Arbitrator(s)

2.1 Supreme Court Verdict dated 10.02.2017, Arbitration Petition (Civil) No. 50 of 2016, Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corporation Ltd.

(A) Full text of the Verdict: Annexure-2.1

(B) Facts of the case, in Brief:

(i) Voestalpine Schienen GmbH, a Company incorporated under the laws of Austria with a branch office in India (hereinafter referred as "contractor"), was awarded a contract on 12.08.2013 by the Delhi Metro Railway Corporation (hereinafter referred as "DMRC") for supply of rails.

(ii) Certain disputes had arisen between the parties with regard to the said contract. The contractor felt that DMRC had wrongfully withheld a sum of Euro 5,31,276/- and also illegally encashed performance bank guarantees amounting to Euro 7,83,200/-. DMRC had also imposed liquidated damages amounting to Euro 4,00,129/- and invoked price variation clause to claim a deposit of Euro 4,87,830/-. Not satisfied with the performance of the contractor, the DMRC suspended the business dealings with the contractor for a period of 6 months. The contractor wanted its claims to be adjudicated upon by an Arbitral Tribunal.

(iii) Clause 9.2(A) of the Special Conditions of Contract (SCC) prescribed a procedure for constitution of the Arbitral Tribunal which, inter alia, stipulates that DMRC shall forward a list of 5 persons from the panel maintained by DMRC. The contractor and DMRC shall choose one Arbitrator each, and the two Arbitrators so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator.

(iv) As per this procedure, DMRC furnished the names of 5 such persons to the contractor with a request to nominate its nominee from the said panel. However, the contractor felt that the panel prepared by the DMRC consisted of serving or retired engineers either of DMRC or of Government Department or Public Sector Undertakings who do not qualify as independent arbitrators. According to the contractor, with the amendment of Section 12 of the Arbitration and Conciliation Act, 1996 such a panel as prepared by the contractor has lost its validity. For this reason, the contractor preferred the instant petition Under Section 11(6) read with Section 11(8) of the Act for appointment of sole arbitrator/arbitral tribunal.

(C) Gist of submissions made by the Contractor: The entire ethos and spirit behind the amendment in Section 12 by Amendment Act, 2015 were to ensure that the arbitral tribunal consists of totally independent arbitrators and not those persons who are connected with the other side, even remotely. The DMRC is public sector undertaking with all the trappings of the Government and, therefore, even those persons who were not in the employment of DMRC, but in the employment of Central Government or other Government body/public sector undertakings should not be permitted to act as arbitrators. The very fact that the

panel of the arbitrator consisted only of "serving or retired engineers of Government departments or public sector undertaking" defied the neutrality aspect as they had direct or indirect nexus/privity with the DMRC and the Contractor had reasonable apprehension of likelihood of bias on the part of such persons appointed as arbitrators.

(D) Gist of submissions made by the DMRC: Though in its earlier letter dated 08.07.2016, DMRC had given a list of 5 persons to contractor for choosing its arbitrator therefrom, the DMRC had now forwarded to the Contractor the entire panel of arbitrator maintained by DMRC. This fresh list contains as many as 31 names and, therefore, a wide choice is given to the Contractor to nominate its arbitrator therefrom. Many panellists were retired officers from Indian Railways, who retired from high positions and were also having high degree of technical qualifications and experience. The said list included 5 persons who were not from railways at all but were the ex-officers of the other bodies like, DDA and CPWD. No one was serving or ex-employee of the DMRC. Merely because these persons had served in railways or other government departments, would not impinge upon their impartiality.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The main purpose for amending the provision of Section 12(5) by the Amendment Act-2015, was to provide for neutrality of arbitrators. In order to achieve this, this section lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. Therefore, the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.

(ii) Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties.

(iii) Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

(iv) The contractor highlighted Entry no. 1 of Seventh Schedule, which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. The Senior Counsel for the contractor argued that the panel of arbitrators drawn by the DMRC consists of those persons who are government employees or ex-government employees. However, that by itself may not make such person as ineligible as the panel indicates that these are the persons who have worked in the railways under the Central Government or CPWD or PSUs. They cannot be treated as employee or consultant or advisor of the DMRC. If this contention is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous PSUs, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the contractor.

(v) It cannot be said that simply because the person is retired officer who retired from the government or other statutory corporation or PSU and had no connection with DMRC, he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators.

(vi) DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the contractor to nominate its arbitrator. They are not the employees or ex-employees or in any way related to the DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the arbitral tribunal.

(vii) As per DMRC's procedure, even when there are number of persons empanelled, discretion is with the DMRC to pick 5 persons therefrom and forward their names to the other side for selecting its nominee (though in this case, it is now done away with). Not only this, the DMRC is also to nominate its arbitrator from the said list. Above all, the 2 arbitrators have also limited choice of picking upon the third arbitrator from the very same list, i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the 5 names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by the DMRC. Secondly, with the discretion given to the DMRC to choose 5 persons, a room for suspicion is created in the mind of the other side that the DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that this Clause need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators.

Likewise, the two arbitrators nominated by the parties should be given full freedom to choose third arbitrator from the whole panel.

(viii) The DMRC prepares the panel of "serving or retired engineers of government departments or PSUs", for appointment as Arbitrators. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and PSUs, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too complicated in nature. Likewise, some disputes may have the dimension of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well.

(ix) Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. The duty becomes more onerous in Government contracts, where one of the parties to dispute is the Government or PSU itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by the DMRC. It, therefore, becomes imperative to have a much broad-based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, especially at the stage of constitution of the arbitral tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today.

(F) Verdict of Hon'ble Supreme Court: Subject to the above, insofar as present petition is concerned, we dismiss the same, giving 2 weeks' time to the DMRC to nominate its arbitrator from the list of 31 arbitrators given by the Respondent to the Petitioner. No costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In the present case, DMRC had sent 5 names from their panel to the contractor for choosing one of them as its nominee. But due to reservations of the contractor regarding the impartiality/neutrality of the arbitrators, DMRC sent the full panel of 31 names, consisting of the retired engineer from Indian Railway or CPWD or PSUs and none of them being retired from DRMC.

(ii) The court has held that the bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The amended provision of the Act also puts an embargo on a person to act as an arbitrator, if he is the employee of the party to the dispute. Moreover, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act.

(iii) However, the Court has made following observation/directions which have repercussion on the procedure followed in Indian Railway:

(a) Rather than following the DMRC's current procedure of sending 5 names form their panel, to the contractor, for choosing one of the nominees, the full panel should be sent to the contractor. The choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose third arbitrator from the whole panel. This observation is relevant for procedure followed by Indian Railway wherein similar provision of sending only 4 names from the panel is followed.

(b) Rather than making the panel of arbitrator only from "serving or retired engineers of government departments or PSUs", it should be broad based to include engineers of prominence & high repute from private sector and persons with legal background like judges and lawyers of repute. This direction is relevant for procedure followed by Indian Railway wherein similar provision of making panel of only retired engineers or finance officers of railways is followed.

2.2 Supreme Court Verdict dated 03.01.2019, Civil Appeal No. 27/2019, the Government of Haryana PWD Vs. M/s G. F. Road Toll Private Limited

(A) Full text of the Verdict: Annexure – 2.2

(B) Facts of the case, in Brief:

(i) On 12.12.2008, Haryana PWD awarded a contract to M/s. G. F. Toll Road Pvt. Ltd. (hereinafter referred as "Contractor"). A Concession Agreement was signed on 31.01.2009. As per the agreement, arbitration on any contractual dispute shall be held by a Board of three Arbitrators appointed in accordance with rules of Arbitration of the Indian Council of Arbitration (ICA).

(ii) During the execution of the Agreement, disputes arose between the parties and the contractor vide their letter dated 30.03.2015, to the ICA, invoked the Arbitration Clause, requesting to commence arbitration proceedings. On 05.05.2015, the Contractor appointed a retired Engineer-in-Chief as their nominee Arbitrator. Haryana PWD nominated a retired Engineer-in-Chief as their nominee arbitrator, vide Letter dated 08.06.2015.

(iii) The contractor, vide Letter dated 03.08.2015, raised objection to the arbitrator nominated by Haryana PWD, on the ground that he was a retired employee of the State, and there may be justifiable doubts with respect to his integrity and impartiality to act as an arbitrator. The ICA advised the Haryana PWD to reconsider its nomination. Haryana PWD refuted this objection, on the ground that there was no rule which prohibited a former employee from being an arbitrator, and there could not be any justifiable doubt with respect to his impartiality since their nominee arbitrator had retired over 10 years ago. On 24.09.2015, contractor raised an objection regarding the independence and impartiality of Haryana PWD's nominee arbitrator and the ICA forwarded the said objection to the Haryana PWD.

(iv) The ICA, vide Letter dated 30.10.2015, reiterated that it has been firmly established that the nominee Arbitrator of Haryana PWD had a direct relationship with them as former employee, which may raise justifiable doubts as to his independence and impartiality in adjudicating the dispute. The ICA stated that it was in the process of appointing new arbitrator and its decision shall be communicated to the Haryana PWD.

(v) In response, the Haryana PWD vide Letter dated 16.11.2015 requested the ICA for a period of 30 days to appoint a substitute arbitrator. In the meanwhile, the ICA vide its Letter dated 23.11.2015 informed the Haryana PWD that it had already appointed a nominee arbitrator on behalf of Haryana PWD, as well as the Presiding Arbitrator.

(vi) Aggrieved by this appointment, Haryana PWD filed an application under Section 15 of the Arbitration and Conciliation Act-1996 ("the Act") before the District Court, Chandigarh, on the ground that the constitution of the arbitral tribunal was illegal, arbitrary and against the principles of natural justice.

(vii) The Haryana PWD also raised an objection before the Arbitral Tribunal, under Section 16, on the issue of jurisdiction. On 08.12.2016, the arbitral tribunal ordered that it shall not hear the objection under Section 16 of the Act, and shall await the decision of the District Court, Chandigarh.

(viii) The District Court vide its Order dated 27.01.2017 held that the Petition was not maintainable, since the Arbitral Tribunal had been constituted, and an objection under Section 16 should be raised before the Tribunal to rule on its own jurisdiction.

(ix) The Haryana PWD filed a Civil Revision Petition before the Punjab and Haryana High Court, Chandigarh. The learned Single Judge of the Punjab and Haryana High Court, vide Order dated 01.03.2018, dismissed the said petition on the ground that the Haryana PWD could raise the issue of jurisdiction under Section 16 before the arbitral tribunal. It was further held that in a situation where an objection is raised regarding the nomination of an arbitrator by one of the parties, and the agreement is silent with regards to the mode of appointment of a substitute arbitrator, the rules applicable would be those of the Institution under which the arbitration is held. Therefore, in the facts of the present case, Rules 25 and 27 of the ICA Rules would apply.

(x) Subsequently, the Application under Section 16 filed by the Haryana PWD was dismissed by a non-speaking Order of the Arbitral Tribunal dated 12.05.2018.

(xi) Aggrieved by the Order dated 01.03.2018 and 12.05.2018, the Haryana PWD filed this Petition before the Supreme Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) The High Court while considering the application under Section 15 failed to take note of the provisions of Section 15(2) of the Act. Section 15(2) provides that a substitute arbitrator must be appointed according to the rules that are applicable for the appointment of the arbitrator being replaced. This would imply that the appointment of a substitute arbitrator must be according to the same procedure adopted in the original agreement at the initial stage.

This Court in *ACC Ltd. v. Global Cements Ltd.* held that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically provide so.

In the present case, Clause 39.2.2 of the agreement expressly provided that each party shall nominate one arbitrator, and the third arbitrator shall be appointed in accordance with the Rules of the ICA.

The Haryana PWD had vide Letter dated 16.11.2015 requested for 30 days' time to appoint another nominee arbitrator, after objections were raised by the ICA to the first nomination. The ICA declined to grant the period of 30 days, and instead appointed the arbitrator on behalf of the Haryana PWD. The ICA could have filled up the vacancy only if the Haryana PWD had no intention of filling up the vacancy. The ICA could not have usurped the jurisdiction over appointment

of the nominee arbitrator on behalf of the State prior to the expiry of the 30 days' period requested by the Petitioner. The appointment of the nominee arbitrator on behalf of the Haryana PWD, by the ICA, was unjustified and contrary to the Rules of the ICA itself.

(ii) The objection raised by the ICA with respect to the appointment of nominee of the Haryana PWD was wholly unjustified and contrary to the provisions of the 1996 Act.

The objection raised by the ICA was that the nominee arbitrator was a retired employee of the Haryana PWD, and as such there may be justifiable doubts to his independence and impartiality to act as an arbitrator. The said objection was refuted by the Haryana PWD on the ground that the nominee arbitrator was a Chief Engineer who retired over 10 years ago from the services of the State. The apprehension of the ICA was hence unjustified since the test to be applied for bias is whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was in fact biased.

The present case is governed by the pre-amended 1996 Act. The 1996 Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. The fact that the arbitrator was in the employment of the State of Haryana over 10 years ago, would make the allegation of bias clearly untenable.

In the Amendment Act-2015, Fifth Schedule to the 1996 Act was inserted and it contains grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The first entry to the Fifth Schedule reads as under:

"Arbitrator's relationship with the parties or counsel

1. *The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."*

Entry 1 of the Fifth Schedule and the Seventh Schedule are identical. They indicate that a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator. The words "is an" indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties."

An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees.

The ICA made only a bald assertion that the nominee arbitrator of Haryana PWD would not be independent and impartial. The objection of reasonable apprehension of bias raised was wholly unjustified and unsubstantiated, particularly since the nominee arbitrator was a former employee of the State over 10 years ago. This would not disqualify him from act as an arbitrator. Mere

allegations of bias are not a ground for removal of an arbitrator. It is also relevant to state that the appointment had been made prior to the 2015 Amendment Act when the Fifth Schedule was not inserted. Hence, the objection raised by the ICA was untenable on that ground also.

(iii) In this view of the matter, the impugned judgment dated 01.03.2018 passed by the Punjab & Haryana High Court is set aside.

(iv) During the conclusion of arguments, the counsel for both parties mutually agreed to the arbitration being conducted by a Sole Arbitrator in supersession of the arbitration clause in the agreement. They agreed to the appointment of retired judge of Supreme Court as the Sole Arbitrator.

(D) Verdict of Hon'ble Supreme Court: The mandate of the three-member arbitral tribunal constituted under the ICA Rules on 05.12.2015 stands terminated. The Sole Arbitrator shall proceed in continuation of the previously constituted arbitral tribunal.

(E) Conclusions based on the verdict of Hon'ble Supreme Court

(i) Appointment of arbitrator(s) in this case was to be dealt under the 1996 Act, prior to the Amendment Act-2015 wherein the Fifth Schedule and Seventh Schedule were inserted. In the earlier act, there was no specific bar on appointment of working or retired employees as the Arbitrator(s) provided that there are no justifiable doubts as to his independence and impartiality.

(ii) During the conclusion of arguments, both the parties agreed to appointment of a retired judge as Sole Arbitrator, in supersession of the arbitration clause in the agreement.

(iii) For the 2015 Amendment Act, Hon'ble Supreme Court has observed that:

"…as per Entry 1 of the Fifth and Seventh Schedule of the Amendment Act-2015, which contains grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator, a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator.

An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees."

Therefore, the retired employees are not barred from appointment as Arbitrator(s) as per the Amendment Act-2015 also.

2.3 Supreme Court Verdict dated 17.12.2019, Civil Appeal Nos. 9486-9487 of 2019, Central Organisation for Railway Electrification Vs. M/S ECI-SPIC-SMO-MCML (JV)

(A) Full text of the Verdict: Annexure - 2.3

(B) Facts of the case, in Brief:

(i) Central Organisation for Railway Electrification (hereinafter referred as "CORE") awarded a contract of Rs. 165,67,98,570/- to M/S ECI-SPIC-SMO-MCML (JV) (hereinafter referred as "Contractor") and signed an agreement on20.09.2010. Subsequently, after coming into force of Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23.10.2015), the Government of India, Ministry of Railways, made a modification to Clause 64 of the General Conditions of Contract and issued a notification dated 16.11.2016 for implementation of modification. The modified Clause 64(3)(a)(ii) (where applicability of Section 12(5) has been waived off) inter-alia provided that in cases where the total value of all claims exceeds Rs. 1 crore, the Arbitral Tribunal shall consist of a panel of three gazetted Railway Officers not below JAG (Junior Administrative Grade) or two Railway Gazetted Officers not below JAG and a retired Railway Officer, retired not below the rank of Senior Administrative Grade (SAG). The procedure for constitution of the Arbitral Tribunal is also provided thereon. Clause 64(3)(b) deals with the appointment of arbitrator where applicability of Section 12(5) of the Arbitration Act has not been waived off and it stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of SAG as the arbitrators as per the procedure indicated thereon.

(ii) Since the contractor did not complete the work within the prescribed period, the contract was terminated on 01.11.2017, as per Clause 62 of the GCC, with forfeiture of security deposit and encashment of performance guarantee submitted by the contractor.

(iii) The contractor filed a Petition before the High Court challenging the termination of the contract. The High Court directed the contractor to avail the alternative remedy by invoking arbitration clause. The contractor vide its letter dated 27.07.2018 requested the CORE for appointment of an Arbitral Tribunal for resolving the disputes and settle the claims of value Rs. 73.35 crores. In reply dated 24.09.2018, CORE sent a list of 4 serving Railway Electrification Officers of JA Grade to act as arbitrators. The contractor was asked to select any 2 for formation of the arbitration tribunal. Vide letter dated 25.10.2018, the contractor was sent a list of another panel comprising 4 retired Railway officers and for selecting any 2 from this list and communicate within 30 days for constitution of the arbitration tribunal.

(iv) The contractor filed Arbitration Petition before High Court under Section 11(6) of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator. In its petition, the contractor suggested name of one retired Railway officer for appointment as arbitrator. According to the contractor, there exists a valid and binding arbitration clause between the parties; but since no neutral arbitrator is contemplated to be appointed in the GCC, they have no other recourse except filing the petition under Section 11(6) of the Act.

(v) The High Court vide order dated 03.01.2019 rejected the argument of the CORE that the arbitrator ought to be appointed only from the panel of arbitrators in terms of GCC and appointed a retired Judge of the High Court as sole arbitrator subject to his consent, under Section 11(8) of the Arbitration and Conciliation Act. Being aggrieved by this order of the High Court, the CORE preferred this appeal which was heard by a three-judge bench of the Supreme Court.

(C) Gist of submissions made by the CORE: As per Clause 64(3)(b) of the GCC (where applicability of Section 12(5) of the Act has not been waived off), the Arbitral Tribunal shall consist of a panel of three retired Railway Officers not below the rank of SAG as the arbitrators after compliance of the procedure stipulated therein. When the agreement and the GCC provided for appointment of Arbitral Tribunal consisting of 3 arbitrators from the Panel, the High Court erred in appointing the sole arbitrator outside the panel of the arbitrators. Appointment of an independent arbitrator is in contravention of Clauses 64(3)(a)(i), 64(3)(a)(ii) and 64(3)(b) of the GCC and the impugned judgment appointing a former Judge of the High Court is not sustainable. In support of this contention, reliance was inter-alia placed reliance upon *some* judgments of Supreme Court.

(D) Gist of submissions made by the Contractor: The Arbitration and Conciliation Act-1996 was amended with effect from 23.10.2015 and in the present case, the demand for arbitration for resolution of disputes was made on 27.07.2018 and hence, the provisions of the amended Act apply to the present case. As per the provisions of the Amendment Act-2015, all employees present or past are statutorily made ineligible for appointment as arbitrators. By virtue of the provisions of Section 12(5) read with Schedule VII to the Amendment Act-2015, the panel of arbitrators proposed by the CORE vide letter dated 24.09.2018 were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the Railway. Moreover, when the General Manager himself being ineligible to be appointed as an arbitrator under Section 12(5) read with Schedule VII of the Act, the General Manager cannot nominate any other person to be arbitrator. In support of this, inter alia reliance was placed upon *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited* [(2017) 4 SCC 665], *TRF Limited v. Energo Engineering Projects Limited* [(2017) 8 SCC 377] and number of other judgments of the Supreme Court.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the GCC has been modified *inter-alia* providing for constitution of Arbitral Tribunal consisting of 3 arbitrators either serving or retired railway officers, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the GCC.

(ii) In the petition filed under Section 11(6) of the Act, the contractor itself prayed for appointment of a specific retired Railway officer as the arbitrator, in terms of Clause 64 of the GCC. Though appointment of this retired officer was not agreeable to the CORE, since this officer was not in the panel of arbitrators and with value of the contract being more than Rs. 165 crores, the dispute can be dealt only by a panel of 3 arbitrators in terms of Clause 64(3)(b) of the GCC.

(iii) In *Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others* [(2019) 3 SCC 505], this Court had held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Act for appointment of a retired employee to act as an arbitrator.

(iv) As held in *Voestalpine Schienen GmbH* [(2017) 4 SCC 665], the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilizing their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.

(v) Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. As per this clause, the Arbitral Tribunal shall consist of a panel of 3 retired Railway Officers retired not below the rank of SAG. For this purpose, the Railway will send a panel of at least 4 names of retired Railway Officers empanelled to work as arbitrators indicating their retirement date to the contractor within 60 days from the date when a written and valid demand for arbitration is received by the GM. The contractor will be asked to suggest at least two names out of the panel for appointment of contractor's nominees within 30 days from the date of dispatch of the request of the Railway. The GM shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the "Presiding Officer" from amongst the three arbitrators. Thus, the right of the GM in formation of Arbitral Tribunal is counterbalanced by contractor's power to choose any 2 from out of the 4 names and the GM shall appoint at least one out of them as the contractor's nominee. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the GM has become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the contractor. The decision in TRF Limited is not applicable to the present case.

(vi) The High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3) (b) of the GCC and the impugned orders cannot be sustained.

(F) Verdict of Hon'ble Supreme Court:

(i) In the result, the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Allahabad are set aside and these appeals are allowed.

(ii) The CORE is directed to send a fresh panel of 4 retired officers in terms of Clause 64(3)(b) of the GCC within a period of 30 days from today under intimation to the contractor. The contractor shall select 2 from the 4 suggested names and communicate to the CORE within 30 days from the date of receipt of the names of the nominees. Upon receipt of the communication from the contractor, the CORE shall constitute the Arbitral Tribunal in terms of Clause

64(3)(b) of the GCC within 30 days from the date of the receipt of the communication from the contractor.

(iii) Parties to bear their respective costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) This is a landmark judgment wherein a three-judge bench of the Supreme Court has examined the issue of appointment of retired Railway officers as Arbitrator when the applicability of Section 12(5) of the Amendment Act-2015 has not been waived off by both the parties subsequent to dispute having arisen between them.

(ii) Citing the verdict of the Supreme Court in *Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others [(2019) 3 SCC 505]*, the Supreme Court held that there is no bar under Section 12(5) of the Act for appointment of a retired employee to act as an arbitrator.

(iii) The Supreme Court held that the right of the GM in formation of Arbitral Tribunal is counterbalanced by contractor's power to choose any 2 from out of the 4 names and the GM has to appoint at least one out of them as the contractor's nominee. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, the Supreme Court did not find any merit in the contention that GM has become ineligible to appoint arbitrator. The Supreme Court also held that decision of Supreme Court in *TRF Limited v. Energo Engineering Projects Limited* [(2017) 8 SCC 377] is not applicable to the present case.

(iv) It is relevant to note a very important fact in this case i.e. the contractor itself has asked for appointment of a specific retired Railway Officer as Arbitrator, in the petition filed before High Court under Section 11(6) of the Act. This weakened their own argument about independence and neutrality of retired Railway officers when working as Arbitrator.

2.4 Bombay High Court Verdict dated 02.06.2020, Arbitration Petition No. 10 of 2019, Afcons Infrastructure Limited Vs. Konkan Railway Corporation Limited

(A) Full text of the Verdict: Annexure - 2.4

(B) Facts of the case, in Brief:

(i) The Konkan Railway Corporation Limited (hereinafter referred as "KRCL") awarded a contract for "Construction of B.G. Single Line Tunnels on the Katra-Laole section of Udhampur- Srinagar- Baramulla Rail Link Project", to the Afcons Infrastructure Limited (hereinafter referred as "Contractor') and the contract agreement was signed on 12.12.2005. Clause 46.0 of the Special Conditions of Contract (arbitration agreement) was as under:

"… The Arbitral Tribunal shall consist of a panel of 3 Gazetted Railway Officers not below JA Grade. For this purpose, the KRCL will send a panel of more than 3 names of Gazetted Railway Officers to the Contractor who will be asked to suggest up to 2 names for appointment as Contractor's nominee. The MD/KRCL shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of the Arbitrators either from the panel or from outside the panel ……."

(ii) As per the contractor, the tunnel work was completed and the defect liability period also expired. The contractor submitted full accounts of all claims to the KRCL vide its letter dated 21.11.2016. Running account bills Nos. 112A, 112B and 112C along with a covering letter dated 27.06.2017 were lodged with the KRCL. As the claims were disputed by the KRCL by their letter dated 12.12.2017, the contractor wrote a letter dated 04.01.2018 to the Chief Engineer/KRCL to give a final decision on the claims submitted within a period of 120 days from the date of receipt, lest the contractor will proceed for an appropriate dispute redressal. As the Chief Engineer/KRCL did not give his decision within the period stipulated under clause 64(1)(i) of general conditions of contract, the contractor invoked the arbitration clause vide letter dated 02.07.2018.

(iii) In the said letter, the contractor stated that the procedure laid down in the arbitration agreement for constitution of the arbitral tribunal was in contravention of the provisions contained in Section 12(5) read with Fifth and Seventh Schedule of the amended Arbitration and Conciliation Act-2015. Thus, the procedure prescribed under Section 11(3) of the Act, 1996, would govern the constitution of the arbitral tribunal. The Petitioner, therefore, nominated a retired Secretary and Engineer-in-Chief, Government of Maharashtra, as their nominee arbitrator and called upon the KRCL to nominate their arbitrator, within a period of 30 days.

(iv) The KRCL, vide letter dated 11.07.2018, apprised the contractor that the case regarding appointment of arbitrator for the subject contract is sub-judice before Hon'ble High Court of Jammu and Kashmir. The contractor joined the issue by a communication dated 03.08.2018 asserting, inter alia, that the reference to arbitration contained in the letter dated 02.07.2018 is a fresh reference distinct from and unrelated to the earlier reference dated 27.06.2012, which is pending before the Hon'ble Jammu and Kashmir High Court. In response to the said letter,

the KRCL vide letter dated 29.08.2018 countered by asserting that the arbitral tribunal was formed as per the terms and conditions of the contract for the entire contract and the same is under challenge, at the instance of the Contrcator, in the High Court of Jammu and Kashmir.

(v) The contractor approached Bombay High Court for exercise of the jurisdiction under section 11(6) of the Act-1996, as the KRCL has refused to nominate their arbitrator.

(C) Gist of submissions made by the Contractor:

(i) Section 12(5) introduced by the Amendment Act-2015 proclaims that "*notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator*''. The first entry in the Seventh Schedule declares any person who is an employee, consultant, advisor or has any other past or present business relationship with a party, ineligible to be appointed as an Arbitrator. Thus, the stipulations in the contract, regarding the appointment of a Standing Arbitral Tribunal comprising of gazetted Railway officers, ex-facie stands foul of the provisions contained in Section 12(5) of the Act.

(ii) To buttress this submission, strong reliance was placed upon the judgment of the Supreme Court in the case of *Voestalpine Schienen Gmbh vs. Delhi Metro Rail Corp. Ltd.*, wherein the legislative purpose and import of the amended Section 12 was expounded.

(D) Gist of submissions made by the KRCL: The employees of a PSU like Railways are not per-se disqualified to be appointed as Arbitrators. Being an employee is not in itself a disqualification to act as an Arbitrator.

(E) Some relevant observations of the Hon'ble High Court:

(i) Arbitration is a preferred mode for resolution of commercial dispute as it is unencumbered by the procedural technicalities of traditional adjudicatory process. However, the determination is not at the expense of impartiality and dispassionate decision which is fundamental to any dispute resolution process. Impartiality and independence of the arbitrators is the very soul of the arbitration process. Though the arbitrators are usually appointed as the nominees of the parties to the dispute, yet the arbitrators are expected to discharge their duties with an element of detachment and impartiality.

(ii) Following the judgment of the Supreme Court in the case of Voestalpine Schienen GmbH (supra), this Court in the case of *Afcons Infrastructure Ltd.*, had observed that "*despite the observations of the Apex Court in Voestalpine Schienen GmbH, if the public sector organization like KRCL have such regressive one sided clauses for dispute resolution, I will not be surprised, in future if they have clauses under which KRCL will decide who will be the lawyer to represent the contractors like Petitioner. If the Government organizations and PSUs change their attitude, it would save substantial judicial time*".

(iii) In the case of *ITD Cementation India Ltd.*, another learned Single Judge after adverting to the organization structure of the Indian Railways observed that, "T*he Indian Railways therefore qualifies as a parent entity of the KRCL. Thus, certainly the KRCL can be said to be an affiliate of the Indian Railways/ Northern Railways within the meaning of 'an affiliate' as described in Explanation 2 to the Seventh schedule of the Arbitration Act"*. It thus cannot be said that the existing employees of Northern Railways would not have any relationship with the KRCL. It is also likely that the officers can very well be posted by the Ministry of Railways on deputation with KRC,L in which case such employees under the Ministry of Railways would also be the employees of the KRCL. In this situation it cannot be said that such an employee Arbitrator would be an independent or impartial Arbitrator having no relationship with the KRCL, and more particularly in the spirit of amended provisions of Section 12 read with Fifth and Seventh Schedule as noted above".

(iv) In view of the amended provisions of the Act, the officers of the KRCL or for that matter Indian Railways are simply ineligible to be appointed as the Arbitrators. To add to this, the procedure of appointment which does not vest free choice to nominate an Arbitrator with the contractor and, conversely, vests the power to appoint the presiding Arbitrator with the MD/KRCL also militates against the principles of autonomy and neutrality and impartiality, respectively. Thus, the prayer of the contractor to constitute an independent arbitral Tribunal appears justifiable.

(v) The KRCL has questioned the competence and authority of the contractor to nominate its Arbitrator to the arbitral Tribunal. However, no objection is raised to the eligibility, competence or impartiality of person named, to discharge functions of Arbitrator. In this view of the matter, I am inclined to allow the contractor to retain its choice of the Arbitrator and direct the KRCL to nominate its Arbitrator so that the two Arbitrators would then nominate a Presiding Arbitrator.

(F) Verdict of Hon'ble High Court: The Petition stands allowed in terms of the following order:

(1) The contractor is allowed to appoint the retired Secretary and Engineer-in-Chief, Government of Maharashtra, named by them, as a nominee Arbitrator on their behalf.

(2) The KRCL is directed to appoint an independent nominee Arbitrator, in conformity with the provisions of Section 12 read with Fifth and Seventh Schedule of the Act 1996, as amended by the Amendment Act-2015, within a period of 4 weeks from today.

(3) The nominee Arbitrators of both the parties shall appoint a Presiding Arbitrator, before entering the reference, in accordance with the provisions of the Arbitration and Conciliation Act-1996.

(4) The prospective Arbitrators, before entering the reference, shall make a statement of disclosure in accordance with the requirements of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act-1996 and forward

the same to the Prothonotary and Senior Master of this Court to be placed on the record of this Petition, with copies to both the parties.

(5) The Arbitration Petition stands disposed of in the above terms.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) In this verdict the High Court has held that in any contract case of KRCL, any retired officer of KRCL or Indian Railway cannot be nominated as Arbitrator as it will be in violation of the Section 12(5) of the Arbitration (Amendment) Act-2015.

(ii) It is observed that in this case, reliance was placed on the verdict of the Supreme Court delivered on 10.02.2017 in *Voestalpine Schienen GmbH vs Delhi Metro Rail Corporation Ltd. [Arbitration Petition (Civil) No. 50 of 2016]*. But a three-judge bench of the Supreme Court in the verdict delivered later, on 17.12.2019, in *Central Organisation for Railway Electrification vs M/S ECI-SPIC-SMO-MCML (JV) [Civil Appeal Nos. 9486-87 of 2019]* has held that there is no bar under Section 12(5) of the Act for appointment of a retired employee to act as an arbitrator in the case of the same department/organisation. But this relevant verdict of the Supreme Court does not seem to have been cited by the KRCL in their pleadings. It is not clear as to whether this was due to the fact that the verdict of the Supreme Court in *Central Organisation for Railway Electrification* was not available at the time of pleadings in the instant case.

2.5 Delhi High Court Verdict dated 04.02.2020, Arbitration Petition No. 779/2019, M/s Arvind Kumar Jain Vs. Union of India

(A) Full text of the Verdict: Annexure - 2.5

(B) Facts of the case, in Brief:

(i) Northern Railway (hereinafter referred as "Railway") awarded a contract for "Provision and laying of sewer line along the Railway boundary at Km 292/15 to 294/15 on DLI-BTI section under ADEN/JHI", to M/s Arvind Kumar Jain (hereinafter referred as "Contractor"), on 15.12.2011.

(ii) Upon disputes having arisen, the contractor, vide letter dated 03.09.2019, invoked the arbitration clause contained in Clause 64 of the GCC.

(iii) On receiving the contractor's request for appointment of an Arbitrator, in accordance with the GCC, the Railway, vide reply dated 19.09.2019, requested the contractor to agree for waiver of Section 12(5) of the Act, for appointment of a Gazetted Officer (JAG/SAG) of the Railways as the arbitrator.

(iv) The contractor did not reply to the Railway and instead filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act"), before the High Court, seeking appointment of an Arbitrator for adjudication of the disputes. This petition was the subject matter of the present case.

(C) Gist of submissions made by the Contractor: They have justifiable doubts regarding the impartiality of the arbitration proceedings when the Railway's own officer has been proposed as the sole Arbitrator. Once the Railway is aware that the appointment of an officer of the Railways as an Arbitrator would contravene the provisions of Section 12(5) of the Act, the Railway could not have directed the contractor to furnish a waiver. Therefore, it is prayed that this Court may appoint an independent Arbitrator.

(D) Gist of submissions made by the Railway: Upon notice being issued by the High Court, the Railway filed its' reply, stating that they are agreeable to arbitration in accordance with Clause 64 of the GCC, but the appointment of an Arbitrator is held up for want of the requisite waiver from the contractor. The delay in referring the disputes to arbitration is only on account of the contractor's failure to furnish the requisite waiver and the contractor be directed to furnish the requisite waiver, so as to enable the Railway to appoint any Gazetted Officer (JAG/SAG) of the Railway as the sole Arbitrator, in accordance with the terms of the Contract.

(E) Some relevant observations of the Hon'ble High Court:

(i) There is absolutely no merit in the pleas taken by the Railway. There is no doubt that Clause 64 of GCC requires disputes, which have arisen between the parties, to be adjudicated through arbitration. The question, however, is as to whether the Railway can insist on the appointment of a Gazetted Officer of Railways as the Arbitrator, especially in the light of the apprehension expressed by the contractor and the expressed provisions of Section 12(5) of the Act.

(ii) In the light of legal position, inter alia based on the Supreme Court verdict in *TRF Limited v. Energo Engineering Projects Limited* [(2017) 8 SCC 377], as also the contractor's apprehensions regarding the impartiality of the Arbitrator proposed to be appointed by the Railway, the Railway cannot be allowed to contend that only a Gazetted Railway Officer ought to be appointed as the Arbitrator. Similarly, the Railway cannot compel the contractor to furnish a waiver from the applicability of Section 12(5) of the Act. In fact, the insistence of the Railway to seek a waiver from the Contractor will contravene the very scheme of Section 12(5) of the Amendment Act-2015.

(F) Verdict of Hon'ble High Court:

(i) In these circumstances, the contractor's prayer for appointment of an independent Arbitrator under Section 11 of the Act is accepted. The petition is, accordingly, allowed and an Advocate named herein is appointed as the sole Arbitrator.

(ii) Before commencing arbitration proceedings, the Arbitrator will ensure compliance of Section 12 of the Act and the fees of the Arbitrator shall be governed by Schedule IV of the Act. The arbitration proceeding will be conducted under the aegis of Delhi International Arbitration Centre (DIAC).

(iii) A copy of this order be sent to the DIAC as also the learned Arbitrator, for information and necessary action.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) In this verdict the High Court has appointed an independent Arbitrator inter-alia observing that in view of contractor's apprehensions regarding the impartiality of the Arbitrator proposed to be appointed by the Railway, the Railway cannot be allowed to contend that only a Gazetted Railway Officer ought to be appointed as the Arbitrator and doing so will be in violation of the Section 12(5) of the Arbitration (Amendment) Act-2015.

(ii) Following infirmities are observed on the part of Railway in dealing this case:

(a) As per the provisions of GCC, after receipt of valid demand for arbitration from the contractor, there are two different procedure for dealing the case of appointment of arbitrator, depending upon whether the contractor agrees for waiver of Section 12(5) of the Act (i.e. appointment of serving Railway Officers as Arbitrators) or not. The communication to the contractor in this regard should be worded in such a way as if it is seeking the choice of contractor about waiver of Section 12(5) of the Act or not, and it should not look like forcing or insisting on the contractor to necessarily convey his agreement only (as seems to have been done in this case). In fact, Railway has stated in their reply to Court that "… *delay in referring the disputes to arbitration is only on account of the contractor's failure to furnish the requisite waiver* ...". Due to this, the High Court has taken a view that there was insistence on the part of the Railway to seek a waiver from the Contractor.

(b) If no reply is received from the contractor, on the communication sent to him seeking his choice about waiver of applicability of Section 12(5) of the Act, then the further processing for appointment of Arbitrator(s) should not be delayed on this account, as was done in this case. The provisions of the Act as well as GCC do not give any relaxation of time lines for appointment of Arbitrator(s) on this account. Therefore, if no reply in received from the contractor, it can be taken as his unwillingness for waiver of applicability of Section 12(5) of the Act (which is the default option in the Act) and further action should be taken for appointment of Arbitrator(s) as per the provisions and timelines contained in the Clause 64 of GCC.

(c) A three-judge bench of the Supreme Court in the verdict, delivered on 17.12.2019, in *Central Organisation for Railway Electrification vs M/S ECI-SPIC-SMO-MCML (JV) [Civil Appeal Nos. 9486-87 of 2019]* has held that there is no bar under Section 12(5) of the Act for appointment of a retired employee to act as an arbitrator in the case of the same department/organisation. But this relevant verdict of the Supreme Court does not seem to have been cited by the Railway in their pleadings. It is not clear as to whether this was due to the fact that the verdict of the Supreme Court in *Central Organisation for Railway Electrification* (supra) was not available at the time of pleadings in the instant case.

(d) In the present case, reliance has been placed inter alia on the decision of Supreme Court in *TRF Limited v. Energo Engineering Projects Limited* [(2017) 8 SCC 377]. But in the case of *Central Organisation for Railway Electrification vs M/S ECI-SPIC-SMO-MCML (JV) (supra),* the three-judge bench of the Supreme Court has held that the verdict of TRF case is not applicable to such cases.

Chapter – 3

Demand for Arbitration after giving "No Dues / No Claims Certificate" and/or Signing "Supplementary Agreement"

3.1 Delhi High Court Verdict dated 12.03.2003, Jain Refractory Erectors Vs. Cement Corporation of India Ltd.

(A) Full text of the Verdict: Annexure - 3.1

(B) Facts of the case, in Brief:

(i) Jain refractory Erectors (hereinafter called as "Contractor") were awarded a contract on 15.12.1980 by the cement corporation of India Ltd. (hereinafter called as "CCI") for the work "Erection of refractory materials at Akaltara Cement Project at Bilaspur (M.P.)". The work was completed and final bill was raised by the contractor, which contained payments for certain extra works done by them. CCI did not accept the said final bill and differences arose between the parties in this regard.

(ii) As per arbitration clause in the contract agreement, *"In case of any dispute or difference arising between the parties … the accredited representative from both sides shall consult each other and endeavour to settle the same. In case such settlement cannot be reached, the same shall be settled by a three member arbitration committee……* ". As stipulated in this clause, the contractor and CCI endeavoured to settle the dispute by holding a meeting between contractor and representatives of CCI. This endeavour was successful and on 11.04.1980, the parties recorded the settlement agreement in writing, wherein the payment(s) to be made for extra items of work was decided. The contractor issued a "no claim certificate" and in terms of the settlement recorded on 11.04.1980 received the final payment in full & final settlement of the dues pertaining to the work done.

(iii) But later on, the contractor wrote number of letters to CCI, from July'1980 to May'1983, claiming that all the dues payable had not been paid. On 09.05.1983, the contractor served a notice on CCI, invoking the arbitration clause, and nominated an advocate as arbitrator from their side with request to CCI for nominate their co-Arbitrator within 15 days. It was stated in the notice that if the CCI failed to nominate their co-Arbitrator, the arbitrator nominated by the contractor would function as the sole Arbitrator. The CCI replied vide letter dated 13.05.1983 that in view of the settlement between the parties, the matter stood closed. The CCI did not nominate their co-Arbitrator also on the ground that no dispute subsisted between the parties, which requires to be adjudicated upon.

(iv) The contractor's nominee arbitrator proceeded to act as sole Arbitrator, published his award on 02.02.1984 in favour of the contractor and the same was sought to be made a Rule of the Court in proceedings initiated under Sections 14, 17 and 29 of the Arbitration Act-1940, by the contractor. The CCI filed objections to the award inter-alia on the ground that there was no subsisting dispute between the parties and therefore the Arbitrator had no jurisdiction to make the award. In the objections, it was pleaded that the perusal of the arbitration clause shows that at the first instance parties would endeavour to

settle their disputes and differences and only in the eventuality of no settlement being arrived at could the question of appointment of Arbitrator arise. The objection of the CCI was accepted and it was held that the award was without jurisdiction and it was set aside by the Court. The present appeal with high court is against this order of the Court.

(C) Gist of submissions made by the Contractor: The issue of accord and satisfaction is itself a dispute and, therefore, the Arbitrator would have complete jurisdiction to decide the same. Reliance was placed on two judgments of the Supreme Court in *Union of India vs. L .K. Ahuja* and *Jayesh Engineering Works vs. New India Assurance Company Ltd.*

(D) Gist of submissions made by the CCI: The arbitration clause required that first an endeavour is to be made by the parties to settle the disputes and only in the eventuality of no settlement being arrived at, the matter could be referred to arbitration. Since a settlement was arrived at between the parties, there subsisted no dispute or difference, a condition precedent for the Arbitrator to be clothed with jurisdiction. Reliance was placed upon three judgments of the Supreme Court in *B. K. Ramaiah and Company vs. Chairman and Managing Director/NTPC*, *Nathani Steels Ltd. vs. Associated Constructions* and *Union of India vs. Popular Builders, Calcutta*.

(E) Some relevant observations of the Hon'ble High Court:

(i) The terms of the settlement dated 11.4.1980 indicate the *consensus ad-idem* arrived at between the parties. Certain claims were agreed to be paid by the CCI and after recording what items were to be paid for, the parties clearly recorded that with the agreement of the above items all the claims of contractor are fully and finally settled and nothing is pending with CCI. The language of the settlement clearly brings out that there was a complete accord and satisfaction of the claim by the contractor. This was followed by a "no claim certificate" issued by the contractor on 12.04.1980.

(ii) Pursuant to this settlement, the CCI released the payment on 21.04.1980. At no stage till this date, did the contractor intimate that the settlement was arrived under some bona-fide mistake or as a result of coercion or undue pressure. Even in the letters written by contractor afterwards, from 02.07.1980 to 06.05.1983, including the notice dated 09.05.1983 invoking the arbitration clause, the contractor has nowhere stated that the settlement arrived at was a result of coercion, pressure or undue influence.

(iii) The legal position coming out from various judgements of the Supreme Court, cited by both the parties, is that when there is a considered endeavour made by the parties to settle the dispute and the dispute is settled between the parties resulting in an accord and satisfaction of the dispute, no dispute would subsist thereafter; and as a result there would be no existing arbitrable dispute capable of being referred to arbitration.

(iv) When the aforesaid legal position is applied to the facts of the present case, it is observed that a settlement was reduced in writing and it was specifically recorded that with the agreement arrived at, all claims of the appellant are fully and finally settled and nothing is pending against the contract in question. This

was followed by a "no claim certificate" by the contractor and payments were released pursuant to this settlement. Even at the time of receiving payment, the contractor did not allege any coercion. Thus, there was a complete accord and satisfaction of the disputes pertaining to the contract in question. Even in the subsequent letters written by the contractor, there was not even a whisper that the settlement arrived at was a result of coercion. There was thus no existing arbitrable dispute, which could be referred to arbitration and the Arbitrator therefore had no jurisdiction to entertain the claim of the contractor.

(F) Verdict of Hon'ble High Court: We find no merit in the appeal. The same is accordingly dismissed. There shall, however, be no order as to costs.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) In case, the contractor submits a "no claim certificate", without any coercion or undue pressure or undue influence on him, and the language of the "No claims certificate" clearly brings out that there is a complete accord and satisfaction of the claim by the contractor; no dispute would subsist thereafter and as a result there would be no arbitrable dispute capable of being referred to arbitration. In such cases, the disputes raised by the contractor thereafter, need not be referred to the arbitrator.

(ii) But the important aspect to be noted here is that based on the undeniable and undisputed facts of the case, it must be clearly established that the "no claims certificate" given by the contractor was without any coercion or undue pressure or undue influence on him.

3.2 Supreme Court Verdict dated 05.01.2004, Appeal (Civil) No. 2754 of 2002, Chairman & MD, N.T.P.C. Ltd. Vs. M/s Reshmi Constructions

(A) Full text of the Verdict: Annexure - 3.2

(B) Facts of the case, in Brief:

(i) M/s Reshmi Constructions (hereinafter referred as "Contractor") was awarded a contract for a project at Kayankulam by National Thermal Power Corporation Ltd. (hereinafter referred as "NTPC"). Upon completion of the work, the contractor submitted final bill. Rather than accepting this bill, NTPC prepared the final bill and forwarded it to the contractor along with a printed format of "No Demand Certificate". The said "No Demand Certificate" was signed by the contractor. However, on the same day a letter dated 20.12.1990 was written by the contractor to the NTPC stating that:

(a) When the final bill was prepared, the NTPC authorities insisted that a "No Demand Certificate" in the given format should be submitted on the contractor's letterhead. This was refused by the contractor, but the NTPC authorities threatened that unless this is done the final bill will not be paid.

(b) They had incurred huge losses in execution of the work due to lapses on the part of NTPC. Under such a situation, they had no other way than budging to the coercion of NTPC authorities, to get whatever they give merely for the necessity of survival.

(c) They are signing the final bill under coercion, under undue influence and under protest only, without prejudice to their rights and claims whatsoever. There is no accord and satisfaction between the contracting parties.

(d) The final bill may be passed incorporating all their claims, as listed therein.

(ii) The contractor thereafter invoked the arbitration clause, by a letter dated 21.12.1991 through their advocate, wherein the claims under several heads were forwarded. The matter was examined in NTPC, duly taking legal advice, and it was decided to appoint arbitrator in the case. NTPC's advocate, vide letter dated 13.02.1992, intimated the contactor that they will be informed about appointment of arbitrator. The contractor was informed that reference to arbitration does not mean that there is admission about disputes being arbitrable, and the arbitrator will have no jurisdiction to deal with many claims; but this is a matter which has to be taken up later and not at the stage of appointment of an Arbitrator.

(iii) The contractor filed an application under Section 20 of the Arbitration Act-1940, before the Subordinate Judge's Court and in the judgment dated 30.06.1994 the said application was dismissed. Aggrieved, the contractor preferred an appeal before the High Court of Kerala which was allowed. The appeal in the present case was filed by the NTPC on this impugned order of High Court.

(C) Gist of submissions made by the NTPC: As the contract itself came to an end upon execution of "No Demand Certificate" and together with the same

the arbitration clause also perished. In support of the said contention, reliance was placed on *M/s. P. K. Ramaiah and Company Vs CMD/NTPC* and *Nathani Steels Ltd. Vs Associated Constructions*. In their application under Section 20 of the Arbitration Act, the contractor did not raise a plea that they had been coerced to submit the "No Demand Certificate", the High Court committed a manifest error in passing the impugned judgment.

(D) Gist of submissions made by the Contractor: There was no accord and satisfaction of the contract agreement. Despite the contract coming to an end, the arbitration clause survives and all questions arising out of or in relation to the execution of the contract are referable to arbitration. Reliance in this connection was placed on *Damodar Valley Vs K. K. Kar*, *M/s. Bharat Heavy Electricals Limited Vs M/s. Amar Nath Bhan Prakash*, *Union of India and Another Vs M/s. L. K. Ahuja & Co.* and *Jayesh Engineering Works Vs New India Assurance Co. Ltd*.

(E) Some relevant observations of the Hon'ble Supreme Court: The facts and situation in the present case, would lead to the conclusion that the arbitration agreement subsists because:

(i) Disputes as regard final bill arose prior to its acceptance, which was prepared by the contractor but not agreed upon in its entirety by the NTPC.

(ii) NTPC has not pleaded that upon submission of the final bill by the contractor any negotiation or settlement took place as a result whereof the final bill, as prepared by the NTPC, was accepted by the contractor unequivocally and without any reservation therefor.

(iii) The contractor lodged its protest and reiterated its claims, immediately after receiving the payment of the final bill.

(iv) The effect of the correspondences between the parties would have to be determined by the arbitrator, particularly as regard the claim of the contractor that the final bill was accepted by it without prejudice.

(v) NTPC never made out a case that any novation of the contract agreement took place or the contract agreement was substituted by a new agreement. Only in the event, a case of creation of new agreement is made out the question of challenging the same by the respondent would have arisen.

(vi) The conduct of the NTPC would show that on receipt of the notice of the respondent through its advocate dated 21.12.1991, the same was not rejected outright but existence of disputes was accepted and the matter was sought to be referred to the arbitration.

(vii) The finding of the High Court that prima facie there are triable issues before the Arbitrator so as to invoke the provisions of Section 20 of the Arbitration Act-1940, cannot be said to be perverse or unreasonable so as to warrant interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India.

(viii) The jurisdiction of the arbitrator under the 1940 Act although emanates from the reference, it is trite, that in a given situation the arbitrator can

determine all questions of law and fact including the construction of the contract agreement.

(ix) The cases cited by the learned counsel for the appellant (*P. K. Ramaiah and Company and Nathani Steels*) would show that the decisions therein were rendered having regard to the finding of fact that the contract agreement containing the arbitrator clause was substituted by another agreement. Such a question has to be considered and determined in each individual case having regard to the fact situation obtaining therein.

(F) Verdict of Hon'ble Supreme Court: For the reasons aforementioned, we are of the opinion that there is no infirmity in the impugned judgment. This appeal is, therefore, dismissed. No Costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court: When the facts and circumstances of the case show that the "No Claim Certificate" or "No Demand Certificate" was submitted by the contractor under coercion or undue pressure or undue influence, then with finalisation of the contract based on such "No Claim Certificate" or "No Demand Certificate", the arbitration clause in the contract does not perish in these circumstances. The issues under dispute, in such cases, are arbitrable and the arbitrator can determine all questions of law and fact. Therefore, arbitration cannot be denied in such cases.

3.3 Andhra High Court Verdict dated 08.09.2006, Sai Engineering Contractors Vs. General Manager, South Central Railway

(A) Full text of the Verdict: Annexure - 3.3

(B) Facts of the case, in Brief:

(i) M/s Sai Engineering Contractors (hereinafter referred as "Contractor") was awarded a contract of value Rs. 37,05,240/- for "Replacement of bridge timbers with new steel channel sleepers" by South Central Railway (hereinafter referred as "Railway"), on 13.05.1998, with completion period of 6 months. As per the contractor, the work could not be completed in time due to many reasons like non-supply of bearing plates & other fittings by Railway in time, non-availability of some angle sections in the market, variation in quantities etc. By Feb'1999, bills to the extent of Rs. 5.46 lakhs only were paid to the contractor. Railway changed certain works and got additional agreements executed, and finally the work was completed by 08.01.2003, final bill was prepared on 16.01.2003 and the amounts were paid.

(ii) The contractor sent a letter dated 18.02.2003 mention that due to Railway's fault they have suffered loss. In this letter the claims were specified and it was stated that if they are not acceptable to Railway, the same may be referred to arbitration. As there was no response to the same, again a letter dated 18.12.2004 was sent to GM/South Central Railway, reiterating the claims and seeking to resolve the same, failing which, to make a reference to the arbitration. Railway vide their latter dated 22.02.2005 rejected all the claims referring to the "no claim certificate" submitted by the contractor. Subsequently the contractor sent another representation dated 04.07.2005 seeking a reference of the disputes for arbitration, which was received by Railway on 06.07.2005, but this was also rejected by the Railway.

(iii) The contractor filed an application with High Court of Andhra Pradesh, under Section 11 (6) and (8) of the Arbitration and Conciliation Act-1996, seeking appointment of an Arbitrator for adjudication of the disputes.

(C) Gist of submissions made by the Railway:

(i) It was specifically stated that the delay, if any, was only on account of the contractor and not on account of the Railway. In view of the request made by the contractor, completion date was extended from time to time without imposing any penalty. After completion of the work, the measurements were taken and final bill was prepared against which the contractor had submitted "no claim certificate" and requested release of the security deposit which was also received without any protest. Therefore, there is no further claim in terms of Clause 43 of the General Conditions of the Contract (hereinafter referred as "GCC").

(ii) Even assuming that Clause 43(2) of GCC came as a result of the amendment made in Dec'1998, the contract agreement between the parties was executed on 31.12.1998 well after this amendment to GCC. Therefore, Clause 43(2) applies to the present work, even though the tenders were called for prior to the said date and work was also entrusted.

(iii) The receipt of the contractor's letter dated 18.02.2003 was disputed and according to the Railway, the earliest communication received from the contractor is only on 18.12.2004 and the said communication is clearly beyond 90 days as contemplated under Clause 64 of the GCC. Therefore, the contractor is not entitled to raise such a claim, especially in the light of Clause 43(2) of GCC which prohibits raising of any dispute after acceptance of the final measurements as well as submission of "no claim certificate" and also having received the final bill amount as well as security deposit without raising any protest. Reliance was placed upon the decisions of the Supreme Court in *Muddu Krishna Rangaiah vs Union of India*, *Y. Babu Rao vs Union of India*, *P. K. Ramaiah vs CMD/NTPC* and *Nathani Steels Ltd. vs Associated Constructions*.

(D) Gist of submissions made by the Contractor:

(i) Clause 43(2) of GCC was inserted only by way of amendments to the GCC in Dec'1998. Since the tender submitted by the contractor was earlier to this, the said amended clause has no application to the present case. Therefore, there is no prohibition for the contractor to raise a claim even after accepting the final bill and also receiving the amount in final bill without any protest.

(ii) There were serious disputes and as the Railway did not resolve the said disputes, a request was made either to resolve the said disputes or to refer the same for arbitration. There was no response to the first communication after the completion of the work and with reference to the second communication there was a communication rejecting the claim. Therefore, a final legal notice was issued on 04.07.2005, which was also replied by Railway negating the claim.

(iii) Reliance was placed upon a decision of this Court in *Union of India vs Vengamamba Engineering Co.*, where a Division Bench of this Court held that "*… the contractor having accepted the final bill without any protest, he had no arbitral dispute. However, in a case where by reason of subsequent agreement there has been negation of contract, the Court may not refuse to appoint an arbitrator as having regard to the provisions of 1996 Act all such disputes can be raised before the arbitrator ...*".

(E) Some relevant observations of the Hon'ble High Court:

(i) A perusal of the Clause 43(2) of GCC clearly shows that once the final bill is accepted, the contractor shall not be entitled to make any claim whatsoever against the railway under or arising out of this contract, nor shall the railway entertain or consider any such claim, if made by the contractor, after he signs a "No claim" certificate in favour of the railway. In view of the specific bar, the contractor is precluded from raising such a plea, and in fact, in terms of Clause 64 of GCC, the matter covered under Clause 43 would be an excepted matter where no arbitration could be allowed.

(ii) Regarding the decision of this Court in *Union of India vs Vengamamba Engineering Co. (supra)*, the legal position has changed altogether, in the light of the later decision of the larger Bench of the Supreme Court in *S.B.P. & Co. vs Patel Engineering Ltd. and Anr.* Further, in all the decisions relied upon by the

Railway, it was consistently held that where "no claim" certificate was submitted, the dispute is not arbitrable.

(iii) In the light of the above legal position, if we examine the facts of the present case, admittedly, the work was completed by 08.01.2003 and final bill was prepared on 16.01.2003 with reference to which "no claim" certificate was submitted by the contractor and received the amount payable under the said final bill. In view of the said acceptance of the final bill and receipt of the amount under the final bill without any protest, which was not even disputed, the contractor is prohibited from raising any dispute with reference to the execution of the work under the agreement with reference to which, the final bill was made and accepted.

(F) Verdict of Hon'ble High Court: Under the above circumstances, the. Arbitration Application is devoid of merit, and the same is, accordingly, dismissed. No costs.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) In this verdict, the High Court has upheld the validity of the Clause 43(2) of GCC, which specifically bars the contractor making any claim whatsoever against the Railway, once the contactor accepts the final bill and furnishes a "No Claims certificate" in favour of the Railway.

(ii) Citing various judgments of High Court/Supreme Court, the High Court has held that once the contractor accepts the final bill and receives the amount under the final bill without any protest or any dispute, the contractor is prohibited from raising any dispute thereafter.

(iii) However, the important point to be noted here is that the acceptance of the final bill amount and submission of "no claims certificate" by the contractor should be unequivocal, without any dispute or protest, for barring any further claims by the contractor in that contract agreement.

3.4 Supreme Court Verdict dated 18.09.2008, Civil Appeal No. 5733 of 2008, National Insurance Co. Ltd Vs. M/s Boghara Polyfab Pvt. Ltd.

(A) Full text of the Verdict: Annexure - 3.4

(B) Facts of the case, in Brief:

(i) M/s Boghara Polyfab Pvt. Ltd. (hereinafter referred as "M/s Boghara") obtained an Insurance policy from National Insurance Co. Ltd. (hereinafter referred as "NIC") for their godown, for the period 04.08.2003 to 03.08.2004, for a sum of Rs. 6 Crores. On 27.05.2004, M/s Boghara requested NIC to increase the sum insured to Rs. 12 Crores for a period of 2 months and NIC issued endorsement about increase in the sum insured. As per M/s Boghara, the additional sum insured was for 69 days (from 27.05.2004 to 03.08.2004). But as per NIC, it was for a period of 60 days only (from 27.05.2004 to 26.07.2004) but one of their officers had delivered a computer-generated statement, with unauthorised alteration by hand showing the additional cover for 69 days up to 03.08.2004, and departmental proceedings have been initiated against the said officer.

(ii) On 05.08.2004, M/s Boghara reported damage to their stocks on account of heavy rains and flooding on 02/03.08.2004 and made a claim for this. The surveyor submitted a report showing net assessed loss as Rs. 3,18,26,025/-, which was arrived at on the basis that the sum insured was Rs. 12 crores. The NIC informed the surveyor that there was an error in the net assessed loss arrived at as it assumed the sum insured as Rs.12 crores up to 03.08.2004 whereas the sum insured was only Rs. 6 crores after 26.07.2004. The surveyor therefore gave an addendum to the final survey report, reassessing the net loss as Rs. 2,34,01,740/-. M/s Boghara protested against this, and the claim and dispute were pending consideration for a considerable time.

(iii) As per M/s Boghara, NIC forced them to accept a lower settlement, by informing them on 21.03.2006 that unless they issue an "Discharge voucher-in-advance" (in the prescribed form) acknowledging receipt of Rs. 2,33,94,964/- in full and final settlement, no amount would be released towards the claim. As per M/s Boghara, due to non-release of the claim, they were in a dire financial condition and had no alternative but to yield to the pressure applied by NIC and give the said discharge voucher, undated, in last week of March, 2006. The payment was released by NIC only after receiving the said discharge-voucher.

(iv) M/s Boghara lodged a complaint dated 24.03.2006 with the Insurance Regulatory and Development Authority, mentioning the above facts and requesting to take up the matter with NIC for paying full compensation to them, as originally assessed by the surveyor. M/s Boghara also issued a legal notice dated 27.05.2006, demanding the difference amount with interest @ 12% per annum from 06.12.2004 (date of final survey report) till the date of payment. They also mentioned that if this payment was not made within 15 days, this notice should be treated as notice invoking arbitration.

(v) NIC vide their reply dated 02.08.2006 rejected this demand by contending that M/s Boghara had unconditionally accepted the settlement amount fully & finally, without any protest. Aggrieved by this, M/s Boghara filed an application

under Section 11 of the Arbitration & Conciliation Act-1996. The High Court by order dated 19.04.2007 held that there was a dispute between the parties as to whether "discharge voucher" was given voluntarily or under pressure or coercion, and that it required to be settled by the Arbitral Tribunal. A retired judge was appointed as the sole arbitrator. The said order of High Court was challenged, by the NIC, in this appeal before the Supreme Court.

(C) Gist of submissions made by the NIC:

(i) Once the insurance claim was settled and M/s Boghara received payment issuing a discharge voucher, there was discharge of the contract by accord and satisfaction. Having received the payment under the said discharge voucher, M/s Boghara cannot, while retaining and enjoying the benefit of the full & final payment, challenge the validity or correctness of the discharge voucher. In support of this contentions, reliance was placed on three decisions of this Court in *State of Maharashtra vs. Nav Bharat Builders*, *M/s. P. K. Ramaiah & Co. vs. CMD/NTPC* and *Nathani Steels Ltd. vs. Associated Constructions*.

(ii) The decisions relied on by M/s Boghara were all rendered by two-Judge Benches of the Supreme Court, whereas the decision in *Nathani Steels* was rendered by a three-Judge Bench; and therefore the principle laid down in *Nathani Steels* that there can be no reference to arbitration wherever there is a full & final settlement, resulting in the discharge of the contract, holds the field and will have to be followed in preference to the other decisions.

(D) Gist of submissions made by M/s Boghara: The scope of proceeding under Section 11 of the Act was limited. Once the petitioner establishes that the contract between the parties contains an arbitration agreement, and that the dispute raised is in respect of a claim arising out of such contract, the dispute has to be referred to arbitration. The contention by the NIC that there is discharge of the contract by issue of discharge voucher is a matter for the arbitral tribunal to examine and decide. If the Court is required to consider the discharge voucher in settlement of all claims, any objection to the validity of such discharge voucher should also be considered by the Court. When the discharge voucher is given under threat or coercion, resulting in economic duress and compulsion, such discharge voucher is not valid nor binding and the dispute relating to the claim survives for consideration and is arbitrable. In support of the said contentions, reliance was placed on the decisions of this Court in *Damodar Valley Corporation vs. K. K. Kar*, *M/s. Bharat Heavy Electricals Ltd. Ranipur vs. M/s. Amar Nath Bhan Prakash*, *Union of India vs. L. K. Ahuja & Co.*, *Jayesh Engineering Works vs. New India Assurance Co. Ltd.*, *CMD/ NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors* and *Ambica Construction vs. Union of India*.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) Based on the decisions of the Supreme Court in some cases (as cited therein) and provision of Section 11 of the Arbitration & Conciliation Act, if a party before the Arbitral Tribunal contends that the contract has been discharged by reason of another party accepting payment in full & final settlement, and if another party counters it by contending that the discharge voucher was extracted from him by practicing fraud, undue influence, or coercion, the arbitral tribunal will have to decide whether the discharge of contract was vitiated by any

circumstance which rendered the discharge voidable at the instance of the claimant. If the arbitral tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the arbitral tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits.

(ii) Where the intervention of the Court is sought for appointment of an Arbitrator under section 11, the duty of the Court is defined in the decision of *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 Court is bound to decide. These issues are:
(a) Whether the party making application has approached the appropriate 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.

(ii) Issues which the Court may choose to decide. These issues 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.

(iii) Issues which should be left to the Arbitrator to decide. These issues are:
(a) 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).
(b) Merits or any claim involved in the arbitration.

It is clear from above that in regard to issues falling under the second category, the Court may decide them, if necessary, by taking evidence. Alternatively, direction may be issued to the Arbitrator to decide the same. This decision should be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Court decides the issue.

(iii) The arbitration agreement in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances:

(a) Where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt. Nothing survives in regard to such discharged contract.

(b) Where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations.

(c) Where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there is no outstanding claims or disputes.

(iv) The cases cited by both the parties fall under two categories. The cases relied on by NIC are of one category where the Court after considering the facts, found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence. Consequently, this Court held that there could be no reference of any dispute to arbitration. The cases relied on by M/s Boghara fall under a different category where the court found some substance in the contention of the claimants that "no due/claim certificate" or "full and final settlement Discharge Vouchers" were insisted and taken as a condition precedent for release of the admitted dues. Alternatively, they were cases where full and final discharge was alleged, but there were no documents confirming such discharge. Consequently, this Court held that the disputes were arbitrable.

(v) Obtaining of undated receipts-in-advance in regard to regular/routine payments by Government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. What is of some concern is the routine insistence by some Government departments, statutory Corporations and Government Companies for issue of undated "no due certificates" or a "full and final settlements vouchers" acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure is unfair, irregular and illegal and requires to be deprecated.

(vi) In this case, we are prima facie of the view that there is no accord and satisfaction in this case and the dispute is arbitrable. But it is still open to NIC to lead evidence before the arbitrator, to establish that there is a valid and binding discharge of the contract by way of accord and satisfaction.

(F) Verdict of Hon'ble Supreme Court: We therefore find no reason to interfere with the order of the High court. The appeal is accordingly dismissed. We make it clear nothing stated by the High Court or by us shall be construed as expression of any final opinion on the issue whether there was accord and satisfaction nor as expression of any views on merits of any claim or contentions of the parties.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The Apex Court has held that when intervention of the Court is sought for appointment of an Arbitrator under Section 11, the issue of 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 can either decided by the Court itself or it can be left to be decided by the Arbitrator. This decision should be guided by the object of expediting the arbitration process with minimum judicial intervention. Where allegations of forgery/ fabrication are

made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Court decides the issue.

(ii) The arbitration agreement in a contract cannot be invoked to seek reference of any dispute to arbitration, when the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a voluntary full and final discharge voucher/receipt. But important aspect to be noted here is that issue of "no claims certificate" or "discharge certificate" should be established to be unequivocal, without any dispute or protest.

(iii) The Court has held that when a party before the Arbitrator contends that the contract has been discharged by reason of another party accepting payment in full & final settlement, and if another party counters it by contending that the discharge voucher was extracted from him by practicing fraud, undue influence, or coercion; it is for the arbitrator to decide whether the full & final settlement/ discharge voucher/no claims certificate was given by the party voluntarily, without any coercion or pressure by the other party. If the arbitrator comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the arbitrator comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits.

3.5 Supreme Court Verdict dated 17.04.2009, Civil Appeal No. 2622 of 2009, Union of India & others Vs. M/s Onkar Nath Bhalla & Sons

(A) Full text of the Verdict: Annexure - 3.5

(B) Facts of the case, in Brief:

(i) Military Engineering Services (hereinafter referred as "MES") signed a contract with M/s Onkar Nath Bhalla & Sons. (hereinafter referred as "contractor"). The contract work was completed on 20.09.2002. A final bill was prepared by the contractor and was forwarded to the MES. The contractor received payment for final bill, without any protest or reservation, on 27.03.2001. But after two years, the contractor submitted a list of 20 claims to the MES. In response to this, MES replied that as per standard conditions of contract, no further claim shall be made by the contractor after submission of final bill and the claims submitted now are deemed to have been waived and extinguished. The contractor then approached Engineer-in-Chief, on 17.08.2003, for appointment of arbitrator. The MES did not appoint an Arbitrator, on the ground that no dispute existed.

(ii) The contractor went before the Civil Judge (Senior Division) Amritsar on 19.09.2003. Civil Judge transferred the same to the Distt. Judge, which was further transferred to Punjab & Haryana High Court. The High Court stated that since no affidavit has been filed within the stipulated period of the notice invoking the arbitration clause, the MES have forfeited their right to appoint the Arbitrator. By an order dated 26.04.2007, the High Court appointed a retired Chief Justice as the sole Arbitrator. The appeal before the Supreme Court, in this case, is directed against this impugned judgment of the High Court.

(C) Gist of submissions made by the MES:

(i) The final bill of the work was signed by the contractor on 21.12.2000 and the payment for the same was made on 27.03.2001. The contractor signed the final bill, "no claim certificate" was also signed without any reservation and he also got the payment of final bill by signing the same without any protest. To support this contention, reliance was placed the decision of the Supreme court in *P. K. Ramaiah & Co. vs. NTPC*.

(ii) The contractor with the intention of receiving further payments, after two years, raised yet another claim and tried to bring up a dispute.

(iii) It is further contended that when the agreement provided for arbitration by serving officer having degree in Engineering or equivalent, then a Retired High Court Judge cannot be appointed as an Arbitrator.

(D) Some relevant observations of the Hon'ble Supreme Court:

(i) The General Conditions of Contract state that no further claim shall be made by the contractor after submission of final bill and these shall be deemed to have been waived and extinguished. Also, all dispute between the parties to the contract shall after written notice by either party to the contract, are to be

referred to the sole arbitration of a serving officer having degree in Engineering or equivalent.

(ii) While appointing an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, two things must be kept in mind: (i) That there exists a dispute between the parties to the agreement and that the dispute is alive; and (ii) An Arbitrator must be appointed as per the terms and conditions of the agreement and as per the need of the dispute.

(iii) It is the specific case of the MES that the contractor could not have raised yet another claim, because after signing on the final bill without any protest or reservation, he has waived his right as per the conditions of the contract. The High Court without considering that whether any dispute exists between the parties, could not have appointed an Arbitrator.

(iv) The High Court was not justified in appointing a Retired High Court Judge as the sole Arbitrator in the present case.

(E) Verdict of Hon'ble Supreme Court: In view of the above discussion, the appeal is allowed. The impugned order passed by the High Court is set aside. No order as to costs.

(F) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The Supreme Court has held that after signing the final bill and receiving the payment also, without any protest or reservation, the contractor has waived off his right for any further claims or payment as per the conditions of contract. It is also held that the High Court could not have appointed an Arbitrator without considering this aspect. This logic is applicable to Railway's cases also because Clause 43(2) of Railway's GCC specifically bars the contractor making any claim whatsoever against the Railway, once the contactor accepts the final bill and furnishes a "No Claims certificate' in favour of the Railway.

(ii) However, the important point to be reiterated is that the acceptance of the final bill amount and submission of "no claims certificate" by the contractor should be unequivocal, without any dispute or protest.

3.6 Supreme Court Verdict dated 10.09.2010, Civil Appeal No. 7970 of 2010, Union of India and Others Vs. Hari Singh

(A) Full text of the Verdict: Annexure - 3.6

(B) Facts of the case, in Brief:

(i) Northern Railway (hereinafter referred as "Railway") awarded a contract to Hari Singh (hereinafter referred as "Contractor") vide Contract Agreement dated 01.05.2002, for execution of "Earthwork in formation, Construction of minor bridges and other protection works etc. in Zone No. 8 from Km. 25 to 42, in connection with new BG Rail Link from Chandigarh to Ludhiana". The Contract Agreement also provided for execution of Supplementary Agreement. The contract was executed by the contactor and the entire amount due was paid to him, by a Supplementary Agreement dated 27.04.2004.

(ii) The said supplementary agreement provided that "….t*he contractor has received the final bill amount from the Railway in full and final settlement of all his claims under principal agreement……. Now it is hereby agreed by and between the parties that they have no further dues of claims … It is further agreed that the contractor has accepted the said sums in full and final satisfaction of all its dues and claims under the said Principal Agreement…. the said Principal Agreement shall stand finally discharged and rescinded all the terms and conditions including the arbitration clause …. It is further agreed and understood by and between the parties that the arbitration clause contained in the said principal agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes."*

(iii) The Contractor sent a legal notice to the GM/Northern Railway, immediately after receiving the entire amount of final bill, mentioning some claims, and seeking appointment of Arbitrator. This legal notice did not even mention the fact of signing the supplementary agreement and receiving the entire amount of Rs. 2,07,49,099/-.

(iv) When arbitrator was not appointed by the Railway, the contractor filed an arbitration petition before the High Court of Punjab and Haryana. The High Court, vide order dated 12.01.2207, referred the claims of the contractor to the two arbitrators. Aggrieved by this, Railway filed this appeal before the Supreme Court against the impugned order of the High Court.

(C) Gist of submissions made by the Railway: The issue is no longer *res integra* (a question that has not been examined) and is covered by a series of judgments for almost a century. Reference was made to the judgment of Privy Council in *Payana Reena Saminathan vs. Pana Lana Palaniappa*, reiterated in *Union of India vs. Kishorilal Gupta & Bros*. Reliance was also placed on Supreme Court judgements in *State of Maharashtra vs. Nav Bharat Builders*, *M/s P.K. Ramaiah and Company vs. CMD/NTPC*, *Nathani Steels Ltd. vs. Associated Constructions*, *National Insurance Company Limited vs. Boghara Polyfab Private Limited*. The legal position which has been crystallized by a series of judgments is that "*where both the parties to a contract confirmed in writing that the contract has been fully and finally discharged by the parties and there was no outstanding*

claim or dispute; thereafter the matter could not have been referred to the arbitration".

(D) Some relevant observations of the Hon'ble Supreme Court: In our considered view, on the basis of the above settled legal position that when the parties by a supplementary agreement obtained a full and final discharge after paying the entire amount which was due and payable to the contractor, thereafter the contractor would not be justified in invoking arbitration, because there was no arbitral dispute for reference to the arbitration.

(E) Verdict of Hon'ble Supreme Court: In view of the settled legal position, the impugned judgment is unsustainable and is accordingly set aside. The appeal is allowed accordingly. The parties to bear their own costs.

(F) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) This was a Railway case wherein the Supreme Court has held that when the parties by a "supplementary agreement" obtained a full and final discharge after paying the entire amount, the contractor would not be justified in invoking arbitration, because there was no arbitral dispute for reference to the arbitration.

(ii) The practice of signing the "Final Supplementary Agreement", as was being followed in the Northern Railway, has been now made part of the Railway's GCC as Clause 48(3) and Annexure-XIV. Therefore, the contractor cannot make any further claims after signing the "Final Supplementary Agreement".

3.7 Supreme Court Verdict dated 14.11.2011, Civil Appeal No. 3245 of 2003, R. L. Kalathia & Co. Vs. State of Gujarat

(A) Full text of the Verdict: Annexure - 3.7

(B) Facts of the case, in Brief:

(i) M/s R. L. Kalathia & Co. (hereinafter referred as "Contractor") was awarded a contract by Gujarat State Govt. (hereinafter referred as "State Govt.") for "Construction of Fulzer Dam II in Jamnagar District", with completion period of 24 months w.e.f. 29.11.1970. During execution of the work, certain additions/alterations/variations were made in respect of certain items of work. The final decision regarding alteration in respect of certain items of work took long time with the result that the contractor was required to execute larger quantity of work and thus entitled for extra payment for the additional work.

(ii) On 16.07.1976, the contractor lodged a consolidated statement of claims for the additional or altered works. As there was no response, the contractor served a statutory notice dated 04.01.1977 under Section 80 of the Code of Civil Procedure. Again, on 24.03.1977, after getting no reply, the contractor filed Civil suit with the Civil Judge (S.D.), Jamnagar, praying for a decree of the aggregate amount of Rs. 3,66,538.05 with running interest @ 9% p.a. from the date of final bill till the date of Suit and at the rate which may be awarded by the Court from the date of Suit till payment.

(iii) Vide order dated 14.12.1982, the Civil Judge allowed the suit and passed a decree for a sum of Rs. 2,27,758/- together with interest @ 6% p.a. from the date of suit till realization. Being aggrieved by the said judgment decree, the State Govt. filed First Appeal before the High Court of Gujarat at Ahmedabad.

(iv) The Division Bench of the High Court, vide its order dated 07.10.2002, allowed the appeal of the State Govt. and dismissed the suit of the contractor and also directed that the decretal amount, deposited by the State Govt. and as permitted to be withdrawn by the contractor, should be refunded within a period of 4 months from the date of the judgment. The decision of the High Court was mainly based on the Clauses 8 and 10 of the contract agreement, which specified as under:

"*Clause 8*: *… the contractor shall, on submitting a monthly bill, be entitled to receive payment proportionate to the part of the work then approved and passed by the engineer in charge … The final bills shall be submitted by the contractor within one month of the date fixed for completion of the work, otherwise the engineer-in-charge's certificate of the measurement and of the total amount payable for the work shall be final and binding on all parties ..".*.

"Clause 10: … A bill shall be submitted by the contractor each month on or before the date fixed by the engineer-in-charge for all work executed in the previous months and the engineer-in-charge shall take or caused to be taken the requisite measurement for the purpose of having the same verified, and the claim, so far as it is admissible, shall be adjusted, if possible within 10 days from the presentation of the bill …".

(v) The stand of the State Govt., accepted by the High Court, was that the contractor has not fully complied with Clauses 8 and 10 of the agreement. It was also their stand that mere endorsement to the effect that the contractor had accepted the final bill amount "under protest" without disclosing real grievance on merits, is not sufficient and it amounts to accepting the final bill without any valid objection and grievance on merits.

(vi) Being aggrieved by the said judgment, the contractor filed this appeal before the Supreme Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) We are unable to accept the reasoning of the High Court. It is true that when the final bill was submitted, the contractor had accepted the amount as mentioned in the final bill "under protest". It is also the specific claim of the contractor that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the terms of agreement. Merely because the contractor had accepted the final bill, it cannot be deprived of its right to claim damages, if it had incurred additional amount and able to prove the same by acceptable materials.

(ii) From the judgements of the Supreme Court in *MD/NTPC Ltd. vs. Reshmi Constructions*, *Ambica Construction vs. Union of India* and *National Insurance Company Limited vs. Boghara Polyfab Pvt. Ltd.*, it emerges out that:

(a) Merely because the contractor has issued "No Dues Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Dues Certificate".

(b) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claims Certificate".

(c) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "No Dues Certificate".

(iii) In the light of the above principles, we are convinced from the materials on record that in the instant case, the contractor had a genuine claim which was considered in great detail by the trial Court and supported by oral and documentary evidence.

(iv) The trial Court based on the materials placed accepted certain items in toto and rejected certain claims and ultimately granted a decree for a sum of Rs. 2,27,758/- with proportionate costs and interest @ 6% per annum from the date of the suit till realization. On going through the materials placed, relevant issues framed, ultimate discussion and conclusion arrived at by the trial Court, we fully

agree with the same and the contractor is entitled to the said amount as granted by the trial Court.

(D) Verdict of Hon'ble Supreme Court: In the result, the impugned judgment of the High Court dated 07.10.2002 is set aside and the judgment and decree of the trial Court dated 14.12.1982 is restored. The civil appeal is allowed with no order as to costs.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The Supreme Court has held that the claims of the contractor for the alterations in work/additional works, executed on the direction of the Department, cannot be denied merely on the ground that the contractor had accepted the final bill and given "no dues certificate"; especially when the contractor has accepted the final bill "under protest" though without giving detailed reasons for this protest.

(ii) Even after receipt of the final bill, if the contractor is able to establish with adequate evidences that he is entitled to further amount, he cannot be barred from claiming such amount merely because of acceptance of the final bill and issue of "No Dues Certificate" by him.

3.8 Supreme Court Verdict dated 25.04.2011, Civil Appeal No. 3542 of 2011, Union of India and Others Vs. M/s Master Construction Co.

(A) Full text of the Verdict: Annexure - 3.8

(B) Facts of the case, in Brief:

(i) M/s. Master Construction Company (hereinafter referred as "Contractor") was awarded a contract by Military Engineering Services (hereinafter referred as "MES"), on 17.09.1995, for the work "Provisions of OTM accommodation and certain essential technical buildings at Bhatinda". The first phase of the work was to be completed by 10.07.1996 and the second phase by 20.01.1997. The contract agreement provided that all disputes to the Contract be referred to arbitration.

(ii) The work was completed by the contractor on 31.08.1998 and completion certificate was issued on 09.09.1999. The contractor furnished no-claim certificates on 03.04.2000, 28.04.2000 & 04.05.2000 and the final bill was signed on 04.05.2000. The payment of final bill was released on 19.06.2000 and the bank guarantee amounting to Rs. 21,00,000/- was also released on 12.07.2000. Immediately after release of the bank guarantee, i.e. on 12.07.2000, the contractor wrote to the MES withdrawing "no claim certificates" and lodged certain claims.

(iii) The MES vide letter dated 13.07.2000 declined to entertain the claims of the contractor on the ground that the final bill has been accepted by the contractor after furnishing the "no claim certificates". The contractor vide letter dated 10.09.200 requested the MES to refer the claims to arbitrator and if the arbitrator was not appointed within 30 days from the date of request, they may be constrained to seek the remedy available under the law.

(iv) As arbitrator was not appointed by MES, the contractor made an application under Section 11 of the 1996 Act before the Civil Judge, (Senior Division), Bhatinda, on 10.01.2001. This application was dismissed by the Civil Judge, Senior Division, Bhatinda, on 06.01.2003. The contractor challenged this order by filing a writ petition before the High Court of Punjab and Haryana. The Division Bench of the High Court heard the parties and by order dated 20.05.2004 dismissed the contractor's writ petition. The contractor challenged the High Court's order by filing a special leave petition before the Supreme Court, which disposed of the petition on 03.01.2006 by directing that the application filed by the contractor under Section 11 of the 1996 Act shall be placed before the Chief Justice of the Punjab and Haryana High Court, for appropriate order thereon.

(v) The High Court vide order dated 08.12.2006 held that all disputes be referred to the arbitration and appointed a retired Chief Justice of High Court as sole arbitrator. The impugned order of the High order was challenged by the MES, before the Supreme court.

(C) Gist of submissions made by the MES: No arbitrable dispute existed between the parties, as full and final payment has been received by the contractor voluntarily after submission of "no claim certificates" and the final bill.

(D) Gist of submissions made by the Contractor: The whole case of the contractor from the very beginning had been that "no claim certificates" were given under the financial duress and coercion, as the MES had arbitrarily withheld the payment. The issue whether "no claim certificates" were given voluntarily or under financial duress, is an issue which must be decided by the arbitrator alone and it is for this reason that the High Court, in the proceedings under Section 11(6), has referred the disputes to the arbitrator. In this regard, reliance was placed upon a recent decision of this Court in the case of *National Insurance Company Limited vs. Boghara Polyfab Private Limited* and also two earlier decisions of this Court, *CMD/NTPC vs. Reshmi Constructions, Builders and Contractors* and *Ambica Construction vs. Union of India*.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The Bench in *Boghara Polyfab Private Limited*, inter-alia, noted that there were two categories of the cited cases: (i) where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, it was held that there could be no reference of any dispute to arbitration; and (ii) where the court found some substance in the contention of the claimants that "no dues/claim certificates" or "full and final settlement discharge vouchers" were insisted and taken as a condition precedent for release of the admitted dues and thereby giving rise to an arbitrable dispute.

(ii) In *Boghara Polyfab Private Limited*, it was explained that when a contract has been fully performed, then there is a discharge of the contract by performance and the contract comes to an end and in regard to such a discharged contract, nothing remains and there cannot be any dispute and, consequently, there cannot be reference to arbitration of any dispute arising from a discharged contract. It was held that the question whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute regarding that question, such question is arbitrable. The Court, however, noted an exception where one of the parties to the contract issues a full and final discharge voucher (or no dues certificate) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim. In such cases, the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or seek reference to arbitration in respect of any claim.

(iii) This Court in *Boghara Polyfab Private Limited* held that if a party alleges that execution of discharge agreement/voucher was on account of fraud/ coercion/undue influence practiced by the other party, and if that party establishes the same, dispute raised by such party would be arbitrable. The Court stated that such dispute will have to be decided by the Court in the proceedings under Section 11 of the 1996 Act or by the Arbitral Tribunal.

(iv) In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher/no claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Court must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute regarding validity of discharge voucher/no-claim certificate, prima

facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all. It cannot be overlooked that the cost of arbitration is quite huge - most of the time, it runs in six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant.

(v) In the present case, the "no claim certificates" given by the contractor leave no doubt that on receipt of the payment, there has been full and final settlement of the contractor's claim. After receipt of final bill on 19.06.2000, no grievance was raised by the contractor immediately. It was only after release of the bank guarantee on 12.07.2000 that the contractor lodged further claims.

(vi) The present case, in our opinion, appears to be a case falling in the category of exception noted in the case of *Boghara Polyfab Private Limited*. The conduct of the contractor clearly shows that 'no claim certificates" were given voluntarily. As to financial duress or coercion, nothing of this kind is established prima facie, mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute. We are, thus, unable to sustain the order of the High Court in the proceedings under Section 11(6) of the 1996 Act.

(F) Verdict of Hon'ble Supreme Court: The appeal is, accordingly, allowed. The impugned order dated 08.12.2006, passed by the High Court, is set aside. The parties shall bear their own costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In this case, the Supreme Court has reiterated the decision in *Boghara Polyfab Private Limited* case that where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence, there could be no reference of any dispute to arbitration.

(ii) It was reiterated that any dispute about whether the contract has been discharged by performance or not, is a mixed question of fact and law, and such question is arbitrable. However, there is an exception to this, where the contractor issues a full and final discharge voucher (or no dues certificate) and in such cases, the contractor cannot thereafter make any fresh claim or seek reference to arbitration. If the contractor alleges that execution of discharge voucher/no claims certificate was on account of fraud/ coercion/undue influence by the other party, and if the contractor establishes this, dispute raised by the contractor would be arbitrable. Such dispute will have to be decided either by the Court in the proceedings under Section 11 of the 1996 Act or by the Arbitrator.

(iii) Where the dispute regarding validity of discharge voucher/no-claim certificate, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute to arbitration at all.

3.9 Delhi High Court Verdict dated 09.01.2012, O.M.P. No. 170/2004, GAIL (India) Ltd. Vs. Hindustan Construction Co.

(A) Full text of the Verdict: Annexure - 3.9

(B) Facts of the case, in Brief:

(i) Gas Authority of India Limited (India) (hereinafter referred as "GAIL"), awarded a contract for "Upgradation of the Auraiya Gas Compressor Station for HBJ Pipeline", to Hindustan Construction Co. (hereinafter referred as "Contractor"), on 06.07.1994. The work was to be completed by 27.02.1995, but it was completed on 31.10.1996. Various notices/letters were issued to contractor by GAIL and also by Engineers India Ltd. who were the Engineer-in-charge of the project. As per General Conditions of Contract, GAIL was entitled to liquidated damages from HCC for delay in completing the work. The contractor submitted final bill on 31.10.1996. Since contractor had already submitted "no claim certificate" in the letter dated 07.03.1997, while requesting extension of the period of completion, GAIL by its letter dated 14.01.1998 requested the contractor to submit a fresh "no claim certificate". This was done by the contractor on 16.01.1998. The contractor also issued another letter dated 16.04.1999, nearly 14 months after the receipt of the final payment, mentioning that no further amount is due to it under the contract in question.

(ii) As per General Conditions of Contract, any objection regarding payments due to them has to be raised by the contractor within 10 days of the final payment. However, after more than 1½ years of receipt of final payment, the contractor filed their claims before the Arbitrator, on 06.10.1999. GAIL in its reply raised the question of maintainability of the claim on the ground that the contractor had on two occasions voluntarily submitted "no claims certificates" and at the time of acceptance of the final payment also, no protest was made by the contractor. The claim was also resisted on merits.

(iii) GAIL's objection about maintainability of contractor's claim was rejected by the Arbitrator in the Award dated 11.08.2003, wherein most of the claims of the contractor were allowed and the counter claim of GAIL was rejected. The impugned award of the Arbitrator was challenged by GAIL, in this petition before the High Court, under Section 34 of the Arbitration and Conciliation Act, 1996.

(C) Gist of submissions made by the GAIL: The Arbitrator erred in rejecting the plea of GAIL that there was full "accord and satisfaction" of the contractor's claims and, therefore, there was no arbitrable dispute remaining to be adjudicated. The plea of the contractor that it gave the "No Claims Certificate" under coercion was an afterthought. At no time did the contractor raise any such protest.

(D) Gist of submissions made by the Contractor:

(i) Relying on the judgment of this Court in *GAIL vs. Bansal Contractors (India) Ltd.*, it was submitted that the "No Claims Certificate" given by the contractor was under coercion, otherwise it could not expect to receive any payment from GAIL. It was a practice that the contractor had to submit "No Claims Certificate" along with the final bill, and there was no choice with the contractor not to do

so. The letter dated 16.04.1999, issued by the contractor, did not pertain to the contract in question.

(ii) Judgments in *Hindustan Tea Co. vs. K. Sashikant Co.* and *State of Rajasthan vs. Puri Construction Co. Ltd.* were relied, to urge that since the Award was a reasoned one, it did not call for any interference unless there was an error on the face of it.

(E) Some relevant observations of the Hon'ble High Court:

(i) In the present case, after completion of the work on 31.10.1996, the contractor submitted its final bill. Going by the first "No Claims Certificate" issued on 07.03.1997, it appears that the contractor had imposed a condition for issuance of such "No Claims Certificate" that was "… *subject to sanction of final extension of time without levy of Liquidated Damages and payment of final bill …".* On 14.01.1998, GAIL wrote to the contractor that "… *You had submitted conditional No Claim Certificate subject to extension of contractual completion period without imposition of LD. Since extension of contractual completion period has been approved without imposition of LD, you are hereby advised to submit the No claim certificate afresh without any condition immediately… the final bill has almost been processed/checked and the same will be released after getting the above cited clarifications"*.

(ii) It appears from the above exchange of letters that far from being compelled or coerced into issuing "No Claims Certificate", the contractor insisted on GAIL extending the completion period of contract without imposition of LD as a pre-condition to issuing the "No Claims Certificate". GAIL acceded to the said condition and thereafter the contractor issued the "No Claims Certificate".

(iii) As far as the subsequent letter dated 16.04.1999 is concerned, the contractor is right in its contention that it pertained to a different contract. In any event, the said letter does not appear to have been relied upon or exhibited as a document by GAIL in the arbitral proceedings.

(iv) The above correspondence shows that the two parties were in negotiation as regards the settlement of the final bill and there was no compulsion on the contractor, much less any coercion, to issue "No Claims Certificate". The Arbitrator has failed to consider this important aspect while concluding that "*In the present case the No Claims Certificate was demanded before the bill was finalized and before the amount of final payment intimated to the contractor*". The said conclusion is contrary to the evidence which shows that the "No Claims Certificate" was issued after the contractor's condition for issuing it was acceded to by GAIL. Also, in terms of the law as explained in the various decisions of the Supreme Court referred, the Arbitrator failed to notice that the contractor had not issued the "No Claims Certificate" under coercion or duress. The "No Claims Certificate" issued by the contractor constituted "accord and satisfaction" of the contractor's claims and there was, therefore, no arbitrable dispute.

(F) Verdict of Hon'ble High Court: For the aforementioned reasons, this Court sets aside the impugned Award dated 11.08.2003. The petition is allowed with costs of Rs. 5,000/- which should be paid by the contractor to GAIL within a period of 4 weeks from today.

(G) Conclusions based on the verdict of Hon'ble High Court: Based on the judgments of Supreme Court in many cases, mentioned in the judgement, the High Court has held that the Arbitrator should examine the facts of the case and decide whether the contractor had issued the "No Claims Certificate" under coercion or duress and whether the "No Claims Certificate" issued by the contractor constituted "accord and satisfaction" of the contractor's claims. If it is established that the contractor had issued the "No Claims Certificate" without any coercion or duress and the "No Claims Certificate" constituted "accord and satisfaction", then there is no arbitrable dispute.

3.10 Supreme Court Verdict dated 29.03.2019, Civil Appeal No. 3303 of 2019, Union of India and Others Vs. Parmar Construction Company

(A) Full text of the Verdict: Annexure - 1.9

(B) Facts of the case, in Brief:

(i) North Western Railway (hereinafter referred as "Railway") awarded a work for "Construction of office accommodation for officer and rest house at Dungarpur in the State of Rajasthan" to Parmar Construction Company (hereinafter referred as "contractor"), 21.12.2011. Extension of time was granted to complete the work by 31.03.2013. The measurement was accepted by the contractor under protest. Railway officials failed to clear 7th and Final bill until the contractor put a line over "under protest" and signed no claim certificate. The total value of the work executed was of Rs. 58.60 lakhs against which Rs. 55.54 lakhs was paid, excluding escalation cost. On 23.12.2013, the contractor sent notice to appoint an arbitrator, invoking Clause 64(3) of the GCC, to resolve the disputes/differences. When the Railway did not appoint the arbitrator in terms of Clause 64(3), the contractor filed an application with High Court, under Section 11(6) of the Act, for appointment of an independent arbitrator. The High Court of Rajasthan, allowed the application of the contractor and appointed a retired judge of the High Court as arbitrator.

(ii) Against this order of the High Court, Railway filed an appeal in Supreme Court. A two-judge bench of the Supreme Court heard this appeal along with a batch of appeals on the same issue.

(C) Gist of submissions made by the Railway on this issue: Once the "no claim certificate" has been signed by the contractor and after settlement of the final bills, no arbitral dispute subsists and the contract stands discharged and they cannot be permitted to urge that they gave the "no claim certificate" under any kind of financial duress/undue influence and even in support thereof, no prima facie evidence has been placed on record. In the given circumstances, the appointment of an independent arbitrator by the High Court under Section 11(6) of the Act, 1996 is not sustainable. In support of this, reliance was placed on the decisions of this Court in *Union of India and Others Vs. Master Construction Company, New India Assurance Company Limited Vs. Genus Power Infrastructure Ltd., ONGC Mangalore Petrochemicals Limited Vs. ANS Constructions Limited and* others.

(D) Gist of submissions made by the Contractor on this issuer:

(i) The contractor was not in a bargaining position and it is a ground reality that final bills are not being released without "no claim certificate" being furnished in advance by contractor. In all the cases, unilateral deductions have been made from the final bill furnished by the contractor and they are very small and petty contractors and the payments are not released unless the "no claim certificate" is furnished. It is nothing more than a financial duress and undue influence by the authorities and is open for the arbitrator to adjudicate by examining the bills which was furnished for payment.

(ii) The effect of no claim certificate has been examined by this Court in *National Insurance Company Limited Vs. Boghara Polyfab Private Limited* and there are series of decisions of this Court where no claim certificate in itself has never been considered to be the basis to non-suit the request made in appointing an arbitrator to independently examine the dispute arising under the terms of the agreement.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The request of the contractor was rejected by the railway on the premise that with "no claim certificate" being furnished, arbitral dispute does not survive for sending it to arbitration.

(ii) As per Clause 43(2) of GCC, the contractor signs a "No claim" certificate in favour of the railway in the prescribed format after the work is finally measured up and the contractor shall be debarred from disputing the correctness of the items covered under the "No Claim" certificate or demanding arbitration in respect thereof. The contractor has to attach no claim certificate with final bill, in the prescribed format, before the final bills are examined. The cost of escalation which was raised by the contractor with final bills were appended with the no claim certificate and the claim of the contractor for making a reference to the Arbitrator for settling the disputes/differences was turned down by the Railway because of furnishing no claim certificate.

(iii) The supreme court judgements in many cases, mentioned therein, fall under two categories. One category where the Court after considering the facts found that there was full and final settlement resulting in accord and satisfaction and there was no substance in the allegations of coercion/undue influence. In the second category of cases, the Court found some substance in the contention of the claimants that "no-dues/no claims certificate or discharge vouchers" were insisted and taken as a condition precedent for release of the admitted dues and consequently this Court held that the disputes are arbitrable.

(iv) It is true that there cannot be a rule of absolute kind and each case has to be looked into on its own facts and circumstances. At the same time, we cannot be oblivious of the ground realities that where a petty/small contractor has made investments from his available resources in executing the contract and bills have been raised for the escalation cost incurred by him and the railway establishments, without any justification, reduces the claim unilaterally and take a defence of the no claim certificate being furnished, which as alleged by the contractor has to be furnished in the prescribed format at the time of furnishing the final bills.

(F) Verdict of Hon'ble Supreme Court:

(i) The order passed by the High Court are quashed and set aside. The Railway are directed to appoint the arbitrator in terms of clause 64(3) of the agreement within a period of 1 month from today under intimation to the contractor. Since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator and the respondent being a petty contractor, the statement of claim be furnished by the contractor within 4 weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties

expeditiously without being influenced/inhibited by the observations made independently in accordance with law.

(ii) The batch of appeals are accordingly disposed of on the terms indicated. No costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In this case, the disputes between the contractor and the Railway were referred to the arbitration, by the Supreme Court, in spite of "No Claims Certificate" being furnished by the contractor with the final bill; because the contractor had accepted the measurement "under protest" and he was coerced by Railway to delete this protest as a precondition for getting the final bill cleared.

(ii) The Supreme Court has reiterated the judicial position emanating from many other verdicts that if the Court finds some substance in the contention of the contractor that "no-dues/no claims certificate or discharge vouchers" were insisted and taken as a condition precedent for release of the admitted dues; the disputes raised by the contractor are arbitrable.

(iii) The Supreme Court has also held that there cannot be a rule of absolute kind and each case has to be looked into on its own facts and circumstances.

Chapter – 4

Excepted Matters

4.1 Supreme Court Verdict dated 01.03.2002, Civil Appeal No. 1791 of 2002, General Manager, Northern Railway Vs Sarvesh Chopra

(A) Full text of the Verdict: Annexure - 4.1

(B) Facts of the case, in Brief:

(i) Sarvesh Chopra (hereinafter referred as "Contractor") was awarded a work for "construction on bored piles 500 mm dia. by cast in Situ method for widening and raising of Pul Mithai", by Northern Railway (hereinafter referred as "Railway"). The contract was signed on 27.04.1985.

(ii) Clause 63 of the GCC provided that "… *matters for which provision has been made in clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(XII)(B)(e)(b) of the GCC or in any clauses of the special conditions of the contract shall be deemed as excepted matters and decisions thereon shall be final and binding on the contractor provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration*".

(iii) Clauses 9.2 of Special Conditions of the contract stipulated that "… *No material price variation or wages escalation … and compensation for "Force Majeure" etc. shall be payable under this contract".* Clauses 11.3 of Special Conditions of the contract stipulated that "*No claim whatsoever will be entertained by the Railway on account of any delay or hold up of the works arising out of delay in supply of drawings, changes, modifications, alterations, additions, omissions, omissions in the site layout plans or detailed drawings or designs and or late supply of such materials as are required to be arranged by the Railway or due to any other factor on Railway Accounts".* Clauses 21.5 of Special Conditions of the contract stipulated that "*No claim for idle labour and/or idle machinery will be entertained. Similarly, no claim shall be entertained for business loss or any such loss".*

(iv) There were disputes between the parties and the contractor moved a petition to the High Court of Delhi, under Section 20 of the Arbitration Act-1940, and presented six claims for being referred to the Arbitrator. The learned Single Judge of the High Court directed two claims to be referred to be arbitration but Claim nos. 3 to 6, being "excepted matters" as per Clause 63 of General Conditions of Contract (GCC), were held not liable to be referred to arbitration.

(v) In Claim no. 3 it was claimed that "*… there was tremendous increase in cost of building materials ... 42 Nos. of piles were bored after the expiry of stipulated completion period … Additional cost incurred for these piles may be paid".*

In Claim no. 4 it was claimed that "*… "Piling rig, mixture, machine, driving pipe, wheel barrows, hoppers and other tools & plants remained idle at site for 75 days … The Rent/hire charges for this may be reimbursed".*

In Claim no. 5 it was claimed that *"… The site was not made available for one month, changes took place and decisions were delayed. The completion of work was dragged for additional 6 months. Establishment cost for these 6 months may please be paid".*

In Claim no. 6 it was claimed that *"… As per the contract, the monthly progress was to be Rs. 1,75,000/-, but due to delayed completion it was reduced to Rs. 75,000/- per month. The losses sustained for less output may be compensated".*

(vi) An intra-Court Appeal preferred by the contractor was allowed by the Division Bench of the High Court and the above four claims were also referred to arbitrator, with an opinion that they were not covered by "excepted matters". Railway filed this petition with the Supreme Court to appeal against the impugned decision of Division Bench of the High Court.

(C) Gist of submissions made by the Railway: Claims nos. 3, 4 and 5 are covered respectively by Clauses 9.2, 21.5 and 11.3. Claim No. 6 is covered by Clause 11.3 of Special Conditions. Thus, being "excepted matters", these claims cannot be referred to arbitration.

(D) Gist of submissions made by the Contractor:

(i) To qualify as "excepted matters" not only the relevant clause must find mention in that part of the contract which deals with special conditions but should also provide for a decision by an authority of the Railways by way of an "in-house remedy" whose decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an "excepted matter". For example, vide Clause 18 of GCC, any question or dispute as to the commission of any offence or compensation payable to the Railway shall be settled by the GM of the Railway in such manner as he shall consider fit & sufficient and his decision shall be final and conclusive. Vide Clause 2.4.2.(b) of Special Conditions a claim for compensation arising on account of dissolution of contractor's firm is to be decided by Chief Engineer (Construction) of the Railway and his decision in the matter shall be final and binding on the contractor. Vide clause 12.1.2 of Special Conditions a dispute whether the Cement stored in the godown of the contractor is fit for the work is to be decided by the Engineer of Railways and his decision shall be final and binding on the contractor. So long as the remedy of decision by someone, though he may be an authority of the Railways, is not provided for, the contractor's claim cannot be left in lurch by including the same in "excepted matters".

(ii) Reliance was placed on *Vishwanath Sood Vs. Union of India & Anr.* and *Food Corporation of India Vs. Sreekanth Transport* to strengthen the submission that an "excepted matter" should be one covered by a clause which provides for a departmental remedy and is not arbitrable for that reason.

(iii) If this Court was not inclined to agree with the interpretation sought to be placed on the meaning of "excepted matter", then whether or not the claim raised

by the contractor is an "excepted matter" should be left to be determined by the arbitrator.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The core issue is the interpretation of Clause 63 of the GCC. We find it difficult to agree with the Counsel of contractor. In our opinion those claims which are covered by several clauses of the Special Conditions of the Contract can be categorized into two. One category is of such claims which are just not leviable or entertainable (Clauses 9.2, 11.3 and 21.5 of Special Conditions). Each of these clauses provides for such claims being not capable of being raised or adjudged. These are "no claim", "no damage" or "no liability" clauses. The other category of claims is where the dispute or difference has to be determined by an authority of Railways as provided in the relevant clause, such as Clause 18 of GCC and Special Conditions Clause 2.4.2.(b) and 12.1.2. The first category is an "excepted matter" because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within "excepted matters" because the claim is liable to be adjudicated upon by an authority of the Railways whose decision shall be final and binding, and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 of GCC refers to the second category of "excepted matters".

(ii) The two decisions relied by the counsel for the contractor are for the Clauses providing a departmental or in-house remedy and attaching finality to decision therein to be an "excepted matter", because such were the Clauses in the contracts which came up for the consideration of this Court. Those decisions cannot be read as holding, nor can be relied on as an authority for the proposition by reading them in a negative way that if a departmental remedy for settlement of claim was not provided then the claim would cease to be an "excepted matter".

(iii) The reference to arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or ministerially by the Court. In many judgments of this court (as listed therein), the view of this court was that for the claims within the ambit of "excepted matters", the question of assumption of jurisdiction by any arbitrator would not arise and that an award by arbitrator over a claim which was not arbitrable as per the terms of contract would be liable to be set aside.

(iv) In our country question of delay in performance of contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the contractor cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any

claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

(v) In the present case, the claims in question are clearly covered by "excepted matters". The statement of claims, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was, in our opinion, not right in directing the said four claims to be referred to arbitration.

(F) Verdict of Hon'ble Supreme Court: For the foregoing reasons we are of the opinion that the view of the "excepted matters" taken by the Division Bench of the High Court cannot be sustained. The appeal is allowed, the impugned decision of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored. No order as to the costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) This verdict of the Supreme Court is a landmark verdict regarding arbitrability of the matters covered as "excepted matters" under Clause 63 of Railway's General Conditions of Contract. The Supreme Court has held that some clauses of GCC and Special Condition of Contracts provide for such claims being not capable of being raised or adjudged. Any claim by the contractor on these issues/matters is just not leviable or entertainable. These are "no claim", "no damage" or "no liability" clauses. The Supreme Court has also held that the issued/matters categorised as "excepted matters" in Clause 63 of GCC are those matters/issues which are liable to be adjudicated upon by an authority of the Railways, whose decision is final and binding. Any claim by the contractor on these matters/issues is, therefore, not arbitrable.

(ii) For the claims within the ambit of "excepted matters", the question of assumption of jurisdiction by any arbitrator would not arise and that any award by arbitrator on such matters would be liable to be set aside.

(iii) Therefore, any claim falling under the ambit of "excepted matter" can be excluded from the "Terms of Reference" of the Arbitrator, at the time of appointment of arbitrator by GM, duly indicating reason for this. Even if any claim under the ambit of "excepted matter" gets referred to the arbitration, the Defending Officer of Railway should cogently present before the arbitrator that the said claim falls under "excepted matter" and request for not arbitrating the said claims.

4.2 Andhra High Court Verdict dated 31.08.2006, A. R. K. Murthy Vs. Senior Divisional Engineer, South Central Railway

(A) Full text of the Verdict: Annexure – 4.2

(B) Facts of the case, in Brief:

(i) South Central Railway (hereinafter referred as "Railway") awarded a contract for "Warangal: Water Supply Bulk Water Drawl from Warangal Municipality and provision of overhead tank and pipelines" to A. R. K. Murthy (hereinafter referred as "Contractor"). The contract agreement was signed on 03.10.1990. The work could not be completed within the time stipulated and on contractor's request, extension of time was accorded.

(ii) As per contractor, the capacity of the overhead tank was raised from 20,000 gallons to 33,000 gallons, which increased quantum of work, and consequently, the value of the work increased from Rs. 4,20,858.25 to Rs. 10,61,121.70. The contractor filed a writ petition in Andhra High Court seeking settlement of his final bill, which was disposed of by the Court directing the Railway to pay the admitted amount of Rs. 1,00,000.00 to the contractor for construction of the original specification of the overhead tank. The High Court further directed Railway to hold negotiations with the contractor for payment with regard to the additional works claimed to have been executed by the contractor; and if the negotiations failed, the Railway was directed to pay to the petitioner the amounts admitted by them for both the works and refer the matter to the arbitrator or review committee for resolution of disputes that still remained unresolved and that such arbitration or review shall be completed within eight weeks from the date of reference.

(iii) As the Railway did not refer the disputes to the arbitration, despite the contractor making several representations in this behalf, the contractor filed this arbitration application with the Andhra High Court.

(C) Gist of submissions made by the Railway: As the dispute is with regard to the additional work done by the contractor, the same is not covered by the arbitration clause and falls within the "excepted matters" and, therefore, no reference to arbitration could be made.

(D) Gist of submissions made by the Contractor: The procedural and substantive discipline of Clause 39 of the GCC was not followed by Railway while calling upon the contractor to execute the additional items of work. There was no prior agreement of the terms between the parties nor on the rate, for execution of the additional items of work. The additional items were far beyond the quantities of work to be executed under the original agreement entered between the parties. Other parameters for a fair settlement of the compensation to the contractor were also not determined, as required under Clause 39 of the GCC. Since there had been a breach of the terms of Clause 39 of the GCC by the Railway, though the additional items of work executed by the contractor fall under Clause 39 of the GCC, it is not an "excepted matter" and falls within the purview of the arbitration clause under Clause 64 of the GCC; and could be referred to arbitration.

(E) Some relevant observations of the Hon'ble High Court:

(i) The matters for which provision has been made in Clause 39 of the GCC, are "excepted matters" and the decisions under Clause 39 of the GCC are to be treated as final and binding on the Contractor. It is further provided in Clause 63 of the GCC that the "excepted matters" stand specifically excluded from the purview of the arbitration clause and are not to be referred to arbitration. The exclusion is reiterated in Clause 64 of the GCC.

(ii) Arbitration is not a process of compulsive adjudication as before a civil court of competent jurisdiction. The power, authority and jurisdiction of an arbitrator to arbitrate upon the disputes referred, is founded on agreement between the parties to an agreement, contained in an arbitration clause. In matters of arbitration, the parties to the agreement are at liberty to agree on which disputes are to be referred to arbitration. If any dispute or classes of disputes are excluded from the purview of arbitration, arbitration of such excepted matter is excluded and an arbitrator is denuded of power, authority or jurisdiction to arbitrate upon such areas.

(iii) In *GM, Northern Railway Vs. Sarvesh Chopra* case, the Supreme Court, on an analysis of Clause 63 of the GCC, declined to the contention that in case of a grey area regarding whether a particular dispute falls within the "excepted matter" or otherwise, the issue should be left to be determined by the arbitrator.

(iv) In several decisions, the Supreme Court has clearly spelt out the principle that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract, would be liable to be set aside.

(v) From the abundance of precedential authority, the position is beyond dispute and the legal principle is established that "excepted matters" are not to be referred to arbitration. This is the unambiguous position on a true and fair construction of the provisions of Clauses 39, 63 and 64 of the GCC which govern the relationship between the parties and define the contours of the jurisdiction, power and authority of an arbitrator.

(F) Verdict of Hon'ble High Court: In the light of the aforesaid analysis, there are no merits in this arbitration application. The relief sought cannot be granted. The application is accordingly dismissed. The contractor is however at liberty to pursue appropriate remedies before the appropriate forum in respect of the grievances for which he seeks reference to arbitration. No costs.

(G) Conclusions based on the verdict of Hon'ble High Court: The High Court has held that in matters of arbitration, the parties to the agreement are at liberty to agree on which disputes are to be referred to arbitration. If any dispute is excluded from the purview of arbitration by being "excepted matter", such matter should not be left to be decide by the arbitrator. Moreover, an award by the arbitrator over a claim which was not arbitrable as per the terms of the contract, would be liable to be set aside.

4.3 Supreme Court Verdict dated 05.09.2014, Civil Appeal No. 534 of 2007, M/s Harsha Constructions Vs. Union of India & Others

(A) Full text of the Verdict: Annexure – 4.3

(B) Facts of the case, in Brief:

(i) Railway entered into a contract with M/s Harsha Constructions (hereinafter referred as "Contractor") for "Construction of a road bridge at a level crossing". Clause 39 of the GCC stipulated the procedure for dealing with the rates for extra items of work not covered by original contract agreement. Some work, which was not covered under the contract, was entrusted to the contractor and for determining the amount payable for the said work, certain meetings were held by the contractor and the concerned Engineer but they could not agree to any rate. Ultimately, some amount was paid in respect of the additional work done, which was not acceptable to the contractor, but the contractor accepted the same under protest. In addition to the dispute with regard to determination of the rate for the extra work done, there were some other disputes also.

(ii) On a petition being filed by the contractor, the High Court appointed a retired Judge as Arbitrator. The Arbitrator decided all the disputes under his Award dated 21.09.2002, though Railway had objected to arbitrability of the disputes which were not referable to the Arbitrator as per Clause 39 of the Contract. Being aggrieved by the Award, Railway preferred an appeal before the Chief Judge, City Civil Court, Hyderabad, under Section 34 of the Arbitration and Conciliation Act-1996. The said appeal was allowed and vide order dated 08.04.2005, the Award was set aside.

(iii) Being aggrieved by the order of the City Civil Court, the contractor filed an appeal before the Andhra Pradesh High Court, which was dismissed by the High Court on 09.05.2005. Aggrieved by the said judgment of the High Court, this appeal was filed by the contractor, with the Supreme Court of India.

(C) Gist of submissions made by the Contractor: As per Clause 39 of GCC, the Engineer of Railway was duty bound to decide the rate at which payment was to be made for the extra work done by the contractor, through negotiations between the parties. A final decision on this was taken by Railway without the contractor's approval and, therefore, there was a dispute between the parties. No decision was taken by the Engineer and therefore, there was no question of filing any appeal before the Chief Engineer and as the Chief Engineer did not take any decision, Clauses 39 and 64 of GCC would not apply because Clause 64 would expect a decision of the Chief Engineer. The Award in toto was correct and the High Court had wrongly upheld the dismissal of the Award by the trial Court. Reference was made to the judgments delivered by this Court in *General Manager, Northern Railway vs. Sarvesh Chopra* and *Madnani Construction Corporation (P) Limited vs. Union of India & ors*.

(D) Some relevant observations of the Hon'ble Supreme Court:

(i) Some of the disputes as mentioned in Clause 39 of GCC were specifically not arbitrable and in relation to the said disputes the contractor had to negotiate with the concerned Engineer of Railway and if the contractor was not satisfied

with the rate determined by the Engineer, it was open to the contractor to file an appeal against the decision of the Engineer before the Chief Engineer within 30 days from the date of communication of the decision to the contractor. In the present case, the said dispute was never decided by the Chief Engineer. In these circumstances, when the disputes were referred to the Arbitrator, the disputes which were "excepted matters" were also referred to the Arbitrator. Railway did object to the arbitrability of the disputes covered under Clause 39, but the Arbitrator had decided the said issues by holding that the same were not excepted matters but arbitrable.

(ii) Arbitration arises from a contract and unless there is a specific written contract, a contract regarding arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract regarding arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the GCC, 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.

(iii) In the instant case, Railway authorities had raised an objection relating to the arbitrability of the aforesaid 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. 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.

(E) Verdict of Hon'ble Supreme Court:

(i) We uphold the portion of the award so far as it pertains to the disputes which were arbitrable, but so far as the portion of the arbitral award which determines the rate for extra work done by the contractor is concerned, we quash and set aside the same.

(ii) It would be open to the contractor to take appropriate legal action for recovery of payment for work done, which was not forming part of the contract because the said issue decided by the Arbitrator is now set aside.

(iii) The appeal is partly allowed with no order as to costs.

(F) Conclusions based on the verdict of Hon'ble Supreme Court: In this verdict, the Supremum Court has again reiterated the legal position that any dispute covered as "excepted matter" in the contract, cannot be referred to arbitration, as they are non-arbitrable. Even if referred to the Arbitrator, it is not open to the Arbitrator to decide such disputes and any award on such issues is bad in law.

Chapter – 5

Multiple Arbitrations in same Contract

5.1 Supreme Court Verdict dated 17.02.2010, Arbitration Petition No. 21 of 2009, Dolphin Drilling Limited Vs. Oil & Natural Gas Corporation Limited

(A) Full text of the Verdict: Annexure – 5.1 of Compendium on IRICEN Website.

(B) Facts of the case, in Brief:

(i) Oil and Natural Gas Corporation Limited (hereinafter referred as ”ONGC”) and Dolphin Drilling Limited (hereinafter referred as ”Contractor”) entered into an agreement on 17.10.2003 for "Charter Hire of Deepwater Drilling Rig DP-Drill Ship `Belford Dolphin' along with Services on Integrated Basis". Clause 28 of the agreement contained the arbitration clause, which stipulated that. ”… *if any dispute, difference, question or disagreement or matter … arises between the parties … it shall be referred to arbitration…. The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration clearly stating all disputes to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days ….” (Emphasis supplied).*

(ii) As per the contractor, though the period of the agreement came to an end on 13.02.2007, on being called upon by ONGC it continued to provide further services till 10.04.2007 for which it was entitled to be paid additionally on comparable rates under the agreement. The contractor was having grievance that a number of invoices were not paid or only paid in part by ONGC. Failing to get any positive response from ONGC, despite demands and reminders, the contractor addressed a notice to ONGC on 29.01.2008 invoking the arbitration clause and nominated a retired Chief Justice of India, as their nominee arbitrator. As per contractor, ONGC did not respond to the arbitration notice in the manner as provided in the arbitration clause and, therefore, they moved this application before the Supreme Court.

(C) Gist of submissions made by the ONGC:

(i) The dispute(s) raised by the contractor in the arbitration notice dated 29.01.2008 were acknowledged and they were fully arbitrable. But the contractor had already invoked the arbitration clause in connection with a different dispute earlier arising under the same agreement. The remedy of arbitration under clause 28 of the agreement was a one-time measure and it could not be taken recourse to repeatedly even though the disputes may be different and unconnected to each other. The contractor had already invoked clause 28 of the agreement in year 2004 and an Arbitral Tribunal consisting of three retired judges was constituted in the year 2005. The said arbitration has continued for the last more than 4 years, in which ONGC has incurred heavy expenses.

(ii) The arbitration is an expensive proposition and even though the ONGC was liable to bear only half of the expenses, the financial burden cast by the arbitration proceedings in terms of fees for the learned arbitrators and counsel/solicitors and other incidental expenses was quite onerous. Hence, the

arbitration clause in the agreement envisaged one, single arbitration for all disputes between the parties and not repeated arbitrations for different disputes arising between the parties at different times under the same agreement.

(D) Some relevant observations of the Hon'ble Supreme Court:

(i) The plea raised by ONGC voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time-consuming means for resolution of disputes. But on that basis, it is difficult to read the arbitration clause in the agreement as suggested by ONGC.

(ii) The plea of ONGC is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. As per counsel of ONGC, those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

(iii) The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern, but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non- arbitrable.

(iv) For the aforesaid reasons, the objection raised by ONGC are not sustained.

(E) Verdict of Hon'ble Supreme Court:

(i) The application is allowed. The contractor has nominated retired Chief Justice of India, as its nominee arbitrator. A former retired Supreme Court judge is appointed arbitrator on behalf of ONGC, subject to her consent and on such terms as she may deem fit and proper.

(ii) The Registry is directed to communicate this order to the learned Arbitrator to enable her to enter upon the reference and decide the matter as expeditiously as practicable.

(F) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The Supreme Court has expressed concern on the fact that arbitration in this country has proved to be a highly expensive and time-consuming means. But the court has opined that this problem can be remedied by suitably amending

the arbitration clause in future agreements, by clear stipulations that remedy of arbitration can be invoked only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. due to this reason alone.

(ii) But considering the stipulations of the arbitration agreement in the present case, the arbitration cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked, the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

5.2 Delhi High Court Verdict dated 23.06.2020, OMP 680/2011 [New No. O.M.P. (COMM) 392/2020] & I.A. 11671/2018, Gammon Indian Limited Vs. NHAI

(A) Full text of the Verdict: Annexure – 5.2

(B) Facts of the case, in Brief:

(i) A contract was signed between a Joint Venture of Gammon India Ltd. and Atlanta Ltd. (hereinafter referred as "Contractor") and National Highways Authority of India (hereinafter referred as "NHAI") on 23.12.2000, for the work of "Widening to 4/6 lanes and strengthening of existing 2 lane carriageway of NH-5 in the State of Orissa from km 387.700 to 414.000, Khurda to Bhubaneswar". The value of the work was approximately Rs. 118.9 crores. The date of commencement of the contract was fixed as 15.01.2001 and the project was to be executed within 36 months i.e., by 14.01.2004. The Project was not executed within the prescribed time and extensions for completing the Project were granted till 31.12.2006. Vehicular traffic was allowed on the main carriageway in March'2007 and according to the Contractor, this amounted to a deemed "taking over" of the carriageway by NHAI and hence completion.

(ii) First Arbitration Award:

(a) During the course of execution of the Project, disputes had arisen between the parties and the same were raised both by the Contractor and by NHAI. On 01.08.2004, the Disputes Review Board (hereinafter "DRB") was constituted in terms of contract conditions. The DRB communicated its inability to resolve issues pertaining to a period earlier to its constitution. The contractor invoked arbitration vide notice dated 27.01.2005, with 3 claims.

(b) An Arbitral Tribunal, consisting of 3 members was appointed and the award was rendered on 05.10.2007. Claim no. 1 was allowed partly, for an amount of Rs. 5.28 crores. Claim No. 2 was also allowed partly, for an amount of Rs. 1.85 crores. Claim No. 3 was rejected on the ground that it was outside the terms of reference.

(c) The said award was challenged both by the Contractor and NHAI, before the Delhi High Court. The Contractor withdrew the challenge in respect of Claim No. 3 with liberty to approach the 2nd Arbitral Tribunal. Vide order dated 13.03.2009, the same was permitted by the Court. The said award was thereafter upheld by a Single Judge of the High Court on 15.11.2016. Two Division Benches also upheld the award vide judgments 18.01.2017 and 20.02.2017. Two SLPs were dismissed on 08.08.2017 and 11.09.2017. Thus, Award No. 1 attained finality.

(iii) Second Arbitration Award:

(a) In 2007, the Contractor had invoked the jurisdiction of the DRB again in respect of payment for an item of work and the DRB rejected the said claim. This claim, along with certain other claims, were referred to the Arbitral Tribunal consisting of three members. Claim no. 3 of Award No. 1 was also filed before this Tribunal.

(b) Vide award dated 21.02.2011, by a 2:1 majority, claims of the Contractor were rejected. The minority award granted the claims of the Contractor. The present petition challenges Award No. 2.

(iv) Third Arbitration Award:

(a) NHAI imposed liquidated damages on the Contractor for the delay caused. Seven disputes were referred to the DRB on 24.03.2008. However, dissatisfied with the recommendations of the DRB, a third arbitration was invoked by the Contractor vide letter dated 23.12.2008 and the 9 claims were referred to the Arbitral Tribunal consisting of 3 members.

(b) Vide award dated 20.02.2012, the Contractor's claim for recovery of amounts paid as liquidated damages was allowed. Award No. 3 was upheld by a Single Judge and a Division Bench of the High court. NHAI paid the awarded sum and the award attained finality.

(v) The present petition was filed in August'2011. Initially itself, it was submitted by the Contractor that it does not press objections to Award no. 2. The petition was then dismissed for non-prosecution on 20.01.2017. The same was, however, restored on 15.03.2017.

(C) Gist of submissions made by the Contractor: There were delays in the appointment of the engineer and handing over of the site and delays caused due to non-payment of dues, placing of variation order which had to be executed by the Contractor, non-grant of extension of time to the Contractor and default/delay in constituting the DRB. The delay was caused by NHAI and the Contractor is entitled to escalation/compensation for the losses due to the said delays.

(D) Gist of submissions made by the NHAI: The Contractor had multiple opportunities before the Arbitral Tribunal and has lost on both counts. There was no reason as to why this Claim was not included in the reference leading to Award No. 1. This claim is barred. The findings by the DRB, 1st and the 2nd Arbitral Tribunals are consistent and thus the petition is liable to be dismissed.

(E) Some relevant observations of the Hon'ble High Court:

(i) The question that arises is whether it is permissible for the Contractor to jettison the findings in Award No. 3 to argue that Award No. 2 ought to be set aside and the claims of the Contractor ought to be allowed.

(ii) As per provisions of Section 7(1), Section 8(3) and Section 21 of Arbitration Act, if there are multiple disputes which have been raised at different times, the commencement of proceedings would be different for each of the disputes. All these provisions show that there can be multiple claims and multiple references at multiple stages. Despite this permissibility, multiplicity ought to be avoided as discussed hereinafter.

(iii) Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration

process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive. As is seen in the present case, parties have invoked arbitration thrice, raising various claims before three different Tribunals which have rendered three separate Awards. Considering that a previously appointed Tribunal was already seized of the disputes between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable. A situation where multiple Arbitral Tribunals parallelly adjudicate different claims arising between the same parties under the same contract, especially raising overlapping issues, is clearly to be avoided.

(iv) A perusal of the finding of the Supreme Court in the cases mentioned therein clearly shows that the Court has expressed its displeasure about the arbitration process becoming a highly expensive and time-consuming means for resolution of disputes. The underlying ratio of *Dolphin case*, on a careful reading, is that all disputes that are in existence when the arbitration clause is invoked, ought to be raised and referred at one go. It is possible that subsequent disputes may arise which may require a second reference, however, if a party does not raise claims which exist on the date of invocation, it ought not to be given another chance to raise it subsequently unless there are legally sustainable grounds. The constitution of separate arbitral tribunals is a mischief which ought to be avoided, as the intent of parties may also not be bona fide.

(v) If an Arbitral Tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references, however, since the Tribunal would be the same, the possibility of contradictory and irreconcilable findings would be avoided. If that is however not found feasible, at least challenges to the Awards rendered could be heard together, if they are pending in the same Court.

(vi) One of the directions issued by Delhi High Court, requires that when petitions under Section 9 of the Arbitration and Conciliation Act-1996 are filed, it is mandatory for the party to mention that no other petition on the same cause of action was filed. Further directions are recommend to be issued that at the time of filing of petitions under Section 11 or Section 34 or any other provision of the Arbitration and Conciliation Act-1996, specific disclosure ought to be made by parties as to the number of arbitration references, Arbitral Tribunals or court proceedings pending or adjudicated in respect of the same contract and if so, the stage of the said proceedings.

(vii) While hearing a petition under Section 34 of the Arbitration and Conciliation Act-1996, it would be incongruous to hold that a finding in a subsequent award would render the previous award illegal or contrary to law. The award would have to be tested as on the date when it was pronounced, on its own merits, and not on the basis of subsequent findings which may have been rendered by a later Arbitral Tribunal. Thus, the findings of the second Arbitral Tribunal do not suffer from any patent illegality or perversity and no other grounds for interference under Section 34 of the Arbitration and Conciliation Act-1996 are made out. Even if, for the sake of argument, one looks at the findings of the third Arbitral Tribunal, those relate to delays caused in the project and the right

of NHAI to impose liquidated damages. Escalation or compensation for non-payment of increased rates, is not the subject matter of Award No. 3. Thus, none of the findings in Award No. 3 can be jettisoned or incorporated into the present petition to rule in favour of the Contractor qua Award No. 2 for awarding compensation/rate revision/escalation. The stand of the Contractor is thus not tenable and is liable to be rejected. The findings of the majority award are clear and succinct - the scope of interference is very limited. This Court does not find any merit in the present petition.

(F) Verdict of Hon'ble High Court:

(i) The petition is dismissed.

(ii) The present order be sent to the Learned Registrar General for being placed before Hon'ble the Chief Justice for considering if any modifications are required to be made in the Rules of the Delhi High Court framed under the Arbitration and Conciliation Act, 1996.

(iii) The present order be also sent to the Secretary, Ministry of Law & Justice, Government of India and the Chairman, National Highway Authority of India.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) The Court has observed that while as per present provision of the Arbitration and Conciliation Act, there can be multiple claims and multiple references to arbitration at different stages; but multiple arbitral proceedings parallelly adjudicating different claims under the same contract, with overlapping issues, needs to be avoided.

(ii) The Court has observed that if a party does not raise claims which existed on the date of invocation of arbitration clause earlier, it ought not to be given another chance to raise them subsequently unless there are legally sustainable grounds.

(iii) The Court has observed that if an Arbitral Tribunal is constituted for adjudicating some disputes, any further disputes in the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references. If this is not found feasible, at least challenges to the Awards rendered could be heard together, if they are pending in the same Court.

(iv) The Court has also held that in case of multiple arbitrations in the same case, it would not be correct to hold that a finding in a subsequent award would render the previous award illegal or contrary to law. Every award has to be tested as on the date when it was pronounced, on its own merits, and not on the basis of subsequent findings which may have been rendered by a later Arbitral Tribunal.

Chapter – 6

Arbitrations in Sub-contracts

6.1 Andhra High Court Verdict dated 29.09.2004, in A.A.O. No. 255 and 624 of 2003, Hindustan Shipyard Limited Vs. Essar Oil Limited and Others

(A) Full text of the Verdict: Annexure – 6.1

(B) Facts of the case, in Brief:

(i) This verdict covers two contracts awarded by the Oil and Natural Gas Corporation Limited (hereinafter referred as "ONGC") to Hindustan Shipyard Limited (hereinafter referred as "HSL") for carrying out works of "Fabrication, skidding, load out, sea fastening, transportation, installation, book up, testing and pre-commissioning of PB PD and PE and RV 10 and RV 17 platforms at PANNA and RAVVA fields". HSL awarded the subcontracts to Essar Oil Limited (hereinafter referred as "EOL"). According to the pricing formula, HSL will get from ONGC the actual cost paid to the sub-contractor plus mark-up ranging from 7.5 to 10%. Later on, it was agreed at the instance of EOL, to make payments directly to EOL by the ONGC, with a copy marked to HSL. The reasons for this change, as kept on record is as following:

"Considering the cash flow restraints being experienced by HSL and the actual physical position that ONGC is being asked by HSL to either backup the LCs opened by HSL or to make the payment directly to HSL's suppliers/ contractors, it was proposed by ONGC that rather than backing up the LCs or making direct payment to suppliers/ contractors on request from HSL, the frequency of which is multiplying, it would expedite of ONGC makes direct payments to the supplies/contractors on the basis of authorization by HSL".

(ii) Later on, EOL invoked the arbitration clause and Arbitral Tribunal was appointed by HSL and EOL, as stipulated in the contract. The majority award of Arbitrary Tribunal was that there is no privity of contract between ONGC and EOL, and HSL is contractually liable to pay the outstanding amounts as may be found due to ESL and there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law. On the other hand, the dissenting view was that privity of contract exists between EOL and ONGC. Questioning the said awards, HSL filed O.P.s before the Principal District Judge, Visakhapatnam, on various grounds, which also included one of the ground as "*the arbitrators erred in holding that there is no privity of contract between ONGC and EOL*".

(iii) The learned District Judge confirmed the arbitral awards in respect of the claims of the EOL. The petitions in the present case were filed by HSL, with the Andhra Pradesh Court, against the said arbitration awards.

(C) Gist of submissions made by the HSL:

(i) HSL was only a certifying agency for the work done by EOL. On such certification, the ONGC had to pay the cheques directly to EOL. The mode of direct payment was incorporated in Schedule-E of the agreement at the instance

of the EOL. The intention of EOL was to have direct contacts with ONGC and the role of the HSL was certification of the bills. As per Clause 13.2.3 of contract, HSL had to certify and approve the invoice for payment only and there is no clause in contract that HSL had to pay the money to EOL, in view of Exhibit-E. Pursuant to the said terms, ONGC had directly made advance payment of Rs. 5 crores to EOL. Hence, there is a privity of contract between the ONGC and the EOL, but not between the HSL and the EOL.

(ii) The Schedule-E was introduced into the contract and number of meetings were held between ONGC, HSL and EOL. In those meetings it was concluded that the duty of HSL is only of certifying agency, which is evident from Schedule-E and hence the award of the arbitral tribunal is illegal.

(iii) As per Section 19(4) of the Arbitration Act, the arbitral tribunal has power to determine the admissibility, relevance and materiality and weight of any evidence. If the Arbitral tribunal has taken into consideration the entire material and particularly the amendment by Schedule-E, it would have come to the conclusion that it is a tripartite agreement among ONGC, HSL and EOL; and it is a case where ONGC has to be made as a party to the proceedings with reference to the payment. Had the entire correspondence between the parties been taken into consideration, the arbitral tribunal as well as the learned District Judge would have held that the agreement is a tripartite agreement among EOL, HSL and ONGC.

(D) Gist of submissions made by the EOL:

(i) There is no privity of contract between ONGC and EOL, and the contract was entered into between HSL and EOL. It is only a bilateral contract and not tripartite contract. HSL is a party to Schedule-E with regard to the receipt of payment from ONGC and a third party to a contract cannot sue or be sued. The EOL has received some payments from ONGC on the certification of the invoices by the HSL. Exhibit-E, incorporated regarding the mode of payment, shall not have the overriding effect of the instructions to the bidders and hence as per the bid agreement, the HSL alone is responsible but not ONGC.

(ii) Even though several meetings were held among HSL, EOL and ONGC, those meetings could not result in any contractual obligations between the parties in the absence of ONGC being a party to the contract. As per Section 11 (3) of the Act, each party to the agreement is required to appoint an arbitrator and HSL had never asked ONGC to have its own arbitrator and hence now it is not open to HSL to contend that the liability should be fastened on the ONGC.

(E) Some relevant observations of the Hon'ble High Court:

(i) A lot of correspondence has taken place wherein HSL has made it clear to EOL that the ONGC has to take a decision for payment of due amounts to EOL. The ESL also addressed number of letters to HSL and also to ONGC for early settlement. As the efforts of EOL to get the amount as per the invoices became futile, it has invoked the arbitration clause and three arbitrators were appointed.

(ii) Exhibit-E was brought into the terms of contract by HSL, with the knowledge of ONGC, wherein EOL as well as ONGC had agreed that on certification by the

HSL, the ONGC has to pay the amount directly to EOL. In view of observations of the Apex Court in case of *Rickmers Verwaltung Gmbh*, it has to be held that, in view of introduction of Exhibit-E into the terms of the contract, the agreement in question is not bilateral one but it is tripartite agreement. It shows that there is privity of contract between the ONGC and the EOL. It is noted that in some cases even after certification of the HSL, the ONGC did not release the amount to the EOL and also withheld some amounts and also deferred to pay some claims. Thus, the ONGC did not act in terms of the agreement and the ONGC has adopted its own assessment to release the amount to EOL. This shows that the agreement is a tripartite one and not bilateral one.

(iii) It is also to be kept in mind that the ONGC is a PSU and it cannot act as per its whims and fancies and it cannot directly pay the amount to anyone unless there is an agreement to that effect. In this case, the ONGC has paid some amounts to the EOL on the certification of HSL. This shows that the ONGC is a party to the terms of the contract which was entered between HSL and EOL; and for any dispute, the ONGC has to be made as a party in view of its conduct. Thus, it has to be held that non-impleadment of the ONGC as a party to the arbitration is bad. It is well settled law that if any award is passed without joining a necessary party, the proceedings have no force at all.

(iv) The EOL has initiated for amendment of the conditions of the contract by introducing Exhibit-E wherein they sought payments directly from the ONGC and it has also accepted the amounts paid by the ONGC. Hence EOL cannot proceed against the HSL alone.

(v) In the reference put forth before the Arbitral Tribunal, it was not the issue as to whether a suit would lie under law against the ONGC and whether EOL could validly sue ONGC. But the Arbitral Tribunal has held that there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law. This Court is of the view that such observation goes beyond the scope of reference, in view of Section 34(2)(a)(iv) of the Act. The finding of the Arbitral Tribunal, to that extent is set aside.

(F) Verdict of Hon'ble High Court: This Court is of the view that the ONGC is a proper and necessary party to the dispute before the Arbitral Tribunal and as the ONGC is not made as a party by the EOL before the Arbitral Tribunal, and as the award is passed without making a proper and necessary party as party to the dispute, the same has to be set aside as the award is violative of provisions of the substantive law of India i.e. the Indian Contract Act. The judgments of District Court in O.P.s with regard to the claims made by the EOL are set aside. In the result, the C.M. is are allowed. No costs.

(G) Conclusions based on the verdict of Hon'ble High Court: In this case, the High Court has held that when a Party "A" awards a contract to Party "B" and this party in-turn awards Sub-contract to another Party "C", with knowledge of Party "A" and the conditions of contract are modified with payment being made directly by Party "A" to Party "C", then it amounts to being a tripartite agreement between the parties "A", "B" and "C" and not a bipartite agreement between the parties "B" and "C" only. In such case, in case of any dispute between the Parties "B" and "C", Party "A" is also to be pleaded as party to such dispute.

6.2 Supreme Court Verdict dated 07.07.2009, in Civil Appeal No. 4150 of 2009, M. R. Engineers & Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd.

(A) Full text of the Verdict: Annexure – 6.2 of Compendium on IRICEN Website.

(B) Facts of the case, in Brief:

(i) The Public Works Department, Government of Kerala (hereinafter referred as "PWD") awarded a contract and entrusted the work of "Four Laning and Strengthening of Alwaye - Vyttila and Aroor - Cherthala and Strengthening of Vyttila to Aroor Section of NH 47 - N2 & N3 packages" to Som Datt Builders Pvt. Ltd. (hereinafter referred as "Contractor"). The contract agreement contained an arbitration clause for referring any dispute to the adjudication of a Committee of three arbitrators; with one arbitrator nominated by PWD, one to be nominated by the Contractor and the third arbitrator to be nominated by the DG/Road Development/Ministry of Surface Transport.

(ii) The contractor entrusted a part of the work namely "Construction of Project Directorate building", for a value of Rs. 33,07,500/-, to M. R. Engineers & Contractors Pvt. Ltd. (hereinafter referred as "subcontractor"), on 04.05.1994. As per conditions of sub-contract, "…*This sub-contract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter…".*

(iii) The subcontractor alleged that it informed the contractor about executing certain extra items and excess quantities on the instructions of PWD; and requested the contractor to make claim on the PWD in this regard. The contractor accordingly made these claims and some other claims on the PWD. These claims were referred to arbitration and the arbitrator made an award dated 18.08.1999. According to subcontractor, the Arbitrator awarded certain amounts in regard to its claims put through the contractor and in terms of the agreement between the contractor and the subcontractor, the contractor is liable to pay to the subcontractor, 80% of amounts awarded for such claims (Rs. 37,55,893/-) along with pre-reference interest upto 04.12.1996 (Rs. 1,55,807/-) and compensation at 18% per annum from 05.12.1996. The subcontractor alleged that a sum of Rs. 1,76,936/- was also due on contractor towards unlawful deductions. The subcontractor, therefore, lodged a claim by letter dated 05.07.2000, for payment of Rs. 65,11,341/-. As the claim was not settled, the subcontractor sent a letter dated 06.12.2000 seeking reference of the disputes to arbitration.

(iii) As the contractor failed to comply, the subcontractor filed an application under section 11 of the Act with the High Court. By order dated 31.01.2003, this application was rejected on the ground that the arbitration clause (in the contract between PWD and the contractor) was not incorporated by reference in the contract between the contractor and subcontractor. This order of the High Court was challenged, by the subcontractor, in this appeal before the Supreme Court.

(C) Gist of submissions made by the Subcontractor: Reliance was placed on decisions of Supreme Court in *Atlas Export Industries v. Kotak & Co.* and *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.*

to contend that even a general reference to the main contract (between PWD and contractor) in the sub-contract was sufficient to incorporate the arbitration clause in the main contract, into the sub-contract, even if there was no special reference to the arbitration clause.

(D) Some relevant observations of the Hon'ble Supreme Court:

(i) The question that arises for consideration is whether the provision for arbitration contained in the contract between PWD and the contractor, was incorporated by reference in the sub-contract between the contractor and sub-contractor.

(ii) As per Section 7(5) of the Arbitration and Conciliation Act-1996, even though the contract between the parties does not contain a provision for arbitration, an arbitration clause contained in an independent document will be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, if the reference is such as to make the arbitration clause in such document, a part of the contract. The wording of this section makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. Section 7(5) therefore requires a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties. But the Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract, can be construed as a reference incorporating an arbitration clause contained in such document, into the contract. In the absence of such statutory guidelines, the normal rules of construction of contracts will have to be followed.

(iii) Therefore, when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract. Where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (e.g. General Conditions of Contract of the Government where Government is a

party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.

(vi) Both the decisions referred by the subcontractor are not of any assistance to them, as in both cases the parties had agreed to be bound by the standard terms and conditions of the Trade Association.

(vii) In the present case, use of the words "*This sub-contract shall be carried out on the terms and conditions as applicable to main contract*" in the work order would indicate an intention that only the terms and conditions in the main contract relating to execution of the work, were adopted as a part of the sub-contract, and not the parts of the main contract which did not relate to execution of the work, for example the terms relating to payment of security deposit, mobilization advance, the itemised rates for work done, payment, penalties for breach etc., or the provision for dispute resolution by arbitration. Even the wording of the arbitration clause in the main contract between the PWD and contractor makes it clear that it cannot be applied to the sub-contract between the contractor and the sub-contractor.

(viii) In view of our finding that there is no arbitration agreement between the parties, it is unnecessary to examine the contention of the contractor that no dispute existed between the parties in view of the full and final settlement receipt executed by the subcontractor.

(E) Verdict of Hon'ble Supreme Court: We are therefore of the view that there is no error in the order of the High Court rejecting the application of the subcontractor on the ground that there is no arbitration agreement.

(F) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The Court has held that mere reference to a document would not have the effect of making an arbitration clause from that document as part of contract under consideration, unless there is a clear acceptance of the arbitration clause from another document. Where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract and there should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract.

(ii) Only exception to the above rationale is: (a) When the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution will bind or apply to the contract; and (b) When the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (e.g. General Conditions of Contract of the Government where Government is a party.

(iii) This verdict is very relevant to decide as to whether the arbitration clause(s) in the contact between the principal employer and main contractor will be applicable for the disputes in the contract between the contractor and the subcontractor.

Chapter – 7

Time Bar Clauses in Arbitration Agreements

7.1 Extract from "Commentary on the Law of Arbitration", Fourth Edition, By: Malhotra (Page: 1092 – 1096)

(A) Full text of the Extract: Annexure – 7.1

(B) Conclusions based on the extract above:

(i) Arbitration agreements many times contain a time-limit for the commencement of the arbitration, which is shorter than what is prescribed under the Limitation Act. As per this, if demand for arbitration is not made within the period specified therein, the claim would be deemed to have been waived and barred and the respondent shall stand discharged and released of all liabilities under the contract. Such clauses, referred as time-bar clause, are generally considered valid in common law jurisdictions.

(ii) Section 43(3) of the Arbitration and Conciliation Act-1996 recognizes the validity of such time bar clauses. The 1996 Act provides that the parties are free to choose the tribunal, the number of arbitrators, the procedure for appointing arbitrators, the procedure to challenge the appointment of an arbitrator, the procedure for conduct of proceedings, the place of arbitration, the date of commencement of proceedings, etc. Parties are also free to provide the time limit within which steps to commence arbitral proceedings are taken. These are matters of procedure pertaining to dispute resolution through arbitration, which stand on a different footing from that applicable to the usual court process.

(iii) Section 28 of the Indian Contract Act was amended on 08.01.1997. Exceptions 1 and 2 to the amended Section 28 of this Act do not bar arbitration agreements which contain a time bar clause or put a cap on the amount awarded.

(iv) However, the court is conferred with the discretion to extend the time limit for such period as it considers proper, if it is of the opinion that in the circumstances of the case, undue hardship would be caused to the claimant. Every hardship is not "undue hardship". The conduct of the party, bona fides, reasonableness of the claim, the amount at stake, the reasons for delay in taking the requisite steps to commence arbitration proceedings, the possibility of material prejudice being caused to the other side by extension of time limit, are some relevant, though not exhaustive criteria for determining the issue of undue hardship. As for the weight of which must be afforded to the various above-mentioned factors, no hard and fast rule can be laid down, which will depend upon the facts and circumstances of each case. A relevant point to note is that the discretion to extend the time limit is not automatic. It would be granted by the court on an application made by a party to the agreement.

(v) In Railway contracts, Clause 43(1) and 64(1)(v) of General Conditions of Contract are such time bar clauses and they should be used judiciously while defending any arbitration case.

7.2 Supreme Court Verdict dated 02.03.1997, in Civil Appeal No. 3314 of 1997, Wild Life Institute of India, Dehradun Vs. Vijay Kumar Garg

(A) Full text of the Verdict: Annexure – 7.2

(B) Facts of the case, in Brief:

(i) Wild Life Institute of India, Dehradun (hereinafter referred as "WLII") entered into a contract on 08.08.1988 with Vijay Kumar Garg (hereinafter referred as "Contractor") for construction of their building at Dehradun. Several extensions were granted to the contractor for completion of the building and ultimately the contract was terminated by WLII on 28.07.1992. The final payment was made under a receipt dated 23.10.1993, which was signed by the Project Manager for and on behalf of the Contractor. It stated that, "… *Received a sum of Rs. 2,19,245 … in full and final settlement of our final bill for the construction work and other dues as per our agreement … No further claim of whatsoever on any ground will be taken up in any court of law or arbitration. Any claim arising on account of Labour Act or otherwise will be our responsibility".*

(ii) After almost 1 year, on 30.08.1994, the contractor addressed a letter to WLII in which for the first time, he set out 18 claims and demanded payment. He also asked for appointment of an arbitrator. Even in this letter, there is no reference to the receipt given by him on 23.10.1993. There is also another letter of 21.10.1994 from the contractor to the WLII in which he invoked the arbitration clause and stated that he would apply to the court for appointment of an arbitrator.

(iii) In reply, the WLII by their letter dated 01.11.1994 pointed out that the receipt signed by the contractor on 23.10.1993 clearly stated that all the bills of the contractor had been settled in full and no further claim whatsoever would be taken up in any court of law or arbitration. The contractor filed a suit under Section 20 of the Arbitration Act, in which the Additional Civil Judge passed an order on 17.12.1996 directing appointment of an arbitrator. An appeal on this order was dismissed by the Division Bench of the High Court. Finally, the WLII filed this appeal before the Supreme Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) Looking to the facts and circumstances in the present case, it is clear that final payment was accepted by the contractor in full satisfaction of all his claims under the contract and that there was no dispute outstanding. After the receipt of the said amount also, the respondent had not lodged any protest nor had he alleged any pressure being put upon him for signing the receipt.

(ii) The arbitration clause under the contract clearly provides that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the WLII that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the WLII shall be discharged and released of all liabilities under the contract in respect of these claims. This clause operates to discharge the liability of the WLII on expiry of 90 days as set out therein and is not merely a clause providing a period of limitation. In present case, the

contractor has not made any claim within 90 days of even receipt of the amount under final bill. The dispute has been raised for the first time by the contractor 10 months after the receipt of amount under final bill.

(D) Verdict of Hon'ble Supreme Court: In the premises, the High Court was not right in referring the alleged dispute to arbitration. The appeal is, therefore, allowed. The impugned order of High Court is set aside. No costs.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In this case, the Supreme Court has upheld the validity of the time bar clause in the contract/arbitration agreement which stipulated that. "*… if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the WLII that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the WLII shall be discharged and released of all liabilities under the contract in respect of these claims…*".

(ii) This verdict is very relevant for Railway cases because Clause 64(1)(v) of General Conditions of Contract (GCC) also stipulates similar "time bar clause" on raising of disputes/claims by the contractor.

7.3 Kerala High Court Verdict dated 29.05.2020, in A.R.P. No. 5/1999, K. Raghavan Vs. General Manager, Southern Railway and Others

(A) Full text of the Verdict: Annexure – 7.3

(B) Facts of the case, in Brief:

(i) Palghat Division of Southern Railway (hereinafter referred as "Railway") entered into a contract for "Work of manning of unmanned level crossing at KM 795/9-8 between Payyannur-Cheruvathur Stations and construction of gate lodge and two Type-I quarters", with K. Raghavan (hereinafter referred as "Contractor"), for an estimated value of Rs. 1,28,658/-. The work was to be completed by 15.01.1988.

(ii) According to contractor, due to change of site and delay in handing over the site, the work could not be completed within the stipulated time and extensions were granted up to 31.08.1989 to complete the entire work. But on 08.05.1989, Railway issued a seven days' notice followed by a termination notice dated 20.05.1989. The contractor contended that the delay was caused by Railway and termination of the contract was illegal and unjust, he had to incur heavy loss and Railway are liable to pay a total amount of Rs. 6,73,530/- to him. As the Railway did not respond to the notice issued by the applicant on 17.12.1996, he sent a notice dated 30.09.1997 to refer the dispute to arbitration. But Railway sent reply dated 26.05.1998, rejecting the request without assigning any reason.

(iii) The contractor filled this arbitration request with the High Court seeking appointment of an arbitrator to adjudicate the disputes.

(C) Gist of submissions made by the Railway:

(i) Out of the agreed contract amount of Rs. 1,28,658/-, Rs. 76,400/- was paid to the contractor by way of part-bills and he had failed to complete the work within the stipulated time due to his own reasons and not due to any delay or default on the part of Railway. Even though time for completion of the work was extended up to 31.03.1989, the contractor failed to complete the work even within that period. Therefore, the agreement was terminated, and arrangements were made to get the work executed by some other agency. The request for cancellation of the termination order, made by the contractor, was not accepted and final bill was drawn in respect of the work done by the contractor and intimated to him on 26.09.1989.

(ii) Though the contractor raised objections to the final bill, by letter dated 18.10.1989 and letter dated 18.11.1989, there was no correction to be made in the bill and the contractor is liable to pay the excess cost incurred by the Railway for arranging the balance work to be done.

(iii) Subsequently the contractor sent lawyer's notice dated 13.11.1990, under Section 80 of the C.P.C., claiming Rs. 6 lakhs, to which a reply was sent. But now about seven years after everything was over, as far as the contractor's claim is concerned, no specific claim is preceded.

(iv) As per clause 63 of the GCC, any demand for arbitration should be preceded by a final claim on disputed matters and if the Railway fails to make a decision within a reasonable time after the final claim, arbitration proceedings can be restored to. Therefore, the applicant is not entitled to any relief in this case and the arbitration request is liable to be dismissed.

(D) Some relevant observations of the Hon'ble High Court:

(i) Even though part payment is made for certain portion of the work done by the contractor, the final bill drawn by Railway after the termination of the contract is not accepted by the contractor. Thereafter it would appear that the contractor did not take recourse to the arbitration proceedings as provided under clause 63 of GCC and instead sent lawyer's notice to Railway under Section 80 of the C.P.C. presumably. Though notice under Section 80 of the C.P.C. was sent by the applicant on 13.11.1990 claiming Rs. 6 lakhs from Railway, no suit was filed by the contractor against Railway claiming the amount.

(ii) Clauses 63 and 64 of GCC provide for settlement of disputes between the contractor and Railway. Clause 64(1) stipulated that if the Railway fails to make a decision with regard to the claim made by the contractor within a reasonable time, after 90 days but within 180 days of his presenting the final claim on disputed matters, the contractor shall demand in writing that the dispute or differences be referred to arbitration. In this case the contractor has not contended anywhere that he has presented his final claim before Railway and Railway have failed to take a decision within the reasonable time and he has preferred written request to refer the dispute for arbitration after 90 days but within 180 days of preferring his final claim. Therefore, it is patent that the applicant has preferred the above arbitration request without complying with the pre-conditions provided under clauses 63 and 64 of the arbitration agreement, so as to invoke the arbitration clause incorporated in the agreement. Under the circumstances the above arbitration request made by the applicant is not sustainable.

(E) Verdict of Hon'ble High Court: In view of the above finding the question whether the claim is barred by limitation or is not considered by this court. In view of above findings this arbitration request is dismissed as not maintainable.

(F) Conclusions based on the verdict of Hon'ble High Court: In this case pertaining to Railway, the High Court has dismissed the arbitration request filed by the contractor on the ground that the contractor directly approached the High Court without first taking recourse to Arbitration Clause 63 & 64 of GCC (i.e. first filing his claims with General Manager and in case of Railway failing to make a decision on these claims within a reasonable time, after 90 days but within 180 days of this, presenting the final claim on disputed matters and demanding in writing that the dispute or differences be referred to arbitration).

7.4 Supreme Court Verdict dated 18.12.2008, in Civil Appeal Nos. 7408 & 9409 of 2008, M/s P. Manohar Reddy & Bros. Vs. Maharashtra Krishna Valley

(A) Full text of the Verdict: Annexure – 7.4

(B) Facts of the case, in Brief:

(i) Maharashtra Krishna Valley Development Corporation (hereinafter referred as "MKVDC") entered into a contract with M/s Manohar Reddy & Bros. (hereinafter referred as "Contractor"), on 09.02.1988, for the work of "Excavation in canal K.M. No. 126, Kukadi Left Bank Canal, Shrigonda in the District of Ahmednagar", at a cost of Rs. 21,10,233/-. The contract was to be completed within a period of about 11 months, by 08.01.1989. The contractor failed to complete the work within the stipulated time. He applied for extensions which were granted up to 30.09.1990 and the work was completed within this time. The measurements of the work were recorded on 26.11.1990, Final bill was prepared by MKVDC and accepted by the contractor without any demur.

(ii) Inter alia, on the premise that they were asked to do extra items of work, the contractor raised its claims by a letter dated 27.02.1991. without giving details of the purported extra work done by them. This was rejected by MKVDC. The contractor submitted another claim, with details, by a letter dated 10.06.1991. The contractor by a letter dated 26.09.1991 invoking the arbitration clause, issued notice to the Executive Engineer of MKVDC, with 16 claims.

(iii) The MKVDC rejected these claims by a letter dated 05.10.1991 stating that, "… *The work was completed in Nov'1990 and the defect liability period of six months is over in May'1991 .. the matter is brought for arbitration process after expiry of 30 days from end of defect liability period … hence the matter cannot be considered for arbitration*". The contractor preferred an appeal before the Superintending Engineer vide their letter dated 26.11.1991. Pursuant to this, a meeting was held between the representatives of the parties. But in the minutes of the meeting, sent by the Superintending Engineer along with his letter dated 30.12.1991, the appeal for arbitration was rejected on the same grounds as given earlier. The contractor served a Notice to the Chief Engineer asking to furnish the names of its three officers for appointment of sole arbitrator within 30 days from the receipt thereof. This request was rejected by the Chief Engineer in letter dated 26.02.1992. The contractor sent a list of arbitrators on 09.03.1992 followed by a notice through a lawyer. This was also rejected by MKVDC.

(iv) The contractor filed an application under Section 8 of the Arbitration Act-1940, in the Court of Civil Judge (Senior Division), Ahmednagar, for appointment of Arbitrator. By a judgment and order dated 09.12.1997, the Court appointed a retired Chief Engineer as Arbitrator. A Civil Revision Application was preferred by the MKVDC before the High Court, which was allowed by a judgment and order dated 13.04.2004. A Review Petition filed by the contractor was dismissed by the High Court. Against this impugned order of the High Court, the contractor had filed the appeal in the Supreme Court.

(C) Gist of submissions made by the Contractor:

(i) The High Court committed a serious error of law in passing the impugned judgment insofar as it failed to take into consideration that limitation for raising a claim as envisaged under clause 54 of the agreement is not applicable in the instant case.

(ii) In view of the fact that the claim was rejected only on 26.02.1992 by the appellate authority, the period of 30 days should be counted therefrom.

(iii) While exercising its jurisdiction under Section 8 of the Act, the court was concerned only with the question as to whether there was a triable issue. Once a triable issue is found to have been raised, which was required to be referred to the arbitration, the merit of the claim cannot be gone into.

(D) Gist of submissions made by the MKVDC:

(i) Clause 54 of the General Conditions of the Contract must be invoked by the contractor during the tenure thereof and not after completion of the contract and acceptance of the final bill.

(ii) The final bill having been accepted without any demur, the contract came to an end, wherewith the arbitration agreement which was a part thereof also perished.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) Clause 37 of GCC imposes an obligation upon the contractor to furnish to the Executive Engineer a list of claims against the Government arising out of the contract, other than the claims specifically identified, evaluated and expected from the operation of the release by the Contractor only after completion of the work and prior to payment thereof. There is nothing on record to show that any claim in relation to extra or additional work had been raised by the contractor prior to 27.02.1991, although final measurement had been recorded on 26.11.1990 and the bill has been paid in full and final satisfaction on 04.12.1990.

(ii) Clauses 54 and 55 of the arbitration agreement must be read together. Clause 54 of GCC stipulates that the contractor has to raise a demand with the Executive Engineer if any work is demanded from him, which he considers to be outside the requirements of the contract. In case Executive Engineer fails and/or neglects to give a decision or issue instruction, the contractor may within a period of 30 days thereafter prefer an appeal to the appellate authority. The appellate authority is required to provide an opportunity of hearing to the contractor. It is only when the contractor is dissatisfied with the decision of the appellate authority, he may indicate his intention to refer the dispute to Arbitration in terms of Clause 55 of GCC within a period of 30 days from the date of receipt of the said decision, failing which, the same would be final. A plain reading of these provisions clearly shows that clause 54 does not envisage raising of a claim in respect of extra or additional work after the completion of contract.

(iii) It is no doubt true that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a clause

providing for limitation so as to enable a party to lodge his claim with the other side is not invalid.

(iv) As arbitration clause could not be invoked having regard to the limited application of Clauses 37, 54 and 55 of the GCC, we are of the opinion that the trial court was not correct in directing appointment of an arbitrator.

(F) Verdict of Hon'ble Supreme High Court:

(i) For the reasons aforementioned, we, albeit for different reasons, affirm the judgment of the High Court. The appeals are, accordingly, dismissed. In the facts and circumstances of the case there shall be no order as to costs.

(ii) We may clarify that nothing stated herein shall affect the merit of the contractor's claim to invoke the jurisdiction before any other forum for enforcing the same.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) In this case, the Supreme Court has upheld the validity of "time bar clause" in the contract/arbitration agreement stipulating a time-limit for the commencement of the arbitration, which is shorter than what is prescribed under the limitation act; and the claim deemed to have been waived and barred if the request for arbitration is not made within the period specified in the contract.

(ii) This verdict is relevant for Railway cases because Clause 64(1)(v) of General Conditions of Contract (GCC) also stipulates similar "time bar clause" on raising of disputes/claims by the contractor.

Chapter – 8

All Arbitrators to Act Together

8.1 Calcutta High Court Verdict dated 18.08.1916, Abu Hamid Zahir Ala Vs. Golam Sarwar

(A) Full text of the Verdict: Annexure – 8.1

(B) Facts of the case, in Brief:

(i) In a contract between Abu Hamid Zahir Ala (hereinafter referred as "applicant") and Golam Sarwar (hereinafter referred as "defendant") a dispute between them was referred to arbitration with following stipulation:

"Considering it desirable to decide the matters in dispute by arbitrators and so appointing the above-mentioned gentlemen as arbitrators, we execute this deed of reference and agree that the award, which all the arbitrators unanimously or the majority of the arbitrators will make, will be accepted as a decree of a superior Court and will have force and be valid at all places. In case of difference of opinion among the arbitrators, the majority of them will make and be competent to make their award unanimously."

(ii) Under this instrument, five arbitrators were appointed and three of them only signed the award. The applicant made application to the subordinate judge for enforcement of this award. The defendant objected that there was no valid award in law because two of the arbitrators had not attended all the sittings and one at least did not take part in the final deliberations. The applicant contended that inasmuch as three arbitrators who had made the award had attended all the meetings, and as a majority of the arbitrators was competent to make a valid award, the award was legal and enforceable. The Subordinate Judge overruled these contentions on the ground that all the arbitrators should be present at all the meetings and particularly at the last when the final act of arbitration is done, though as a result of this united deliberation there may be an award by a majority only of them. Against this ruling of the subordinate judge, the applicant filed an appeal with the High Court.

(C) Some relevant observations of the Hon'ble High Court:

(i) It is now firmly settled, as ruled in *Nand Ram v. Fakir Chand [7 A. 523: A.W.N. (1885) 139 : 4 Ind. Dec. (N.S.) 539]* that when a case has been referred to arbitration, the presence of all the arbitrators at all the meetings and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award.

(ii) We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving, at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a whole number of arbitrators may make a valid award, they cannot do so

without consulting the other arbitrators. The inference follows that in the present case there is no valid award.

(D) Verdict of Hon'ble High Court: The result is that the decree of the Subordinate Judge is affirmed, and this appeal dismissed with costs. We assess the hearing fee at five gold mohurs.

(E) Conclusions based on the verdict of Hon'ble High Court: In this case, the High Court has held that when a case is referred to arbitration, the presence of all the arbitrators at all the meetings is necessary so that by deliberations amongst them they may mutually assist each other in arriving, at a just conclusion; though the arbitration award may not be unanimous.

8.2 Himachal Pradesh High Court Verdict dated 10.11.2003, in Arbitration Appeal No. 14 of 2003, M/s Inderjit Singh Avtar Singh Vs. State of H.P. and Another

(A) Full text of the Verdict: Annexure – 8.2

(B) Facts of the case, in Brief:

(i) A contract for "Construction of a bridge over Ali Khud near village Kothi in the district of Bilaspur", was awarded to M/s Inderjit Singh Avtar Singh (hereinafter referred as "Contractor") by the State Govt. of Himachal Pradesh (hereinafter referred as "State Govt."), sometime in Sept'1989, with completion period of 3 years. As per the contract agreement, any dispute was to be referred to the arbitration by two arbitrators, one to be appointed by each party and in case of difference of opinion between the two arbitrators, the matter was to be referred to an Umpire. There were disputed between the parties and it was referred to arbitration, by nominating two arbitrators by both the parties.

(ii) The arbitral proceedings had not commenced before coming into force of the Arbitration and Conciliation Act-1996 Act. in terms of Section 85 of 1996 Act, the Arbitration Act-1940 had stood repealed on the coming into force of 1996 Act. As per Section 10 of 1996 Act, in a multi-member Arbitral Tribunal, the number of arbitrators could not be even. Therefore, the two nominee arbitrators of the parties appointed a Presiding Arbitrator.

(iii) Because of some misconception, the functionaries of the State Government felt that since the arbitration agreement (which admittedly been executed at a point of time in 1989, when 1996 Act was not applicable and 1940 Act was applicable) had provided for appointment of only two arbitrators, appointment of the third arbitrator was untenable and, therefore, the State nominated arbitrator did not participate in the proceedings. The arbitral award was passed by the other two members of the arbitral tribunal.

(iv) The award was challenged by the State Govt. under Section-34 of the Act, before the High Court, which issued directions that the Arbitral Tribunal shall consider afresh the subject matter of the arbitration proceedings and after deliberating upon the same pass the final arbitral award in accordance with law. The appeal in the present case was filed by the contractor, with division bench of High Court, against the judgment dated 16.9.2003 passed by the Single Judge of the High Court.

(C) Some relevant observations of the Hon'ble High Court:

(i) Since the arbitral proceedings had not commenced at the relevant time, provisions as contained in 1996 Act were applicable, and not those contained in 1940 Act. Even though the arbitration agreement as originally executed had provided for appointment of two arbitrators, but as per provision of 1996 Act any Arbitral Tribunal comprising of even number of arbitrators would have been a nullity in the eyes of law. Similarly, the provisions regarding the appointment of an Umpire and his role being relevant only in the eventuality of the two arbitrators dissenting was no more an applicable proposition of law after coming into force of 1996 Act since this was a stipulation contained in 1940 Act alone

which had stood repealed as already noticed above by virtue of Section 85 of 1996 Act.

(ii) The arbitral Award was set aside by the learned Single Judge on the ground that in the decision-making process, the nominee of the State Government did not participate. Even though Section 29 of the 1996 Act clearly provides that the decision of the arbitral Tribunal shall be made by a majority of all its members and even though out of the three members of the arbitral Tribunal, two members are parties to the decision in the present case. In our considered opinion, the learned Single Judge has adopted a very rational, right and correct approach and has charted a right course of action by remitting the matter to the arbitral Tribunal to consider the matter afresh, in a joint meeting of all the three Members and pass the arbitral award. Any other course of action could have been detrimental and prejudicial to the interests of justice.

(D) Verdict of Hon'ble High Court:

(i) We therefore, while upholding the judgment of the learned Single Judge and dismissing the appeal, direct that (if not already done) the meeting of the Arbitral Tribunal comprising of all the three members of the Tribunal shall be held in the shortest possible time and in any case within four weeks from the date of communication of this order. The Arbitral Tribunal shall decide the matter afresh on its merits, in accordance with law and pass the Arbitral award in the shortest possible time.

(ii) We have been informed that the State nominee arbitrator, namely Superintending Engineer (Arbitration) is not available anymore because of the abolition of this post. That being the case, we direct State Govt. to nominate the State nominee arbitrator within two weeks from today. He shall fill up the vacancy caused owing to the abolition of the post of Superintending Engineer (Arbitration) and be the third member of the arbitral Tribunal.

(iii) Appeal dismissed. No order as to costs.

(E) Conclusions based on the verdict of Hon'ble High Court: In this case, the High Court has again held that presence of all the members of the Arbitral Tribunal in the arbitral proceedings and deliberations of all the relevant issues by them is necessary for the arbitral award to be legally tenable. Otherwise, the arbitral award will not be legally valid, even if it is pronounced by majority members of the arbitral tribunal.

8.3 Karnataka High Court Verdict dated 11.03.2005, in Miscellaneous First Appeal No. 3742 of 2000, Rudramuni Devaru Vs. Shrimad Maharaj Niranjan

(A) Full text of the Verdict: Annexure – 8.3

(B) Facts of the case, in Brief:

(i) There is a Veerashaiva Math called Moorusaavira Math at Hubli, which is registered as a public trust. Shrimad Maharaj Niranjan (hereinafter referred as "respondent") was the Mathadipathi of the Math. The succession to the office of the Mathadipathi is by way of appointment of a successor by the existing Mathadipathi in accordance with the opinion of devotees of Hubli and Dharwad. Rudramuni Devaru (hereinafter referred as "appellant") was appointed as successor on 17.10.1991 by the respondent with the unanimous consent of devotees of Hubli and Dharwad. The respondent sought to cancel the appointment of the appellant as successor by executing a cancellation deed dated 19.10.1995. However, the differences and disputes between them were settled by intervention of the devotees and people of Hubli and Dharwad; thereby cancelling the cancellation deed dated 19.10.1995 and affirming the appointment of the appellant as successor. However, the respondent within a short time executed another cancellation deed dated 02.11.1998 cancelling the appointment of the appellant as the Mathadipathi. Due to intervention of the devotees, leaders of the community and other prominent citizens of Hubli and Dharwad, the appellant and the respondent ultimately agreed to refer the dispute between them to the arbitral tribunal consisting of five arbitrators. Out of five arbitrators, the respondent was to nominate two arbitrators, the appellant was to nominate two arbitrators and the Chief Minister of Karnataka was to nominate one arbitrator and all the arbitrators were required to be Mathadipathies of different Maths. Accordingly, the arbitral tribunal was constituted.

(ii) The arbitral tribunal held various sittings in Dec'1998 and Feb'1999. One of the arbitrators was not in a position to attend the sittings in Feb'1999, due to his ill-health. He requested the arbitral tribunal to fix some other dates for hearing, but these sittings were held. Another arbitrator protested to the sittings held in the absence of an arbitrator, but the arbitral tribunal conducted the sittings. As a protest, the protesting arbitrator tendered his resignation on 19.02.1999 and did not participate in the sitting held on 19.02.1999. The arbitral tribunal held further sittings in March'1999. The appellant made a request to the arbitrators to give him time to nominate another arbitrator in place of arbitrator who had tendered resignation. But this request was not granted, and the proceedings were continued. In the meanwhile, the arbitrator who was not well sent a letter dated 25.03.1999 tendering his resignation. On the same day, the appellant sent a fax message to the arbitral tribunal followed by a telegram on 26.03.1999 requesting to give him opportunity to appoint another arbitrators in place of two arbitrators, who had resigned, requesting not to proceed with the enquiry before the arbitral tribunal is properly reconstituted.

(iii) The arbitral tribunal passed the award on 27.03.1999, signed only by three arbitrators. In the award, the installation of the appellant as the Mathadipathi by the first respondent in pursuance of the deed executed by the respondent dated 16.10.1998 were held to be invalid. The arbitral tribunal directed the respondent

to demit the office of the Mathadipathi and appoint a successor to him. The respondent demitted the office of Mathadipathi on 28.03.1999.

(iv) The appellant being aggrieved by the award of arbitral tribunal, made an application under Section 34 of the Act before the First Additional District Judge, Dharwad, for setting aside the impugned arbitral award on various grounds such as three arbitrators could not have proceeded to conduct and complete the enquiry and pass the impugned award after two arbitrators tendered resignations. The Court dismissed this application. Hence this appeal was filed by the aggrieved applicant, with the High Court.

(C) Gist of submissions made by the Appellant: The award passed by only three arbitrators out of five arbitrators who constituted the arbitral tribunal, and other two arbitrators not participating in the deliberations, cannot be regarded as an award within the meaning of that term under the Act. It is requirement of law that all the arbitrators who constituted the arbitral tribunal should not only subscribe their signatures to their award but should also participate at every hearing/ sitting of the arbitral tribunal. Since the proceedings of the arbitral tribunal resulting in the impugned award disclosed many apparent illegalities and irregularities on its face, the impugned award is liable to be set aside.

(D) Gist of submissions made by the Respondent(s): This case could not be regarded as a commercial arbitration nor an adversarial litigation. The point referred to the arbitral tribunal was restricted to find out a Mathadipathi acceptable to all or at least to the majority of the devotees. The two arbitrators having offered their opinion to the other arbitrators and with their opinion not accepted by other arbitrators, they sought to resign and, therefore, their subsequent resignation would not invalidate the impugned arbitral award.

(E) Some relevant observations of the Hon'ble High Court:

(i) Section 14 of the Arbitration and Conciliation Act specifies the grounds for terminating the mandate of an arbitrator, which includes the ground of "arbitrator withdrawing from his office". On the authority of an arbitrator being terminated, a substitute arbitrator has to be appointed and such appointment as per Sub-section (2) shall be made by following the same procedure as followed while appointing the arbitrator.

(ii) In this case, two of the arbitrators had resigned and they did not participate in all the sittings of the arbitral tribunal. Simply because the resignation letters of these two arbitrators were not accepted by the arbitral tribunal, it could not be said that even after receipt of the resignation letters by the arbitral tribunal, they continued to be the members of the arbitral tribunal. It is quite clear that without there being a properly constituted arbitral tribunal, only three arbitrators conducted the enquiry/proceedings and ultimately pronounced the arbitral award.

(iii) The arbitral tribunal was a multimember body and, therefore, what was of importance and need was the joint deliberation from amongst all the members of the arbitral tribunal. That insistence helps the members of the arbitral tribunal to influence/pursue each other, to appreciate each other's view point and ultimately to arrive at a consensus and unanimous opinion, if that is possible or

to accept the opinion of the majority with respect and perfect understanding. The arbitral tribunal in this case is deprived of the essence of deliberations from amongst all the members of the arbitral tribunal.

(iv) Simply because the arbitral agreement provides that the arbitral tribunal can evolve its own procedure to be followed in the conduct of the enquiry, from that provision, it cannot be said that the arbitral agreement dispenses with the applicability of principles of natural justice and fairness in procedure.

(F) Verdict of Hon'ble High Court:

(i) For the foregoing reasons, we allow this application, set aside the judgment and order of the First Additional District Judge, Dharwad, and the award of the arbitral tribunal dated 27.03.1999 and remand the proceedings to the arbitral tribunal for de-novo disposal of the arbitral reference made to it in accordance with law.

(ii) The arbitral tribunal is directed to know from the two arbitrators who had resigned, whether they are willing to be members of the arbitral tribunal. In the event of their refusal to be members of the arbitral tribunal, the arbitral tribunal shall grant 15 days' time to the appellant to nominate alternate arbitrators. Having regard to the importance of the issue covered by the arbitral reference, we request the arbitral tribunal to dispose of the arbitral reference as expeditiously as possible and under any circumstance within the period of 6 months from today. In the facts and circumstances of the case, the parties shall bear their respective costs.

(G) Conclusions based on the verdict of Hon'ble High Court: In this case, the High Court has held that in case of multi member arbitral tribunal, it is essential to have joint deliberation amongst all the members of the arbitral tribunal; which helps the members of the arbitral tribunal to influence/pursue each other, to appreciate each other's view point and ultimately to arrive at a consensus and unanimous opinion, if that is possible or to accept the opinion of the majority with respect and perfect understanding.

Chapter – 9

Arbitrator Fee

9.1 Delhi High Court Verdict dated 20.07.2018, in O.M.P. (T) (COMM.) 39/2018 & IA No. 6559/2018 & 9228/2018, National Highway Authorities of India Vss Gammon Engineers & Contractors Pvt. Ltd.

(A) Full text of the Verdict: Annexure – 9.1

(B) Facts of the case, in Brief:

(i) National Highway Authority of India (hereinafter referred as "NHAI") entered into a contract agreement dated 07.02.2006 with Gammon Engineers & Contractors Pvt. Ltd. (hereinafter referred as "Contractor"), for the work of "Widening and strengthening to 4 lane of the existing single/intermediate lane carriageway of NH-57 section from km 230.00 to km 190.00, Forbesganj - Simrahi Section, in the State of Bihar". The arbitration agreement in the contract included a clause for arbitration fee also. The NHAI thereafter, issued a Circular dated 01.06.2017, *inter-alia* amending the fee structure payable to the Arbitrators.

(ii) Disputes having arisen between the parties, the NHAI vide its letter dated 14.07.2017 appointed its nominee Arbitrator, *inter-alia*, stating that the "… *Fee applicable may be considered as per the Policy Circular of NHAI dated 01.06.2017 …".* The contractor also nominated its nominee Arbitrator and the two Arbitrators thereafter appointed a Presiding Arbitrator. During the arbitral proceedings, the contractor informed that there is no agreement between the parties regarding the fees of the AT and NHAI informed that fees of the AT may be fixed in terms of the instructions issued by them vide circular dated 01.06.2017. The tribunal decided that fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

(iii) As the fees fixed by the Arbitral Tribunal was more than the one prescribed in the Circular issued by NHAI, the NHAI filed an application with the tribunal seeking review of the fees of the Arbitral Tribunal. This application was dismissed by the Arbitral Tribunal vide its order dated 30.01.2018 observing that "… *in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties …".*

(iv) Being aggrieved of the said order, the NHAI filed the present application in Delhi High Court, invoking Section 14 of the Act seeking termination of the mandate of the arbitral tribunal and substitution by another arbitral tribunal.

(C) Gist of submissions made by the NHAI: As the Arbitral Tribunal has failed to abide by the conditions fixed by the parties in the Arbitration Agreement or by NHAI in its Circular, it should be considered as *de jure* and *de facto* unwillingness to perform its functions, thereby leading to the termination of its mandate. In this regard reliance was placed on the Judgments of Delhi High Court in *National Highways Authority of India vs. Mr. K. K. Sarin and Ors.* and *Taxus Infrastructure and Power Projects Pvt. Ltd. vs. Schneider Electric India Pvt. Ltd.* and of the Madras High Court in *Madras fertilizers Limited vs. SICGIL India Limited and Hon'ble Mr. Justice V. Ratnam (Retd.)* as also of the Supreme Court in *Sanjeev*

Kumar Jain vs. Raghubir Saran Charitable Trust and Ors. and *Union of India vs. Singh Builders Syndicate*.

(D) Gist of submissions made by the Contractor: As the Arbitral Tribunal has fixed its fees in accordance with the Fourth Schedule of the Act, the same cannot be termed as unreasonable. In terms of Section 31A read with Section 31(8) of the Act, the Arbitral Tribunal is empowered to fix its own fee and, in this regard, reliance was placed on the Judgment of Delhi High Court in *National Highways Authority of India Vs. Gayatri Jhansi Roadways Limited*.

(E) Some relevant observations of the Hon'ble High Court:

(i) Arbitration is an Alternative Dispute Resolution mechanism adopted by the parties with informed consent. The parties may also provide the expenses that they are willing to bear for the same. In arbitration, party autonomy is therefore, the most vital ingredient. The Arbitrators are appointed with the consent of the parties, failing which they are appointed by the Court in exercise of its power under Section 11 of the Act.

(ii) Whether the Arbitrators are appointed by the parties or by the Court, the parties or the Court may also stipulate various conditions for such appointment including fixation of fees. In the case of *Sanjeev Kumar Jain Vs. Raghubir Saran Charitable Trust and Ors.*, the Supreme Court has held that the word "appoint" is wide enough to stipulate the terms of such appointment, including the fees payable to the Arbitrators. It is for the Arbitrators to accept or reject such appointment, however, they cannot impose unilateral conditions on the parties while accepting such appointment.

(iii) The Fourth Schedule to the amended Act-2015 is not mandatory, but provides for a reasonable fee structure that may be adopted by the High Court in form of Rules, while appointing an Arbitrator under Section 11 of the Act and may also be used by the parties and the arbitrators for arriving at a consensus on the fees payable to the Arbitral Tribunal.

(iv) Reading of Law Commission of India's Report No. 246 would clearly show that the "costs" under Section 31(8) and 31A of the Act are the costs which are awarded by the Arbitral Tribunal as part of its award in favour of one party to the proceedings and against the other; and it does not mean the "fee of arbitrators".

(v) The Arbitral Tribunal is bound by the Arbitration Agreement between the parties, which is the source of its power. The Arbitral Tribunal cannot accept the appointment in part and rewrite the Arbitration Agreement between the parties.

(F) Verdict of Hon'ble High Court: In view of the above, the mandate of the Arbitral Tribunal shall stand terminated. The parties may appoint a substitute Arbitrator in terms of the Arbitration Agreement between them, within a period of 15 (Fifteen) days from today. The Arbitral Tribunal so constituted shall proceed from the stage where the proceedings stood before the existing Arbitral Tribunal.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) Whether the Arbitrators are appointed by the parties or by the Court, the parties or the Court may also fix the fee of the arbitrators. It is for the Arbitrators to accept or reject such appointment. The Arbitral Tribunal is bound by the Arbitration Agreement between the parties and it cannot accept the appointment in part and rewrite the Arbitration Agreement between the parties with regard to fee of the arbitrators.

(ii) The Fourth Schedule to the amended Act-2015 is not mandatory. It provides a reasonable fee structure that may be adopted by the High Court while appointing an Arbitrator under Section 11 of the Act and may also be used by the parties and the arbitrators for arriving at a consensus on the fees payable to the Arbitral Tribunal.

(iii) This verdict is relevant to Railway cases because as per Clause 64(6) of GCC (the arbitration agreement) "… *the fee payable to arbitrator(s) would be governed by the instructions on the subject by Railway Board from time to time irrespective of the fact whether arbitrator(s) is/are appointed by the Railway administration or by the court of law unless specifically directed by Hon'ble Court otherwise on the matter*". Therefore, in Railway cases, the fees of the arbitrator(s) will be governed by the instruction issued by Railway Board from time to time.

9.2 Supreme Court Verdict dated 10.07.2019, in Civil Appeal No. 5383 of 2019, National Highway Authority of India Vs. Gayatri Jhansi Raodways Limited

(A) Full text of the Verdict: Annexure – 9.2

(B) Facts of the case, in Brief:

(i) National Highway Authority of India (hereinafter referred as "NHAI") entered into a contract agreement with Gayatri Jhansi Roadways Limited (hereinafter referred as "Contractor"). The arbitration agreement in the contract inter-alia included a clause for arbitration fee structure as per the Policy Circular dated 31.05.2004 issued by NHAI.

(ii) Disputes having arisen between the parties, arbitration clause was invoked by the contractor on 23.05.2017. The contractor wrote a letter dated 14.07.2017 appointing its nominee arbitrator and mentioning that the fee applicable is to be considered as per the policy circular of the NHAI dated 01.06.2017, which has substituted amount payable to the arbitrator as per the earlier circular of 2004.

(iii) The matter then came up before the Arbitral Tribunal, in which the Tribunal passed an order dated 23.08.2017 stating that, "*the contractor informed that there is no agreement between the parties regarding the fees of the AT and NHAI informed that fees of the AT may be fixed in terms of the instructions issued by them vide circular dated 01.06.2017. The tribunal decided that fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015*.

(iv) Against this order, NHAI moved an application dated 13.10.2017 before the Tribunal mentioning that the arbitral fees have been fixed by the agreement and, therefore, they may be fixed in terms of the policy of 2017 and not as per the Fourth Schedule of the Act. The tribunal deliberated on the matter and decided that in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties.

(v) Faced with this order, NHAI moved an application with Delhi High Court on 08.05.2018, under Section 14 of the Act, to terminate the mandate of the arbitrators, as the arbitrators had wilfully disregarded the agreement between the parties and were, therefore, de jure unable to act any further in the proceedings. Meanwhile, the Arbitral Tribunal passed yet another order dated 19.07.2018 stating it had no objection to payment of any fees as would be decided in the pending proceedings by the High Court of Delhi.

(vi) The High Court in its' judgement terminated the mandate of the arbitrators and stated that the Fourth Schedule of the Arbitration Act not being mandatory, whatever terms are laid down as to arbitrator's fees in the agreement, needs to be followed by the Arbitrator. Against this order of the High Court, this appeal was filed by the contractor in the Supreme Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) The application filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not stand for the simple reason that an arbitrator does not become *de jure* unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in *Gayatri Jhansi Roadways Limited* case which clearly mandated that the Fourth Schedule and not the agreement would govern. The arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated, as if they have now become *de jure* unable to perform their functions.

(ii) However, the learned Single Judge's conclusion that the change in language of Section 31(8) read with Section 31A which deals only with the costs generally and not with arbitrators' fees is correct in law. It is true that the arbitrators' fees may be a component of costs to be paid but it is a far cry thereafter to state that Section 31(8) and 31A would directly govern contracts in which a fee structure has already been laid down. We may also state that the declaration of law by the learned Single Judge in *Gayatri Jhansi Roadways Limited* is not a correct view of the law.

(D) Verdict of Hon'ble Supreme Court: With these observations, this appeal is allowed, the impugned judgment is set aside, and the arbitrators are directed to proceed with the arbitration as expeditiously as possible.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The Arbitral Tribunal is bound by the Arbitration Agreement between the parties, including the fee of arbitrators. The Fourth Schedule to the amended Act-2015 is not mandatory.

(ii) This verdict is relevant to Railway cases because as per Clause 64(6) of GCC (the arbitration agreement) "… *the fee payable to arbitrator(s) would be governed by the instructions on the subject by Railway Board from time to time irrespective of the fact whether arbitrator(s) is/are appointed by the Railway administration or by the court of law unless specifically directed by Hon'ble Court otherwise on the matter*". Therefore, in Railway cases, the fees of the arbitrator(s) will be governed by the instruction issued by Railway Board from time to time.

9.3 Delhi High Court Verdict dated 10.07.2020, in O.M.P.(T)(COMM) 28/2020, Rail Vikas Nigam Limited Vs. Simplex Infrastructure Limited

(A) Full text of the Verdict: Annexure – 9.3

(B) Facts of the case, in Brief:

(i) Rail Vikas Nigam Limited (hereinafter referred as "RVNL") entered into a contract with Simplex Infrastructure Limited (hereinafter referred as "Contractor"), on 28.01.2011, for "Construction of Viaduct and related works for 4.748 km length in Joka-BBD Bag Corridor of Kolkata Metro Railway Line". The work was to be completed by 27.06.2013, but for various reasons the original schedule could not be adhered. The completion date kept being extended and the work was completed on 20.11.2017.

(ii) The contractor sought cost escalation from RVNL, due to delay in completion for work. The contractor invoked arbitration clause but RVNL did not appoint its nominee arbitrator. The contractor approached Delhi High Court by way of Arbitration Petition, which was allowed on 11.12.2018, and a retired Judge of Supreme Court was appointed as the nominee arbitrator on behalf of the contractor, with a specific direction that the fee of the arbitrator would be fixed as per Schedule-IV of the Arbitration Act.

(iii) Various sittings of arbitral tribunal took place starting from 15.01.2019. The parties completed all pleadings and made part payment towards fees. On 09.01.2020, in its 8th sitting, the Tribunal directed the parties to pay the outstanding dues towards fee of the tribunal (Rs. 49,87,500/-) within four weeks' time.

(iv) Aggrieved by this fixation of fee, RVNL preferred an application before the Tribunal on 27.02.2020, stating that the fee fixed exceeds the limit of Rs. 30,00,000/- prescribed in Schedule-IV of the Act. The Tribunal examined these objections and rejected them by way of its order dated 03.03.2020. The present petition, under Section 14 of the Act, was filed by RVNL before the Delhi Court, seeking termination of the mandate of the three-member Arbitral Tribunal.

(C) Gist of submissions made by the RVNL:

(i) Considering that the claims being arbitrated by the Tribunal is approximately for an amount of Rs. 102 crores, the fixation of fee was required to be done in accordance with entry no. 6 of Schedule-IV. This provision fixes fee at Rs. 19,87,500/- and 0.5% of the claim amount over and above Rs. 20 crores, with cumulative amount further subject to a ceiling of Rs. 30 lakh. The Tribunal has erroneously concluded that under Entry No. 6, the maximum chargeable arbitration fee is Rs. 49,87,500, i.e., Rs. 19,87,500/- of base fee added to *an additional amount* of 0.5% of the claim amount over and above 20 crores and that the ceiling of Rs. 30 lakh is only applicable to the second half of the Model Fee clause under Entry No. 6 of Schedule-IV.

(ii) The English version of Schedule-IV shows that the ceiling of Rs. 30 lakh is inclusive of the base fee of Rs. 19,87,500/- but even the Hindi version of the

notification, bearing a comma before the figure of Rs. 30,00,000/-, makes it clear that the ceiling limit of Rs. 30,00,000/- is applicable on the cumulative sum charged as arbitrator's fee under Entry No. 6. Mere absence of a comma in the English version cannot imply that the ceiling of Rs. 30 lakh is exclusively applicable to the second half of the Model Fee clause under Entry no. 6.

(iii) The 246th Law Commission Report specifically recommended the schedule to be drafted on the basis of the fee schedule set out by the Delhi International Arbitration Center Administrative Costs and Arbitrators Fees Rules (DIAC Rules) which was ultimately adopted verbatim in the Act. While the Hindi version of the notification has adopted the DIAC Rules in spirit and includes the comma, the English version omits to do so and appears to be an inadvertent mistake. The comma disjoins the phrase "with a ceiling of Rs. 30,00,000/-" from the preceding phrase "Rs. 19,87,500/- plus 0.5% of the claim amount over and above Rs. 20 crore" thereby capping the maximum limit of chargeable fee under Schedule-IV as Rs. 30 lakh.

(iv) RVNL has been a part of several arbitration proceedings in the past which required fixation of fee under Schedule-IV of the Act and has watched most Tribunals follow this interpretation and adhere to the ceiling limit of Rs. 30,00,000/- on the entire fee chargeable under Entry No. 6 of Schedule-IV.

(v) The manner in which the Tribunal interpreted Schedule-IV and dealt with RVNL's objections regarding fee fixation is contrary to the legislative intent of the provision. Based on various judicial pronouncements, it is submitted that this is a valid ground for termination of the arbitrator's mandate under Section 14 of the Act.

(D) Gist of submissions made by the Contractor:

(i) When the plain text of the Schedule is clear and explicitly stipulates that the ceiling of Rs. 30,00,000/- is applicable on the latter half of the Model Fee Clause corresponding to Entry No. 6, i.e., 0.5% of the sums in dispute over and above Rs. 20 crores, there is no occasion to refer to external aids such as the 246th Law Commission Report and the DIAC Rules to understand the Schedule. Contrary to RVNL's submissions, the addition of a comma in the Hindi notification does not change the meaning of Entry No. 6 in Schedule-IV at all.

(ii) This petition under Section 14 is merely an attempt on RVNL's part to defeat the rights of the contractor which is evident from the fact that this application has been moved rather belatedly, i.e., after a lapse of 4 months from the date of the order dated 03.03.2020. Even during this period of 4 months, RVNL has been continuously moving applications before the Tribunal seeking various reliefs, while simultaneously building the narrative that the learned Tribunal has become de-jure/de-facto unable to effectively perform its functions.

(E) Some relevant observations of the Hon'ble High Court:

(i) The question raised in this petition is regarding the interpretation of Entry No. 6 of Schedule-IV: is the ceiling limit of Rs. 30,00,000/- inclusive of the base fee of Rs. 19,87,500/- or is it only applicable as a cap on the latter portion of

the Model Fee prescribed, i.e., 0.5% of the claim amount over and above Rs. 20 crores.

(ii) On a perusal of this Schedule, it becomes evident that every entry under "Sums in Dispute" bear upper and lower limits, barring Entry No. 6 which is the last entry and does not bear an upper limit. The "Model Fee" column also bears two kinds of figures, the base fee component and the variable fee component. The base fee is a fixed fee prescribed against the lower limit of the sums in dispute, whereas the variable fee component is prescribed in relation to the upper limit of the sums in dispute. The variable fee component, being additional in nature and calculated on a percentage basis, is dependent on the sums in dispute. Evidently, the word 'plus' employed in the preceding rows containing Entry Nos. 1 to 5 disjoint the two components of the Model Fee, which implies that the same is true for Entry No. 6. In the light of the fact that the word 'plus' is the disjunctive between the base fee and variable fee component, it is evident that the ceiling of Rs. 30,00,000/- has been imposed on the variable fee component for Entry No. 6. Absence of a comma in the English version does not materially alter the legislative intent of placing the ceiling of total chargeable fee per arbitrator under Entry no. 6 at Rs. 49,87,500/-.

(iii) Even otherwise, considering the fact that arbitrations can involve enormous sums in dispute, often running into hundreds and thousands of crores, the cap of Rs. 49,87,500/- in Entry no. 6 as the maximum fee which can be charged per arbitrator is reasonable and in furtherance of the recommendations made in the 246th Law Commission Report. The prevalent practice in some arbitration proceedings conducted under the aegis of DIAC, of capping the overall fee chargeable under Entry No. 6 at Rs.30,00,000/- does not change the text, spirit or effect of the Schedule and it is always open for a Tribunal to charge fee which is lower than that set out in Schedule-IV.

(F) Verdict of Hon'ble High Court: In these circumstances, when the interpretation of the learned Tribunal is in consonance with Schedule-IV of the Act, I find that the RVNL has been unable to make out a case for termination of the mandate of the learned Tribunal under Section 14. The petition, being meritless, is dismissed with no order as to costs.

(G) Conclusions based on the verdict of Hon'ble High Court: The High Court has held that the cap of Rs. 30,00,000/- towards arbitration fee, as given in the Entry No. 6 of the Schedule-IV of the Act, is for the second part of the fee component which is variable (i.e. 0.5% of the claim amount over and above Rs. 20, Crore) and the total arbitration fee. With this, the maximum payable arbitration fee becomes Rs. 19,87,500/- (fixed first part of the fee) + Rs. 30,00,000/- = Rs. 49,87,500/-. But it is advisable Entry No. 6 of the Schedule-IV of the Act is explicitly clarified, because different arbitral tribunals, including those constituted under aegis of DIAC, are taking different interpretations for this provision.

Chapter – 10

Arbitration Award exceeding Norms of Contract

10.1 Supreme Court Verdict dated 15.07.1991, in Civil Appeal No. 338-339 of 1991, Associated Engineering Co. Vs. Government of Andhra Pradesh

(A) Full text of the Verdict: Annexure–10.1

(B) Facts of the case, in Brief:

(i) Govt. of Andhra Pradesh (hereinafter referred as "State Govt.") entered into a contract with Associated Engineering Co. (hereinafter referred as "Contractor") for "Cement concrete lining in construction of Nagarjunasagar Dam". Some disputes arose between the parties and Arbitrator was appointed. The award made by the Arbitrator was filed before the 1st Additional Chief Judge, Civil Court, Hyderabad, which passed a decree in terms of the award with interest at 12% per annum from the date of the decree. On appeal by State Govt., the High Court set aside the decree in respect of three claims on the ground that the claims were not supported by the agreement between the parties and that the arbitrator had gone beyond the contract in awarding the claims, and confirmed the decree in respect of three other claims.

(ii) Both the Contractor and the State Govt. filed appeals with Supreme Court. The Contractor contended that since Arbitrator made a non-speaking award and did not incorporate any document as part of the award except his reference to the contract, law did not permit interference by the Court with the award, and that the High Court exceeded its jurisdiction in interfering with a non-speaking award. State Govt. contended that notwithstanding the brevity of his reasoning, the arbitrator had given a speaking award, but with errors of law and fact apparent on the face of it; and that he acted contrary to the contract, thereby exceeding his jurisdiction.

(C) Gist of submissions made by the State Govt.:

(i) Claim No. III: Escalation on napa slabs: There was no provision in the contract for escalation of the cost of napa-slabs. The escalation provided in Clause 35 of contract related to labour, diesel oil, tyres and tubes. Both the parties to the contract were bound by that price and the arbitrator had no jurisdiction to award any escalation in price of napa-slabs. This contention of Government was accepted by High Court.

(ii) Claim No. VI: Payment of Extra Lead for water: The agreement provides no payment for any lead and much less for any additional lead. The Contractor had to make its own arrangements for supply of water at work site for all purposes. In absence of any such provision, the arbitrator had no jurisdiction to allow this Claim. The High Court, accepting the contention of the State, reversed the Civil Court's decree.

(iii) Claim No. IX: Extra Expenditure incurred due to flattening of canal slopes and consequent reduction in top width of banks used as roadway: The contract did not provide for any payment for maintenance of canal slopes and consequent

deduction in top width of banks used as roadway. It was the responsibility of the Contractor to repair the banks and the contract contained no provision for payment of any amount towards the decrease in the width or otherwise. The arbitrator had no jurisdiction to award 50% extra rate and by doing so, the arbitrator acted outside his jurisdiction.

(iv) Claim No. II: Labour Escalation: The Contractor had to pay enhanced rates of wages but that did not entitle it to claim any amount in excess of what had been provided under the contract. A specific formula was prescribed in the contract and the function of arbitrator was to make award in accordance with that formula. He had no jurisdiction to alter the formula, which he has done.

(D) Gist of submissions made by the Contractor:

(i) Claim No. III, VI & IX: Being a non-speaking award, the Court cannot examine the reasons.

(ii) Claim No. II: The formula followed by the arbitrator is different from the formula prescribed under the contract. But the contract provided for payment of all wages according to the current rates and, therefore, the arbitrator was well within his jurisdiction to make an award by adopting a formula in keeping with the enhanced rates of wages, and the High Court rightly decreed the amounts under that claim in terms of the award.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) We are concerned only with Claim Nos. III, VI and IX, which are claims awarded by arbitrator and decreed by the Civil Court, but set aside by the High Court; and with Claim Nos. II, IV and VII(4) which were awarded by the arbitrator and decreed by the Civil Court as well as by the High Court.

(ii) Claim No. III, VI & IX: The High Court was right in stating that the arbitrator acted outside the contract in awarding these claims.

(iii) Claim No. II: The High Court was wrong in coming to the conclusion, which it did. There is no justification for the arbitrator to act outside the contract. He travelled outside the permissible territory and thus exceeded his jurisdiction in making the award under this claim.

(iv) Claim No. IV: Refund of excess Hire Charges of Machinery: This claim relates to "Refund of excess hire charges of machinery and payment towards losses suffered as a result of poor performance of department machinery". This claim was rightly allowed by the arbitrator and his decision was rightly upheld by High Court. The Govt. was, in terms of the contract, bound to compensate the Contractor for the excess higher charges paid as a result of the poor performance of machinery supplied by the Government.

(v) Claim No. VII(4): Sand Conveyance: The arbitrator says, *"The diesel oil requirement shall be taken as 0.35 lit for item No. 5 of statement (A) at page 59 of Agreement as indicated in the original tender and not as 0.035 and price adjustment made accordingly".* The arbitrator was, in our view, right in so stating and the High Court, in our view, rightly upheld this claim.

(vi) The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. He commits misconduct, if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to malafide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority, vitiates the award.

(vii) In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself.

(viii) In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed.

(F) Verdict of Hon'ble Supreme Court: In the circumstances, we affirm the judgment of the High Court under appeals except in respect of Claim No. II. Accordingly, the appeals of the contractor are dismissed; and, the appeals of the Govt. are allowed in respect of claim No. II. We do not, however make any order as to costs. Appeals dismissed.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The sole function of the arbitrator is to arbitrate in terms of the contract. The arbitrator cannot act independently of the contract. If he travels outside the contract conditions, he acts without jurisdiction. In his award, if the arbitrator decides the matters excluded by the agreement, it amounts to misconduct. A deliberate departure from contract not only amounts to manifest disregard of his authority or misconduct on his part, but it may tantamount to mala fide action also. A conscious disregard of provisions of the contract, vitiates the award.

(ii) In order to see what the jurisdiction of the arbitrator was, the Court may see what dispute was submitted to arbitrator. If that is not clear from the award, it is open to the Court to have recourse to outside sources like affidavits & pleadings of parties and the contract agreement etc.

(iii) In this verdict, the Supreme Court has come down very heavily on the arbitral awards not conforming to the norms/conditions of the contract.

10.2 Supreme Court Verdict dated 17.02.1997, in Civil Appeal No. 808 of 2997, New India Civil Erectors (P) Ltd. Vs. Oil & Natural Gas Corporation

(A) Full text of the Verdict: Annexure–10.2

(B) Facts of the case, in Brief:

(i) A contract was entered into between New India Civil Erectors (P) Ltd. (hereinafter referred as "Contractor") and Oil & Natural Gas Corporation (hereinafter referred as "ONGC") for "Construction of 304 nos. pre-fabricated housing units at Panvel, Phase-I". The contractor did not complete the work even within the extended period. The ONGC terminated the contract and got the work completed through another agency. Disputes arose between the parties, with each party raising claims against the other, which were referred for decision to two arbitrators. By their award dated 18.06.1991, the arbitrators decided that the ONGC shall pay to the contractor a sum of Rs. 1,09,04,789/- and the contractor shall pay to ONGC a sum of Rs. 41,22,178/- (i.e. the contactor to be paid net amount of Rs. 67,82,620/-) with interest at the rate of 18% per annum from the date of award till the date of payment or till the date of decree whichever was earlier.

(ii) While the contractor applied for making the said award a Rule of the Court, ONGC filed objections seeking to have the award set aside. The learned Single Judge overruled the objections of ONGC and made the award a Rule of the Court. ONGC filed appeal against the same, with Division Bench of the High Court, which was partly allowed. The present appeal with the Supreme Court, was filed by the contractor.

(C) Gist of submissions made by the Contractor:

(i) Claim No. 4: This claim was on account of the shortage of cement in the bags supplied by ONGC, which had undertaken to supply cement in bags, each bag containing 50 kg. of cement. But the cement actually found in the bags was less. This was complained to the officers of ONGC from time to time and a record of the shortages was also kept by the parties. Their letter dated 05.08.1984, which was in the nature of a counter-offer, clearly stated that "*Ordinary Portland Cement, Rs 8.30 per metric tonne [each 50 kg. bag]" will be supplied by ONGC "at site*". The terms in the said letter take precedence over tender conditions. The said letter forms part of the contract between the parties and that indeed it is this letter which contains the arbitration clause. In their acceptance letter dated 10.01.1985, ONGC merely stated that the cement will be supplied only at Bombay and not at the site, but did not say anything with respect to the stipulation in the contractor's letter dated 05.03.1984 that each bag of cement supplied to it shall contain 50 kg. of cement.

(ii) Claim No. 6: The dispute between the parties is with respect to the method/mode of measuring the constructed area. The plans attached with tender notice were modified later and that the flats as finally constructed, did not have any balconies and, hence, no question of excluding the balconies area can arise.

(iii) Claim No. 9: The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period.

(D) Gist of submissions made by the ONGC:

(i) Claim No. 4: According to the stipulation contained in Tender notice, ONGC was not to be held responsible for any variation in the weight of the cement in the bags supplied by them. The relevant stipulation read that "… *Twenty bags of cement shall mean one metric tonne for the purpose of recovery irrespective of variation in standard weight of cement filled in bags*."

(ii) Claim No. 6: According to the tender conditions, as well as Clause 10 of the letter dated 05.03.1984 (written by the contractor to ONGC), the area covered by balconies is liable to be excluded from the measurements.

(iii) Claim No. 9: The acceptance letter dated 10.01.1985 clearly stated that "*the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work*".

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The contactor had raised 19 claims and ONGC had submitted 3 counter claims. The arbitrators rejected contractor's Claim Nos. 3, 5, 7, 8, 10, 11, 12 and 18, but awarded various amounts under other claims, the total of which came to Rs. 1,09,04,789/-. For ONGC's counter claims, the arbitrators rejected Claim No. 2 but accepted Claim No. 1 (partly) and awarded total amount of Rs. 41,22,178/-. In the appeal before the Division Bench, ONGC confined its attack only to claims 1, 4, 6, 9 and 13. The Division Bench rejected ONGC's contention with respect to Claims 1 and 13 but upheld the same with respect to Claims 4, 6 and 9. Only the contractor has come to this Court challenging the Judgment of the Division Bench. We shall deal with these three claims in their proper order.

(ii) Claim No. 4: On this count, the appellant claimed a sum of Rs. 3,96,984.50, against which the arbitrators awarded an amount of Rs. 3,70,221.50. The Division Bench has not referred to the letter dated 05.03.1984 nor the acceptance letter dated 10.01.1985, but rejected the contractor's claim only and exclusively with reference to the stipulation in the schedule to the Tender notice. It appears to be border-line case and it is possible to take either view. It must be remembered that in this case there is no formal contract and the terms of the agreement have to be inferred from the Tender Notice and the correspondence between the parties. Since the attempt of the Court should always be to support the award within the letter of law, we are inclined to uphold the award on this count. Accordingly, we reverse the judgment of the Division Bench to the above extent. The amount awarded by the arbitrators under this claim is affirmed.

(iii) Claim No. 6: The claim under this head was of Rs. 53,11,735.60, against which the Arbitrators have awarded an amount of Rs. 49,91,327/-. The tender condition clearly provides that "*work should be measured on the built-up area excluding balcony area*". It is undisputed that in the plan of the flats attached to the Tender Notice, balconies were provided. The contractor could not have constructed flats except in accordance with the plans attached to the Tender

Notice, unless there was a later mutually agreed modified plan – and there is none in this case. We must proceed on the assumption that the plans attached to the Tender notice are the agreed plans and that construction was done according to them and that in the light of the agreed stipulation, the areas covered by balconies should be excluded. Therefore, we agree with the Division Bench that the arbitrators over-stepped their authority by including area of the balconies in the measurement of the build-up area. It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. We, therefore, affirm the decision of the Division Bench on this score.

(iv) Claim No. 9: The contractor claimed an amount of Rs. 32,21,099.89 under this head, against which the arbitrators awarded a sum of Rs. 16,31,425/-. In the face of express stipulation between the parties, the contractor could not have claimed any amount on account of escalation in the cost of construction after expiry of the original contract period. This stipulation between the parties is binding upon them both and the arbitrators. The arbitrators could not, therefore, have awarded any amount on the ground that the contractor must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The learned single Judge was not right in holding that the said prohibition is confirmed to the original contract period and does not operate thereafter. Merely, because the time was made the essence of the contract and the work was completed within 15 months, it does not follow that the aforesaid stipulation was confirmed to the original contract period. It was a clear case of the arbitrators acting contrary to the stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this Count as well.

(F) Verdict of Hon'ble Supreme Court: For the above reasons, the appeal is allowed in part, i.e., to the extent of Claim No. 4 (in a sum of Rs. 3,70,221.50). In other respects, the appeal is dismissed. There shall be no order as to costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court: The Supreme Court has held that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the stipulation/condition contained in the contract agreement between the parties.

10.3 Supreme Court Verdict dated 01.09.1999, in Civil Appeal No. 507 of 1992, Steel Authority of India Limited Vs. J. C. Budharaja

(A) Full text of the Verdict: Annexure–10.3

(B) Facts of the case, in Brief:

(i) National Mineral Development Corporation (NMDC), predecessor of the Steel Authority of India Limited (hereinafter referred as "SAIL") executed a contract on 01.08.1977, with J. C. Budharaja (hereinafter referred as "Contractor") for "Construction of tailing-cum-storage reservoir at Kundi for Megha Taburu Iron Ore Project". The work was to be completed within a period of two years. During this period, SAIL became the employer in place of NMDC. Further, the contractor also died and was succeeded by his successor. On 29.08.1979, the contractor raised claims of about Rs. 18 lakhs as damages for delay in handing over work sites and allied reasons. On 20.12.1980, a supplementary agreement was executed between SAIL and the contractor for the same work at an increased rate. On 03.09.1983, the contractor wrote a letter to SAIL repeating the claims of Rs. 18 lakhs, as raised in their letter dated 29.08.1979.

(iii) Thereafter, dispute arose for the work with regard to supplementary agreement dated 20.12.1980, wherein the contractor raised certain claims relating to the work done under the first agreement. SAIL replied that the claim could not be decided by the Arbitrators as the same was pertaining to previous agreement. The contractor gave notice dated 02.12.1985 to appoint arbitrator as provided under the first agreement. On 10.12.1985, SAIL appointed sole arbitrator with reservation regarding the tenability, maintainability and validity of the reference, as also on further grounds that the claim was barred by the period of limitation and that it pertained to "excepted matters" of General Conditions of Contract. On 11.07.1986, the arbitrator gave an award pertaining to the dispute under the supplementary agreement. Against the Claim No. 1 of about Rs. 17 lakhs pertaining to first agreement, the arbitrators awarded Nil. This award was made rule of the Court by the High Court of Delhi.

(iv) Meanwhile, SAIL challenged the jurisdiction of the sole arbitrator and the High Court dismissed the Revision Application on 22.08.1988. On 18.11.1988, the arbitrator made an award granting damages to the tune of Rs. 11,26,296/- as principal sum (unliquidated damages) and a further sum of Rs. 12,06,000/- as interest on the above principal amount from 29.08.1979 till the date of the Reference, i.e. 15.12.1985. The arbitrator also awarded future interest at the rate of 17% from the date of the award to the date of payment or the date or decree whichever is earlier. By order dated 02.04.1990, the Subordinate Judge, 1st Court, Chas, made the award rule of the court with a modification for the payment of interest from the date of the decree at the rate of 8% on the principal amount or unpaid part till the date of actual payment. The appeal filed by SAIL before the Patna High Court, Ranchi Bench, against the said judgment and decree was also dismissed on 11.09.1991. This appeal, with Supreme Court, was filed by SAIL against the judgment of the High Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) From the Award, it is apparent that damages are granted for delay in obtaining permission(s) from the Forest Department for executing the main work and allied activities inside wildlife sanctuary. Clause 32 of the agreement specifically stipulated that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the contractor is required to arrange his working programme accordingly. Clause 39 further stipulated that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the NMDC and the contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of Government or other reasons beyond the control of either the NMDC or the Contractor. Obtaining permission from Forest Department to carry out the work in wild life sanctuary depends on statutory regulations. Clause (vi) of GCC also provided that failure or delay by the NMDC to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by NMDC which due to any other cause whatsoever would not entitle the contractor to damage or compensation thereof; in such cases, the only duty of NMDC was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to malafide action.

(ii) The Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. Interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, if the arbitrator ignores conditions of contact and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction.

(iii) In view of the aforesaid settled law, the award passed by the arbitrator is against the conditions agreed by the contracting parties and is in conscious disregard of stipulations of the contract from which the arbitrator derives his authority. His appointment as a sole arbitrator itself was conditional one and he was informed that the same was with reservation regarding the tenability, maintainability and validity of the Reference as also on further grounds that the claim was barred by the period of limitation and that it pertained to "excepted matters" of general conditions of the contract. Despite this he has ignored the stipulations and conditions between parties. Hence, the said award is, on the face of it, illegal.

(D) Verdict of Hon'ble Supreme Court: In the result, the appeal is allowed with costs. The impugned order passed by the Patna High Court, Ranchi Bench, and the order passed by the Subordinate Judge, 1st Court, Chas, in Arbitration Suit are quashed and set aside.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. The Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. It is not open to the arbitrator to ignore the conditions of contact and by doing so he acts beyond the jurisdiction conferred upon him. The deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on part of arbitrator, but it may tantamount to malafide action also.

(ii) Interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, if the arbitrator ignores conditions of contact and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction.

10.4 Supreme Court Verdict dated 17.04.2003, in Civil Appeal No. 7419 of 2001, Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.

(A) Full text of the Verdict: Annexure–10.4

(B) Facts of the case, in Brief:

(i) In response to a tender invited by Oil and Natural Gas Corporation (hereinafter referred as "ONGC"), Saw Pipes Limited (hereinafter referred as "Contractor") vide its letter dated 27.12.1995, on agreed terms and conditions, offered to supply "26" diameter and 30" diameter casing pipes". ONGC by letter of intent dated 03.06.1996, followed by a detailed order, accepted the offer of the Contractor. The goods were required to be supplied before 14.11.1996. The raw materials were required to be procured from the reputed and proven manufacturers/suppliers approved by ONGC as listed therein. By letter dated 08.08.1996, the contractor placed an order for supply of steel plates with an Italian suppliers stipulating that material must be shipped latest by the end of Sept'1996. All over Europe, including Italy, there was a general strike of the steel mill workers during Sept/Oct'1996. Therefore, contractor by its letter dated 28.10.1996 conveyed to ONGC that Italian supplier was unable to deliver the material as per agreed schedule. The contractor, therefore, requested for an extension of 45 days' time in view of the reasons beyond its control. By letter dated 04.12.1996, the time for delivery was extended with a specific statement inter-alia that liquidated damages for delay in supply would be recovered.

(ii) ONGC made payment after deducting an amount of US $ 3,04,970.20 and Rs. 15,75,559/- as liquidated damages, which was disputed by the contractor. The dispute was referred to the arbitral tribunal, which arrived at the conclusion that strikes affecting the supply of raw material are not within the definition of "Force Majeure" in the contract, and hence, on that ground, it cannot be said that the amount of liquidated damages was wrongfully withheld. Thereafter, the arbitral tribunal arrived at the conclusion that it was for ONGC to establish that they had suffered any loss because of the breach committed by the contractor in not supplying the goods within time. The arbitral tribunal thereafter appreciated the evidence and arrived at the conclusion that it was clear that shortage of casing pipes was only one of the other reasons which led to the change in the deployment plan and that ONGC failed to establish its case that it has suffered any loss in terms of money because of delay in supply of goods under the contract. Hence, the arbitral tribunal held that ONGC had wrongfully deducted the amounts. The arbitral tribunal held that the contractor was entitled to recover the said amount with interest at a rate of 12% p.a. from 01.04.1997 till the date of the filing of statement of claim and thereafter at the rate of 18% per annum pendente-lite till payment is made.

(iii) The ONGC challenged the arbitral award dated 02.05.1999, by filing Arbitration Petition before the High Court of Bombay, which was dismissed. The appeal preferred before the Division Bench of the High Court was also dismissed. Hence, the present appeal was filed by the ONGC, before the Supreme Court.

(C) Gist of submissions made by the ONGC:

(i) There was delay on the part of contractor in supplying pipes and for the delay, ONGC was entitled to recover agreed liquidated damages. Thereby, the award was contrary to Section 28(3) of the Act which provides that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract.

(ii) The award is on the face of it illegal and erroneous as it arrived at the conclusion that ONGC was required to prove the loss suffered by it before recovering the liquidated damages. The arbitral tribunal misinterpreted the law on the subject.

(iii) The award granting interest, on the liquidated damages deducted, is unjustified, unreasonable and against the specific terms of the contract, namely Clause 34.4 of the agreement, which provides that on "disputed claim", no interest would be payable.

(D) Gist of submissions made by the Contractor:

(i) It is settled law that for the breach of contract provisions of Section 74 of the Contract Act would be applicable and compensation/damages could be awarded only if the loss is suffered because of the breach of contract.

(ii) This Court has also held that the plaintiff claiming liquidated damages has to prove the loss suffered by him. In any case, even if there is any error in arriving at the said conclusion, the award cannot be interfered with under Section 34 of the Act.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) For construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If the words are clear, there is very little the court can do about it. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods.

(ii) In arbitration proceedings, the arbitral tribunal is required to decide the dispute in accordance with the terms of the contract. The agreement between the parties specifically provides that without prejudice to any other right or remedy if the contractor fails to deliver the stores within the stipulated time, ONGC will be entitled to recover from the contractor, as agreed, liquidated damages. This is what is provided in Section 73 of the Contract Act. Further, at the time when contractor sought extension of time for supply of goods, time was extended with a specific demand that the clause for liquidated damages would be invoked. Despite this specific letter written by ONGC, the contractor had supplied the goods which would indicate that even at that stage, contractor was agreeable to pay liquidated damages.

(iii) Section 74 of the Contract Act is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree.

(iv) It is true that if the arbitral tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But if contractual terms are taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. The reference to the arbitral tribunal was not with regard to interpretation of question of law. It was only a general reference with regard to claim of respondent. Hence, if the award is erroneous with regard to proposition of law or its application, the Court will have jurisdiction to interfere with the same.

(F) Verdict of Hon'ble Supreme Court: For the reasons stated above, the impugned award directing the ONGC to refund the amount deducted for the breach as per contractual terms requires to be set aside and is hereby set aside. The appeal is allowed accordingly. There shall be no order as to costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) For interpretation of contract conditions, the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement.

(ii) In arbitration proceedings, the arbitral tribunal is required to decide the dispute in accordance with the terms of the contract.

(iii) If contractual terms are taken into consideration and the award is erroneous and in violation of the terms of the contract, it violates Section 28(3) of the Arbitration Act. The Court will have jurisdiction to interfere with such awards.

10.5 Supreme Court Verdict dated 10.04.2007, in Civil Appeal No. 1874 of 2007, Food Corporation of India Vs. M/s. Chandu Construction & Others

(A) Full text of the Verdict: Annexure–10.5

(B) Facts of the case, in Brief:

(i) Food Corporation of India (hereinafter referred as "FCI") entered into a contract with M/s Chandu Construction (hereinafter referred as "Contractor"), on 19.09.1984, for "Construction of 50000 MT capacity conventional godowns in 10 units along with ancillary work and services". The work was to be completed within 10 months from 30th day of issue of the orders. As the contractor could not complete the work within the stipulated time, which was once extended, the FCI terminated the contract on 15.11.1987. The contractor invoked the arbitration clause and requested the FCI to appoint an arbitrator. Since there was no response from the FCI, the contractor filed a suit in the High Court for appointment of an arbitrator. An arbitrator was appointed, who gave his award on 27.08. 1998. As payment in terms of the award was not made, the contractor again moved the High Court. The FCI filed a petition in the High Court for setting aside of the award. With the consent of parties, the award was set aside, and the matter was remitted to the Arbitrator for fresh adjudication.

(ii) In fresh proceedings before the Arbitrator, the stand of the contractor, for Claim No. 9 was that the rate quoted by them for filling the plinth under floors in item No. 1.7 of the Schedule of rates was only for labour and did not cover "providing or supplying sand"; yet they were required to supply sand and as such they are entitled to be paid Rs. 8,23,101/- on this account. As per FCI, the contract clearly stipulated that the work was to be carried out as per specifications contained in Volume I and II of C.P.W.D. Manual, Para 2.9.4, which provided that the "Rate" includes the cost of materials and labour and, therefore, the contractor was not entitled to any extra amount for supply of sand.

(iii) The arbitrator gave his award on 31.12.2003, accepting the said claim for Rs. 8,23,101/-. The FCI filed objections against the award under Section 30 of the Indian Arbitration Act-1940, with the Bombay High Court; but it was dismissed. The FCI carried the matter in appeal before the Division Bench of High court, where FCI also attempted to raise the issue of award of interest by the Arbitrator, which was not permitted on the ground that the issue was neither taken up before the Arbitrator nor was raised before the Single Judge. The Division Bench dismissed this appeal on 14.10.2005. The present appeal was filed by FCI, before the Supreme Court, against the final judgment and order passed by the Division Bench of the High Court.

(C) Gist of submissions made by the FCI: The claim for supply of sand against Claim No. 9 was opposed to the terms of the contract between the parties. The relevant clause of the contract is clear, unambiguous and admits of no such interpretation, as has been given by the arbitrator. The arbitrator has misconducted himself in awarding additional amount of Rs. 8,23,101/- in favour of the claimants, which deserves to be set aside.

(D) Gist of submissions made by the Contractor: It was within the domain of the arbitrator to construe the terms of contract in the light of the evidence placed on record by the contractor, particularly the terms of similar contracts entered into by the FCI with the other contractors.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) While considering objections under Section 30 of the Arbitration Act-1940, the jurisdiction of the Court to set aside an award is limited. One of the grounds, stipulated in the Section, on which the Court can interfere with the award is when the arbitrator has "misconducted" himself. The word "misconduct" has neither been defined in the Act nor is it possible for the Court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word "misconduct" does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result.

(ii) The arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. If the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction; but if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.

(iii) The contract was to be executed in accordance with the C.P.W.D. specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. The contractor had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. The arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor had been separately paid for the material.

(iv) Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has out-stepped confines of the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of claim No. 9, on the face of it, is beyond his jurisdiction; is illegal and needs being set aside.

(F) Verdict of Hon'ble Supreme Court: The appeal is allowed and the impugned judgment of the High Court, to the extent it pertains to Claim No. 9 is set aside. However, on the facts and circumstances of the case, there shall be no order as to costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error, falling within the ambit of legal misconduct which could be corrected by the Court. If the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction; but if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.

(ii) In case the arbitrator out-steps confines of the contract, the arbitrator misdirects and misconducts himself. Award by arbitrator in such cases is beyond his jurisdiction; is illegal and needs to be set aside by the Court.

10.6 Supreme Court Verdict dated 08.10.2010, in Civil Appeal No. 8817 of 2010, Oil & Natural Gas Corporation Vs. M/s Wig Brothers Builders & Engineering Pvt. Ltd.

(A) Full text of the Verdict: Annexure–10.6

(B) Facts of the case, in Brief:

(i) Oil and Natural Gas Corporation (hereinafter referred as "ONGC") entrusted a construction work to M/s Wig Brothers Builders & Engineering Pvt. Ltd. (hereinafter referred as "contractor") under a contract dated 11.10.1983. Certain disputes arose between the parties and they were referred to a sole arbitrator on 31.12.1986. The contractor made several claims aggregating to Rs. 82,89,000/-. ONGC made counter claims aggregating to Rs. 1,24,87,000/-. The arbitrator awarded claims aggregating to Rs. 25,26,270/-, with 12% pendente-lite interest and 6% from the date of the award/decree. The counter claims were rejected.

(ii) The ONGC challenged the said award, by filing a petition under Section 30 and 33 of the Arbitration Act-1940, before the Additional District Judge, Dehradun, which was dismissed and the award was made a rule of the court. ONGC filed an appeal before the Uttarakhand High Court and by the judgment dated 14.06.2007, the High Court upheld the judgment of the Civil Court making the award the rule of the court, subject only to one change, by reducing the rate of pendente lite interest from 12% to 6% per annum. The said judgment is challenged by ONGC, in this appeal before the Supreme Court.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) An award is not open to challenge on the ground that the arbitrator had reached a wrong conclusion or had failed to appreciate some facts. But if there is an error apparent on the face of the award or if there is misconduct on the part of the arbitrator or legal misconduct in conducting the proceedings or in making the award, the court will interfere with the award. Keeping the said principles in view, we will consider the challenge.

(ii) The award has been made with reference to several claims. ONGC has not been able to make any valid ground to attack except with reference to Claim No. 1, which relates to the claim for compensation for loss due to prolongation of the completion period on account of the ONGC's failure to perform its contractual obligations. The arbitrator has held that the delay in completion was due to the fault of both the contractor and ONGC and that both are equally liable for the delay of 19 months. The arbitrator held that as both were equally liable, the contractor was entitled to compensation at the rate of Rs. 1 lakh for a period of 9 months (half of the period of delay of 19 months) in all Rs. 9,50,000/-. The arbitrator has observed that there is no provision in the contract by which the contractor can be estopped from raising a dispute in regard to the said claim. But Clause 5A of the contract pertains to extension of time for completion of work and it specifically bars any claim for damages.

(iii) In view of the above, in the event of the work being delayed for whatsoever reason, that is even delay which is attributable to ONGC, the contractor will only

be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs. 9.5 lakhs. This aspect is covered by several decisions of this Court i.e. *Associated Engineering Co. vs. Government of A.P., Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises* and *Ramnath International Construction (P) Ltd. v. Union of India.*

(D) Verdict of Hon'ble Supreme Court: In view of the above, the award of the arbitrator, in violation of the bar contained in the contract, has to be held as one beyond his jurisdiction requiring interference. Consequently, this appeal is allowed in part, as follows:

(a) The judgment of the High Court and that of the civil court making the award the rule of the court is partly set aside in so far as it relates to the award of Rs. 9.5 lakhs under Claim No. 1 and the award of interest thereon.

(b) The judgment of the civil court as affirmed by the High Court in regard to other items of the award is not disturbed.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The contract agreement in this case had a clause that *"In the event of delay by the Engineer-in-Charge to hand over to the contractor possession of land/lands necessary for the execution of the work or to give the necessary notice to the contractor to commence work or to provide the necessary drawing or instructions or to do any act or thing which has the effect of delaying the execution of the work, then notwithstanding anything contained in the contract or alter the character thereof or entitle the contractor to any damages or compensation thereof but in all such cases the Engineer-in-Charge may grant such extension or extensions of the completion date as may be deemed fair and reasonable by the Engineer-in Charge and such decision shall be final and binding".*

(ii) The Supreme Court has held that in view of the above clause, in the event of the work being delayed for whatsoever reason, that is even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation to contractor due to prolongation of the completion period on account of the ONGC's failure to perform its contractual obligations.

(iii) In case of Railway contracts, Clause 17-A of GCC, for "Extension of Time in Contracts", carries similar stipulations. Therefore, no compensation can be demanded by the contractor, in case of extension of date of completion under this clause of GCC.

10.7 Supreme Court Verdict dated 11.05.2020, in Civil Appeal No. 673 of 2012, South East Asia Marine Engineering and Constructions Ltd. Vs. Oil India Limited

(A) Full text of the Verdict: Annexure–10.7

(B) Facts of the case, in Brief:

(i) M/s south East Asia marine Engineering and constructions Ltd. (hereinafter referred as "contractor") was awarded a contract on 20.07.1995, by Oil India Limited (hereinafter referred as "OIL") for the purpose of "Well drilling and other auxiliary operations in Assam, for a period of 1 year from 05.06.1996". The contract was extended for two successive periods of one year each, by mutual agreement, and finally the contract expired on 04.10.2000. During the contract execution period, the prices of High Speed Diesel, one of the essential materials for carrying out the drilling operations, increased. The contractor raised a claim that increase in the price of HSD, triggered the "change in law" clause under the contract and the OIL is liable to reimburse them for the same. When the OIL kept on rejecting the claim, the contractor invoked the arbitration clause vide letter dated 01.03.1999. The dispute was referred to an Arbitral Tribunal comprising of three arbitrators.

(ii) On 19.12.2003, the Arbitral Tribunal issued the award. The majority opinion allowed the claim of the contractor and awarded a sum of Rs. 98,89,564.33 with interest @10% per annum from the date of the award till the recovery of award money. The amount was subsequently revised to Rs. 1,32,32,126.36 on 11.03.2005. The Arbitral Tribunal held that while an increase in HSD price through a circular issued under the authority of State or Union is not a "law" in the literal sense, but has the "force of law". The minority opinion held that the executive orders do not come within the ambit of contract clause about "change in law".

(iii) The OIL challenged the award under Section 34 of the Arbitration Act before the District Judge. On 04.07.2006, the District Judge upheld the award.

(iv) The OIL challenged the order of the District Judge by filing an appeal under Section 37 of the Arbitration Act, before the High Court. By the judgment dated 13.12.2007, the High Court allowed the appeal and set aside the award passed by the Arbitral Tribunal. Aggrieved by the same, the Contractor filed the present appeal before the Supreme Court.

(C) Gist of submissions made by the Contractor:

(i) The construction of Clause 23 of the contract regarding "change in law" is a matter of interpretation and has been correctly interpreted by the Arbitral Tribunal based on the authorities cited before it. The High Court has imparted its own personal view as to the intent for inclusion of Clause 23 and has sat in appeal over the award of the Arbitral Tribunal.

(ii) If two views are possible on a question of law, the High Court cannot substitute one view and deference should be given to the plausible view of the

Arbitral Tribunal. Reliance was placed upon a judgment of the Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd*.

(iii) The question of law decided by the Arbitral Tribunal is beyond judicial review and thus the High Court could not have interfered with a reasoned award which was neither against public policy of India nor patently illegal.

(D) Gist of submissions made by the OIL:

(i) The Arbitral Tribunal has to adjudicate the dispute within the four corners of the contract and thus awarding additional reimbursement, not contemplated under Clause 23, is perverse and patently illegal.

(ii) Overlooking the terms and conditions of a contract is violative of Section 28 of the Arbitration Act and, thus, the tribunal has exceeded its jurisdiction. This is not a case where the Arbitral Tribunal accepted one interpretation of the terms of the contract where two interpretations were possible. Findings of the Tribunal are perverse and unreasonable as the Tribunal did not consider the contract as a whole and failed to follow the cardinal principle of interpretation of contract.

(iii) The Arbitral Tribunal has rewritten the contract in the guise of interpretation and such interpretation being in conflict with the terms of the contract, is in conflict with the public policy of India.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) It is a settled position that a Court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the Courts. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. However, the question in the present case is whether the interpretation provided to the contract in the award of the Tribunal was reasonable and fair, so that the same passes the muster under Section 34 of the Arbitration Act.

(ii) Clause 23 of the contract provided that *"SUBSEQUENTLY ENACTED LAWS: Subsequent to the date of Price Bid Opening if there is a change in or enactment of any law or interpretation of existing law, which results in additional cost/ reduction in cost to Contractor on account of the operation under the Contract, the Company/Contractor shall reimburse/pay Contractor/Company for such additional/reduced cost actually incurred".* The interpretation of Clause 23 of the Contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.

(iii) The contract was based on a fixed rate and the contractor entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into

margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23, to include change in rate of HSD, is not a possible interpretation of this contract.

(iv) The other contractual terms also suggest that the interpretation of the clause, as suggested by the Arbitral Tribunal, is perverse. For instance, Item 1 of List-II (Consumables) of Exhibit-C (Consolidated Statement of Equipment and Services Furnished by Contractor or Operator for the Onshore Rig Operation), indicates that fuel would be supplied by the contactor, at his expense. The existence of such a clause shows that the interpretation of the contract by the Arbitral Tribunal is not a possible interpretation of the contract.

(F) Verdict of Hon'ble Supreme Court: For the aforesaid reasons, we are not inclined to interfere with the impugned judgment and order of the High Court setting aside the award. The appeal is accordingly dismissed. There shall be no order as to costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The thumb rule of interpreting any contract is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory.

(ii) When the contract is based on a fixed rate, no compensation can be granted to the Contractor due to fluctuations in the rates of input materials or consumables, other than those provided explicitly in the contract. Price fluctuations will always be there, and a prudent contractor would have taken these into margin, while bidding for the tender.

Chapter – 11

Interest for Pre-award Period

11.1 Delhi High Court Verdict dated 30.11.2005, in IA 9619/2005 (OMP 437/2005), Union of India Vs. Pradeep Vinod Construction Co.

(A) Full text of the Verdict: Annexure–11.1

(B) Facts of the case, in Brief: This was a Railway Contract, wherein the disputes between Railway and Pradeep Vinod Construction Co. (hereinafter referred as "contractor") were referred to an Arbitral Tribunal of three Arbitrators. The Tribunal published the award on 16.08.2005. One of the claims, on which award was given was "interest on the sum awarded for some of the claims". Railway challenged this award under Section 34(2)(a) of the Arbitration and Conciliation Act-1996.

(C) Submission(s) by the Railway side, with regard to "interest":

(i) The award in certain matters is contrary to the terms of the contract. In the judgment of the apex court in *ONGC vs Saw Pipes Ltd*., it was held that the words "public policy of India" has to be given wider meaning and where an award is patently illegal, the award is likely to be interfered with. Further if an award is patently contrary to the terms of the contract, the court is entitled to interfere with the award.

(ii) No interest ought to have been awarded in view of there being a specific stipulation to the contrary contained in Clause 16(c) of GCC, which stipulated that "*No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract…*".

(D) Some relevant observations of the Hon'ble High Court:

(i) While scrutinizing the aspect "public policy of India", it is not as if the award is required to be interfered with merely because there is another possible view to be taken on the finding arrived by the arbitrator. The award must be perverse in its reasoning while considering whether a particular aspect is or not incorporated in the contract. So long as the view taken by the arbitrator is a plausible view, though perhaps not the only correct view, the award ought not to be interfered with by the court.

(ii) Reference was made to a judgment of the Division Bench of the Gauhati High Court in *Union of India v. Major V Ninhawan (Retd) & Anr* where the same clause has been considered. The Division Bench came to the conclusion that there appeared to be a complete bar for grant of interest under the said clause on amounts payable in respect of refund of earnest money, security deposit or amounts payable to the contractor under the contract. Railway side submits that the amounts awarded are the amounts payable to the contractor under the contract.

In my considered view, what is envisaged by the said expression "amounts payable to the contractor under the contract" would mean the amounts which have to be paid in normal course to the contractor. This expression has to be

also read with two other stipulations in respect of earnest money and security deposit. The object is that the earnest money and security deposit are liable to be detained till the completion of the contract. Not only amounts are payable to the contractor at various stages of the contract but there will be differences between the dates when such bills are raised and amounts are paid. It is in respect of these payments, on which no interest is payable. It cannot be said that if Railway unreasonably detains any amount, no interest would be payable. Similarly, if it is found that there are claims arising on account of eventualities like additional work, breach by the petitioner of the terms of the contract, then the arbitrators cannot be said to be devoid of any authority to compensate the suffering party by grant of interest.

(E) Verdict of Hon'ble High Court: In view of the aforesaid position, despite the strenuous and erudite effort of the learned counsel for the Railway, I am unable to persuade myself to agree with the submissions made by learned counsel for the Railway. The petition is dismissed.

(F) Conclusions based on the verdict of Hon'ble High Court

(i) In this case, the Arbitral Tribunal has given award on the claims due to extra lead involved in earthwork arising from a ban imposed by the government after issuance of acceptance letter, wastage of labour due to Railway failing to provide the requisite traffic blocks and expenses incurred for employment of caution men. Interest on these amounts was also allowed by the Arbitral Tribunal, as award on one of the claims, for the period till pronouncement of the award.

(ii) With regard to the payment of interest, the court has held that "any amount(s) unreasonably detained/held from the contractor, by the by Railway, do not come under the category of "amounts payable to the contractor under the contract" on which no interest is payable as per Clause 16(2) of Railway's GCC.

(iii) But it is relevant to note here that in many cases after this verdict by the High Court, a larger bench of the Delhi High court as well as Supreme Court (including a three judge Bench of the Supreme Court) has examined this issue. These cases are discussed subsequently. The apex court has held that as per Section 31(*7*)(*a*) of the Arbitration Act-1996, unless otherwise agreed by the parties, the arbitral tribunal can award interest on sum for which the award is made, at such rate as it deems reasonable, for the whole or any part of the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite). But as per Clause 16(2) of GCC, "*No interest shall be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the Contract*". Also as per Clause 64.5 of the GCC, "w*here the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made".* These clauses of GCC, framed in conformity with the provisions of the Act, specifically bar award of any interest by the arbitrator on Earnest Money or Security Deposit or amounts payable to the Contractor under the Contract or any other award amount for some other claims, for the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite).

11.2 Supreme Court Verdict dated 08.05.2008, Civil Appeal No. 7340 of 2002, M/s M. B. Patel & Co. Vs. Oil & Natural Gas Corporation

(A) Full text of the Verdict: Annexure–11.2

(B) Facts of the case, in Brief:

(i) In an arbitration case, M/s M. B. Patel & Co. (hereinafter referred as "Contractor") claimed Rs. 30,425/- for abandonment of contract as first claim. The second claim was for Rs. 30,213/- for illegal deductions made by Oil and Natural Gas Corporation (hereinafter referred as "ONGC"). The third claim was for Rs. 2,00,000/- for not supplying the material in time by the ONGC. The fourth claim was for Rs. 3,50,000/- for loss occasioned by the contractor for keeping his establishment alive. The fifth claim for Rs. 1,80,000/- was on loss of profit at the rate of 20%. Last claim was for interest at the rate of 18% p.a. The Arbitrator awarded Rs. 5,98,438/- as lump sum award amount.

(ii) The award was challenged by ONGC and the award was set aside by the High Court of Gujarat, vide order dated 11.07.2000, on following grounds:

(a) that arbitrator or umpire has misconducted himself in the proceedings;

(b) that there appears to be an error on the face of the record inasmuch as the Umpire has overlooked Clauses 14 & 18 of the Arbitration Agreement;

(c) that the Umpire has travelled beyond the scope of the contract between the parties on certain items and claims; and

(d) that he has rendered lump sum award making it totally unintelligible.

(iii) The contractor challenged verdict of the High Court, through this Civil Appeal, in the Supreme Court.

(D) Some relevant observations of the Hon'ble Supreme Court:

(i) As per Clause 18 of the Arbitration Agreement "*No interest will be payable on the security deposit or any other amount payable to the CONTRACTOR under the contract*". The Arbitrator has awarded interest at the rate of 12% on the amount with effect from 09.02.1984 to 03.05.1985 (pendente lite) and also awarded interest at the rate of 12% on the amount till the date of decree or actual date of payment, whichever is earlier.

(ii) The interest has been awarded in violation of Clause 18 of the Agreement. Apart from others, this legal aspect has not been considered by the Arbitrator. We are, therefore, in full agreement with the reasoning given by the High Court.

(E) Verdict of Hon'ble Supreme Court: The Arbitrator may now proceed with the arbitration but in the light of the judgment of the High Court. We direct the Arbitrator to consider the matter afresh in the light of the reasoning of the High Court. Subject to the aforesaid, the appeal is dismissed.

(F) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) The apex court has held that awarding of the interest by the Arbitrator, overlooking the contract agreement condition about "*no interest being payable on the security deposit or any other amount payable to the contractor under the contract*", was erroneous.

(ii) Though the interest awarded by the arbitrator in this case was only for the pendente lite period, but the verdicts of High Court as well as Supreme Court have both held that awarding interest overlooking the contract conditions to the contrary (which bars award of interest for both ante lite as well as pendente lite period) was erroneous.

11.3 Supreme Court Verdict dated 20.08.2010, Civil Appeal No. 6815–6816 of 2010, Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager/Works/Palghat & Others

(A) Full text of the Verdict: Annexure–11.3

(B) Facts of the case, in Brief:

(i) Palghat Division of Southern Railway (hereinafter referred as "Railway") awarded a contract for "track renewal works" to the Sree Kamatchi Amman Constructions (hereinafter referred as "Contractor") in the year 1995. The contractor invoked arbitration Clause and the disputes were referred to an arbitral tribunal. The arbitral tribunal made a non-speaking award dated 14.05.1999 in favour of contractor. On appeal by Railway, the High Court by order dated 09.01.2001 set aside the said award and remitted the matter to the arbitral tribunal with a direction to make a reasoned award after fresh consideration. The arbitral tribunal accordingly passed an award dated 05.12.2001, awarding certain amounts with a direction that the award amount be paid to the contractor by 04.01.2002 and in case of failure to do so, the award will carry simple interest at a rate of 10% p.a. on the amounts awarded from 05.12.2002 till date of payment. The arbitral tribunal did not award any interest for pre-reference period and for the pendente lite period. The award rejected two of the claims (Nos. 1 & 2) of the contractor and rejected all the counter claims of Railway.

(ii) Railway challenged the award under Section 34 of the Arbitration and Conciliation Act-1996. Aggrieved by the rejection of its Claim nos. 1 and 2 and the failure to award interest for the pre-reference and pendente lite period, the contractor also filed a petition under Section 34 of the Act. A Single Judge of the High Court rejected both the challenges to the award. Insofar as interest was concerned, the learned Single Judge held that having regard to the bar contained in Clause 16(2) of the GCC, the contractor was not entitled to it.

(iii) Both Railways and the contractor filed appeals with Division Bench of the Madras High Court. The division bench, by the judgment dated 18.07.2007, dismissed the appeal by the contractor. It allowed the Railways appeal and set aside the award made on Claim No. 3 (damages for idle labour) and Claim No. 5 (damages for overstay). Thus, what was upheld as part of the award was award of Rs. 38,92,455/- under Claim No. 4 (erroneous billing with reference to unit of measurement) and award of Rs. 94,100 under Claim No. 6 (refund of security deposit), with interest at 10% per annum from 05.01.2002 till date of payment.

(iv) The contractor challenged this before Supreme Court. The Supreme Court on 07.07.2008 allowed the appeal only in regard to the non-award of interest pendente lite and pre-reference period; but refused to interfere with the decision of setting aside the award for Claim Nos. 3 and 5.

(C) Submission(s) by the Contractor, with regard to "interest":

(i) Clause 16(2) of the GCC did not prohibit arbitrator to direct payment of interest and, therefore, the award insofar as it denied interest for pre-reference

and pendente lite period, by relying upon Clause 16(2), was liable to be interfered with. As the arbitrators had found that the delay in completion of the work was due to reasons attributable to Railways, the contractor cannot be denied interest for pre-reference and pendente lite period.

(ii) Even if the contractor was not entitled to interest for the pre-reference period, he will be entitled to interest pendente lite, having regard to the decisions of this court in *Board of Trustees for the Port of Calcutta vs Engineers-De-Space-Age* [1996 (1) SCC 516] and *Madnani Construction Corporation Pvt. Ltd. vs Union of India* [2010 (1) SCC 549].

(D) Submission(s) by the Railway, with regard to "interest": The contract contained a specific bar against award of interest on any amount payable to the contractor under the contract or upon the earnest money or security deposit and, therefore, the arbitral tribunal was barred from awarding interest for the said periods under Section 31(7)(a) of the Act.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) The two claims on which amounts are awarded are Claim No. 4 relating to erroneous billing and Claim No. 6 relating to security deposit. Clause 16(2) of GCC specifically bars payment of interest on security deposit. The amount awarded in regard to Claim No. 4 was an amount payable to the contractor under the contract. Consequently, no interest could be paid thereon having regard to the bar under Clause 16(2) of the GCC.

(ii) This court had occasion to consider the jurisdiction and authority of the arbitrator to award interest under the Arbitration Act-1940 and under the new Act of 1996 in many cases and this court held that the arbitrator had the jurisdiction and authority to award interest for three distinct periods namely, the pre-reference period (period between date of cause of action to date of reference), pendente lite period (period between date of reference to date of award) and future period (period between the date of award to date of payment), if there was no express bar in the contract regarding award of interest. This court had held that if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite period. In view of the specific bar under Clause 16(2) of GCC, we are of the view that the arbitral tribunal was justified in refusing interest from the date of cause of action to date of awards.

(iii) The *Engineers-De-Space-Age* and *Madnani case* arose under the old Arbitration Act-1940 which did not contain a provision similar to Section 31(7) of the new Act which by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore, where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

Where the arbitral tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the arbitrator could not be interfered with.

(F) Verdict of Hon'ble Supreme Court: For the aforesaid reasons, we find no merit in these appeals and they are dismissed. Parties to bear their respective costs.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) As per Section 31(*7*)(*a*) of the Arbitration Act-1996, unless otherwise agreed by the parties, the arbitral tribunal can award interest on sum for which the award is made, at such rate as it deems reasonable, for the whole or any part of the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite).

(ii) But as per Clause 16(2) of GCC, "*No interest shall be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the Contract*". Also as per Clause 64.5 of the GCC, "w*here the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made".*

The aforesaid provisions of GCC, which are framed in conformity with the provisions of the Act, specifically bar award of any interest by the arbitrator on Earnest Money or Security Deposit or amounts payable to the Contractor under the Contract or any other award amount for some other claims, for the pre-award period i.e. the pre-reference period (ante lite) and during pendency of arbitration (pendente lite).

11.4 Delhi High Court Verdict dated 24.02.2012, FAO (OS) 494 of 2010, Union of India Vs. M/s Conbes India Pvt. Ltd.

(A) Full text of the Verdict: Annexure–11.4

(B) Facts of the case, in Brief:

(i) This pertains to an arbitration case of Railway dealt under the Arbitration & Conciliation Act, 1940 (hereinafter referred as Old Act). A petition was filed by M/s Conbes India Pvt. Ltd. (hereinafter referred as "Contractor") for making the arbitral award passed by the Arbitrator as a rule of the Court. On receipt of the notice, Railway filed objections under Section 30 & 33 of old Act, raising specific objection to the awards in respect of Claims Nos. 1, 2, 5, 6 and 8. Objections for Claims Nos. 1, 2, 5 and 6 were rejected by a Single Judge Bench of the High Court and for Claim no. 8, objections were sustained thereby reducing the amount awarded under this claim to Rs. 1,75,000/-.

(ii) On the issue of award of pendente lite interest by the Arbitrator, Railway preferred an appeal to the Division Bench of the High Court.

(iii) The Division Bench took note of the judgments cited on either side and prima facie found that there appears to be some conflict and, therefore, referred the matter for consideration by a Larger Bench for a settled legal position.

(C) Submission(s) by the Railway: The Arbitrators could not have awarded any interest on the awarded amount in view of Section 16(2) of the GCC. However, this contention did not find favour with the learned Single Judge who had held that notwithstanding the aforesaid contractual provision, the Arbitrator had the jurisdiction to award the interest.

(D) Some relevant observations of the Hon'ble High Court:

(i) The reference order to the Division Bench spells out the conflicting approach of this Court and takes note of relevant judgments of the Supreme Court which have to be kept in mind while straightening the controversy.

(ii) In a recent judgment of the Supreme Court in the case of *Union of India Vs Krafters Engineering and Leasing Private Ltd.* (2011) 7 SCC 279, the Supreme Court has undertaken the identical exercise which we are supposed to undertake.

(iii) This latest judgment is rendered by two Judges Bench of Supreme Court. However, it has interpreted the earlier two Constitution Bench judgments and it is well established principle of law that the interpretation given by the Apex Court to the earlier judgments is also law under Article 141 of the Constitution and binding on High Courts and Subordinate Courts.

(iv) The principle which clearly emerges from the reading of the aforesaid judgment is that in case where agreement is silent about the award of interest, the discretion lies with the Arbitrator to award or not to award the interest. On the other hand, if the arbitration clause specifically prohibits grant of interest, then, the arbitrator is bound by such contractual provision and would have no power to grant the interest.

(v) When the contract barred the Arbitrator from granting any interest or bars the contractor from claiming any interest, it would amount to a clear prohibition regarding interest as the Arbitrator could not ignore such express bar in the contract.

(vi) Applying the aforesaid principle to the facts of this case, the clear answer would be that the Arbitrator had no power to award pendente lite interest. As the Clause 16(2) of GCC stipulates in no uncertain terms that the interest would not be payable.

(E) Verdict of Hon'ble High Court: We, thus, are of the view that the award of pendente lite interest by the Arbitrator was not legally justified. The order of the learned Single Judge making the award a rule of the Court on this aspect is set aside. The appeal is disposed of accordingly.

(F) Conclusions based on the verdict of Hon'ble High Court:

(i) Even for the cases dealt under the old Act (Arbitration & Conciliation Act, 1940)**,** as per Clause 16(3) of GCC, "*No interest shall be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the Contract*". Also, as per Clause 64.5 of the GCC, "w*here the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made".*

The said provisions of GCC, specifically bar award of any interest by the arbitrator on Earnest Money or Security Deposit or amounts payable to the Contractor under the Contract or any other award amount for some other claims, for the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite).

(ii) With the contract agreement specifically barring the Arbitrator from awarding any interest, the Arbitrator cannot ignore such express bar in the contract and has no power to award interest for the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite).

11.5 Supreme Court Verdict dated 03.10.2017, Civil Appeal Nos. 15545-15546 of 2017, Chittaranjan Maity Vs. Union of India

(A) Full text of the Verdict: Annexure–11.5

(B) Facts of the case, in Brief:

(i) On 17.06.1991, South Eastern Railway (hereinafter referred as "Railway") awarded a contract for "Earthwork, roads, platforms and miscellaneous works" to Chittaranjan Maity (hereinafter referred as "Contractor") for a value of Rs. 61,24,159/-. The date of completion of the work was extended, in stages, up to 31.07.1993. The remaining work was abandoned by the contractor w.e.f. 03.11.1993.

(ii) Stating the delay and/or hindrances due to breaches committed by the Railway, the contractor demanded arbitration by a letter dated 22.6.1998. The contractor filed an application before the High Court of Calcutta, under Section 11(6) of the Arbitration Act-1996, seeking appointment of an Arbitrator. The High Court in order dated 06.12.2001, directed GM/SER to appoint Arbitrators from their panel. Pursuant to this, the Arbitral Tribunal was constituted which gave following award(s), on 20.09.2006:

Claim	Claimed Amount (Rs.)	Awarded Amount (Rs.)
1. Balance amount payable	45,37,230/-	2,39,657/-
2. Claim for price variation due to rise in price of materials, labour and fuel	21,82,719.58	1,17,060/-
3. Claim for security deposit	15,000/-	15,000/-
4. Claim on account of advance payment towards labour supplier	51,000/-	15,300/-
5. Claim for advance payment to the earth supplier	1,80,000/-	54,000/-
6. Claim for remaining idle wage payment	1,80,000/-	54,000/-
7. Claim for overhead charges, i.e., staff salary and house rent	22,000/-	15,000/-
8. Claim for blockage of capital and business loss	12,75,000/-	6,03,119/-
9. Claim for Interest (including for the pre-reference and pendente lite periods)	1,58,23,193.16	12,44,546/-

(iii) Railway moved an application, under Section 34 of the Act, for setting aside the said award, which was dismissed by the Single Judge of the High Court. Railway filed an appeal with the Division Bench, contending that the contractor had issued a "No Claims Certificate", thereby forfeiting his right for any claim(s) and these claims could not be adjudicated by the Arbitral Tribunal. The Division Bench set aside the order of the Single Judge and also the award and directed holding of fresh reference by the Arbitral Tribunal.

(iv) The contractor challenged the legality and correctness of the judgment of Division Bench of the High Court, by filing this Appeal in the Supreme Court.

(C) Submission(s) by the Contractor, with regard to "interest": As per decision of the Supreme Court in *M/s Ambica Construction vs Union of India* [(2017) SCC OnLine SC 678], mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest.

(D) Submission(s) by the Railway, with regard to "interest": The position of law for cases covered under the 1996 Act, i.e. if agreement prohibits award of interest then the grant of pre-award interest is impermissible for the Arbitrator, has been reiterated by the Supreme Court in various judgments.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) In the 1940 Act, there was no provision which prohibited the Arbitrator from awarding interest for the pre-reference, pendente lite or post award period; whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the Arbitrator cannot award interest for the said period. Therefore, the decision in *M/s Ambica Construction* (supra) cannot be made applicable to the instant case.

(ii) A specific provision has been created under Section 31(7)(a) of the 1996 Act. As per this Section, if the agreement bars payment of interest, the Arbitrator cannot award interest from the date of cause of action till the date of award.

(iii) In *Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and Others*, this Court was dealing with an identical case, wherein Clause 16 of the GCC of Railways prohibited grant of interest. The Court held that where the parties had agreed that the interest shall not be payable, the Arbitral Tribunal cannot award interest between the date on which the cause of action arose to the date of the award.

(iv) *In Union of India vs. Bright Power Projects (India) Private Limited*, a three-Judge Bench of this Court held that when the terms of the agreement had prohibited award of interest, the Arbitrator could not award interest for the pendente lite period.

(F) Verdict of Hon'ble Supreme Court: A sum of Rs. 38,82,150/- was deposited by Railway, which includes the award amount. We have held that the contractor is not entitled for any interest. The contractor has already withdrawn 50% of the amount deposited by the Railway, which is in excess of the award amount exclusive of interest. Having regard to the facts and circumstances of the case, we deem it proper to direct the Railway not to recover the excess amount withdrawn by the contractor. Ordered accordingly.

(G) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) As per Clause 31(*7*)(*a*) of the Act, unless otherwise agreed by the parties, the arbitral tribunal can award interest on sum for which the award is made interest, at such rate as it deems reasonable, for the whole or any part of the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite).

(ii) But as per Clause 16(2) of GCC, "*No interest shall be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the Contract*". Also, as per Clause 64.5 of the GCC, "w*here the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made".*

The aforesaid provisions of GCC, which are framed in conformity with the provisions of the Act, specifically bar award of any interest by the arbitrator on Earnest Money or Security Deposit or amounts payable to the Contractor under the Contract or any other award amount for some other claims, for the pre-reference period (ante lite) as well as the period during pendency of arbitration (pendente lite).

11.6 Supreme Court Verdict dated 07.02.2019, Civil Appeal Nos. 1539 of 2019, Jaiprakash Associates Ltd. Vs. Tehri Hydro Development Corporation

(A) Full text of the Verdict: Annexure–11.6

(B) Facts of the case, in Brief:

(i) Jaiprakash Associates Ltd. (hereinafter referred as "Contractor") was awarded a contract by Tehri Hydro Development Corporation (hereinafter referred as "THDC") and the Agreement was signed on 18.12.1998. As per Clause 50 of the contract *"No omission on the part of the Engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him".*

As per Clause 51 of the contract "*No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, different or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer-in-charge in making intermediate or final payments on in any other respect whatsoever"*.

(ii) Some disputes arose between the parties and two claims raised by the contractor were referred to the arbitral tribunal of three Arbitrators. The majority award pronounced on 10.10.2010 allowed the two claims to certain extent and interest at the rate of 10% per annum from the date when the arbitration was invoked (09.10.2007) till 60 days after the award. Future interest at the rate of 18% per annum till the date of payment was also awarded.

(iii) THDC filed objections before the High Court of Delhi and vide order dated 15.11.2011, the High Court quashed the award related to the interest awarded by the Arbitrators. The contractor preferred intra-court appeal which was dismissed by the Division Bench of the High Court, taking a view that Clauses 50 and 51 of the GCC categorically provide that no interest would be payable to the contractor on the money due to him.

(iv) The dispute raised in the present Civil Appeal, filed in the Supreme Court, pertains only to the question as to whether the Arbitrators could award any interest in view of Clauses 50 and 51 of the GCC.

(C) Submission(s) by the Contractor, with regard to "interest":

(i) The judgment of the Supreme Court in *Tehri Hydro Development Corporation (THDC) Limited vs Jai Prakash Associates Limited* [(2012) 12 SCC 10] is contrary to the earlier judgment rendered by this Court in *State of Uttar Pradesh vs Harish Chandra and Company* [(1999) 1 SCC 63]. Both the judgments are by the Benches of three-Judges. The judgment of *Harish Chandra* is earlier in point of time, which has not been taken note of in *Jai Prakash Associates Limited case*. In such a scenario, the judgment which is passed earlier should hold the field

and, therefore, we should be guided by the law laid down in *Harish Chandra case*.

(ii) The clauses of the contract in question, when interpreted correctly would clearly bring about that these clauses did not prohibit the Arbitrators from granting interest. The words "or any other respect whatsoever" occurring in Clause 51 of the GCC are to be read *ejusdem generis* and should take their colour from the earlier part of clause. When these words are read in the aforesaid manner, it is only in those cases where some amount or balance is lying with the THDC because of any dispute different or misunderstanding between the parties etc., interest is not payable. Such a situation would not arise in those cases where claim is raised on other counts and awarded by the Arbitrators.

(D) Submission(s) by the THDC, with regard to "interest": The clauses in *Harish Chandra case* and the present case were altogether different. There was a difference between the scheme provided under the Arbitration Act-1940, when contrasted with the 1996 Act. The judgment in the *Harish Chandra* case was under 1940 Act whereas in the instant case award was passed under the 1996 Act. In many recent judgments rendered by the Supreme Court, it has been held that an arbitrator could not award pendente lite interest when there was an express bar against award of such an interest.

(E) Some relevant observations of the Hon'ble Supreme Court:

(i) A Constitution Bench judgment of this Court in the case of *Secretary, Irrigation Department, Government of Orissa & Ors. vs. G. C. Roy* [*(1992) 1 SCC 508]* construed the provisions of the 1940 Act which was in vogue at that time. It held that under the general law, the arbitrator is empowered to award interest for the pre-reference, pendente lite or post award period. However, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases.

(ii) However, there is a significant departure on this aspect insofar as 1996 Act is concerned. In many verdicts of this court, it was held that under the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period.

(iii) In this case when Clauses 50 and 51 of GCC put a bar on the arbitral tribunal to award interest, the arbitral tribunal did not have any jurisdiction to do so. In the present case we noticed that the clause barring interest is very widely worded. It uses the words "any amount due to the contractor by the employer". In our opinion, these words cannot be read as *ejusdem generis* along with the earlier words "earnest money" or "security deposit".

(F) Verdict of Hon'ble Supreme Court: The upshot of the aforesaid discussion would be to hold that the conclusions of the High Court in the impugned judgment are correct and need no interference. This appeal is accordingly dismissed.

(G) Conclusions based on the verdict of Hon'ble Supreme Court

(i) As per the Arbitration and Conciliation Act-1940, the arbitrator was empowered to award interest for the pre-reference, pendente lite or post award period. However, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases.

(ii) But in the Arbitration and Conciliation Act-1996, there is a significant departure on this aspect. The 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period.

(iii) Therefore, if the contract agreement or GCC puts a bar on awarding the interest for pre-award period, the arbitral tribunal does have any jurisdiction to award interest for this period.

(iv) In Railway cases, Clause 16(2) and Clause 64.5 of the GCC clearly bar award of interest for the pre-award period (i.e. ante lite and pendente lite period combined) upon the Earnest Money, Security Deposit, amounts payable to the Contractor under the Contract and arbitral award for the payment of money. Thus, in Railway cases, no interest can be awarded by the arbitrator for the pre-award period.

Chapter – 12

Award without Proper Stamp Duty

12.1 Supreme Court Verdict dated 18.02.1969, Civil Appeal No. 2425 of 1968, Hindustan Steel Ltd. Vs. M/s Dalip Construction Company

(A) Full text of the Verdict: Annexure–12.1

(B) Facts of the case, in Brief:

(i) M/s Dalip Construction Company (hereinafter referred as "Contactor") entered into a contract with Hindustan Steel Ltd. (hereinafter referred as "HSL") for "Raising, stacking, carting and loading into wagons limestone at Nandini Mines". Dispute which arose between the parties was referred to arbitration, pursuant to Clause 61 of the agreement. The arbitrators differed, and the dispute was referred to an umpire who made and published his award on 19.04.1967. The umpire filed the award in the Court of the District Judge, Rajnandgaon. On 14.07.1967, HSL filed an application for setting aside the ward under Section 30 and Section 33 of the Indian Arbitration Act-1940. One of the contentions raised by HSL was that the award was unstamped and, on that account, "invalid and illegal and liable to be set aside". The contractor then applied to the District Court that the award be impounded and validated by levy of stamp duty and penalty. By order dated 29.09.1967, the District Judge directed that the award be impounded. He then called upon the contractor to pay the appropriate stamp duty on the award and penalty and directed that an authenticated copy of the instrument be sent to the Collector, Durg, together with a certificate in writing stating the receipt of the amount of duty and penalty.

(ii) Against that order, HSL moved the High Court of Madhya Pradesh, in exercise of its revisional jurisdiction. The High Court rejected the petition. The Appeal in the present case, before the Supreme Court, was filed by the HSL.

(C) Gist of submissions made by the HSL: An instrument which is not stamped as required by the Indian Stamp Act, may, on payment of stamp duty and penalty, be admitted in evidence, but cannot be acted upon, because the instrument has no existence in the eye of law.

(D) Some relevant observations of the Hon'ble Supreme Court:

(i) The arbitral award, which is an "instrument", as per Section 12(4) of the Stamp Act, was required to be stamped. Being unstamped, the award could not be received in evidence by the Court, nor could it be acted upon, as per Section 35 of the Stamp act. But as per Section 33(1) of the Stamp Act, the Court was competent to impound it and send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the Instrument so received, the Collector as per Section 39 of the Stamp Act, may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. As per Section 42(1) of the Stamp Act, if the duty and penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid.

(ii) An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer.

(iii) Section 35 of Stamp Act provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Relying upon the difference in the phraseology between Section 35 and Section 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be acted upon as if it had been duly stamped.

(iv) The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments; it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument.

(E) Verdict of Hon'ble Supreme Court: In our judgment, the learned Judge attributed to Section 36 a meaning which the Legislature did not intend. Attention of the learned Judge was apparently not invited to Section 42(2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had "been duly stamped". The appeal fails and is dismissed with costs.

(F) Conclusions based on the verdict of Hon'ble Supreme Court: If the award is not stamped with requisite Stamp Duty, it cannot be not be received in evidence by the Court nor could it be acted upon. But such an award can be impounded by the Court, which has authority to receive evidence and admit such instrument in evidence upon payment of a penalty as provided in the Act. Thereafter, this award shall be sent to Collector with a certificate stating the amount of duty and penalty levied thereon. On the Instrument so received, the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. On payment of Stamp Duty and penalty, the Collector will endorse this fact on the award. Every award so endorsed is admissible in evidence, and can be registered and acted upon.

Chapter – 13

Revocation of Terminated Proceedings

13.1 Supreme Court Verdict dated 01.05.2019, Civil Appeal No. 4956 of 2019, Sai Babu Vs. M/s Clariya Steels Pvt. Ltd.

(A) Full text of the Verdict: Annexure–13.1

(B) Facts of the case, in Brief: The sole arbitrator terminated proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act-1996 (i.e. when the tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible), by order dated 04.05.2017. However, on an application dated 05.05.2017 to recall the aforesaid order, the arbitrator passed an order on 18.05.2017 stating that, as good reasons had been made out in the affidavit for recall, he was inclined to recall the order even though under the Act, in law, it may be difficult to do so. A revision filed against the aforesaid order was dismissed by the High Court on 14.06.2017.

(C) Some relevant observations of the Hon'ble Supreme Court:

(i) The matter is no longer *res integra (i.e.* a **case or a question that has not been examined or passed upon).** In *SREI Infrastructure Finance Limited* v*. Tuff Drilling Private Limited* [(2018) 11 SCC 470], this Court held:

> *"… Section 32(2)(c) contemplates two grounds for termination (i) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary, or (ii) impossible. The eventuality as contemplated under Section 32 shall arise only when the claim is not terminated under Section 25(a) [i.e. when the claimant fails to communicate his statement of claims] and proceeds further. The words "unnecessary" or "impossible" cannot be said to be covering a situation where proceedings are terminated in default of the claimant…. Subsection (3) of Section 32 further provides that the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings subject to Section 33 and Section 34(4). Section 33 is the power of the Arbitral Tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the award. Section 34(4) reserves the power of the court to adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. On the termination of proceedings under Sections 32(2) and 33(1), Section 33(3) further contemplates termination of the mandate of the Arbitral Tribunal, whereas the aforesaid words are missing in Section 25. When the legislature has used the phrase "the mandate of the Arbitral Tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be recommenced."*

(ii) Therefore, a distinction was made by this Court between the mandate terminating under Section 32 and proceedings coming to an end under Section

25 of the Act. This Court has clearly held that no recall application would, therefore, lie in cases covered by section 32(3).

(D) Verdict of Hon'ble Supreme Court:

(i) This being the case, we allow the appeal that is being filed and set aside the judgment of the High Court of Karnataka dated 14.06.2017. However, this is not the end of the matter. Section 15(2) of the Act states:

> *15. Termination of mandate and substitution of arbitrator -- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.*

(ii) By the consent of the parties, a former Judge of the High Court, is appointed to be the sole arbitrator to decide all disputes between the parties.

(iii) The appeal stands disposed of accordingly.

(E) Conclusions based on the verdict of Hon'ble Supreme Court:

(i) As per provisions of the Arbitration Act, the termination of arbitration proceedings, before passing of arbitral award, are covered in two sections. First in under Section 25(a), when the proceedings are terminated due to default of Claimant. Second is under Section 32(2).

(ii) While for the proceedings terminated under section 25(a), there is no specific bar on arbitrator recalling the termination order; in case of termination of proceedings under Section 32 the termination order cannot be recalled. In the second case, the mandate of the arbitrator terminates and if required, new arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Chapter – 14

Specific Performance

14.1 Delhi High Court Verdict dated 13.12.1996, Classic Motors Limited Vs. Maruti Udyog Limited

(A) Full text of the Verdict: Annexure–14.1

(B) Facts of the case, in Brief:

(i) In 1985, M/s. Maruti Udyog Limited (hereinafter referred as "MUL") awarded a dealership to a partnership firm known as M/s. Classic Motors (hereinafter referred as "Plaintiff"), of which Mr. Raj Chopra and Mr. Narendra Anand were the partners. An agreement was executed between the parties, on a standard form used for every dealership. M/s. Classic Motors established its show room in Connaught Place and Service Station at Mathura Road, New Delhi.

(ii) In 1986, a dispute arose between the partners of plaintiff firm and they arrived at a settlement for availing of the dealership on altogether new terms by separating the assets between themselves. For this purpose, a modification deed dated 30.09.1986 was executed. On being approached, the MUL under their letter dated 09.01.1988 agreed to allow these two partners to separate and establish independent dealership subject to the conditions, inter-alia, that the existing dealership will cease to exist and that separate agreement for dealership by Mr. Raj Chopra and Mr. Narendra Anand will be executed with MUL. In terms of the same, a fresh agreement was executed on the standardized form of contract. As per Clause 21 of this agreement, "*Notwithstanding the provisions of any Clause hereof either party may by giving the other 90 days' notice in writing terminate this Agreement without assigning any cause".*

(iii) MUL issued a show cause notice dated 06.04.1991, alleging certain breaches committed by the plaintiff in respect of sales policies of the defendant. The plaintiff being aggrieved filed a petition under Section 20 of the Arbitration Act in Delhi High Court praying for reference of the disputes arising between the parties to an Arbitrator. The court granted an ex-parte injunction which was later on confirmed on 18.11.1991. Being aggrieved by this, MUL filed a Special Leave Petition in the Supreme Court, on which while issuing notice on 03.02.1992, the Supreme Court stayed the order dated 18.11.1991 but observed that it would be open to the plaintiff to file its reply to the show cause notice. The Supreme Court further directed that the order of the High Court under appeal would remain stayed subject to the undertaking of the MUL that pursuant to the show cause notice no order of termination of the dealership would be made. The Supreme Court by order dated 18.08.1994 finally disposed of the said Special Leave Petition directing that all the points urged by the two sides would remain open for fresh consideration by the High Court in the first instance while deciding the main matter on merits. It was further directed that the order of injunction issued by the High Court against the MUL would not be construed as restraining the MUL from exercising the power that they might have under clause 21 of the agreement and in case the MUL chooses to exercise its power under clause 21 of the agreement the parties would be entitled to their respective rights as a result thereof as might be available to them in accordance with law.

(iv) The MUL thereafter, by order dated 31.8.1994 terminated the dealership of the plaintiff with 90 days' notice. Being aggrieved by this, the plaintiff filed a petition under Section 20 of the Arbitration Act before Delhi High Court, along with an application under Section 41 of the Arbitration Act, on which an interim order was passed on 09.09.1994 by the Court permitting the plaintiff to book the vehicles up to 29.11.1994. The said order was challenged in the Supreme Court in a Special Leave Petition filed by MUL and the Supreme Court by order dated 15.09.1994 granted an interim stay in respect of the order 09.09.1994 passed by the High Court. Thereafter the Supreme Court by order dated 26.09.1994 set aside the order of the High Court and directed that the matter be disposed of finally without any such interim orders being made in the suit. The petition filed in the High Court under Section 20 of the Arbitration Act, was finally heard and the judgment in the said case was reserved. However, by a subsequent application, the plaintiff sought to withdraw the petition as he had taken recourse to another remedy namely - filing of the present suit in this court. Accordingly, the High Court, by order dated 22.11.1994, dismissed the petition as withdrawn.

(v) The plaintiff instituted the present suit. By order dated 29.11.1994, the High Court ordered that in the interest of justice status quo as of that day would continue till the next date and on the next date i.e. on 30.11.1994 the interim order was continued and finally by order dated 03.02.1995, the court stayed the implementation of the show cause notice dated 31.08.1994 issued by the MUL. Being aggrieved by this order, the MUL approached the Supreme Court through a Special Leave and by order dated 28.2.1995, the Supreme Court stayed the operation of the order dated 03.02.1995 passed by the High Court and also stayed the further trial of the present suit and to avoid any further confusion in the matter it was made clear that no order of any kind be passed by the High Court during the pendency of the matter in the Supreme Court. The Supreme Court by order dated 03.11.1995 remanded the matter back to the High Court by setting aside the order of injunction granted by the High Court on 03.02.1995 in the present suit leaving all questions of fact and law between the parties open for decision by the High Court at the time of disposal of the suit itself. It was further directed that during the pendency of the suit and subject to its final outcome, the dealership Code No. 0807 which was assigned to the plaintiff, Classic Motors, would be kept vacant by the MUL to enable it to give the same to the plaintiff in case the plaintiff ultimately succeeds in the present suit pending in the High Court.

(C) Gist of submissions made by the Plaintiff, on the relevant issue:

(i) They are entitled to seek for specific performance of the contract and to the injunction as prayed for in the suit. Section 10, 38 and also Section 42 of the Specific Relief Act were relied upon in support of this submission.

(ii) The compensation in money would not be an adequate relief nor does there exist any standard for ascertaining the actual damages which would be caused and are likely to be caused to the plaintiff if the MUL is allowed to get away with the termination of the dealership agreement. Section 10 specifically provides that unless and until the contrary is proved the court would presume that contract to transfer immovable property cannot be adequately relieved by compensation in money, when it consists of goods which are not easily available in the market. The plaintiff had incurred huge investment and had put in its

labour, expertise, manufacturing skill in sale promotion of the vehicles manufactured by the defendant. Accordingly, if the injunction is not granted to the plaintiff the plaintiff would be put out of business and would face utter financial ruin.

(D) Gist of submissions made by the MUL, on the relevant issue:

(i) The present agreement cannot be enforced under the provisions of Specific Relief Act. Any contract which is terminable would not be enforceable under Section 14(1) and accordingly the question of enforcement of determinable contract under Section 10 of the Act does not at all arise.

(ii) A contract which could be compensated for damages in terms of money cannot be enforced. In a contract where no specific performance can be granted, the grant of declaration and injunction, as prayed for, is not sustainable.

(E) Some relevant observations of the Hon'ble High Court, on the issue:

(i) Section 42 of the Specific Relief Act provides that notwithstanding anything contained in clause I of Section 41, where a contract comprises of the affirmative agreement to do a certain act, coupled with a negative agreement express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

(ii) In the present agreement, there is no negative covenant and therefore, ex-facie the provisions of Section 42 of the Specific Relief Act do not apply to the facts and circumstances of the present case and reliance on the same by the plaintiff, is misconceived. The provisions of Section 14 of the Specific Relief Act appear to be relevant. The provisions of Section 14(1)(a) of the Specific Relief Act require that if a breach of contract can be compensated on payment of damages the contract cannot be specifically enforced. Sub-section (b) thereof provides that where enforceability of the contract depends upon the personal qualifications or volition of the parties, the court cannot enforce specific performance of its material terms. Sub-section (c) appears to be very material and relevant on the facts and circumstances of the present case. The said provision requires that determinable contracts cannot be enforced by decree of specific performance. The provisions of sub-section (d) state that a contract, performance of which involves the performance of a continuous duty which the court cannot supervise cannot be enforced by such a decree. On a discussion of the material terms of the clauses of the agreement it has already been held that the present agreement is not permanent and indeterminable in nature and therefore, the present agreement is in its very nature determinable. Therefore, to the facts and circumstances of the case the provisions of Section 14(1)(c) appear to be applicable. Besides compensation in money in the present case could be an adequate relief in the nature of the present case and therefore, the present contract, in my considered opinion, cannot be specifically enforced.

(iii) In the landmark decision of the Supreme Court in *M/s. Indian Oil Corporation Ltd. Vs. Amritsar Gas Corporation*, pertaining to the termination of contract of a LPG distributor, it was held that, "… a contract which is in its nature determinable can never be enforced". In the present case also the agreement

having been held to be determinable cannot be enforced being an agreement covered by Section 14(1) of the Contract Act. Therefore, since it has been held that no specific performance of the agreement in question being permissible no declaration and injunction as prayed for by the plaintiff in the present suit could be granted to the plaintiff.

(F) Verdict of Hon'ble High Court, on the issue: The aforesaid issues having been held against the plaintiff and in favour of the MUL, the suit filed by the plaintiff stands dismissed with costs.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) "Specific performance' or "specific relief' is a legal term referring to an equitable remedy in the law of contracts, whereby Court issues an order requiring a party to perform a specific act, such as to complete the performance of the contact. It is typically available in sale of land law, but otherwise is not generally available if damages are an appropriate alternative. There is a Specific Relief Act, 1963, on this issue.

(ii) The issue of "specific performance" or "specific relief" becomes relevant in Railway contract cases when some contract is terminated by Railway and the Contractor files an application with Court for not only arbitration claiming damages/claims but also for specific relief like contract could not have been terminated or seeking injunction on award of contract for balance work to any other party. If such specific relief is granted, even in the form of injunction till final verdict of the Court, then till that time (which may take considerable time) the work under the said contract comes to a standstill, thereby jeopardising the project work. If such specific relief is granted in the final verdict, Railway is forced to work with a contractor who was found not suitable to execute/complete the work. Therefore, proper pleadings need to be made with the Court, for not granting such specific relief.

(iii) According to Section 14(d) of the Specific Relief Act-1963, a contract which is in its nature determinable, is not specifically enforceable. This legal position was upheld in the decision of the Supreme Court in case of *M/s. Indian Oil Corporation Ltd. Vs. Amritsar Gas Corporation*, pertaining to the termination of contract of an LPG distributor. All Railway contracts are terminable by nature, and the procedure for termination forms part of contract conditions and hence Railway contracts do not qualify for specific relief as per Specific Relief Act. While the contractor may ask for compensation/damages/claims due to termination of his contract, he is not entitled for specific relief like his contract should not be terminated or contract for balance work should not be awarded to any other party.

Chapter – 15

Suppression of Facts

15.1 Delhi High Court Verdict dated 16.07.2020, O.M.P.(I)(COMM) 159/2020 & I.A. 4824/2020, UNI Constructions Vs. IRCON International Ltd.

(A) Full text of the Verdict: Annexure–15.1

(B) Facts of the case, in Brief:

(i) UNI Constructions (hereinafter referred as "Contractor") was awarded a work for "Construction of depot building, service building, station building and residential building at Saphale, Palghar, Maharashtra of VAITARANA-SACHIN section in connection with construction of Western Dedicated Freight Corridor Phase-II", by IRCON International Ltd. (hereinafter referred as "IRCON"), on 18.01.2018. As per Clause 8.0 of the GCC, the contractor was required to submit Performance Guarantee (PG) in the form of Bank Guarantee (BG) or Fixed Deposit Receipt (FDR) from a scheduled bank endorsed in favour of IRCON, for an amount equal to 5% of the contract value. Failure of the successful tenderer to furnish the required performance security was a ground for the annulment of the award of the Contract and forfeiture of the Earnest Money Deposit.

(ii) The contractor avers that two BGs totalling Rs. 23,51,300/-, were submitted by them. This is factually inaccurate, as the contractor had furnished two Term Deposits, for Rs. 16,51,300/- and Rs. 7,00,000/- respectively. The contractor averred that:

(a) Though the date of completion of the work was 15.04.2019, there was hindrance from doing so, owing to delay, on the part of IRCON, in providing the requisite drawings. This resulted in extension of the date of completion of the contract, by IRCON, to 30.06.2020.

(b) Prior to the said date, the COVID-2019 pandemic intervened, and the country faced lockdown, from the last week of March'2020. During the period of lockdown, the workforce of the Contractor returned to their villages and the contract site was declared as a containment zone in April/May'2020. These circumstances constituted "*force majeure*" which fact was communicated to the IRCON on 07.04.2020.

(iii) On 16.06.2020, IRCON addressed a seven days' notice to the contractor, asking them to make good its default, whereafter IRCON was entitled to terminate the contract on 48 hours' notice. The contractor replied to this on 19.06.2020, relying on Clause 71 of the GCC, which was the "*force majeure*" clause.

(iv) Following this, the contractor moved the present petition before Delhi High Court, under Section 9 of the 1996 Act, stating that they apprehended invocation, by IRCON, of the BGs of Rs. 7 lakhs furnished by them.

(C) Gist of submissions made by the Contractor:

(i) Attention is drawn to the fact that Clause 73 of the GCC, provided for resolution of disputes by arbitration.

(ii) On being asked by the Court, the contractor submitted that, *"He had liquidated the Bank Guarantee of Rs. 16,51,300 because at that time he was handling three contracts for IRCON and bills for all three contracts were pending with IRCON. Due to this he was not in a position of clearing the bill of the vendors and they were creating pressure on him".*

(D) Gist of submissions made by the IRCON: This petition was liable to be dismissed on the ground of suppression of fact, inasmuch as the contractor had failed to disclose the fact that, prior to the completion of work, the petitioner had, *suo-motu* and without any notice to IRCON, encashed the term deposit of Rs. 16,51,300/-, in stark violation of the terms of the GCC, and had concealed the said fact from this Court in the present petition.

(E) Some relevant observations of the Hon'ble High Court:

(i) It is clear that there is a conscious suppression, from the contractor, of the fact that, even prior to the completion of work and in obvious violation of the terms of the contract, the term deposit of Rs. 16,51,300/- which covered almost 75% of the performance security required to be provided, had been liquidated by the contractor. This fact has been suppressed in the petition, which, nonchalantly, refers only to the term deposit of Rs. 7 lakhs. Even in the affidavit dated 06.07.2020, filed in terms of the directions of this Court, the date of encashment of the aforesaid term deposit of Rs. 16,51,300/- is not forthcoming.

(ii) IRCON submits that they come to know of this clandestine act, only when on 29.06.2020, they approached the Bank to encash the term deposits, upon which the Bank informed that the term deposit of Rs. 16,51,300/- stood encashed, by the contractor, on 22.08.2019.

(iii) Interlocutory relief, be it relatable to Section 9 of the 1996 Act, Order XXXIX of the Code of Civil Procedure, 1908, or for that matter, Article 226 of the Constitution of India, is fundamentally discretionary in nature. Invocation of the discretionary jurisdiction of a court necessarily requires, as a condition precedent, the applicant invoking the jurisdiction to be candid, and to make a clean breast of its affairs; to approach the Court, as it were, "with clean hands". Suppression of material facts, from the Court, has, classically, been held to constitute fraud. Suppression of material fact, and invocation of the discretionary and equitable jurisdiction of the court, are strange bedfellows.

(iv) The facts, stated hereinabove are, even by themselves, sufficient to disentitle the petitioner to any discretionary relief, under Section 9 of the 1996 Act. That apart, having unjustly, and in stark violation of the terms of the contract with the respondent, encashed the term deposit of Rs. 16,51,300/-, even before the work had been completed, the contractor cannot seek an injunction, against IRCON, against encashment of the sole remaining term deposit receipt of Rs. 7 lakhs.

(F) Verdict of Hon'ble High Court: On a conspectus of the facts, I am of the opinion that the petitioner is not entitled to any relief. The petition is, accordingly, dismissed, with no order as to costs.

(G) Conclusions based on the verdict of Hon'ble High Court:

(i) A litigant, who approaches the court, is bound to produce all the facts and documents which are relevant to the litigation. If he withholds a vital fact or document in order to gain advantage, then he would be guilty of playing fraud on the Court as well as on the opposite party.

(ii) Therefore, if any contractor approaches a Court for a matter connected to contracts or arbitration, suppression of any material facts constitutes a fraud and shall have all repercussion of committing a fraud.

(iii) This principal can be applied in arbitration cases also, which are quasi-judicial proceedings.

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ANNEXURES

Annexure – 1.1

Bombay High Court

Union of India and Others Vs Seth Construction Company, on 22.04.1997

Author: V. S. Sirpurkar

Bench: V. S. Sirpurkar

JUDGMENT

1. Admit. Heard finally with the consent of the parties.

2. This judgment shall govern appeal against Order Nos. 120/96 and 121/96 as the facts and even the parties are practically identical. By these appeals, the orders passed by the Civil Judge, Senior Division, Chandrapur appointing an arbitrator under Section 20 of the Arbitration Act, 1940 are challenged. By both the orders one Shri. S. G. Mahajan of Pune is appointed as a sole arbitrator.

3. Factual Matrix is as follows:

Respondent M/s. Seth Construction Company was awarded two contract of Fifty Five Lacs and One Crore Rupees approximately. In the stage of settlement of final account certain claims were denied by the appellant department and the respondent, therefore, gave a notice dated 20.9.1993 for appointment of an arbitrator in both these contracts. Probably because of the apathy on the part of department to do anything in the matter of appointment of arbitrator, the respondent proceeded to file the two applications in respect of the two contracts under Section 20 of the Arbitration Act, 1940. In these applications, it was contended that there an arbitration, clause in both the contracts which was as follows:

> *"To execute all works referred to in the said documents upon the terms and conditions contained or referred to therein and as detailed in the General Summary hereinafter and to carry out such deviations as may be ordered vide Condition 7 of IAFW 2249 upon a maximum of Ten per cent and further agree to refer all disputes as requires by condition 70 of IAFW 2249 to the sole arbitrator of an Engineer Officer to be appointed by Engineer-in-Chief or in his absence the officer officiating as Engineer-in-Chief or Director General of Works. It specially delegated in writing by Engineer-in-Chief, Army Head Quarters, New Delhi, whose decision shall be final, conclusive and binding."*

It was complained in the said applications that the differences were placed for settlement by the applicant in his various communications but the same were not resolved and in fact the appellant No. 3 herein the Union of India had informed by Letter dated 31.1.1994 that there was no objection to the appointment of the arbitrator but had failed to appoint the sole arbitrator. It was further stated that the said appointment of the arbitrator should have been made within 15 days of the notice of claims and reference for arbitration which was dated 20.9.1993 and admittedly was not made and as such the application under Section 20 of the Arbitration Act was being filed.

4. A reply thereto was given by the present appellants wherein it was contended that the defendants had taken action for the appointment of arbitrator as per the contract agreement and though there was delay in appointment of arbitrator, the appointment was made properly and this was conveyed to the applicant by them. It was signified that the arbitrator could be appointed only by the appointing authority named in the contract agreement and since such appointment was already made, there was no question of further appointment of the arbitrator by the Court. It was further suggested that the plaintiff/applicant could not have suggested the three names as he had done for the appointment of a sole arbitrator. Objection was also taken to the three names suggested by the plaintiff. The applications stood allowed as has already been stated earlier necessitating the present appeals.

5. Shri M. G. Bhangde, the learned Counsel for the appellants, very strenuously urged that the Court could not have taken upon itself to appoint an arbitrator of its choice particularly when the arbitrator was appointed by the Chief Engineer as contemplated in the arbitration agreement on 28.8.1995 itself. According to Shri Bhangde, even if the application was filed on 5.5.1995, the subsequent appointment before the application was ordered upon would have the effect of rendering the said application under Section 20 infructuous. Shri Bhangde stressed heavily on sub-section (4) of Section 20 of the Arbitration Act and contended that even if it was held that no arbitrator was appointed by the Engineer-in-Chief, the Court could appoint only such arbitrator as was already appointed by the parties. He pointed out that the parties had already consented for the appointment of an arbitrator in the contract agreement by a particular mode in that the parties had agreed that the arbitrator shall be such person as would be appointed by the Engineer-in-Chief. Therefore, where the Engineer-in-Chief had already made an appointment on 28.8.1995, there was no question of the Court appointing any other arbitrator. He also invited the attention of the Court to Section 4 to suggest that the parties to an arbitration agreement could agree for the arbitrator being appointed by any other person designated in the agreement either by name or as holder of any office or appointment. According to the learned Counsel. Section 20(4) has to be read in the light of Section 4 and it was liable to be hold that the words "arbitrator appointed by the parties" in sub-section (4) of Section 20 would mean and include an arbitrator agreed upon in terms of Section 4 meaning in this case any person appointed by the Engineer-in-Chief. According to Shri Bhangde, if such a person was available, then there would be no question of the Court appointing any arbitrator of its choice as has been done in the present case. In support of his contention. Shri Bhangde has relied on the Division Bench decision of this Court reported in Union of India v. M/s. Ajit Mehta & Associates, Pune, as also the judgments of the other High Courts including Madhya Pradesh, Kerala and Delhi High Court.

6. Shri S. P. Dharmadhikari, the learned Counsel for the respondent, however, very strenuously urged that the legal position is no more res integra stood concluded by a decision also reported in Ram Chandra Reddy & Co. v. Chief Engineer M. E. S. Madras Zone. He has pointed out that this decision is a complete answer and it holds that if no arbitrator is appointed in terms of the contract when the notice for the same is given by the other party, the administrative head who is authorized to appoint the arbitrator is deemed to have abdicated himself of the power given to him by the contract to appoint arbitrator and as such the Court

before whom an application under Section 20 is made is entitled to appoint the arbitrator of its choice.

7. Considering the rival contentions, it will have be to seen as to whether while entertaining an application under Section 20, the Court can appoint an arbitrator of its choice or is bound to appoint only such person who has been already agreed to be appointed in the contract agreement in terms of sub-section (4) of Section 20. Shri Bhangde insists upon giving a strict construction to sub-section (4) and contends that where no sufficient cause is shown against filing of the agreement in the Court, the Courts as a first step would direct the parties to file the agreement but thereafter the Court has to refer the dispute to the arbitrator appointed by the parties, whether in agreement or otherwise. According to the learned Counsel, the respondent had agreed in the agreement for an appointment of an arbitrator as per the choice of Engineer-in-Chief or his representative. It would, therefore be incumbent upon the Court to appoint only such person and it would be only where the parties did not agree upon the arbitrator that the Court would proceed to appoint an arbitrator of its choice. Thus, according to Shri Bhangde, even if the matter of arbitration does not take place itself by the consent of the parties and is required to be taken to the Court under Section 20 and is channelize through it, the arbitration clauses in the agreement would have to be adhered to. Shri Bhangde falls back on Section 4 where the arbitrator could be agreed to be appointed by a designated person in the agreement. Therefore, the words in sub-section (4) *"arbitrator appointed by the parties"* according to the learned Counsel also refer to such an arbitrator who is agreed to be appointed by any designated person and particularly in this case by the Engineer-in-Chief. According to the learned Counsel, therefore, where such a person is available, the Court has no choice but to appoint only such person as appointed by the Engineer-in-Chief. Shri Bhangde then as a necessary corollary to his argument submits that since the appointment was already made on 28.8.1995, there is no question of the Court appointment anybody else excepting the one who has been appointed by the Engineer-in-Chief. Considering plainly the language of Section 20(4), such construction does not appear to be a proper construction. It will be seen that the occasion to file an application under Section 20 comes in where the difference arises in any matter to which an arbitration agreement applies. In fact, after such difference arise, the party has a choice to proceed under Chapter II where intervention of the Court would not be necessary, that is essentially to proceed to give the notice under Section 8 and where in spite of the notice no appointment is made within the prescribed time, the Court could be approached under Section 8 of the appointment of any arbitrator. However, if the party does not proceed under Section 8 it may only call upon the other party to file the agreement in the Court. Sub-section (3) provides that the Court would direct a notice to be given to all the parties to the agreement and require them to show cause as to why the agreement should not be filed, sub-section (4) then provides that where no sufficient cause is shown against the filing of the agreement in the Court, the Court would order the agreement to be filed and then make an order of reference. The real controversy comes here.

8. The controversy is as to whether the Court has to necessarily appoint an arbitrator who has already been appointed in the agreement or otherwise or whether the Court has a choice to appoint an arbitrator. From the plain language of Section 4, it does appear that once the agreement is filed, a choice lies in the party not to agree upon a particular arbitrator. The words "arbitrator appointed

by the parties" may mean the arbitrator who is agreed to be appointed by any designated person in terms of Section 4. However, the further clause "or where the parties cannot agree upon an arbitrator" does provide discretion to the parties at that stage not to agree upon an arbitrator contemplated by the contract agreement and in the event of such disagreement, the Court would have all the discretion to appoint an arbitrator of its own. In short, the disagreement or a difference between the parties prior to approaching of the Court is the key-factor which would make available the two courses to the parties - the first via Section 8 and the second via Section 20. Now here in the present case it is an admitted position that a notice to appoint an arbitrator was given on 20.9.1993 and till 5.5.1995 nothing was done by the Engineer-in-Chief who was empowered to appoint an arbitrator. It was because of this inaction on the part of the Engineer-in-Chief that the party proceeded to file an application under Section 20. It was only after the notice was given on this application that the Engineer-in-Chief proceeded to appoint an arbitrator of his choice on 28.8.1995. Shri Bhangde (sic) that this was a good appointment. However, if that contention is accepted then the words "where the parties cannot agree upon an arbitrator" would be rendered meaningless. After all here is a case where the difference have arisen in respect of the matters to which the contract agreement applies. The party has not stopped there but has also given a 15 days' notice for the appointment of an arbitrator. However, even that notice has been ignored completely for a period of almost one year and 8 months and it is then that the party has approached the Court via application under Section 20. To say then that still the appointing authority would retain its power to appoint an arbitrator of its choice would be a sheer injustice. Further to say that the Court would have no choice but to simply appoint an arbitrator strictly in terms of the arbitration agreement would also render the further clause as a mere legislative surplusage. The correct interpretation, therefore, would be that under such circumstances where the party is required to proceed under Section 20 and where the opposing party cannot give any sufficient cause for not filing the agreement in the Court, there lies a discretion in the party not to agree upon an arbitrator whether named in the agreement or otherwise. It does not mean that the party cannot agree on the named arbitrator in the agreement. It may in the given case still be prepared for an arbitrator named in the agreement or it may still be prepared to get an arbitrator appointed by the mode agreed to in the agreement. It would be certainly a matter of the choice of such party but where there is no agreement upon an arbitrator, the Court would have the power to appoint any arbitrator of its choice or at least it would not be bound to appoint an arbitrator named in the agreement. If the contention of the appellants were to be accepted, there would be eventuality as suggested in sub-section (4) of the parties not agreeing upon an arbitrator. Indeed if there was no such discretion contemplated by the legislators in the parties not to agree the clause would not have been there. The existence of the clause itself suggests that at that state the parties could have a discretion not to agree upon an arbitrator in which case the Court would proceed to appoint an arbitrator.

9. It has to be borne in mind that in the - matters of arbitration, the agreement between the parties is of essence. In the absence of any agreement the whole concept of arbitration suffers substantially. Therefore, where the differences arise and the parties to a contract ignore the agreement, the Court intervention would be the only possible result. The Apex Court in G. Rama Chandra Reddy's case cited (supra) has harped on this disagreement only. In that case, the facts were almost identical. Even there, it was Engineer-in-Chief who was to appoint a sole arbitrator

to adjudicate the dispute that arose between the parties. The parties accordingly had given the notices to the Engineer-in-Chief. However the Engineer-in-Chief had failed to appoint any arbitrator. The Court having been approached by the aggrieved party vide an application under Section 20 of the Arbitration Act proceeded to appoint an arbitrator. However, in appeal the Division Bench cancelled the appointment made by the learned single Judge and directed that the appointment of an arbitrator should be made in terms of the agreement meaning thereby that the respondent could make an appointment and if he failed to do so then alone the appointment of the arbitrator made by the learned single Judge was to be deemed to have been made under Section 20. In paragraph 4 the Apex Court made a reference to Union of India V/s Prafulla Kumar, and pointed out that in Prafulla Kumar's case no notice was given by the appellant to appoint an arbitrator in terms of the contract before the suit was filed and no action was taken pending the suit except contending that the matter was under active consideration. The Apex Court then made a reference to the other case Nandyal Co-operative Spinning Mills Limited v. K. V. Mohan Rao, and proceeded to quote therefrom to suggest that if the administrator had not appointed the arbitrator in terms of contract within the 15 days from the date of receipt of notice, he had abdicated himself of the power to appoint an arbitrator under the contract and the Court got the jurisdiction to appoint arbitrator. The Court relied upon the observations in Nandyal's case where by the Apex Court had distinguished between the appointment of a named arbitrator and the appointment of the arbitrator by the administrative head. In paragraph 5 the Court proceeded to hold as follows:

> *"5. Thus when the notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken it must be deemed that he neglected to act upon the contract. When no agreement was reached, even in the Court between the parties the Court gets jurisdiction and power to appoint an arbitrator. Even if Section 8(a) per se does not apply, notice was an intimation to the opposite contracting party to act upon the terms of the contract and his/its non-availment entails the forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the other party to invoke the Court's jurisdiction under Section 20. In the instant case the respondent did not appoint an arbitrator, after the notice was received. The respondent averred in the written statement that it was under consideration. Even before the learned single Judge he did not even state that he was willing to appoint an arbitrator. The learned single Judge rightly exercised the power under Section 20(4) of the Act and appointed the Arbitrator. The Division Bench therefore, was not right in holding that the appellant has by giving option to the respondent to agree for appointment of an arbitrator out of the five named persons had left it to the respondent to appoint an arbitrator and allowing respondent to appoint an arbitrator. On the other hand, the appointment of an arbitrator made by the learned single Judge must be deemed to have been approved by us."*

Shri Bhangde however, tried to get out of the rigors of this pronouncement by pointing out that in that case before the single Judge the appointment authority had not stated that he was willing to appoint an arbitrator while in the present case such willingness was, not only shown but in fact an appointment was made on 28.8.1995. I am afraid the learned Counsel is reading the said sentence in paragraph 5 out of its context. The essence of the observations is the disagreement between the parties to begin with and inaction of one of the parties

in the matter of appointment in spite of the notice which would drive the other party to the Court. The Court has come harshly on such an inaction and has ordained that such inaction divests the appointing party is the agreement such as the present one of his power to appoint. In this view, it has to be held that the appellants herein cannot insists upon the appointment of the arbitrator as per the arbitration agreement only.

10. In view of this clear-cut pronouncement it would be futile to consider the Division Bench Judgment of this Court in Union of India v. Ajit Mehta & Associates, (supra). Shri Bhangde's main thrust in this decision was on the observations in paragraphs 21 and 25.

In paragraph 21 the Division Bench went on to depict the difference in the scheme of Sections 8 and 20 of the Arbitration Act and proceeded to hold that under Section 8 once an arbitrator was named by the Court the Court became functs officio and the subsequent proceedings should be strictly as per the arbitration agreement while in Section 20 the arbitration proceedings conducted by the arbitrator appointed by the Court could be controlled by the provisions of the Act and the Court could give the directions to the arbitrator from time to time. So far as the observations is paragraph 25 are concerned, it is not necessary to consider these observations because the pronouncement in G. Rama Chandra Reddy's case (supra) is more than clear and the Apex Court has held that even if Section 8(v), was not applicable to the matters if the notice given by one party was not acted upon by the other, the other party would forfeit its power to appoint the arbitrator. The observations in paragraph 25 of the decision are in the following terms:

> *"It is only the provision of Section 20(4) that can be availed of in such circumstances and even in that case the only direction that the Court as give in the first instance, is to the appointing authority to name the arbitrator."*

In view of what has been held in G. Rama Chandra Reddy's case it must be held that the law laid down in paragraph 25 is impliedly over ruled. For the similar reasons the other decisions relied upon by Shri Bhangde in Parganihs & Agnihotri Raipur (Firm) V/s. Union of India [1977 MPLJ 252]; Union of India v. Matahi [(1987) I Ker LT 259]; Ved Prakash Mithal v. Union of India and Government of NCT of Delhi v. M/s. Uttam Singh Duggal & Company Limited [1997(1) Arb. LR 227], cannot be of any consequence.

11. In the result for the reasons stated, the appeals are dismissed with costs.

12. Appeals dismissed.

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Annexure – 1.2

Supreme Court of India

Datar Switchgears Ltd V/s Tata Finance Ltd. & others, on 18.10.2000

Appeal (Civil) 5986 of 2000
Special Leave Petition (civil) 13812 of 2000

Datar Switchgears Ltd. …….. Petitioner

Vs

TATA Finance Ltd. & Anr ..…… Respondent

Author: K. G. Balakrishnan, J.

Bench: M. J. Rao, K. G. Balakrishnan

JUDGMENT

Leave granted

2. The appellant challenges an order passed by the Chief Justice of Bombay High Court, under Section 11 of the Arbitration and Conciliation Act, 1996 [for short, "the Act"]. The appellant had entered into a lease agreement with the 1st respondent in respect of certain machineries. Dispute arose between the parties and the 1st respondent sent a notice to the appellant on 5.8.1999 demanding payment of Rs. 2,84,58,701 within fourteen days and in the notice it was specifically stated that in case of failure to pay the amount, the notice be treated as one issued under Clause 20.9 (Arbitration clause) of the Lease Agreement. The appellant did not pay the amount as demanded by the 1st respondent. The 1st respondent did not appoint an Arbitrator even after the lapse of thirty days, but filed Arbitration Petition No. 405/99 on 26.10.99 under Section 9 of the Act for interim protection. On 25.11.99, the 1st respondent appointed the 2nd respondent as the sole Arbitrator by invoking clause 20.9 of the Lease Agreement and the Arbitrator in turn issued a notice to the appellant asking them to make their appearance before him on 13th March, 2000. Thereafter, the appellant filed Arbitration Application No. 2/2000 before Hon'ble the Chief Justice of Bombay and prayed for appointment of another Arbitrator and the 1st respondent opposed this application. This petition was rejected by the Chief Justice holding that as the Arbitrator had already been appointed by the first respondent, the Lessor, the petition was not maintainable. This order is challenged before us.

2. We heard the appellant's Counsel Mr. V. A. Mohta and respondent's Counsel Mr. R. F. Nariman. The appellant's Counsel questioned the authority of the 1st respondent in appointing an Arbitrator after the long lapse of the notice period of 30 days. According to the appellant, the power of appointment should have been exercised within a reasonable time. The appellant's Counsel also urged that unilateral appointment of Arbitrator was not envisaged under the Lease Agreement and the 1st respondent should have obtained the consent of the appellant and the name of the Arbitrator should have been proposed to the appellant before appointment. On the other hand, the Counsel for the 1st respondent supported the impugned order.

3. Learned counsel for the appellant, Shri V. A. Mohta argued that the order passed by the Chief Justice is amenable to Article 136 of the Constitution of India. Even if it is an administrative order as decided by a three Judge Bench in Konkan Railway Corporation Ltd. Vs. M/s Mehul Construction Co. [2000(6) SCALE 71, it is amenable to Article 136. Learned Senior Counsel for the 1st respondent, Shri R. F. Nariman, however, stated that in this case we need not go into this controversy and we may decide the matter on merits on the assumption that Article 136 is attracted. In view of the above stand taken for the respondents, we are not deciding the question of maintainability.

4. The Arbitration and Conciliation Act, 1996 made certain drastic changes in the Law of Arbitration. This Act is codified in tune with the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). Section 11 of the Act deals with the procedure for appointment of Arbitrator. Section 11(2) says that the parties are free to agree to any procedure for appointing the Arbitrator. If only there is any failure of that procedure, the aggrieved party can invoke sub-clause (4), (5) or (6) of Section 11, as the case may be. In the instant case, the Arbitration clause in the Lease Agreement contemplates appointment of a sole Arbitrator. If the parties fail to reach any agreement as referred to in Sub-Section (2), or if they fail to agree on the Arbitrator within thirty days from receipt of the request by one party, the Chief Justice can be moved for appointing an Arbitrator either under sub-clause (5) or sub-clause (6) of Section 11 of the Act.

5. Sub-clause (5) of Section 11 can be invoked by a party who has requested the other party to appoint an Arbitrator and the latter fails to make any appointment within thirty days from the receipt of the notice. Admittedly, in the instant case, the appellant has not issued any notice to the 1st respondent seeking appointment of an Arbitrator. An application under sub-clause (6) of Section 11 can be filed when there is a failure of the procedure for appointment of Arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an Arbitrator refuses to appoint the Arbitrator or where two appointed Arbitrators fail to appoint the third Arbitrator. If the appointment of Arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of Arbitrator.

6. The appellant in his application does not mention under which sub- section of Section 11 the application was filed. Evidently it must be under Sub-section (6) (a) of Section 11, as the appellant has no case that a notice was issued but an Arbitrator was not appointed or that there was a failure to agree on certain Arbitrator. The contention of the appellant might be that the first respondent failed to act as required under the procedure.

7. Therefore, the question to be considered is whether there was any real failure of the mechanism provided under the Lease Agreement. In order to consider this, it is relevant to note the Arbitration clause in the Agreement. Clause 20.9 of the Agreement is the Arbitration clause, which is to the following effect:

"20.9 It is agreed by and between the parties that in case of any dispute under this Lease the same shall be referred to an Arbitrator to be nominated by the

Lessor and the award of the Arbitrator shall be final and binding on all the parties concerned. The venue of such arbitration shall be in Bombay. Save as aforesaid, the Courts at Bombay alone and no other Courts whatsoever will have jurisdiction to try suit in respect of any claim or dispute arising out of or under this Lease or in any way relating to the same."

The above clause gives an unfettered discretion to the 1st respondent-lessor to appoint an Arbitrator. The 1st respondent gave notice to the appellant and later appointed the 2nd respondent as the Arbitrator. It is pertinent to note that no notice period is prescribed in the above arbitration clause and it does not speak about any concurrence or consent of the appellant being taken in the matter of the choice of Arbitrator.

8. The question then arises whether for purposes of Section 11(6) the party to whom a demand for appointment is made, forfeits his right to do so if he does not appoint an arbitrator within 30 days. Learned Senior counsel for the appellant contends that even though Section 11(6) does not prescribe a period of 30 days, it must be implied that 30 days is a reasonable time for purposes of Section 11(6) and thereafter, the right to appoint is forfeited. Three judgments of the High Courts from Bombay, Delhi and Andhra Pradesh are relied upon in this connection.

9. Learned Senior counsel for the respondents submits that the Bombay, Delhi and Andhra Pradesh cases relied upon are distinguishable. It is also contended that under Section 11(6) no period of time is prescribed and hence the opposite party can make an appointment even after 30 days, provided it is made before the application is filed under Section 11.

10. The appellant contended that the 1st respondent did not appoint the Arbitrator within a reasonable period and that amounts to failure of the procedure contemplated under the Agreement. Our attention was drawn to a decision of the Bombay High Court [1999(2) Bombay CR. 189] Naginbhai C. Patel Vs. Union of India. There, the petitioner, a Govt. Contractor, as per the form of the Arbitration clause requested the Secretary PWD to appoint the arbitrator. The Secretary, PWD did not take any action and the petitioner filed an application under Section 11(6) of the Act. After the filing of this application, the respondent appointed an Arbitrator and urged before the Chief Justice that application under Section 11(6) filed by the petitioner became infructuous. It was held that the petitioner had waited for 30 days for appointment of the arbitrator and as the respondent had failed to appoint the arbitrator the objection was not sustainable and the appointment of arbitrator made by the respondent was not valid in the eye of law.

11. The above decision has no application to the facts of this case as in the present case, the Arbitrator was already appointed before the appellant invoked Section 11 of the Act. The Counsel for the appellant contended that the Arbitrator was appointed after a long lapse of time and that too without any previous consultation with the appellant and therefore it was argued that the Chief Justice should have appointed a fresh arbitrator. We do not find much force in this contention, especially in view of the specific words used in the Arbitration clause in the Agreement, which is extracted above. This is not a case where the appellant requested and gave a notice period for appointment of arbitrator and the latter failed to comply with that request. The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-

payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the Arbitration clause in the Agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and settling the dispute. It is pertinent to note that the appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. Under such circumstances, it cannot be said that there was a failure of the procedure prescribed under the contract.

12. The decision of the Delhi High Court in B.W.L. Ltd. Vs. MTNL & Ors. [2000(2) Arb. LR 190 (Del.)] decided on 23.2.2000 is also distinguishable inasmuch as the respondent, in spite of being given opportunity on 11.10.99 by the Court after filing of the application under Section 11 to appoint an arbitrator, failed to do so and the Court felt that it was a fit case for appointment of an arbitrator under Section 11. This case is also distinguishable as the appointment was not made before the filing of the application under Section 11.

13. In Sharma & Sons vs. Engineer-in-Chief, Army Headquarters, New Delhi & Ors. [2000 (2) Arb.LR 31 (AP)], the respondents were requested on 26.6.95, 6.8.95 and other dates in 1997 to appoint an arbitrator. Application under Section 11 was filed after nearly 4 years on 21.4.99. Only thereafter the respondent appointed an arbitrator on 13.5.99, but only in respect of some of the disputes. The respondent felt that the other disputes were outside the ambit of the arbitration clause. The High Court of Andhra Pradesh held that in view of Section 11(6) read with Section 11(8) the respondent had forfeited his right to appoint an arbitrator after the expiry of 30 days from the date of demand for arbitrator. Even in the above case, the appointment was not made before the application under Section 11 was filed. Hence, the case is not applicable to the facts of this case.

14. In all the above cases, therefore, the appointment of the arbitrator was not made by the opposite party before the application was filed under Section 11. Hence, all the above cases are not directly in point.

15. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

16. So far as cases falling under Section 11(6) are concerned -- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the

right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

17. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

18. We need not decide whether for purposes of sub-clauses (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not. While interpreting the power of the Court to appoint arbitrator under Section 8 of the Arbitration Act, 1940, this Court in Bhupinder Singh Bindra Vs. Union of India and Another [(1995) 5 SCC 329], in para 3 held as under:

"It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation."

19. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavor to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

20. Therefore, we do not think that the first respondent, in appointing the second respondent as the Arbitrator, failed to follow the procedure contemplated under the Agreement or acted in contravention of the Arbitration clause.

21. Lastly, the appellant alleged that "nomination" mentioned in the arbitration clause gives the 1st respondent a right to suggest the name of the Arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant. We do not find any force in the contention.

22. In P. Ramanatha Aiyar's Law Lexicon (2nd Edition) at page 1310, the meaning of the word 'Nomination" is given as follows:

"The action, process or instance of nominating;

2. The act, process or an instrument of nominating; an act or right of designating for an office or duty.

"Nominations" is equivalent to the word "appointments", when used by a mayor in an instrument executed for the purpose of appointing certain persons to office."

Nomination virtually amounts to appointment for a specific purpose and the 1st respondent has acted in accordance with Section 20.9 of the Agreement. So long as the concurrence or ratification by the appellant is not stated in the arbitration clause, the nomination amounts to selection of the Arbitrator.

23. Hence, the appellant, while filing the application under Section 11 of the Act had no cause of action to sustain the same as there was no failure of the agreement or that the 1st respondent failed to act in terms of the agreement. The application was rightly rejected. The appeal deserves to be and is accordingly dismissed, however, without any order as to costs.

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Annexure – 1.3

Delhi High Court

Cdr. S.P. Puri (Retd.), Sole Prop. Spiral Services Vs. Agriculture Produce Market Committee, on 03.10.2006

Appeal No. : Arb. P. No. 129/2006

Cdr. S.P. Puri (Retd.) Sole Prop. Spiral Services … Appellant
V/s
Agriculture Produce Market Committee … Respondent

Advocate for Def.: Avnish Ahlawat, Adv.
Advocate for Pet/Ap.: V. K. Sharma, Adv.

JUDGEMENT

Reva Khetrapal, J.

1. This is a petition under Section 11 of the Arbitration & Conciliation Act, 1996 whereby the petitioner seeks appointment of an arbitrator to enter upon the reference to adjudicate the claims preferred by the petitioner.

2. The petitioner is the sole proprietor of M/s. Spiral Services and has filed the petition as such. An agreement was entered into between the petitioner acting as sole proprietor of M/s. Spiral Services and the respondent Agriculture Produce Market Committee on 29th December, 2000. This agreement was for a period of 30 years and the object of the Agreement was "Conversion of 125 Metric Tonne fruit and vegetable waste generated in fruit and vegetable markets of APMC, Azad Pur, Delhi into organic manure".

3. According to the petitioner, the respondent miserably failed in adhering to the various clauses of the agreement between the parties. Thus, between July, 2001 to January, 2006 the total supply of garbage received by the petitioner from the respondent was 610.88 metric tonnes, whereas in terms of the agreement the quantity which ought to have been supplied during these 4½ years should have been above 2 lakh metric tonnes (Clause 2.1 of the agreement). Then again, the quality of waste which was supplied to the Compost Plant being run by him, which was to comprise of only biodegradable material, in fact contained non-biodegradable material such as heavy stones, tyres, polythene bags, malba, etc. Resultantly, the petitioner was forced to segregate the waste being provided by the respondent and the Compost Plant was getting converted into a dump yard with excessive non-biodegradable material, which was being sent to the site by the respondent. Faced with these circumstances, the petitioner was left with no option but to send a bill for segregation costs incurred by the petitioner and compensation for deliberate short supply of raw-material vis-a-vis meeting the fixed costs for running the system and anticipated loss of profits and other issues. Disputes with regard to the fulfillment of the obligation on the part of the respondent in terms of the agreement between the parties thus cropped up between the parties. The petitioner took up the issues at various levels as delineated at length in the petition and ultimately vide letter dated 31st March, 2004 addressed to the Secretary of the respondent served notice for appointment

of an arbitrator. The said notice was delivered in the office of the respondent on 31st March, 2004 itself. A copy of the same was sent to the Chairman of the respondent which was also delivered on 31.3.2004.

4. Despite the aforesaid request made by the petitioner, no action was taken by the respondent for appointment of an arbitrator in terms of Clause 5.2 of the Agreement dated 29th December, 2000 between the parties (Annexure-B). The said clause reads as under:

"5.2 ARBITRATION CLAUSE

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned as to the quality of workmanship or material used on the work or as to any other question claim, right matter or thing whatsoever in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions orders or these conditions or otherwise concerning the works or the failure to execute the same whether arising during the progress of the work or after the completion or abandonment shall be referred to the sole arbitration of the person who shall be appointed with mutual consent of both the parties by the administrative head of APMC at the time of such appointment. There will be no objection to any such appointment even if the arbitrator so appointed is a Govt. servant, and had dealt with the matters to which the contract relates and that in the course of his duties as Govt. servant he had expressed views on all or any of the matters in dispute or difference. The arbitration to whom the matter is originally referred being transferred or vacating his offices or being unable to act for any reason, Administrative head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the references from the stage at which it was left by his predecessor. In all cases where the amount of the claim in dispute is Rs. 25,000.00 (Twenty Five Thousand) and above the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under the clause."

5. The respondent not having acceded to the request of the petitioner for reference of the matter to an arbitrator in terms of Clause 5.2 of the agreement between the parties and having abrogated its duty in this regard, the petitioner then knocked at the door of the administrative head of the respondent. A letter dated 30th August, 2004 was sent to the administrative head of the respondent reminding him about the letter dated 31st March, 2004 through which request for appointment of an arbitrator was made by the petitioner, but without any result.

6. In the aforesaid circumstances, the petitioner approached this Court for reference of the disputes and prayed for the appointment of an arbitrator to adjudicate the claims preferred by the petitioner as set out in paragraphs N-1 to N-23 of the petition. Thus, the present petition was filed on 13th February, 2006 after the petitioner had exhausted all remedies, including service of notice upon

the respondent for appointment of an arbitrator vide letters dated 31st March, 2004 and 30th August, 2004.

7. Notice of the petition was served on the respondent on 31st March, 2006. The respondent filed a reply to the petition alleging that the same was totally misconceived and liable to be dismissed on the short ground that though a notice was issued by the petitioner to the respondent on 31st March, 2004 invoking the arbitration clause, the same was abandoned for the time being by the petitioner for the following reasons:

> The petitioner had approached the Minister for redressal of his grievance and consequent thereto a meeting was arranged. Thereupon a committee was constituted which accepted certain suggestions from the side of the petitioner, including the petitioner's suggestion to install a new segregating plant at the given site. The petitioner, however, asked for a loan of Rs. 50 lakhs for installation of the segregating plant which, however, was declined by the committee. This decision was duly communicated to the petitioner. Petitioner thereupon asked the respondent to treat the segregation of non-biodegradable material as an additional service and desired the respondent to pay reasonable segregation charges. This plea of the petitioner was also not accepted by the respondent.

8. According to the respondent, from the above facts it is clearly evident that the petitioner had abandoned the request for appointment of an arbitrator, and after the talks failed he rushed to the court for appointment of an arbitrator without first making a fresh request to the respondent for the said appointment, and this was an abuse of the process of the court. The respondent further contends that in fact, as per the terms of the agreement, the names of 3 arbitrators were offered to the petitioner vide letter of 1.5.2006, but he refused to give his sanction and, therefore, the respondents nominated Sh. K.S. Gangadharan, retired Additional D.G. (W), 15-B, Charakh Sadan, Vikas Puri, New Delhi.

9. In the course of hearing, learned Counsel for the petitioner strenuously urged that notice dated 31st March, 2004 was never given up, waived or abandoned by the petitioner. Had it been so, the respondent would not have nominated an arbitrator after the filing of the present petition. The very fact that the respondent nominated Sh. K. S. Gangadharan as the arbitrator itself belies the contention of the respondent that notice dated 31st March, 2004 invoking the arbitration clause was treated as abandoned by the petitioner.

I am inclined to agree with this contention for more than one reason, other than the reason given by the petitioner. Firstly, the petitioner has stated that letter dated 31st March, 2004 addressed to the Secretary of the respondent was followed by another letter dated 30th August, 2004 sent to the administrative head of the respondent reminding him about the letter dated 31st March, 2004. This clearly shows that the petitioner did not intend to abandon the notice dated 31st March, 2004. Secondly, the committee constituted by the respondent having declined the proposal for a loan of Rs. 50 lakhs for installation of a Segregation Plant, the petitioner vide its letter dated 27th March, 2006 wanted re-consideration of the decision. Thus, quite apparently the petitioner who had filed the present petition on 13.2.2006 was simultaneously making efforts to settle the matter with the respondent. This, to my mind, cannot be construed as an

abandonment of his notice for appointment of an arbitrator. Had the respondent construed it as such, it would not have extended to the petitioner the names of three arbitrators and thereafter nominated Sh. K. S. Gangadharan as the arbitrator to adjudicate upon the dispute between the parties.

10. In view of the foregoing, it clearly emerges that there was a valid and subsisting arbitration agreement between the parties. Disputes and differences had cropped up between the parties. The petitioner in terms of Clause 5.2 of the agreement by letter/notice dated 31st March, 2004, followed by letter dated 30th August, 2004 quantifying the various claims, invoked the arbitration agreement. It also clearly emerges from a bare perusal of Clause 5.2 of the agreement that the arbitrator was to be appointed with mutual consent of both the parties and not unilaterally. Names of three arbitrators were offered vide letter dated 1st May, 2006 after the present petition had been filed in this Court on 13th February, 2006, when the respondent had already lost its right to appoint an arbitrator.

11. Thus, the only aspect of the matter which remains to be considered is whether the appointment of Sh. K. S. Gangadharan by the respondent after the filing of the present petition is contrary to the law laid down by the Hon'ble Supreme Court. According to the respondent the petition has become infructuous after the said appointment of Sh. A. S. Gangadharan, while according to the petitioner the alleged appointment of the arbitrator itself is not in accordance with the law as enunciated by the Apex Court in the case of Datar Switchgear Ltd. v. Tata Finance Ltd. and Anr. [(2000) 8 SCC 151]. The relevant part of the judgment which appears at page No. 158 of the Report reads as under:

> *"19. So far as cases falling under Section 11(6) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.*

12. The ratio of Datar Switchgear (supra) was affirmed by the Apex Court in Punj Lloyd Ltd. V/s Petronet MHB Ltd. [(2006) 2 SCC 638] and Shin Satellite Public Co. Ltd. v. Jain Studios Ltd. [AIR 2006 SC 963]. A three Judge Bench in Punj Lloyd (supra) held that once the party conferred with the power to appoint the arbitrator, fails to respond to the request of the aggrieved party to appoint the arbitrator, it ceases to have an authority to appoint the arbitrator after the aggrieved party approaches the court for the appointment of the arbitrator. To the same effect is the ratio of the judgment in Shin Satellite (supra), wherein it was

held that the respondent had lost its right to make appointment of an arbitrator once the petitioner had approached the Chief Justice under Section 11(6) of the Act for appointment. This then is the consistent view of the Apex Court.

13. Looked at it from another angle, continued obduracy and nonchalance of governmental authorities and semi-governmental bodies must not, in my view, be countenanced by the courts as the same defeats the very purpose of the enactment viz., the expeditious settlement of disputes between the parties. Not infrequently, invocation of the arbitration clause by the aggrieved party falls on deaf ears or at any rate is met with dogged refusal to appoint an arbitrator, compelling the aggrieved party as a last resort to knock at the doors of the Court. Abrogation of duty to nominate an arbitrator must, therefore, be viewed strictly. Last ditch efforts to wrest the power to nominate by the concerned authority after an impasse in the settlement of disputes has been created by the authority itself must be snubbed by the Courts. To do otherwise, would tantamount to allowing the wrong-doer to take advantage of his own default. The nomination of an arbitrator by the respondent after the Chief Justice has been approached for such appointment makes mockery of the system, and renders at naught the whole purpose of setting up an Alternate Dispute Resolution System.

14. In the above view of the matter, it is held that the nomination of Shri K. S. Gangadharan after the filing of the present petition and after the respondent had forfeited all right to nominate an arbitrator deserves to be set aside. The same is accordingly set aside, and Justice Jaspal Singh, Retired Judge of this Court, is appointed as sole arbitrator to adjudicate upon the disputes/claims raised by the petitioner as detailed in the petition. The arbitrator shall fix his own fees as he deems fit. The parties shall appear before the learned arbitrator on 16th October, 2006 or on any date and time convenient to the learned arbitrator. The learned arbitrator will dispose of the disputes set out in the petition, preferably within a period of 4 months from the date of entering upon the reference.

15. The petition is disposed of accordingly, leaving the parties to bear their own costs.

16. A copy of this judgment be sent to the learned Arbitrator to enable him to enter upon the reference on an early date.

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ANNEXURE – 1.4

Supreme Court of India

The Iron and Steel Co. Ltd vs M/S. Tiwari Road Lines, on 08.05.2007

CASE NO.: Appeal (Civil) 2386 of 2007
(Special Leave Petition (Civil) No.26108 of 2005)

The Iron and Steel Co. Ltd ……. Petitioner

Versus

M/s. Tiwari Road Lines …… Respondent

Author: G. P. Mathur

BENCH: G. P. Mathur & Lokeshwar Singh Panta

J U D G M E N T

Leave granted.

2. This appeal, by special leave, has been filed against the judgment and order dated 09.09.2005 of a Division Bench of Andhra Pradesh High Court by which the writ petition filed by the appellant herein The Indian Iron and Steel Co. Ltd. was dismissed. The writ petition was filed assailing the order dated 27.12.2004 of Chief Judge, City Civil Courts, Hyderabad (designated authority) by which the petition filed by the respondent M/s. Tiwari Road Lines was allowed and a retired judicial officer was appointed as sole arbitrator to decide the dispute between the parties.

3. The appellant Indian Iron and Steel Co. Ltd., having its registered office at Kolkata, invited tenders on 17.02.2003 for transportation of pig iron and steel material from Burnpur/Kolkata stockyard to different customer locations in various parts of the country. The tender submitted by the respondent M/s. Tiwari Road Lines was accepted and a letter was issued on 14.05.2003 awarding the contract to the respondent to transport the material with effect from 17.05.2003 for a period of two years. The tender was submitted by the respondent at the Head Office of the company at Kolkata and the agreement was also signed between the parties at Kolkata. In terms of the agreement the respondent furnished a bank guarantee for Rs. 5,00,000/-. According to the appellant there was failure on the part of the respondent to comply with the terms of the agreement and accordingly the appellant invoked the bank guarantee on 16.09.2003. Feeling aggrieved by the encashment of the bank guarantee, the respondent filed an application before the Chief Judge, City Civil Courts, Hyderabad, who was the designated authority under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') under the scheme framed by the Andhra Pradesh High Court, for appointment of an arbitrator to decide the dispute between the parties. The appellant contested the application on two grounds, viz., that the City Civil Court at Hyderabad had no territorial jurisdiction to entertain the application and, secondly, under the terms of the agreement between the parties the dispute had to be resolved in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the application filed under Section 11 of the Act was not maintainable. The Chief Judge, City Civil Courts, Hyderabad allowed the

application by order dated 31.03.2004 and appointed a retired judicial officer as arbitrator to decide the dispute. The said order was challenged by the appellant by filing a civil revision petition before the Andhra Pradesh High Court. The revision petition was allowed and the matter was remanded to the City Civil Court, Hyderabad to consider the question of jurisdiction. The City Civil Court again allowed the application filed by the respondent by order dated 27.12.2004 and appointed a retired judicial officer as arbitrator to decide the dispute between the parties. This order was challenged by the appellant by filing a writ petition in the High Court on the ground, inter alia, that the application under Section 11 of the Act was not maintainable as the agreement between the parties contained a clause that any dispute between the parties shall be decided in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the respondent had not taken recourse to the said Rules. The other plea taken in the writ petition was that the City Civil Court, Hyderabad, had no territorial jurisdiction to entertain the application under Section 11 of the Act. The High Court negatived the contention raised by the appellant and dismissed the writ petition and it is these orders which are subject-matter of challenge in the present appeal.

4. We have heard learned counsel for the parties and have perused the records.

5. After the tender of the respondent M/s. Tiwari Road Lines had been accepted, an agreement was executed between the parties which contained General Conditions of Contract for transportation of iron/ steel materials and pig iron from Burnpur and Kolkata to various destinations in India. Clause 13 of the General Conditions of Contract reads as under:

"13. ARBITRATION

13.1 All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

13.2 In all above cases, the work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor as advised by the company will be withheld by the companion account of such proceedings."

A perusal of clause 13.1 will show that under the terms of the agreement all disputes or differences whatsoever arising between the parties have to be decided by arbitration in accordance with the Rules or Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

6. It is not disputed that the respondent did not make any effort to have the dispute settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. On the contrary, it straightaway moved an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the City Civil Court, Hyderabad, which was the designated court, in accordance with the scheme framed by the High Court of Andhra Pradesh. The principal

question, which requires consideration is, whether such an application moved by the respondent was maintainable. Sub-sections (1) to (7) of Section 11 of the Act read as under:

"11 - Appointment of arbitrators (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final."

Sub-section (2) of Section 11 of the Act provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator. The opening part of sub-sections (3) and (5) of Section 11 of the Act use the expression "failing any agreement referred to in sub-section (2)". Therefore, sub-

sections (3) and (5) will come into play only when there is no agreement between the parties as is referred to in sub-section (2) of Section 11 of the Act, viz., that the parties have not agreed on a procedure for appointing the arbitrator or arbitrators. If the parties have agreed on a procedure for appointing arbitrator or arbitrators, sub-sections (3) and (5) of Section 11 of the Act can have no application. Similarly, under sub-section (6) of Section 11 request to the Chief Justice or to an institution designated by him to take the necessary measures, can be made if the conditions enumerated in clauses (a) or (b) or (c) of this sub-section are satisfied. Therefore, recourse to sub-section (6) can be had only where the parties have agreed on a procedure for appointment of an arbitrator but (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. Therefore, a combined reading of the various sub- sections of Section 11 of the Act would show that the request to the Chief Justice for appointment of an arbitrator can be made under sub-sections (4) and (5) of Section 11 where parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of Section 11. A request to the Chief Justice for appointment of an arbitrator can also be made under sub-section (6) where parties have agreed on a procedure for appointment of an arbitrator as contemplated in sub-section (2) but certain consequential measures which are required to be taken as enumerated in clauses (a) or (b) or (c) of sub-section (6) are not taken or performed.

7. In the present case the agreement executed between the parties contains an arbitration clause and clause 13.1 clearly provides that all disputes and differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. This clause is in accordance with sub-section (2) of Section 11 of the Act. There being an agreed procedure for resolution of disputes by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration sub-sections (3), (4) and (5) of Section 11 can have no application. The stage for invoking sub-section (6) of Section 11 had also not arrived. In these circumstances, the application moved by the respondent before the City Civil Court, Hyderabad, which was a designated authority in accordance with the scheme framed by the Chief Justice of the Andhra Pradesh High Court, was not maintainable at all and the City Civil Court had no jurisdiction or authority to appoint an arbitrator. Thus, the order dated 31.03.2004 passed by the Chief Judge, City Civil Courts, Hyderabad, appointing a retired juridical officer as arbitrator is clearly without jurisdiction and has to be set aside.

8. The legislative scheme of Section 11 is very clear. If the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightaway. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of Section 11 of the Act or the various contingencies provided for in sub-section (6) have arisen. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute

by arbitration as contemplated by sub-section (2) and there is no allegation that anyone of the contingencies enumerated in clauses (a) or (b) or (c) of sub-section (6) had arisen, the application moved by the respondent herein to the City Civil Court, Hyderabad, was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order. The order dated 27.12.2004, therefore, is not sustainable.

9. In the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that in clause (a) of sub-section (8) of Section 11 of the Act it is specifically provided that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties.

10. The judicial pronouncements also show that normally the clause in the agreement providing for settling the dispute by arbitration by arbitrators having certain qualifications or in certain agreed manner should be adhered to and should not be departed with unless there are strong grounds for doing so. In S. Rajan vs. State of Kerala [(1992) 3 SCC 608], the Court was called upon to interpret sub-section (4) of Section 20 of the Arbitration Act, 1940, which reads as under:

"20. Application to file in Court arbitration agreement –

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

The Court considered the scope of sub-section (4) of Section 20 of the Arbitration Act, 1940 and held as under: -

"Sub-section (4) of Section 20 says that the reference shall be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. Where the agreement itself specifies and names the arbitrator, it is obligatory upon the court, in case it is satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It is not open to the Court to ignore such an arbitration clause of the agreement and to appoint another person as an arbitrator. Only in cases where the arbitrator specified and named in the agreement refuses or fails to act or where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator. Since in the present case the agreement specified and named the arbitrator, there was no occasion or warrant for the court to call upon the parties to submit panels of arbitrators. The court was bound to refer the dispute only to the arbitrator named and specified in the agreement."

In Government of A.P. vs. K. Mastan Rao [1995 Supp. (4) SCC 528], the agreement between the parties provided for settlement of dispute by three persons holding the post of Chief Engineer of the project, Deputy Secretary to Government, Finance Department, and the Director of Accounts of the project. On the petition made by the contractor, the subordinate judge removed the panel of three arbitrators and appointed a retired Chief Engineer as the sole arbitrator to adjudicate the dispute. This Court, after taking into consideration the terms of the agreement, set aside the order passed by the subordinate judge and directed that the arbitration matter should be entrusted to the incumbents of the three posts mentioned in the agreement. In Rite Approach Group Ltd. vs. Rosoboronexport [(2006) 1 SCC 206], it was held as under in para 20 of the Report:

"20. In view of the specific provision specifying the jurisdiction of the Court to decide the matter, this Court cannot assume the jurisdiction. Whenever there is a specific clause conferring jurisdiction on particular Court to decide the matter then it automatically ousts the jurisdiction of the other Court. In this agreement, the jurisdiction has been conferred on the Chamber of Commerce and Trade of the Russian Federation as the authority before whom the dispute shall be resolved. In view of the specific arbitration clause conferring power on the Chamber of Commerce and Trade of the Russian Federation, it is that authority which alone will arbitrate the matter and the finding of that arbitral tribunal shall be final and obligatory for both the parties."

11. This being the settled position of law we are clearly of the opinion that the respondent should have initiated proceedings for settlement of disputes by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration as provided in clause 13.1 of the agreement and the application moved by it to the City Civil Court, Hyderabad, for appointment of an arbitrator was not maintainable. Consequently, the order passed by the City Civil Court, Hyderabad dated 27.12.2004 is wholly illegal and without jurisdiction and is liable to be set aside.

12. Learned counsel for the appellant has also submitted that City Civil Court, Hyderabad had no jurisdiction to entertain the application moved by the respondent as no part of cause of action had accrued there. In this connection, he has referred to clause (b) of sub-section (12) of Section 11 and clause (e) of sub-section (1) of Section 2 of the Act which will govern the question of jurisdiction as to Chief Justice of which High Court has to be approached for moving an application under Section 11 of the Act. Learned counsel has submitted that the tenders were floated at Kolkata, the respondent submitted the tender at Kolkata, the agreement was executed at Kolkata and, therefore, the court at Hyderabad had no jurisdiction to entertain the application. Learned counsel has also submitted that the view taken by the High Court that as the bank guarantee was furnished at Hyderabad and was encashed at Hyderabad, the court at Hyderabad has jurisdiction is erroneous in law inasmuch as the agreement did not contain any clause regarding the place from where the bank guarantee had to be furnished. Learned counsel has submitted that there was only a requirement for furnishing the bank guarantee and that it could be furnished from anywhere in India and since in the present case the bank guarantee was furnished by the respondent from a bank at Hyderabad it was encashed there and, therefore, the said fact was wholly irrelevant for deciding the plea of jurisdiction. He has also relied upon a decision of this Court in South East Asia Shipping Co. Ltd. vs. Nav Bharat Enterprises Pvt. Ltd. [(1996) 3 SCC 443], in support of his contention that the submission of the bank guarantee from Hyderabad or the encashment thereof does not constitute even a part of cause of action to confer jurisdiction on the court at Hyderabad. Though we find substance in the contention raised by the learned counsel for the appellant but in view of our finding recorded on the main point, we do not consider it necessary to express any final opinion on the second contention.

13. For the reasons discussed above, the appeal is allowed with costs throughout. The judgment and order dated 09.09.2005 of the High Court of Andhra Pradesh and the judgment and order dated 27.12.2004 of the City Civil Court, Hyderabad appointing an arbitrator are set aside. It will be open to the parties to get the dispute decided by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

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Annexure – 1.5

IN THE HIGH COURT OF DELHI AT NEW DELHI

Sarvesh Chopra Builders Pvt. Ltd. Vs Union of India, on 06.12.2007

No. 514 of 2006

Sarvesh Chopra Builders Pvt. Ltd. ..... Petitioner
Through: Mr. Kirti Uppal with
Mr. Sanjeet Singh, Advocate

Versus

Union of India ..... Respondents
Through: Mr. Shambu Sharan with
Mr. Gunjan Kumar, Advocate

Author: Shiv Narayan Dhingra, J.

Judgement

1. This petition has been filed by the petitioner under section 11(6) and section 14(1) of Arbitration and Conciliation Act with a prayer that this Court should appoint another sole arbitrator in place of the earlier Arbitrators appointed under the agreement, to decide the dispute and claims of the petitioner. The petitioner contended that the Arbitrators appointed under the agreement have failed to proceed in the matter for last more than one year which demonstrate that they have failed to perform their function and hence the present application.

2. A brief background of the case. The petitioner is a contractor who had undertaken a contract of civil construction. He raised certain disputes and invoked arbitration agreement on 20.10.1997 and sent notice to the respondent to appoint the arbitrators. The Arbitrators were appointed by the respondent and claims of the petitioner were referred to the Arbitrators. However, petitioner approached this Court vide a petition No. 352/98 claiming that the only a part of the claim was referred to the Arbitrators and claim Nos. 3, 5, 6 and 7 were not referred to the Arbitrators. Vide order dated 28.8.2000 this Court directed that claim Nos. 3, 5, 6 and 7 raised by the petitioner be also referred to the Arbitrators. After the order of this Court, those claims were also referred to the Arbitrators. The petitioner had also filed another petition being AA-56/2004 alleging that respondent had failed to Act as per order, which was disposed of by this Court vide order dated 27.9.2004 A perusal of this order shows that the respondent had issued a letter to the petitioner on 12.5.2004 itself whereby it conveyed three names to the petitioner out of which one was to be chosen by him. When the petitioner was confronted with this letter, counsel for the petitioner prayed that the petition be disposed of with liberty to the petitioner to convey his choice. The respondent thereafter filed a counter claim before the Arbitrators claiming liquidated damages. The petitioner filed an OMP before this Court, being OMP No. 188/2005, claiming that liquidated damages were not permissible and the counter claim was not as per the conditions of the contract and therefore, Arbitrators should be told not to decide the counter claim. This petition was withdrawn by the petitioner on 24.5.2005, after arguing the matter at some length. Petitioner sought liberty to

raise this issue before the Arbitrators themselves. Now the petitioner has filed the present petition stating that the Arbitrators appointed by the respondent have not entered upon the reference and they have failed to adjudicate upon the disputes raised by the petitioner for the last one year and therefore, this Court should appoint a sole arbitrator to adjudicate upon the claim of the petitioner.

3. A perusal of facts right from 1998 till now would show that it is petitioner who had been rushing to the Court without any cause. Once he rushed to the Court that Arbitrators were not being appointed, while in fact the letter has been written to the petitioner long back asking him to chose one of his nominee, secondly he rushed to the Court that the counter claim filed by the respondent was not maintainable and should not be entertained by the Arbitrators. Later on he withdrew this petition since the petition was not maintainable and this issue should have been raised before the Arbitrators. However, such court proceedings filed by the petitioner wasted a lot of time. The Arbitrators appointed by the respondent could not act and adjudicate the claim because of the pendency of petitions in the Court. The petitioner's claim that Arbitrators had not entered upon reference is belied by his own pleading that the Arbitrators had entertained the counter claim filed by the respondent. If no reference had been entered into, the counter claim could not have been entertained.

4. It is well settled law that the parties are bound by the arbitration agreement. Who shall be the Arbitrators, is also the subject matter of agreement between the parties. It is not possible for one party to arbitration agreement to resile from the agreement and say that the matter be not adjudicated by the Arbitrators as provided in the agreement and another sole arbitrator should be appointed. The Court cannot without a reasonable cause replace an Arbitrator whom the parties have chosen under the terms of the contract. The Court can only interfere where there is legal misconduct of the Arbitrator or Arbitrator appointed was not competent and disqualified in terms of the agreement. The Court can appoint an Arbitrator different from one as stated in the agreement in those cases where the party for a valid reason do not agree to appoint the person named in the contract as Arbitrator. The Court would not be justified to appoint a different person as sole arbitrator unless the Arbitrators named in the arbitration agreement had refused to act and adjudicate the claim or he had neglected to enter upon the reference.

5. In the present case the Arbitrators were not allowed to act upon by filing one or another petition by the petitioner in the Court. The petition is not maintainable and is hereby dismissed. However, the Arbitrators appointed under the agreement are directed to expedite and adjudicate upon the claim and pass an award, as far as possible, within four months of communication of this order to them.

Sd./-

December 06, 2007 SHIV NARAYAN DHING

****

ANNEXURE – 1.6

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 6324 of 2004

Union of India ……. Appellant

Versus

Krishna Kumar ……. Respondent

ORDER

Heard parties.

1. This appeal is directed against the judgment and order dated 23.02.2004 passed by the Division Bench of the Calcutta High Court in APOT No. 557 of 2002 upsetting the judgment of the Learned Single judge.

2. For the disposal of this appeal it may not be necessary to recite the entire facts relating to the filling of the present appeal. Suffice it to say that there was an agreement between the appellant and the respondent for a civil contract. Clause 64 of the agreement deals with the demand for arbitration which read:

"64. Demand for Arbitration:

(3)(a)(ii) – Two arbitrators who shall be gazette railway officers of equal status to be appointed in the manner laid in clause 64(3)(b) for all claims of Rs. 5,00,000 (Rupees Five Lakhs) and above, and for all claims irrespective of the amount or value of such claims if the issue involved are of a complicated nature. The general manager shall be the sole Jude to decide whether the issue involved are of a complicated nature or not. In the event of the two arbitrators being undecided in their opinions, the matter under dispute will be referred to an umpire to be appointed in the manner laid down in sub clause (3)(b) for his decision.

(3)(a)(ii) – it is a term of this contract that no person other than a gazette railway officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

3. Despite the aforesaid clause stipulated in the agreement the respondent filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") before the learned Chief Justice of the Calcutta High Court. Pursuant to the application, the Learned Chief Justice appointed an Arbitrator. The arbitrator has made an award. The award was challenged before the learned single Judge under Section 34 of the Act which was allowed by the learned Single Judge setting aside the award.

4. Aggrieved thereby the claimant preferred an appeal before the Division Bench. By the impugned order the learned Division Bench upset the well-reasoned judgment rendered by the learned Single Judge. Hence, the present appeal by special leave.

5. The learned Division Bench repealing the contention of the appellant that the appointment of Arbitrator was not in accordance with law has held that the

order of the learned Chief Justice being an administrative in nature the contention raised by the appellant was not tenable. When the learned Division Bench rendered that order, judgment of the Constitution Bench of this Court in SBP & Co. Ltd. v. Patel Engineering Ltd. [2005 (7) SCJ 461 (2005) 8 SCC 618] was not available. Be that as it may, in the Constitution Bench Judgment this Court has held that the order passed by the learned Chief Justice appointing the Arbitrator is a judicial order. Having regard to the subsequent order rendered by the Constitution Bench of this Court in SBP Co. Ltd. (supra) the observations of the Division Bench of the High Court that the order of the learned chief Justice is administrative in nature are no longer held to be appropriate and valid in the eyes of law.

6. With regard to the interpretation of the Clause 64 of the agreement the three Judge Bench of this Court examined the same Clause which is involved in the present case in Union of India and another v. M. P. Gupta [(2004) 10 SCC 504] and has held in paragraph 4 of judgment as under:

"4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators. Justice P. K. Bahri could not be appointed by the High Court as the Sole Arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P. K. Bahri as sole arbitrator is set aside. Within 30 days from today the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months."

7. Therefore, the decision rendered in M.P. Gupta's case (supra) is squarely covered in the case at hand. In view thereof the order passed by the Division Bench of the Calcutta High Court is not tenable in law and is accordingly set aside. The order of the learned Single Judge is restored. The appeal is allowed. No costs.

8. Considering that the matter has been pending for quite long time, we direct the appellant to appoint an arbitrator in terms of Clause 64 of the agreement within three weeks from today. The Arbitrator thereafter shall make an award within 30 days from the date of entering into reference.

9. Pursuant to our order dated 24.09.2007 the awarded amount appeared to have been deposited before this Court. This Court further directed that the respondent is permitted to withdraw on furnishing bank Guarantee of a Nationalised Bank within six weeks from the date of deposit. It is submitted that the amount could not be withdrawn by the claimants as they are not able to furnish Bank Guarantee of a Nationalised Bank. In such event, this Court directed that the Registry shall keep the amount in the Fixed Deposit in a Nationalised Bank for an initial term of one year. It appears that the Registry has deposited the amount in a Nationalised Bank for one year and by another order 16-12-05 the FDR is extended for a further period of one year. The FDR was extended for a further period of 6 months each on 7-12-2006 and 29-5-2007 by orders passed by the Registrar of this Court. Let the FDR remain in deposit as it is as ordered by the Registrar of this Court.

Sd/-
(H. K. Sema)

Sd/-
(LOKESHWAR SINGH PANTA)

NEW DELHI
July 19, 2007.

A. P. 397 of 1997

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

Union of India

Versus

Krishna Kumar

Present:
The hon'ble Mr. justice
Girish Chandra Gupta
5th July, 2002

1. This was an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereunder referred to as the Act) for setting aside as award dated 11.11.2000 passed by Justice P. K. Ghosh, a retired judge of this Court. The facts of the case briefly stated are as follows:

A constructional work was entrusted by the petitioner with respondent for an aggregate sum of Rs. 33,40,268/- to be completed within 8 months from the date of the issuance on the work order. The work order was issued on 19.05.1995. the respondent failed to start the work. As a result, by a notice dated 23.08.1995 the respondent was directed to gear up his men and machinery and to start the work within 7 days failing which termination of the contract was threatened. The respondent remained indifferent. In the circumstances by a letter dated 22.09.1995 it was notified to him that the contract shall stand terminated after expiry of 48 hours. Ultimately by a letter dated 13.10.1995 the contract was terminated. The contract entered into between the parties contained an arbitration clause which provided that in the event of disputes involving a claim below Rs. 5 lakhs, a sole arbitrator shall be appointed by the General manager and in the case of claim above Rs. 5 lakhs, the claim shall be adjudicated by two arbitrators in the event of their being difference of opinion between the two arbitrators, the matter shall be referred to an Umpire. With regard to the qualification of the arbitrators or Umpire the contract provided as follows:

"It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an arbitrator / umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all"

2. The respondent appears to have applied under Section 11 of the Act before this Court on 01.12.1997 and the said application was disposing of by an order dated 10.07.1998 by which Mr. Ganas Kumar Sengupta, a retired judge of this Court was appointed. The said Mr. Sengupta had expressed his inability to act as an arbitrator. A further order dared 05.08.1999 was passed appointing Justice P. K. Ghosh, a retired judge of this Court to act as the sole arbitrator. It was disclosed in the application under Section 11 that the name of the respondent exceeded a sum of Rs. 10 lakhs.

3. On 26.08.1999 the petitioner challenging the arbitral tribunal under Section 12(3)(b) of the Act on the ground that the arbitral tribunal did not possessed the qualification agreed to between the parties. The learned arbitrator rejected the aforesaid challenge in the first meeting of the arbitration dated 10.09.1999 the relevant portion of the minute of the said meeting containing the decision of the arbitrator on the challenge is reproduced herein below:

"Today Mr. R. K. Bajpai appearing for the respondent, has orally submitted that he has filed an application challenging my appointment as Arbitrator.

Mr. S. K. Basu, advocate appearing for the claimant has raised a point of order that this is not the proper forum to raise objection with regard to the appointment of Arbitrator. The respondent has to move the appropriate forum for vindicating its grievances.

Arbitrator: Having heard both sided I do not find any merit in the submission of the respondent and, as such I am not taking any cognizance of the said application of the respondent."

4. The learned arbitrator proceeded to issue direction for filling pleadings; held 10 sittings and passed the impugned award directing the petitioner to pay a sum of Rs. 14,35,497/- and in default to pay interest thereon at the rate of 10 percent annum from the date of the award until the date of the payment. It is this award which is under challenge before this Court.

5. Mr. Samaddar, learned advocate appearing for the petitioner, submitted that the challenge to the arbitral tribunal was unduly rejected by the learned arbitrator and therefore this is a ground for setting aside the award under Sub-section (4) and (5) of the Section 13 of the Act which provides as follows:

"S.13 Challenge to procedure

4) if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-Section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

5) Where an arbitral award is made under Sub-Section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34."

6. Mr. Dutta learned advocate appearing for the respondent submitted that the petitioner took change of a favorable decision before the arbitrator, participated in the proceedings preferred a counter claim before the arbitrator for

adjudication and thus acquiesced in the proceedings and should be deemed to have waived his objection. If any, with regard to the competence of the arbitral tribunal and should not be allowed to take this hyper technical objection which, if allowed to prevail would mean wastage of the entire exercise and the cost incurred by the parties. The question now is whether the objection to the competence of the arbitral tribunal goes to the root of the matter. If it does the award cannot be allowed to prevail. If it does not, the award should be allowed to stand.

7. Section 11 of the Act enjoins, a duty upon the appointing authority to have due regard to the qualification required of the arbitrator by the agreement of the parties. Section 11(8)(a) provides as follows:

"S.11 Appointment of arbitrators – (8) the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to –

a) Any qualification required of the arbitrator by the agreement of the parties"

8. In the case of Konkan Railway Corporation Limited Vs Rani Construction Private Ltd. [(2002) 2 SCC 388] a Constitution Bench held that in appointing an arbitrator the Chief Justice should not decide any contentious issued between the parties and the matter should be left to the decision of the Arbitrator. Their Lordship however observed that the learned Chief Justice has to take into account the qualification required of the arbitrator by the agreement between the parties. Their Lordship also laid down that it would be open to the party concerned to challenge the arbitrator has been appointed by the Chief Justice or his designate under Section 11. Relevant portion of the judgment may be extracted herein below:

"…….. That the Chief justice or his designate has taken into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily would also be annexed to the request) and other consideration like secure the nomination of an independent and impartial arbitrator cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function.

It might be that though the Chief Justice of his designate might have all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrator's independence or impartiality. In that even, it would be open to that party to challenge the arbitrator nominated under Section 12, adopting the procedure under Section 13. There is no reason whatever to conclude that the grounds for challenge under Section 13 are not available only because the arbitrator has been nominated by the Chief Justice or his designate under Section 11.

It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. Section 16 provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the arbitral tribunal may rule on any objection with respect to the existence or validity of the arbitration agreement shows that the arbitral tribunal's authority under Section 16 is not confined to the width of

its jurisdiction, as was submitted by learned counsel for the appellants, it goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

9. I am of the view that the attention of the learned Chief Justice was not drawn to the qualification of the arbitrator laid down in the agreement between the parties and the arbitrator deliberately refused to take notice of the same when an application under Section 12(3)(b) of the Act was moved before him.

10. In the case of Rahacassi Shipping Co. S. A. Vs. Blue Star Line Ltd., reported in 1967 (3) All E. R. 301 question arose whether an award passed by a lawyer could be allowed to prevail when the arbitration agreement between the parties provided that the arbitrator or the Umpire would be a commercial man and not a lawyer. To be precise, the relevant portion of the arbitration agreement which fell for decision in that case was "arbitrator and Umpire shall be commercial men and not lawyers". In spite of this provision of the agreement a lawyer was appointment to act as the Umpire by the arbitrators. It was held "*I think that what happened here, arising through a regrettable and understandable, oversight in complete good faith by everyone concerned, vitiated Mr. LLOYD's original appointment, and that once Mr. LLOYD's original appointment had been wrongly made the error in the appointment of Mr. LLOYD cannot subsequently be cured by the subsequent appearance before him*".

11. This is a question of competence of the forum. If the forum is incompetent then it has no jurisdiction to decide the matter and this will go to the root of the matter. It is well settled that "*even a right decision by a 'wrong' forum is no decision. Reference may be made to the case of Pandurang Vs State of Maharashtra reported in (1986) 4 SCC 436.*"

12. For these reasons, the award cannot be sustained and is accordingly set aside. But in the facts of this case there will be no order as to costs. It may be added that neither of the parties prayed before me to decide as to whether the arbitrator is entitled ti his fees in the facts of this case. Therefore, I have no occasion to decide on that respect of the matter.

[GIRISH CHANDRA GUPTA, J]

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ANNEXURE – 1.7

Supreme Court of India

Northern Railway Administration, Ministry of Railway, New Delhi vs Patel Engineering Company Ltd., on 18.08.2008

Civil Appellate Jurisdiction
Civil Appeal No. 5067 of 2008
(Arising out of SLP (C) No. 16196 of 2006)

Northern Railway Administration, Ministry of Railway, New Delhi ... Appellant
Versus
Patel Engineering Company Ltd. ... Respondent

With

Civil Appeal No.	SLP (C) No.
5068 /2008	10409/2007
5072 /2008	11550/2007
5073 /2008	11552/2007
5074 /2008	11554/2007
5075 /2008	11556/2007
5076 /2008	11557/2007
5078 /2008	11559/2007
5079 /2008	11560/2007
5080 /2008	11561/2007
5081 /2008	11562/2007
5082 /2008	11563/2007
5083/2008	11564/2007
5084/2008	11565/2007
5071/2008	8248/2007
5069/2008	8744/2007
5085/2008	4687/2008

Author: Dr. Arijit Pasayat, J.

Bench: Arijit Pasayat, P. Sathasivam, Aftab Alam

JUDGMENT

1. Leave granted in all the Special Leave Petitions.

2. Noticing two different views in two decisions of this Court in Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [2007 (5) SCC 304] and Union of India v. Bharat Battery Mfg. Co. (P) Ltd. [2007 (7) SCC 684] the matter has been referred to a larger Bench and that is how these cases are before us.

3. In both the decisions the question related to appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the `Act'). In Bharat Battery's case (supra) the earlier decision in Ace Pipeline's case (supra) was apparently not brought before the Bench as a result of which there appears to be some confusion. As noted above, the scope and ambit of Section

11(6) of the Act relating to appointment of arbitrator falls for consideration in these cases.

4. The stand of Mr. Harish N. Salve appearing for some of the parties in these appeals and Mr. B. Dutta, Additional Solicitor General is that the true scope and ambit of Section 11(6) has to be considered in the background of Section 28(3) and Section 34 of the Act. According to them, the agreed procedure referred to in sub-section (2) of Section 11 has an exception in sub-section (6) i.e. where the agreed procedure fails. Where there is no agreed procedure, sub-sections (3), (4) and (5) of Section 11 apply. It is pointed out that there are three clauses in sub-section (6) of Section 11. Clause (c) relates to failure to perform function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. In other words, Clause (a) refers to parties to the agreement. Clause (c) relates to a person who may not be party to the agreement but has given consent to the agreement. It is also pointed out that there is a statutory mandate to take necessary measures, unless the agreement on the appointment procedure provided other means for securing the appointment. It is, therefore, submitted that before the alternative is resorted to agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort. It is also pointed out that while appointing an Arbitrator in terms of sub-section (8) of Section 11, the Court has to give due regard to any qualification required for the Arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is pointed out that both these conditions are cumulative in nature. Therefore, the Court should not directly make an appointment. It has to ensure first that the provided remedy is exhausted and the Court may ask to do what has not been done.

5. In response, Mr. Ashok Desai, learned senior counsel appearing for some of the parties who have sought for appointment of Arbitrator submitted that the expression `due regard' relates to some of the factors which have to be considered and it is not mandatory that the qualifications and the considerations as referred to in sub-section (8) of Section 11 perforce have to be applied. It is a question of degree of the parameters of consideration.

6. With reference to the earlier scheme under the Arbitration Act, 1940 (in short the `Old Act') it is stated that the party is forced to move the Court because of request being refused to appoint named Arbitrator and, therefore, the Court in terms of sub-section (8) of Section 11 is not constrained to appoint any arbitrator.

7. Section 11 reads as follows:

"Appointment of arbitrators-

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or subsection (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub- section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub- sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to "Chief Justice in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to, the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the court referred to in that clause, to the Chief Justice of that High Court."

8. The crucial sub-sections are sub-sections (2), (3), (4), (5) and (6).

9. Sub-sections (3) to (5) refer to cases where there is no agreed procedure. Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (i) a party fails to act as required under agreed procedure or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators.

10. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures" (underlined for emphasis). This expression has to read along with requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

11. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators.

But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

12. The expression `due regard' means that proper attention to several circumstances have been focused. The expression `necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

13. In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

14. The appeals are disposed of accordingly.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P. SATHASIVAM)

.....J.
(AFTAB ALAM)

New Delhi, August 18, 2008

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ANNEXURE – 1.8

Supreme Court of India

Union of India & Ors vs M/S Talson Builders, on 11.09.2008

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5605 OF 2008
(Arising out of SLP No.8195 of 2007)

Union of India & Ors. ... Appellants

Versus

M/s. Talson Builders … Respondent

Author: ……..J.
Bench: Tarun Chatterjee, Aftab Alam

ORDER

1. Delay of 264 days in filing the special leave petition is condoned.

2. Leave granted.

3. This appeal is directed against the judgment and final order dated 24th of February, 2006 passed by the High Court of Judicature at Allahabad in Original Arbitration Petition No. 117 of 2003 whereby the Chief Justice of the High Court had appointed a retired Judge of the Allahabad High Court as Arbitrator to decide the dispute raised by the parties. The order passed by the High Court runs as under:

"For the purpose of acting as Arbitrator in this matter, Hon'ble R. K. Gulati of 11, Taskhand Marg, Allahabad, a retired Judge of this Hon'ble Court is hereby nominated and appointed."

4. It is not in dispute that the respondents filed an application for appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. The respondent was granted certain contracts for Military Engineering service out of which, we are only concerned relating to CA NO. CWE/KAN/22 of 1996-97. After completion of contract work, the respondent submitted its final bill wherein it was specifically certified that the final bill included all claims raised by it from time to time irrespective of the fact whether they were admitted by the department or not and that there were no more claims in respect of the contract and the amount so claimed must be held to be full and final settlement of the claim of the respondent under the contract agreement. According to the appellants, the respondent submitted its final bill and received full payment without any protest. However, on 14th of August, 2000, the respondent sent a letter to the appellants for appointment of an Arbitrator which was not agreed to by them with the observation that the final bill in respect of the subject work had been signed and the amount had already been paid in full and final settlement and therefore, there was no dispute to be referred to the Arbitrator as prayed for by

the respondent. By the aforesaid order and without going into the question whether there was any dispute pending between the parties, the High Court, by the impugned order, appointed a retired Judge of the High Court as an Arbitrator to decide the dispute between the parties. Now, the question is - when such objections were raised against the appointment of an arbitrator on the ground that the claim could not be referred to the Arbitrator because of full and final settlement and the claim stood liquidated, the High Court ought not to have referred such dispute by appointing an Arbitrator without deciding the objections so raised, or it would be left open to the Arbitrator to go into this question after the parties had entered appearance before him. This question has already been decided by a three-Judge Bench of this Court in Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd. dated 18th of August, 2008. This Court after giving due consideration of the expression "due regard" has observed in paragraph 13 as follows:

"In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

5. In view of the aforesaid decision, we have no other alternative but to set aside the order of the High Court and request the High Court to go into the dispute and then dispose of the application for appointment of an Arbitrator under Section 11(6) of the Act in accordance with law. It is expected that the High Court shall decide the said application as early as possible preferably within three months from the date of supply of a copy of this order to it. The impugned order is thus set side. The appeal is allowed to the extent indicated above. There will be no order as to costs.

.....J.
[Tarun Chatterjee]

..... J
[Aftab Alam]

New Delhi;
September 11, 2008

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ANNEXURE – 1.9

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 3303 OF 2019
(Arising out of SLP(C) No(s). 6312 of 2018)

Union of India …… Appellants(s)

Versus

Parmar Construction Company …… Respondent(s)

With

Civil Appeal No(s).	(Arising out of SLP(C) No(s).
3306 of 2019	6034 of 2018
3304 of 2019	2166 of 2018
3307 of 2019	6316 of 2018
3312 of 2019	7720 of 2018
3310 of 2019	8019 of 2018
3311 of 2019	8021 of 2018
3305 of 2019	7937 of 2018
3308 of 2019	8597 of 2018
3319 of 2019	8256 of 2019 (Diary No.8885/2018)
3309 of 2019	8596 of 2018
3314 of 2019	9514 of 2018
3313 of 2019	8598 of 2018
3315 of 2019	9559 of 2018
3317 of 2019	11417 of 2018
3318 of 2019	11862 of 2018
3316 of 2019	22263 of 2018

JUDGMENT

Rastogi, J.
Leave granted.

2. The question that arises for consideration in the batch of appeals by special leave is as to whether (1) the High Court was justified in invoking amended provision which has been introduced by Arbitration and Conciliation(Amendment Act), 2015 with effect from 23rd October, 2015 (hereinafter being referred to as "Amendment Act, 2015"); (2) whether the arbitration agreement stands discharged on acceptance of the amount and signing no claim/discharge certificate and (3) whether it was permissible for the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (prior to the Amendment Act, 2015) to appoint third party or an independent Arbitrator when the parties have mutually agreed for the procedure vis-à-vis the authority to appoint the designated arbitrator. The High Court has passed separate orders in exercise of its powers under Section 11(6) of the Act, 1996 in appointing an independent arbitrator without adhering to the mutually agreed procedure under the agreement executed between the parties. Since the batch of appeals involve common questions of law and facts with the consent of parties, are disposed off by the present judgment.

3. The facts have been noticed from civil appeal arising out of SLP (Civil) no. 2166 of 2018.

4. The work for construction of office accommodation for officer and rest house was allotted to the respondent contractor, at Dungarpur in the State of Rajasthan on 21st December, 2011. As alleged, the extension was granted by the appellants to complete the work by 31st March, 2013. The measurement was accepted by the respondent under protest and when appellants officials failed to clear 7th final bill until the respondent put a line over "under protest" and signed no claim certificate. The total value of the work executed was of Rs. 58.60 lakhs against which Rs. 55.54 lakhs was paid and escalation cost was not added with interest @ 18% over delay payment. Demand notice was sent to the appellants to appoint an arbitrator invoking Clause 64(3) of the GCC to resolve the disputes/differences on 23rd December, 2013. When the appellants failed to appoint the arbitrator in terms of Clause 64(3), application came to be filed under Section 11(6) of the Act, 1996 before the Chief Justice/his Designate for appointment of an independent arbitrator who after hearing the parties under the impugned judgment allowed the application of the respondent and appointed a retired judge of the High Court as an independent arbitrator to arbitrate the proceedings.

5. In the instant batch of appeals, one fact is common that the orders were placed for various nature of construction works for its execution and the agreement executed between the parties includes a separate chapter for settlement of disputes leaving any dispute or difference between the parties to be resolved through the process of arbitration by appointing an arbitrator invoking clause 64(3) of the contract. As per terms of the agreement, date of completion of the project was delayed as alleged due to breach of obligations by the appellants and the scheduled date of completion had to be extended. Meanwhile, due to rise in the prices of raw material, the project was impossible to be completed by the respondent contractors and hence correspondence was made to either pay the escalated price or in the absence, the respondents would not be in a position to conclude the contract. It was alleged that the appellants accepted the terms and conditions for escalated prices and asked the respondents to complete the work and handover the project.

6. But when the respondents raised the final bills in the predetermined format (which also included the no dues certificate) on the newly agreed prices, dispute has arisen in context of payment of escalated prices or withholding of security deposits, taking note of the existence of arbitration clause in the agreement the respondents sent a notice to appoint an arbitrator as per clause 64(3) of GCC to resolve the dispute of payment of outstanding dues which was declined by the appellants by sending the reply that "No Due Certificate" was signed and that entails no dispute to be sent to arbitration. Since the appellants failed to appoint the arbitrator in accordance with the arbitration clause in the agreement, each of the respondent filed application under Section 11(6) of the Act before the High Court for appointment of an independent arbitrator and the primary objection of the appellants before the High Court was that on furnishing the no claim certificate by the contractor, no dispute subsists which is to be sent to the arbitrator and further the claims which has been submitted were beyond time as prescribed in the agreement and thus falls under the 'excepted matter' in the agreement.

7. After the matter being heard, the application for appointment of arbitrator under Section 11(6) of the Act, 1996 came to be decided by the High Court of Rajasthan by separate order(s) keeping in view the independence and neutrality of arbitrator as envisaged under Section 12(5) of the Amendment Act, 2015. The High Court further observed that the amended provisions of Act, 2015 shall apply to the pending proceedings and mere furnishing of no claim certificate would not take away the right of the parties and it is open for adjudication before the arbitrator and appointed a retired Judge of the High Court as an independent sole arbitrator under the impugned judgment in exercise of power under Section 11(6) of the Act, 1996. Undisputedly, the request for the dispute to be referred to arbitration in the instant batch of appeals was received by the appellants much before the Amendment Act, 2015 came into force (i.e. 23rd October, 2015).

8. Mr. K. M. Natarajan, learned Additional Solicitor General appearing for the appellants submits that Section 12 including subsections (1) and (5) as also Fifth and Seventh Schedule, has come into force by the Amendment Act, 2015 w.e.f. 23rd October, 2015 and undisputedly, in the instant batch of appeals, request to refer to the arbitration was received by the appellants much prior to the Amendment Act, 2015. In view of Section 21 read with Section 26 of the Amendment Act, 2015 where the request has been sent to refer the dispute to arbitration and received by the other side before the amendment Act, 2015 has come into force, the proceedings will commence in accordance with the pre-amended provisions of the Act, 1996 and in the given circumstances, apparent error has been committed by invoking Section 12(5) of the Amendment Act, 2015 for appointment of an independent arbitrator without resorting to the clause 64(3) of GCC as agreed by the parties and in support of submission, learned counsel has placed reliance on the decision of this Court in the case of *M/s. Aravali Power Company Private Limited Vs. Era Infrastructure Engineering Limited [*2017(15) SCC 32] and *S.P. Singla Constructions Pvt. Ltd. Vs. State of Himachal Pradesh and Others [*2018(15) Scale 421].

9. Learned counsel further submits that once the no claim certificate has been signed by each of the respondent and after settlement of the final bills, no arbitral dispute subsists and the contract stands discharged and they cannot be permitted to urge that they gave the no claim certificate under any kind of financial duress/undue influence and even in support thereof, no prima facie evidence has been placed on record. In the given circumstances, the appointment of an independent arbitrator by the High Court under Section 11(6) of the Act, 1996 is not sustainable and in support of submission, learned counsel has placed reliance on the decisions of this Court in *Union of India and Others Vs. Master Construction Company [*2011(12) SCC 349*]*; *New India Assurance Company Limited Vs. Genus Power Infrastructure Ltd. [*2015(2) SCC 424*]*; *ONGC Mangalore Petrochemicals Limited Vs. ANS Constructions Limited and Anr. [2018(3) SCC 373].*

10. Learned counsel further submits that none of the respondents had made any allegation of bias to the arbitrator who was likely to be appointed by the railways in terms of the agreement. The said issue would have cropped up only when the appointment of arbitrator was made by the railways. It was required in the first instance to make every possible attempt to respect the agreement agreed upon by the parties in appointing an arbitrator to settle the disputes/differences and only when there are allegations of bias or malafide, or the appointed arbitrator has miserably failed to discharge its obligation in submitting the award, the Court

is required to examine those aspects and to record a finding as to whether there is any requirement in default to appoint an independent arbitrator invoking Section 11(6) of the Act, 1996 and in support of submission, learned counsel has placed reliance on the decision of this Court in *Union of India & Another Vs. M.P. Gupta [2004(10) SCC 504],* Union of India & Another Vs. V.S. Engineering(P) Ltd. *[2006(13) SCC 240], Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Co. Limited [2008(10) SCC 240], Union of India Vs. Singh Builders Syndicate [2009(4) SCC 523].*

11. Learned counsel further submits that as indicated in clause 64(7) of the GCC, all statutory modifications thereof will be binding to the arbitration proceedings and after promulgation of the Arbitration and Conciliation (Amendment) Act, 2015, clause 64(7) stood amended to fulfil the mandate of Amendment Act, 2015 and it was clarified that all statutory modifications thereof shall apply to the appointment of arbitrator and arbitration proceedings and the respondents being signatory to the agreement have accepted the enforceability of aforesaid clause 64(7) and, therefore, are bound by any modification made in GCC even subsequently and placed reliance on the judgment of this Court in *S.P. Singla Constructions Pvt. Ltd's case* (supra).

12. Per contra, Mr. Sameer Jain, learned counsel for the respondents submits that respondents are the registered contractors undertaking various nature of works contracts with the railway establishment and are not in a bargaining position and it is a ground reality that final bills are not being released without a no claim certificate being furnished in advance by them. In all the cases, unilateral deductions have been made from the final bills furnished by each of the respondent and they are very small and petty contractors and the payments are not released unless the no claim certificate is being furnished, it is nothing more than a financial duress and undue influence by the authorities and is open for the arbitrator to adjudicate by examining the bills which was furnished for payment.

13. Learned counsel further submits that the effect of no claim certificate has been examined by this Court in *National Insurance Company Limited Vs. Boghara Polyfab Private Limited [2009(1) SCC 267]* and there are series of decisions of this Court where no claim certificate in itself has never been considered to be the basis to non-suit the request made in appointing an arbitrator to independently examine the dispute arising under the terms of the agreement.

14. Learned counsel further submits that once the appellants have failed to appoint an arbitrator under the terms of agreement before the application under Section 11(6) being filed before the Court, the authority forfeits its right of appointing an arbitrator and it is for the Chief Justice/his designate to appoint an independent arbitrator under Section 11(6) of the Act, 1996 as held by this Court in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another [2000(8) SCC 151]* followed in *Punj Lloyd Ltd. Vs. Petronet MHB Ltd. [2006(2) SCC 638]* and later in *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd. [2007(7) SCC 684]* that once the party fails to appoint an arbitrator until filing of an application under Section 11(6) of the Act, the opposite party would lose its right of appointment of arbitrator(s) as per the terms of the contract.

15. Learned counsel further submits that while dealing with Section 11(6), the Chief Justice/his designate can even overlook the qualification of the arbitrator

under the agreement but arbitration agreement in the instant case does not contain any specific qualification of the arbitrator under Clause 64(3) of the GCC and since the appellants failed to appoint an arbitrator until the application was filed, Section 11(6) empowers the Court to deviate from the agreed terms if required by appointing an independent arbitrator and by virtue of operation of Section 12(5) of the Amendment Act, 2015, the employee of the railway establishment became ineligible to be appointed as arbitrator. In the given circumstances, the authority is vested with the Chief Justice or his designate to appoint an independent arbitrator under Section 11(6) of the Act and the same has been held by this Court in *North Eastern Railway and Others Vs. Tripple Engineering Works [2014(9) SCC 288]* and *Union of India and Others Vs. Uttar Pradesh State Bridge Corporation Limited [2015(2) SCC 52]*.

16. Learned counsel further submits that the primary object by introducing the remedy to measure arbitration is to have a fair, speedy and inexpensive trial by the Arbitral Tribunal. Unnecessary delay or expense would frustrate the very purpose of arbitration and it holds out that arbitrator should always be impartial and neutrality of the arbitrator is of utmost importance and that has been noticed by the Parliament in amending Section 12(5) of the Act, 1996 which came into force on 23rd October, 2015 and when the matters have been taken up for hearing by the High Court after the amendment has come into force, the effect of the amended provisions would certainly be taken note of and in the given circumstances, if an independent arbitrator has been appointed which is undisputedly an impartial and neutral person fulfilling the mandate of the object of the proceedings of arbitration, the amended provision has been rightly invoked by the High Court in the appointment of an independent arbitrator invoking Section 11(6) of the Act, 1996.

17. We have heard learned counsel for the parties and with their assistance perused the material on record.

18. The facts which manifest from the batch of appeals are that the respondents are the registered contractors with the railway establishment and undertaking work contracts (construction) of various kinds. They raised a demand for escalation cost and the interest accrued thereon because the date of the completion of the project was delayed as alleged due to breach of obligations by the appellants and the scheduled date of completion had to be extended. In the interregnum period, there was a rise in the prices of the raw material and the project became impossible to be completed by the respondent contractors. Hence, a request was made to the appellants to either pay the enhanced escalation price otherwise the respondent contractors would not be in a position to conclude the contract and on the acceptance for payment of the escalation costs, respondent contractor completed the work and delivered the project and raised final bills in the prescribed predetermined format (which also included no dues certificate). Since the dispute has arisen in the context of the payment of the escalated cost, as demanded by respondent contractors, and their being a clause of arbitration in the agreement, each of the respondent contractors sent a notice for arbitration invoking clause 64(3) of GCC, which in majority of the cases declined by the appellants stating that no dues certificate has been furnished and that entailed no subsisting dispute and that was the reason due to which each of the respondent contractor had approached the High Court by filing an application under Section 11(6) of the Act, 1996. It is also not in dispute that the request for referring the

dispute to arbitration was received by the appellants much prior to the enforcement of the Amendment Act, 2015 which came into force, w.e.f. 23rd October, 2015.

19. To proceed with the matter further, it will be apposite to take note of the relevant clauses of the agreement with which we are presently concerned:

"CLAIMS: 43.(1) Monthly Statement Of Claims : The Contractor shall prepare and furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional expenses to which the Contractor may consider himself entitled to and of all extra or additional works ordered by the Engineer which he has executed during the preceding month and no claim for payment for and such work will be considered which has not been included in such particulars.

43.(2) Signing Of "No Claim" Certificate: The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a "No Claim" Certificate in favour of the Railway in such form as shall be required by the Railway after the works are finally measured up. The Contactor shall be debarred from disputing the correctness of the items covered by "No Claim" Certificate or demanding a clearance to arbitration in respect thereof.

64.(1) Demand for Arbitration:

64.(1)(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 "excepted 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.

64.(1)(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.

64.(1)(iii)(a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway. (b) The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal. (c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal. (d) Place of Arbitration: The place of arbitration would be within the

geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

64.(1)(iv) No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64.(1)(v) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

64.(2) Obligation During Pendency Of Arbitration:
Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

64.(3) Appointment of Arbitrator:

64.(3)(a)(i) In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM. {Authority: Railway Board's letter no. 2012/CEI/ CT/ARB./24, Dated 22.10./05.11.2013}

64.(3)(a)(ii) In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be

considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

64.(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause.

20. As per clause 43(2), the contractor signs a "No claim" certificate in favour of the railway in the prescribed format after the work is finally measured up and the contractor shall be debarred from disputing the correctness of the items covered under the "No Claim" certificate or demanding a clearance to arbitration in respect thereof. Each of the respondent has to attach no claim certificate with final bills in the prescribed format to be furnished in advance before the final bills are being examined and measured by the railway authorities. Although it has been seriously disputed by the appellants but that is the reason for which even after furnishing no claim certificate with the final bills being raised, it came to be questioned by the respondent (contractor) by filing an application to refer the matter to arbitration invoking clause 64(3) of the conditions of contract as agreed by the parties.

21. Under clause 64(1), if there is any dispute or difference between the parties hitherto as to the construction or operation of the contract, or the respective rights and liabilities of the parties on any matter in question or any other ancillary disputes arising from the terms of the contract or if the railway establishment fails to take a decision within the stipulated period and the dispute could not be amicably settled, such dispute or difference is to be referred to arbitration and who shall arbitrate such disputes/differences between the parties, the General Manager may nominate the officer by designation as referred to under clause 64(3)(a)(i) and a(ii) respectively with further procedure being prescribed for the sole arbitrator or the Arbitral Tribunal to adjudicate the disputes/differences arising under the terms of contract between the parties.

22. It is also not disputed that when the request of the respondent contractors was rejected by the appellants on the premise of the no claim certificate being furnished, arbitral dispute does not survive which is to be sent to arbitration, each of the respondent contractor approached the High Court by filing an application under Section 11(6) of the Act for appointment of an arbitrator for settling their disputes/differences arising from the terms of contract as agreed between the parties.

23. It is to be noticed that the cost of escalation which was raised by each of the respondent contractor with final bills were appended with the no claim certificate in the prescribed predetermined format and each of the claim of the respondent contractor for making a reference to the Arbitrator for settling the disputes/differences arising from the terms of the contract, as agreed between the parties was turned down by the appellants because of furnishing no claim certificate.

24. As on 1st January, 2016, the Amendment Act, 2015 was gazetted and according to Section 1(2) of the Amendment Act, 2015, it deemed to have come into force on 23rd October 2015. Section 21 of the Act, 1996 clearly envisage that unless otherwise agreed by the parties, the arbitral proceedings in respect of a

dispute shall commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent and the plain reading of Section 26 of Amendment Act, 2015 is self-explicit, leaves no room for interpretation. Section 21 & 26 of the Act, 1996/Amendment Act, 2015 relevant for the purpose is extracted hereunder:

"21. Commencement of arbitral proceedings— Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

26. Act not to apply to pending arbitral proceedings– Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

25. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the Amendment Act, 2015 shall not apply to such of the arbitral proceedings which has commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of Amendment Act, 2015 has been examined by this Court in *Aravali Power Company Private Limited Vs. Era Infra Engineering Limited* (supra) and taking note of Section 26 of the Amendment Act, 2015 laid down the broad principles as under:

22. The principles which emerge from the decisions referred to above are:

22.1 In cases governed by 1996 Act as it stood before the Amendment Act came into force:

22.1.1 The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject matter of the dispute.

22.1.2 Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of subsection (6) of Section 11 of the 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under subsection (6) of Section 11.

22.1.3 The Chief Justice or his designate while exercising power under subsection (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

22.1.4 While exercising such power under subsection (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant

appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

22.2 In cases governed by 1996 Act after the Amendment Act has come into force: If the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appoint such arbitrator(s) as may be permissible."

which has been further considered in *S. P. Singla Constructions Pvt. Ltd. case(supra)*.

"16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015(w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and, therefore, provisions of the Amended Act cannot be invoked."

26. We are also of the view that the Amendment Act, 2015 which came into force, i.e. on 23rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree.

27. In the instant case, the request was made and received by the appellants in the concerned appeal much before the Amendment Act, 2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of Amendment Act, 2015, in terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the respondent contractors deserves to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015 which came into force from 23rd October, 2015.

28. The thrust of the learned counsel for the appellants that submission of a no claim certificate furnished by each of the respondent/contractor takes away the right for settlement of dispute/difference arising in terms of the agreement to be examined by the arbitrator invoking Clause 64(3) of the conditions of the contract.

The controversy presented before us is that whether after furnishing of no claim certificate and the receipt of payment of final bills as submitted by the contractor, still any arbitral dispute subsists between the parties or the
contract stands discharged.

29. Before we take note of the factual aspect of the present matters, it will be appropriate to carefully consider the plenitude of decisions of this Court referred to by learned counsel for the parties and to summarise (first category) *Union of India Vs. Kishorilal Gupta & Bros. [AIR 1959 SC 1362]*; *P. K. Ramaiah & Co. Vs. Chairman and Managing Director, National Thermal Power Corpn. [1994 Supp(3) SCC 126]*; *State of Maharashtra Vs. Nav Bharat Builders [1994 Supp(3) SCC 83]*; *Nathani Steels Limited Vs. Associated Constructions [1995 Supp(3) SCC 324]*……(second category) *Damodar Valley Corporation Vs. KK Kar [1974(1) SCC 141]*; *Bharat Heavy Electricals Limited Ranipur Vs. Amarnath Bhan Prakash [1982(1) SCC 625]*; *Union of India and Anr. Vs. L.K. Ahuja and Co. [1988(3) SCC 76]*; *Jayesh Engineering Works Vs. New India Assurance Co. Ltd. [2000(10) SCC 178]*; Chairman and MD, *NTPC Ltd. Vs. Reshmi Constructions Builders & Contractors [2004(2) SCC 663]*.

30. The aforesaid cases fall under two categories, the one category where the Court after considering the facts found that there was full and final settlement resulting in accord and satisfaction and there was no substance in the allegations of coercion/undue influence. In the second category of cases, the Court found some substance in the contention of the claimants that "no-dues/no claims certificate or discharge vouchers" were insisted and taken (either on a printed format or otherwise) as a condition precedent for release of the admitted dues and consequently this Court held that the disputes are arbitrable. It took note of the principles earlier examined and summarised in *National Insurance Company Limited Vs. Boghara Polyfab Private Limited case* (supra) as under:

> *"44. None of the three cases relied on by the appellant lay down a proposition that mere execution of a full and final settlement receipt or a discharge voucher is a bar to arbitration, even when the validity thereof is challenged by the claimant on the ground of fraud, coercion or undue influence. Nor do they lay down a proposition that even if the discharge of contract is not genuine or legal, the claims cannot be referred to arbitration. In all the three cases, the Court examined the facts and satisfied itself that there was accord and satisfaction or complete discharge of the contract and that there was no evidence to support the allegation of coercion/undue influence."*

31. Further, taking note of the jurisdiction of the Chief Justice/ his Designate in the proceedings under Section 11(6) of Act 1996, this Court culled out the legal proposition in paragraph 51 as follows:

> *"51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is*

satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance."

32. It further laid down the illustrations as to when claims are arbitrable and when they are not. This may be illustrative (not exhaustive) but beneficial for the authorities in taking a decision as to whether in a given situation where no claim/discharge voucher has been furnished what will be its legal effect and still there is any arbitral dispute subsists to be examined by the arbitrator in the given facts and circumstances and held in para 52 of *National Insurance Company Limited Vs. Boghara Polyfab Private Limited* (supra) as follows:

"52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject are:

(i) A claim is referred to a conciliation or a prelitigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

(iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of rupees six lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the

admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The "accord" is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration."

33. It is true that there cannot be a rule of absolute kind and each case has to be looked into on its own facts and circumstances. At the same time, we cannot be oblivious of the ground realities that where a petty/small contractor has made investments from his available resources in executing the works contract and bills have been raised for the escalation cost incurred by him and the railway establishments/appellants without any justification reduces the claim unilaterally and take a defence of the no claim certificate being furnished which as alleged by the respondents to be furnished at the time of furnishing the final bills in the prescribed format.

34. The nature of work under contract of the respondent contractors and the claim of the contractors which is the dispute in brief to be adjudicated by the arbitrator is submitted as follows:

S. N	**SLP**	**No Name of Contractor**	**Nature of Work under Contract**	**Claim of Contractor**
1.	6312/ 2018	Parmar Construction Company	Construction, Strengthening and rebuilding of major bridges between Nadbhai-Idgah (Agra) Total Cost of Contract Rs 3,30,71,724/-	**Rs 1,07,98,765/-** (Final Bill) + Interest and Arbitration Cost.
2.	2166/ 2018	S.K. Construction	Construction of Office Accommodation for officers and rest house at Dungarpur. Total Cost of Contract Rs 43,76,112/-. Total value of Work done was **Rs 58.50 Lacs.** **Rs 55.54 Lacs** were paid.	Rs 2.96 Lacs (Deficit amount) + Rs 2.65 Lacs (Escalation cost) + Rs 2.39 Lacs (Commercial Interest @ 18% p.a.) **Total Rs 8 Lacs**
3.	7937/ 2018	Anil Trading Company	Augmentation of the capacity of Diesel Shed, Bhagat-ki-kothi, Jodhpur. Contract Price Rs 2,42,85,808.84/-	Rs. 2,15,000/- (Non availability of Drawing) + Rs 1,50,000/- (Non availability of clear site) + Rs 1,14,099 (interest on delay of Final bill payment) + Rs 12,15,000/- (Bank Guarantee) + Rs 12,14,290/- (Security Deposit with interest) + Rs 1,00,000/- (Arbitration Cost)

				Total Rs 30,08,389/-
4.	6034/ 2018	Rajendra Prasad Bansal	Construction addition and alteration and raising of existing platform surfacing RRI Building, S&T Structures and dismantling of various structures at Bharatpur-Agra Fort Station Yard. Total Cost of Contract Rs 87,85,292/- 3 Supplementary contracts of the value of RS 24,62,511.52/-, Rs 3.5 Lacs & Rs 26,12,977,14/-	Rs 1.5 Lacs (deducted along with interest of 18% p.a.) + Rs 7.9 Lacs (expenses incurred on office staff and labour office) + Rs 1.2Lacs (delayed release of security amount & Final bill) + Rs 2 Lacs (Loss of Profit) **Total Rs 12,60,000/-**
5.	6316/ 2018	Maya Construction Pvt Ltd	Construction of Ratangarh Bye Pass. Total Cost of Contract Rs 8,29,25,822.68/-	Rs 38,27,196/- (Final bill amount) + Rs 17,78,231/- (PVC Final bill amount) + Rs 50,63,738/ (Security deposit & EMD) **Total Rs 1,06,69,165/-**
6.	8597/ 2018	Bharat Spun Pipes & Construction Company	Construction of Road Over Bridges across Railway track in Dausa Yard. Total Cost of Contract Rs 3,81,90,423.68/-	Rs 1,88,709/- (charged under head Cess) + Rs 8,36,386/- (Final PVC Bill) **Total Rs 10,25,095/-**
7.	8596/ 2018	Harsha Constructions	Construction of new Major Bridge no 178 (on Banas River) Total Cost of Contract Rs 10,51,42,109/-	Rs 1,30,960/- (Payment withheld for expansion joints) + Rs 1 Lacs (Refund of penalty from bill no XXV) + 36 Lacs (refund of cost of PSC box girder) + Rs 3,19,573/- (Loss due to delay in making final payment) + Rs 76,15,206/- (Incresed cost of material) **Total Rs 1,17,65,739/-**
8.	8019/ 2018	Bharat Spun Pipes & Construction Company	Construction of road over bridges across railway track Total cost of Contract Rs 6,31,07,472.50/-	Rs 6,18,302/- (charged under head Cess) + Rs 10,30,081/- (Final PVC Bill) **Total Rs 16,48,383/-**
9.	8021/ 2018	SB-SHC-MCDPL (JV)	Construction of Major Bridges including earth work. Total Cost of Contract Rs 15,92,08,761.97/-	Rs 27,93,752/- (amount deducted which was previously paid on account of overlapping under 10th running bill) + Rs 1,66,785/- (work done outside the scope of work order) + 7,98,214/- (deduction of 1% Cess) + Rs 5,78,144/- (Interest on delayed payment) + Rs 28,085 (Cost of computer stolen) + Rs 24,87,864/- (Cost of expansion joint) + Rs 1,81,003/- (Price

				variation) + Rs 60,390/- (Welding and bolting) **Total Rs 70,94,237/-**
10.	7720/ 2018	Bharat Spun Pipes & Construction Company	Construction of road over bridges across railway track Total cost of Contract Rs 2,98,59,531/-	Rs 44,514/- (charged under head Cess) + Rs 7,80,547 (Final PVC Bill) **Total Rs 8,25,061/-**
11.	8598/ 2018	Rajendra Prasad Bansal	Construction of misc., AEN Office, Signalling structure, platform surfacing, Rs 8.8 Lacs (loss of Profit) + Rs 5 Lacs (loss due to bad debts) & some other grounds like price variation, non temporary site offices, addition and alteration of existing structure, dismantling and rebuilding various structures between Idgah-Agra Fort Station Yard. Total Cost of Contract Rs 1,40,43,594/-	payment of final bill and security deposit for 1.5 yrs & interest on amount of final Bill **Total Rs 13.8 Lacs/-** [exact amount not ascertainable from documents on record]
12.	Diary No 8885/ 2018	Bharat Spun Pipes & Construction Company	Construction of road over bridges across railway track Total cost of Contract Rs 5,47,26,451.47/-	Rs 4,78,780/- (charged under head Cess) + Rs 23,07,563/- (Final PVC Bill) along with price variation and interest **Total Rs 27,86,343/-**
13.	9514/ 2018	B. M. Construction Company	Construction of major bridge between Kanauta- Jaipur stations. Total Cost of Contract Rs 8,46,08,660/-	Rs 7,21,733/- (for adding 10% more cement) + Rs 6,23,923/- + Rs 7,55,734/- (Extra work) + Rs 11,07,561/ -(Price variation of Steel purchased) + 4Lacs (using pressure rings) + 4,53,304/- (Labour Cess deducted), Rs 1.25 Lacs (deduction from bills) + Rs 3,47,880/- (interest on delayed paymet) + Rs 1.28 Lacs (Deducted as penalty) + Rs 19,01,537 (on a/c of PVC) + Rs 60Lacs (20 Lacs each for business losses, mental agonies and social humiliation) along with interest **Total Rs 1,93,34,667/-**
14.	9559/ 2018	Balaji Builders & Developers	Construction of 72 Units Type-II, 108 Units Type-III, 36 Units Type-IV in multi-storied tower and health units, shopping complex and	Rs 1,32,71,424/- (Final PVC Bill) + Rs 50Lacs (Price variation of steel bars) **Total Rs 1,82,71,424/** other ancillary works near Getore Jagatpur Railway Station. Total Cost of Contract Rs 28,28,20,028/-
15.	22263/ 2018	B.M. Construction Company	Construction of major bridge between Jatwara- Kanauta stations. Total Cost of Contract Rs 10,4484,441/-	Rs 39,05,010/- (for vacant labour charges of 9 months) + Rs 19,46,970/- (delay in

				providing drawing) + Rs 13,66,488/-(Price variation of Steel purchased) + Rs 3,91,534.88/- (using pressure rings) + 1,32,655/- (Labour Cess deducted), Rs 1,30,771/- (deduction from bills) + Rs 50,000/- (Deducted from 21 running bills) + Rs 11,91,127/ (interest on delayed payment) + Rs 56,40,327/- (Security Amount) + Rs 1,38,000/- (deducted as penalty) + Rs 76,39,600/- (PVC Bill)+ Rs 60Lacs (20Lacs each for business losses, mental agonies and social humiliation) along with interest **Total Rs 2,85,32,482/-**
16.	11417/ 2018	Kewai Constructions Co (JV)	Construction of Minor Bridge between Dausa – Lalsot Total Cost of Contract Rs 5,98,22,476/-	Rs 16,74,748/- (security Deposit) + Rs 47,66,869/- (Payment of Bill) + Rs 31,33,116/- (Cost of material left at site) + Rs 10Lacs (PSC Slab Advances) + Rs 13.85 Lacs (Idle Labour Charge) + Rs 50,000/- (Cost of Arbitration) **Total Rs. 1,20,09,733/-**
17.	11862/ 2018	Harinarayan Khandelwal	Construction of Staircase for fire exit, drilling tube well, underground water tank, and other miscellaneous works Total Cost of Contract Rs 1,56,63,006.87/-	**Rs 4,82,283.26/-** (Final PVC Bill)

35. The respondents are the contractors and attached with the railway establishment in the instant batch of appeals are claiming either refund of security deposits/bank guarantee, which has been forfeited or the escalation cost has been reduced from final invoices unilaterally without tendering any justification. It is manifest from the pleadings on record that the respondent contractors who entered into contract for construction works with the railway establishment cannot afford to take any displeasure from the employer, the amount under the bills for various reasons which may include discharge of his liability towards the bank, financial institutions and other persons, indeed the railway establishment has a upper hand. A rebuttable presumption could be drawn that when a no claim has been furnished in the prescribed format at the time of final bills being raised with unilateral deductions made even that acceptable amount will not be released,

unless no claim certificate is being attached to the final bills. On the stated facts, Para 52(iii) referred to by this Court in *National Insurance Company Limited Vs. Boghara Polyfab Private Limited* (supra) indeed covers the cases of the present contractors with whom no option has been left and being in financial duress to accept the amount tendered in reference to the final bills furnished and from the discharge voucher which has been taken to be a defence by the appellants prima facie cannot be said to be voluntary and has resulted in the discharge of the contract by accord and satisfaction as claimed by the appellants. In our considered view, the arbitral dispute subsists and the contract has not been discharged as being claimed by the appellants employer(s) and all the contentions in this regard are open to be examined in the arbitral proceedings.

36. Learned counsel for the appellants has referred to the judgments in *Union of India and Others Vs. Master Construction Company (supra); New India Assurance Company Limited Vs. Genus Power Infrastructure Limited* (supra); *ONGC Mangalore Petrochemicals Limited Vs. ANS Constructions Limited and Anr.* (supra). In all the cases referred, this Court has taken note of the judgment in *National Insurance Company Limited Vs. Boghara Polyfab Private Limited* (supra) on which a detailed discussion has been made and taking note of the pleadings of the case on hand, this Court arrived at a conclusion that prima facie there is an evidence on record to justify that no claim certificate or letter of subrogation was voluntary and free from coercion/undue influence and accordingly held that there is no live claim subsists, which is arbitrable after the discharge of the contract by accord and satisfaction.

37. The further submission made by the appellants that the High Court has committed error in appointing an independent arbitrator without resorting to the arbitrator which has been assigned to arbitrate the dispute as referred to under clause 64(3) of the contract. To examine the issue any further, it may be relevant to take note of three clauses in subsection 6 of Section 11 of Act, 1996 (pre-amended Act, 2015) which is as under:

> *(6) Where, under an appointment procedure agreed upon by the parties,—*
>
> *(a) a party fails to act as required under that procedure; or*
>
> *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
>
> *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

38. Clause (c) of subsection (6) of Section 11 relates to failure to perform any function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. In other words, clause(a) refers to the party failing to act as required under that procedure; clause(b) refers to the agreement where the parties fails to reach to an agreement expected of them under that procedure and clause (c) relates to a person which may not be a party to the agreement but has given his consent to the agreement and what further

transpires is that before any other alternative is resorted to, agreed procedure has to be given its precedence and the terms of the agreement has to be given its due effect as agreed by the parties to the extent possible. The corrective measures have to be taken first and the Court is the last resort. It is also to be noticed that by appointing an arbitrator in terms of subsection (8) of Section 11 of Act, 1996, due regard has to be given to the qualification required for the arbitrator by the agreement of the parties and also the other considerations such as to secure an independent and impartial arbitrator. To fulfil the object with terms and conditions which are cumulative in nature, it is advisable for the Court to ensure that the remedy provided as agreed between the parties in terms of the contract is first exhausted.

39. It has been considered by a three Judges' Bench of this Court in *Union of India & Another Vs. M.P. Gupta* (supra). Taking note of clause 64 of the agreement for arbitration, the Court held that in view of express provision contained in terms of the agreement in appointment of two gazetted railway officers, the High Court was not justified in appointment of a retired Judge as the sole arbitrator. It held as under:

3. The relevant part of clause 64 runs as under:

64. Demand for arbitration

(3)(a)(ii) Two arbitrators who shall be gazetted railway officers of equal status to be appointed in the manner laid in clause 64(3)(b) for all claims of Rs 5,00,000 (Rupees five lakhs) and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being undecided in their opinions, the matter under dispute will be referred to an umpire to be appointed in the manner laid down in subclause (3)(b) for his decision.

(3)(a)(iii) It is a term of this contract that no person other than a gazetted railway officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all."

4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P. K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months."

40. It was further considered by this Court in *Union of India and Another Vs. V.S. Engineering(P) Ltd.* (supra) as under:

3. The learned Additional Solicitor General appearing for the appellants Union of India has pointed out that as per clauses 63 and 64 of the General Conditions of

Contract, this Court in no uncertain terms has held that the Arbitral Tribunal has to be constituted as per the General Conditions of Contract, the High Court should not interfere under Section 11 of the Act and the High Court should accept the Arbitral Tribunal appointed by the General Manager, Railways. In this connection, the learned ASG invited our attention to a decision of this Court directly bearing on the subject in Union of India v. M.P. Gupta [(2004) 10 SCC 504] wherein a similar question with regard to appointment of the Arbitral Tribunal for the Railways with reference to clause 64 of the General Conditions of Contract came up before this Court and this appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole arbitrator and the appointment of sole arbitrator was set aside. The conditions of clauses 63 and 64 of the General Conditions of Contract are almost analogous to the one we have in our hand. In that case also relying on clause 64 of the contract a three-Judge Bench presided over by the Chief Justice of India observed as follows: (SCC p. 505, para 4)

4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P. K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints P. K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazette railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months."

and further reiterated by this Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited (supra) as follows:

5. It is pointed out that there are three clauses in subsection (6) of Section 11. Clause (c) relates to perform function entrusted to a personal institution and also failure to act under the procedure agreed upon by the parties. In other clause (a) refers to parties to the agreement. Clause (c) relates to a person who may not be party to the agreement but has given consent to the agreement. It is also pointed out that there is a statutory mandate to take necessary measures, unless the agreement on the appointment procedure provided other means for securing the appointment. It is, therefore, submitted that before the alternative is resorted to, agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort.

6. It is also pointed out that while appointing an in terms of subsection 8 of Section 11, the has to give due regard to any qualification required for the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is pointed out that both these conditions are cumulative in nature. Therefore, the Court should not directly make an appointment. It has to ensure first that the provided remedy is exhausted and the Court may ask to do what has not been done.

12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely

as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations."

and further, in *Union of India Vs. Singh Builders Syndicate* (supra) it was held as under:

11. The question that arises for consideration in this appeal by special leave is whether the appointment of a retired Judge of the High Court as sole arbitrator should be set aside and an Arbitral Tribunal should again be constituted in the manner provided in terms of Clause 64.

12. Dealing with a matter arising from the old Act (the Arbitration Act, 1940), this Court, in Union of India v. M.P. Gupta [(2004) 10 SCC 504] held that appointment of a retired Judge as sole arbitrator contrary to Clause 64 (which requiring serving gazette railway officers being appointed) was impermissible.

13. The position after the new Act came into force, is different, as explained by this Court in Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.[(2008) 10 SCC 240]. This Court held that the appointment of arbitrator(s) named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered to and/or given effect, as closely as possible.

14. It was further held in Northern Railway case [(2008) 10 SCC 240] that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of subsection (8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration."

41. This Court has put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible.

42. The judgments in *Datar Switchgears Ltd. case*(supra); *Punj Lloyd case* (supra) and *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd. Case* (supra) on which reliance has been placed by the learned counsel for the respondents/contractors may not be of assistance for the reason that the question for consideration before this Court was that if one party demands the opposite

party to appoint an arbitrator and the other party fails to appoint an arbitrator within 30 days what will be its legal consequence and it was held in the cases (supra) that if one party demands the opposite party to appoint an arbitrator and if the opposite party has failed to make an appointment within 30 days, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former makes an application under Section 11 seeking appointment of an arbitrator. In the instant cases, the question for consideration is as to whether the Chief Justice or his Designate in exercise of power under Section 11(6) of the Act should directly make an appointment of an independent arbitrator without, in the first instance, resorting to ensure that the remedies provided under the arbitration agreement are exhausted.

43. In the present batch of appeals, independence and impartiality of the arbitrator has never been doubted but where the impartiality of the arbitrator in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned, or has to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, Chief Justice or his designate in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act. In *North Eastern Railway and Others Vs. Tripple Engineering Works* (supra), though the panel of arbitrators as per clause 64(3)(a)(ii) and (iii) of the general conditions of contract under GCC was appointed in the year 1996 but for two decades, the arbitrator failed to pass the award and no explanation came forward. In the given situation, this Court observed that general conditions of the contract do not prescribe any specific qualification of the arbitrators to be appointed under the agreement except that they should be railway officers further held that even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6) to depart therefrom and accordingly, confirmed the appointment of an independent arbitrator appointed by the High Court in exercise of Section 11(6) of the Act, 1996. Almost the same situation was examined by this Court in *Union of India and Others Vs. Uttar Pradesh State Bridge Corporation Ltd.* (supra) and after placing reliance on *North Eastern Railway and Others Vs. Tripple Engineering works* (supra) held that since Arbitral Tribunal has failed to perform and to conclude the proceedings, appointed an independent arbitrator in exercise of power under Section 11(6) of the Act, 1996. In the given circumstances, it was the duty of the High Court to first resort to the mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties and the default procedure was opened to be resorted to if the arbitrator appointed in terms of the agreement failed to discharge its obligations or to arbitrate the dispute which was not the case set up by either of the parties.

44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

45. Consequently, the orders passed by the High Court are quashed and set aside. The appellants are directed to appoint the arbitrator in terms of clause 64(3) of the agreement within a period of one month from today under intimation to

each of the respondents/contractors and since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator and majority of the respondents being the petty contractors, the statement of claim be furnished by each of the respondents within four weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties expeditiously without being influenced/inhibited by the observations made independently in accordance with law.

46. The batch of appeals are accordingly disposed of on the terms indicated. No costs.

47. Pending application(s), if any, stand disposed of.

.....J.
(A.M. KHANWILKAR)

.....J.
(AJAY RASTOGI)

NEW DELHI
March 29, 2019

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ANNEXURE – 1.10

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 6400 OF 2016

UNION OF INDIA ... Appellant

VERSUS

PRADEEP VINOD CONSTRUCTION COMPANY … Respondent

With

CIVIL APPEAL No. 6420 OF 2016

UNION OF INDIA ... Appellant

VERSUS

M/S. B. M. CONSTRUCTION COMPANY … Respondent

J U D G M E N T

R. BANUMATHI, J.

1. These appeals arise out of the impugned judgments dated 15.05.2015 and 02.02.2015 passed by High Court of Delhi in Arbitration Petition No. 168 of 2015 and Arbitration Petition No. 531 of 2014 in and by which the High Court appointed an independent arbitrator for adjudication of disputes between the parties, instead of directing appointment of arbitrator as per Clause 64 of General Conditions of Contract (GCC) which stipulates that Railways' Officers should be appointed as Arbitrator.

2. Brief facts which led to filing of these appeals are as under:

Facts in CA No. 6400/2016:

On 14.07.2010, Northern Railways awarded the contract for misc. civil engineering works such as construction of duty huts at L-xings, water supply arrangements, provision of station name boards etc. in connection with Rewari-Rohtak New Line to the respondent. The total cost of the work at accepted rate came to Rs.5,30,31,369.30. The work was finally completed on 31.03.2012. According to the appellant, final payments were made by the appellant to the respondent vide bill bearing Vr. No. 00356/104/C/TKJ dated 06.05.2014. On the same day i.e. on 06.05.2014, parties also entered into a supplementary agreement which recorded full accord and satisfaction as on 06.05.2014. In the meanwhile, on 05.05.2014, respondent sent a letter to the appellant alleging that under the compulsion of circumstances, it had to sign the so-called final bill without protest as desired by the administration, otherwise heavy financial loss would have been caused to respondent and it may not be in a position to tender and execute further works. The respondent averred that a sum of over Rs.1.50 crores still remains to be paid to the respondent and calling upon the appellant to make the payment within 90 days. The respondent *vide* its letter dated 05.05.2014 invoked arbitration clause as contained under Clause 64 of General Conditions of Contract.

3. The appellant issued a reply dated 25.07.2014 rejecting the arbitration claim of the respondent, taking the stand that the respondent had signed the final bill and also signed the supplementary agreement which clearly stipulates that it was agreed between the parties that the respondent has accepted the said sums mentioned therein in full and final satisfaction of all dues and claims under the principal agreement.

4. The respondent thereafter filed Arbitration Petition No.168 of 2015 under Section 11 of the Arbitration and Conciliation Act, 1996 before the High Court for appointment of an arbitrator. Upon consideration of contention of the parties, the learned Single Judge held that the question whether the discharge certificate and supplementary agreement were signed by the respondent under duress, would require evidence to be led and is therefore, required to be examined by the arbitrator. So far as the appointment of arbitrator is concerned, the High Court held that since the Railways failed to appoint an arbitrator despite invocation of the arbitration clause by the respondent on 05.05.2014, the Railways forfeited its right under the arbitration clause and the learned Judge appointed Mr. Ram Prakash (Retd.), District and Sessions Judge as the sole arbitrator instead of directing the appointment of arbitrator as per Clause 64 of the General Conditions of Contract.

Facts in CA No. 6420/2016:

5. An agreement dated 17.01.2012 was entered into between the Northern Railways and the respondent for construction of two-lane road over bridge in lieu of L-xing near Muradnagar Railway Station at a cost of Rs.4,21,69,176.25/-. The work was completed on 03.08.2013. According to the Railways, the respondent received full and final payment vide final bill bearing Vr. No. 280 dated 29.01.2014 and also signed a supplementary agreement dated 01.03.2014 acknowledging full and final settlement of all claims. It was also provided in this supplementary agreement that the principal agreement shall stand finally discharged and the arbitration clause contained therein shall cease to exist. The respondent vide letter dated 15.01.2014 raised two claims and requested for appointment of arbitrator. The Railways informed the respondent that the claims of the respondent are not referable to arbitration as the same are covered under "excepted matter". The respondent- contractor on 28.08.2014 also sent a "No Claim" letter to the Railway stating that it has no claim towards the Railways and requested for release of security deposit made by it.

6. The respondent thereafter filed Arbitration Petition No. 531/2014 under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator. The High Court held that though the appellant claims that the disputes raised by the respondent are in the nature of "excepted matters" but that the issue can be examined by the arbitrator. With those findings, the court appointed Mr. H. K. Chaturvedi, advocate, as Sole Arbitrator and directed that arbitration shall take place under the aegis of the Delhi International Arbitration Centre.

7. Mr. Bharat Singh, learned counsel appearing for the appellant- Union of India-Railways submitted that the request for appointment of arbitrator was made before the Amendment Act, 2015 (w.e.f 23.10.2015) and hence, the proceedings

will have to be proceeded in accordance with the pre-amended provision of the Act, 1996. It was submitted that the High Court erred in appointing an independent arbitrator instead of directing the General Manager, Railway administration to appoint an arbitrator as per the terms and conditions of Clause 64 of GCC which stipulates that "excepted matters" cannot be referred to arbitration.

8. Per contra, Mr. Shantanu Kumar and Ms. Geetanjali Mohan, learned counsel for the respondent(s), submitted that once the appellant has failed to appoint an arbitrator under the terms of the agreement before the petition under Section 11(6) of the Arbitration Act, 1996 being filed before the Court, the authority forfeits its right of appointing an arbitrator and it is for the Chief Justice/Designate Judge to appoint an independent arbitrator under Section 11(6) of the Act. It was further submitted that Section 11(6) empowers the court to deviate from the terms of the agreement, if required, by appointing an independent arbitrator. Insofar as the contention that the respondent(s) have already received the final bill and issued "No Claim" letter to the Railway, the learned counsel for the respondent(s) submitted that "No Claim" certificate was issued under compulsion and it is nothing but due to undue influence by the authorities and it is open to the arbitrator to adjudicate by examining the bills which is furnished for payment and in such circumstances, it cannot be said to be an "excepted matter".

9. We have heard the learned counsel appearing for the parties. We have carefully considered the contentions of both the parties and perused the impugned judgment and materials on record.

10. The respondent(s) are registered contractors with the Railways and they are claiming certain payments on account of the work entrusted to them. The request of the respondent(s) for appointment of arbitrator invoking Clause 64 of the contract was declined by the Railways stating that their claims have been settled and the respondent(s) have issued "No Claim" certificate and executed supplementary agreement recording "accord and satisfaction" and hence, the matter is not referable to arbitration. Admittedly, the request for referring the dispute was made much prior to the Amendment Act, 2015 which came into force w.e.f. 23.10.2015. Since the request for appointment of arbitrator was made much prior to the Amendment Act, 2015 (w.e.f. 23.10.2015), the provision of the Amended Act, 2015 shall not apply to the arbitral proceedings in terms of Section 21 of the Act unless the parties otherwise agree. As rightly pointed out by the learned counsel for the appellant, the request by the respondent(s)- contractors is to be examined in accordance with the Principal Act, 1996 without taking resort to the Amendment Act, 2015.

11. Insofar as the applicability of the provisions of the Principal Unamended Act, 1996, after referring to *SP Singla Pvt. Ltd. v. State of Himachal Pradesh and another* [(2019) 2 SCC 488], in *Union of India v. Parmar Construction Company* [2019 (5) SCALE 453], it was held as under:

> "*26. We are also of the view that the Amendment Act, 2015 which came into force, i.e. on 23rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree.*

27. In the instant case, the request was made and received by the Appellants in the concerned appeal much before the Amendment Act, 2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of Amendment Act, 2015, in terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the Respondent contractors deserves to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015 which came into force from 23rd October, 2015."

12. In order to appreciate the contention of the parties, it is necessary to refer to Clause 64 of the General Conditions of Contract (GCC) which reads as under:

"64. (1) Demand for Arbitration:

64. (1) (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 "excepted 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.

64. (1) (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.

64. (3) Appointment of Arbitrator:

64. (3) (a)(i) In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM. {Authority: Railway Board's letter No. 2012/CE-I/CT/ARB./24, Dated 22.10./05.11.2013}

64. (3) (a)(ii) In cases not covered by the Clause 64(3)(a) (i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to

General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

64. (7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the Rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause."

13. It is seen from the above that under Clause 64(1) of GCC, if there is any dispute or differences between the parties or the respective rights and liabilities of the parties on any matter in question or any other ancillary dispute arising from the terms of the contract or if the railway administration fails to make a decision within the time stipulated thereon, then in any such case, but except in any of the "excepted matters", the General Manager may nominate the officer by designation as referred to under Clause 64(3)(a)(i) and a(ii) respectively with further procedure being prescribed for the sole arbitrator or the Arbitral Tribunal to adjudicate the dispute/differences arising under the terms of the contract between the parties.

14. In *Union of India and another v. M.P. Gupta* [(2004) 10 SCC 504], *Union of India and another v. V.S. Engineering (P) Ltd.* [(2006) 13 SCC 240], *Union of India v. Singh Builders Syndicate* [(2009) 4 SCC 523] and in a catena of judgments, the court held that whenever the agreement specifically provides for appointment of named arbitrators, the appointment of arbitrator should be in terms of the contract. After referring to *M. P. Gupta*, in *V.S. Engineering*, it was held as under:

"3. The learned Additional Solicitor General appearing for the appellant Union of India has pointed out that as per clauses 63 and 64 of the General Conditions of Contract, this Court in no uncertain terms has held that the Arbitral Tribunal has to be constituted as per the General Conditions of Contract, the High Court should not interfere under Section 11 of the Act and the High Court should accept the Arbitral Tribunal appointed by the General Manager, Railways. In this connection, the learned ASG invited our attention to a decision of this Court directly bearing on the subject in Union of India v. M. P. Gupta [(2004) 10 SCC 504] wherein a similar question with regard to appointment of the Arbitral Tribunal for the Railways with reference to clause 64 of the General Conditions of Contract came up before this Court and this Court held that where two gazetted railway officers are appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole arbitrator and the appointment of sole arbitrator was set aside. The conditions of clauses 63 and 64 of the General Conditions of Contract are almost analogous to the one we have in our hand. In that case also relying on clause 64 of the contract a three-Judge Bench presided over by the Chief Justice of India observed as follows: (SCC p. 505, para 4)

"4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P. K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P. K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months."

The court, however observed in para (6) that in the case of public institutions which are slow in responding to the request made by the contractor for appointment of an arbitrator, the power of the High Court to appoint an arbitrator under Section 11 is not taken away. The failure of the authorities in appointing an arbitrator and when the contractor approached the court for appointment of an arbitrator under Section 11 of the Act, it will then be in the discretion of the Chief Justice/designated Judge to appoint a railway officer as per the contract or a High Court Judge.

15. Considering the various matters of railway contracts and setting aside the appointment of independent arbitrators, after referring to *M. P. Gupta* and *V.S. Engineering* and other judgments, in *Parmar Construction Company*, this Court set aside the appointment of the independent arbitrator and directed the General Manager of the Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In paras (44) and (45), this Court held as under:

"44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under Clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

45. Consequently, the orders passed by the High Court are quashed and set aside. The Appellants are directed to appoint the arbitrator in terms of Clause 64(3) of the agreement within a period of one month from today under intimation to each of the Respondents/contractors and since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator and majority of the Respondents being the petty contractors, the statement of claim be furnished by each of the Respondents within four weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties expeditiously without being influenced/inhibited by the observations made independently in accordance with law."

The ratio of the above decision squarely applies to the case in hand. When the agreement specifically provides for appointment of named arbitrators, the appointment should be in terms of the agreement. The High Court, in our view, was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract.

16. Insofar as the plea of the appellant that there was settlement of final bill/issuance of "No Claim" letter, the learned counsel for the appellant has drawn our attention on Clause 43(2) – Signing of the "No Claim" Certificate and

submitted that as per Clause 43(2), the contractor signs a "No Claim" certificate in favour of the railway in the prescribed format after the work is finally measured up and the contractor shall be debarred from disputing the correctness of the items covered under the "No Claim" certificate or demanding a clearance to arbitration in respect thereof. On behalf of the respondent, it has been seriously disputed that issuance of "No Claim" certificate as to the supplementary agreement recording accord and satisfaction as on 06.05.2014 (CA No. 6400/2016) and issuance of "No Claim" certificate on 28.08.2014 (CA No. 6420/2016) that they were issued under compulsion and due to undue influence by the railway authorities. We are not inclined to go into the merits of the contention of the parties. It is for the arbitrator to consider the claim of the respondent(s) and the stand of the appellant-railways. This contention raised by the parties are left open to be raised before the arbitrator.

17. In the result, the impugned judgments dated 15.05.2015 and 02.02.2015 of the High Court of Delhi in Arbitration Petition No. 168 of 2015 and Arbitration Petition No.531 of 2014 are set aside and these appeals are allowed. The appellant is directed to appoint the arbitrator in terms of Clause 64(3) of the agreement within a period of one month from today under intimation to the respondent(s)-contractors. As soon as the communication of the appointment of arbitrator is made to the respondent(s), the statement of claim be filed by the respondent(s) within six weeks thereafter and the reply of the appellant to be filed within four weeks thereafter. The arbitrator shall proceed with the matter in accordance with law and decide the claim after affording sufficient opportunity of hearing to both parties expeditiously preferably within a period of four months.

……..J.
[R. BANUMATHI]

……..J.
[A.S. BOPANNA]

…….J.
[HRISHIKESH ROY]

New Delhi;
November 14, 2019

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Annexure – 1.11

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 23.07.2020, ARB P. 32/2020

NKB INFRASTRUCTURE PVT. LTD. …… Petitioner
Through: Mr. Arun Khatri, Advocate

Versus

NORTHERN RAILWAY ….. Respondent
Through: Mr. Amitava Poddar, Advocate

CORAM: HON'BLE Ms. JUSTICE JYOTI SINGH, J. (ORAL)

Hearing has been conducted through Video Conferencing.

1. Present petition has been filed under Section 11(6) read with Section 11(10) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. Petition relates to an Agreement between the parties dated 18.07.2014. Certain disputes having arisen between the parties with respect to the said Agreement, Petitioner had sent a notice to the Respondent dated 22.11.2019 invoking Arbitration in terms of Clause 64 of the General Conditions of Contract (hereinafter referred to as 'GCC'). Receiving no response towards appointment of the Arbitrator, present petition was filed. The matter was adjourned on the last date of hearing to enable Learned Counsel for Petitioner to go through the judgment of the Supreme Court in *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, 2019 SCC OnLine SC 1635*, wherein the Supreme Court has upheld the power of the Railways to appoint an Arbitral Tribunal in terms of Clause 64 of the GCC, which envisages the appointment through a panel of officers.

3. Learned Counsel for the Petitioner having perused the judgement very fairly and candidly submits that he has no objection if the Arbitral Tribunal was to be constituted as per the procedure laid down under the provisions of Clause 64(3)(a)(ii) of the GCC.

4. Mr. Amitava Poddar, Learned Counsel for Respondent submits that since Petitioner is agreeable to the appointment of Arbitral Tribunal by the Railways in terms of Clause 64(3)(a)(ii) of the GCC, he does not oppose the petition.

5. Relevant portion of Arbitration Clause 64 GCC, which provides for appointment of an Arbitral Tribunal, reads as under:

*"**64.(3) Appointment of Arbitrator: (a)(ii)** In cases not covered by the clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway*

which may also include the name(s) of retired Railway Officer(s) empaneled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch. of the request by Railway. The General Manager shall appoint at least one out them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM· shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator."

6. With the consent of the parties, following directions are passed:

(i) Respondent shall send a panel of 3 Officers, which shall include a retired Officer, in terms of Clause 64(3)(a)(ii) of GCC, within a period of 30 days from today to the Petitioner.

(ii) Petitioner shall suggest two names as his nominees to the General Manager, from the suggested names, and shall communicate the same to the Respondent, within 30 days from the date of receipt of the names.

(iii) General Manager shall thereafter appoint at least one Arbitrator from the names so suggested, as Petitioner's nominee and shall simultaneously appoint the balance 2 Arbitrators duly indicating the 'Presiding Arbitrator' from amongst the 3 Arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Petitioner's nominees.

7. At this stage, Learned Counsel for the Petitioner submits that in the Notice invoking Arbitration, he has suggested the name of one Mr. R. P. Gupta who is the Ex-Chief Engineer, Indian Railways. He prays that the Respondent be directed to take into consideration the name of the said Officer while constituting the Tribunal.

8. It is open to the Respondent to take into consideration the request made by the Petitioner.

9. Petition is disposed of in the above terms.

JYOTI SINGH, J

JULY 23, 2020

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ANNEXURE – 2.1

IN THE SUPREME COURT OF INDIA

Arbitration Petition (Civil) No. 50 of 2016
Decided On: 10.02.2017

Voestalpine Schienen GmbH ……. Appellants

Versus

Delhi Metro Rail Corporation Ltd. ……. Respondent

Judges/Coram:
A. K. Sikri, J. and R. K. Agrawal, J.

Acts/Rules/Orders:

- Arbitration and Conciliation Act, 1996 - Section 1,
- Arbitration and Conciliation Act, 1996 - Section 11,
- Arbitration and Conciliation Act, 1996 - Section 11(6),
- Arbitration and Conciliation Act, 1996 - Section 11(8),
- Arbitration and Conciliation Act, 1996 - Section 12,
- Arbitration and Conciliation Act, 1996 - Section 12(1),
- Arbitration and Conciliation Act, 1996 - Section 12(3),
- Arbitration and Conciliation Act, 1996 - Section 12(4),
- Arbitration and Conciliation Act, 1996 - Section 12(5),
- Arbitration and Conciliation Act, 1996 - Section 14;
- Arbitration and Conciliation (Amendment) Act, 2015 - Section 12

Cases Referred:

- Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627;
- Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651;
- International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360;
- S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608;
- Indian Drugs & Pharmaceuticals v. Indo-Swiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54;
- Union of India v. M.P. Gupta (2004) 10 SCC 504;
- ACE Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304;
- Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817;
- Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384;
- Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. MANU/SC/0651/2000 : (2008) 8 SCC 151;
- Punj Lloyd Ltd. v. Petronet MHB Ltd. MANU/SC/2836/2005 : (2006) 2 SCC 638;
- Union of India v. Bharat Battery Manufacturing Co. (P) Ltd. MANU/SC/7792/2007 : (2007) 7 SCC 684;
- Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited MANU/SC/0837/2014: (2015) 2 SCC 52;

- Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460;
- Union of India v. Singh Builders Syndicate MANU/SC/0490/2009 : (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246;
- Deep Trading Co. v. Indian Oil Corporation MANU/SC/0275/2013 : (2013) 4 SCC 35: (2013) 2 SCC (Civ) 449;
- Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. MANU/SC/7953/2008 : (2008) 10 SCC 240;
- Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co. 2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314;
- Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. MANU/SC/8227/2006 : (2006) 6 SCC 204;
- Northern Eastern Railway v. Tripple Engineering Works MANU/SC/0690/2014 : (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30;
- Jivraj v. Hashwani MANU/UKSC/0041/2011 : (2011) UKSC 40

Disposition: Petition Dismissed

JUDGMENT

A. K. Sikri, J.

1. The Petitioner, which is a Company incorporated under the laws of Austria, with its registered office in that country, has its branch office in DLF City, Gurgaon, Phase-II, India as well. It is engaged, inter alia, in the business of steel production with the use of advance technology, like Rolling Technology and Heat Treatment Technology, as well as manufacturing, producing and supplying rails and related products. It claims to be a European market leader and innovation pioneer with a worldwide reputation which has played a decisive role in the development of modern railway rails. The Respondent, Delhi Metro Rail Corporation Ltd. (DMRC) awarded the contract dated 12th August, 2013 to the Petitioner for supply of rails. Certain disputes have arisen between the parties with regard to the said contract inasmuch as the Petitioner feels that Respondent has wrongfully withheld a sum of euro 5,31,276/- (Euro Five Lakhs Thirty One Thousand Two Hundred and Seventy Six only) towards invoices raised for supply of last lot of 3000 MT of rails and has also illegally encashed performance bank guarantees amounting to EURO 7,83,200/- (Euro Seven Lakhs Eighty Three Thousand Two Hundred only). Respondent has also imposed liquidated damages amounting to EURO 4,00,129.397/- (Euro Four Hundred Thousand One Hundred Twenty Nine and Cent Three Hundred Ninety Seven Only) and invoked price variation Clause to claim a deposit of EURO 4,87,830/- (Euro Four Lakhs Eighty Seven Thousand Eight Hundred Thirty). Not satisfied with the performance of the Petitioner, the Respondent has suspended the business dealings with the Petitioner for the period of six months. The Petitioner feels aggrieved by all the aforesaid actions and wants its claims to be adjudicated upon by an Arbitral Tribunal, having regard to the arbitration agreement between the parties as contained in Clause 9.2 of General Conditions of Contract (GCC) read with Clause 9.2 of Special Conditions of Contract (SCC).

2. It may be pointed out, at the outset, that arbitration agreement between the parties, as contained in the aforesaid Clause of the contract is not in dispute. It may also be pointed out that Clause 9.2(A) of the SCC prescribes a particular

procedure for constitution of the Arbitral Tribunal which, inter alia, stipulates that the Respondent shall forward names of five persons from the panel maintained by the Respondent and the Petitioner will have to choose his nominee arbitrator from the said panel. As per the events mentioned in detail hereinafter, the Respondent had, in fact, furnished the names of five such persons to the Petitioner with a request to nominate its arbitrator from the said panel. However, it is not acceptable to the Petitioner as the Petitioner feels that the panel prepared by the Respondent consists of serving or retired engineers either of Respondent or of Government Department or Public Sector Undertakings who do not qualify as independent arbitrators. According to the Petitioner, with the amendment of Section 12 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') such a panel, by Amendment Act, 2015, as prepared by the Respondent, has lost its validity, as it is contrary to the amended provisions of Section 12 of the Act. For this reason, the Petitioner has preferred the instant petition Under Section 11(6) read with Section 11(8) of the Act for appointment of sole arbitrator/arbitral tribunal under Clause 9.2 of GCC read with Clause 9.2 of SCC of the Contract dated August 12, 2013.

3. With the aforesaid preliminary introduction reflecting the nature of these proceedings, we may take note of the relevant and material facts in some detail. January, 2013, the Respondent had floated a tender for the procurement of 8000 Metric Tons (MT) "Head Hardened Rails of certain specifications for Delhi Metro, Phase-III projects and invited bids from the eligible bidders. The Petitioner was one such bidder whose bid was ultimately accepted after tender evaluation process undertaken by the Respondent. It resulted in the signing of contract agreement dated August 12, 2013 between the parties for the supply of the aforesaid material. As per the Petitioner, it has duly delivered the rails in three lots of 3000MT, 3000MT and 2000MT rails on January 13, 2014, January 19, 2014 and August 03, 2014 respectively at sea port at Mumbai, which delivery, according to the Petitioner, was well within the agreed time limits. However, after the delivery of the aforesaid rails at Mumbai, inland transport thereof from Mumbai to Respondent's depots at Delhi was delayed due to various reasons. As per the Petitioner, these reasons are not attributed to it and it cannot be faulted for the same. However, the Respondent treated it as default on the part of the Petitioner and imposed liquidated damages vide its letter dated September 21, 2015. The Respondent also called upon the Petitioner to submit its final bill so that the liquidated damages could be set off against the said bill. This was the starting point of dispute between the parties, as the Petitioner refuted the allegations of the Respondent and questioned the imposition of liquidated damages as well as calculations thereof. Correspondence ensued and exchanged between the parties but it may not be necessary to state the same in detail here as that would be the subject matter of adjudication before the arbitral tribunal. Suffice it to state that Respondents also encashed the bank guarantee and raised claims against the Petitioner as balance amount due from the Petitioner. On the other hand, the Petitioner states that it is the Respondent which has to pay substantial amounts to the Petitioner and a glimpse of the claims of the Petitioner has already been indicated above.

4. One thing is clear, there are disputes between the parties giving rise to claims and counter claims against each other and these pertain to and arise out of contract dated August 12, 2013. in view of these disputes and after receipt of communication dated April 28, 2016 whereby Respondent had taken a decision to

suspend business dealings with the Petitioner for a period of six months, and feeling aggrieved thereby, the Petitioner issued a legal notice dated May 11, 2016 through his advocates calling upon the Respondent to withdraw the suspension orders with a threat to resort to legal proceedings if the same was not done within a period of seven days. The Respondent did not succumb to the said demand and this inaction provoked the Petitioner to approach the High Court by filing Writ Petition No. 5439 of 2016 challenging Respondent's action of suspending business with the Petitioner. In this petition, order dated June 03, 2016 has been passed by the Delhi High Court thereby directing the Respondent to keep its decision of suspension with the Petitioner, in abeyance.

5. The Petitioner states that thereafter it invoked the dispute resolution Clause and made efforts to amicably resolve the dispute. However, the said attempt failed and on June 14, 2016, the Petitioner invoked the arbitration clause.

6. At this juncture, we would like to reproduce Clause 9.2 of GCC as well as Clause 9.2 of SCC.

9.2 If, after twenty-eight (28) days from the commencement of such informal negotiations, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Purchaser or the Supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. Any dispute or difference in respect of which a notice of intention, to commence arbitration has been given in accordance with this Clause shall be finally settled by arbitration. Arbitration may be commenced with this Clause shall be finally settled by arbitration. Arbitration may be commenced prior to or after delivery of the Goods under the Contract Arbitration proceedings shall be conducted in accordance 'with the Rules of procedure specified in the SCC.

9.2 The Rules of procedure for arbitration proceedings pursuant to GCC Clause 9.2 shall be as follows:

ARBITRATION & RESOLUTION of DISPUTES

The Arbitration and Conciliation Act, 1996 of India shall be-applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.

Arbitration: If the efforts to resolve all or any of the disputes through conciliation fails, then such, disputes or differences, whatsoever arising between the parties, arising but of touching or relating to supply/manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration, in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million, there shall be three Arbitrators. ***For this purpose the Purchaser will make out a panel of***

engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers "Government Departments or of Public Sector Undertakings;

(b) For the disputes to be decided by a sole Arbitrator, a 'list of three engineers taken the aforesaid panel will be sent to the supplier by the Purchaser from which the supplier will choose one;

(c) For the disputes to be decided by three Arbitrators, the Purchaser will make out a list of five engineers from the aforesaid panel. The supplier and Purchaser shall choose one Arbitrator each, and the two so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator;

(d) Neither party shall be limited in the proceedings before such Arbitrators(s) to the evidence or the arguments put before the Conciliator;

(e) The Conciliation and Arbitration hearings shall be held in Delhi only. The language of the proceedings that of the documents and communications shall be English and the awards shall be made in writing. The Arbitrators shall always give item-wise and reasoned awards in all cases where the total claim exceeds Rs. One million; and

(f) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be and shall be binding on all parties.

7. As per the aforesaid procedure, having regard to the quantum of claims and counter claims, three arbitrators are to constitute the arbitral tribunal. The agreement further provides that Respondent would make out a panel of engineers with the requisite qualifications and professional experience, which panel will be of serving or retired engineers of government departments or public sector undertakings. From this panel, the Respondent has to give a list of five engineers to the Petitioner and both the Petitioner and the Respondent are required to choose one arbitrator each from the said list. The two arbitrators so chosen have to choose the third arbitrator from that very list, who shall act as the presiding arbitrator.

8. In the letter dated June 14, 2016, addressed by the Petitioner to the Respondent while invoking arbitration, the Petitioner took the stand that appointment of the arbitral tribunal as per the aforesaid Clause from a panel of five persons comprising of serving or retired engineers of government departments or public sector undertakings, if followed, would lead to appointment of 'ineligible persons' being appointed as arbitrators, in view of Section 12(5) of the Act read with Clause 1 of Seventh Schedule to the same Act. The Petitioner, thus, nominated a retired judge of this Court as a sole arbitrator and requested the Respondent for its consent.

9. The Respondent, vide its letter dated July 08, 2016, stuck to the procedure as prescribed for the arbitration Clause and asked the Petitioner to nominate an arbitrator from the panel of five persons which it forwarded to the Petitioner. Thereafter vide letter dated July 19, 2016, the Respondent appointed one person as its nominee arbitrator from the said list of five persons who is a retired officer

from Indian Railway Service of Engineers (IRSE) and called upon the Petitioner to appoint its nominee arbitrator from the remaining panel of four persons. At this juncture, on August 17, 2016 present petition Under Section 11 of the Act was filed by the Petitioner for constitution of the arbitral tribunal by this Court with the prayer that the arbitrator nominated by the Petitioner (i.e. a former Judge of this Court) should be appointed as the sole arbitrator if the Respondent consents to it or any impartial and independent sole arbitrator if appointment of the Petitioner's nominee is objected to by the Respondent. Alternate prayer is made for appointment of an independent and impartial arbitral tribunal comprising of three members Under Section 11(6) read with Section 11(8) of the Act for adjudication of the disputes between the parties.

10. The Respondents have contested the petition by filing its detailed reply, inter alia, taking upon the position that in view of the specific agreement between the parties containing arbitration clause, which prescribes the manner in which arbitral tribunal is to be constituted, present petition Under Section 11(6) of the Act is not even maintainable. The Respondent maintains that arbitration agreement as per which arbitral tribunal is to be constituted from the panel prepared by the Respondent does not offend provisions of Section 12 of the Act as maintained in the year 2015. It is submitted that the agreement valid, operative and capable of being performed and the arbitrators proposed by the Respondent are not falling in the category of 'prohibited clause' as stipulated in Under Section 12(5) of the Act read with Clause 1 of the 7th Schedule thereto. As per the Respondent, since the arbitration involves adjudication of technical aspects, the Respondents have proposed the panel of retired engineers of the government having requisite expertise to arbitrate the sub-matter. They are neither serving nor past employees of the DMRC and have no direct or indirect relations with the DMRC. Therefore, they are capable of arbitrating the subject matter without compromising their independence and impartiality.

11. In support of the aforesaid plea taken in the petition, Mr. Gopal Jain, learned Senior Counsel appearing for the Petitioner submitted that the entire ethos and spirit behind the amendment in Section 12 by Amendment Act, 2015 were to ensure that the arbitral tribunal consists of totally independent arbitrators and not those persons who are connected with the other side, even remotely. He submitted that Respondent No. 1, i.e., DMRC was public sector undertaking which had all the trappings of the Government and, therefore, even those persons who were not in the employment of DMRC, but in the employment of Central Government or other Government body/public sector undertakings should not be permitted to act as arbitrators. He submitted that the very fact that the panel of the arbitrator consisted only of 'serving or retired engineers of Government departments or public sector undertaking' defied the neutrality aspect as they had direct or indirect nexus/privity with the Respondent and the Petitioner had reasonable apprehension of likelihood of bias on the part of such persons appointed as arbitrators, who were not likely to act in an independent and impartial manner.

12. Mr. Mukul Rohatgi, learned Attorney General justifying the stand taken by the Respondent, with the aid of the provisions of the Act and the case law, also drew attention to a subsequent development. He pointed out that though in its earlier letter dated July 8, 2016 addressed by the Respondent to the Petitioner, a list of persons was given asking the Petitioner to choose its arbitrator therefrom,

the Respondent has now forwarded to the Petitioner the entire panel of arbitrator maintained by it. This fresh list contains as many as 31 names and, therefore, a wide choice is given to the Petitioner to nominate its arbitrator therefrom. It was further pointed out that many panelists were the retired officers from Indian Railways who retired from high positions and were also having high degree of technical qualifications and experience. The said list included five persons who were not from railways at all but were the ex-officers of the other bodies like, Delhi Development Authority (DDA) and Central Public Works Department (CPWD). No one was serving or ex-employee of the DMRC. He further submitted that merely because these persons had served in railways or other government departments, would not impinge upon their impartiality.

13. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Sub-section (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below.

Section 12(1), the following Sub-section shall be substituted, namely:

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(ii) after Sub-section (4), the following Sub-section shall be inserted, namely:

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing.

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute.

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1: The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2: The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3: For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above.

14. It is a well-known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

15. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

NEUTRALITY of ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. ***In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process***

54. In the Act, the test for neutrality is set out in Section 12(3) which provides- "An arbitrator may be challenged only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any ***justifiable apprehensions of bias.***

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. Indo-Swiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party

autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. ***There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.*** *The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes.* ***In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.***

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. ***The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts.*** *On the other hand, in terms of the proposed Section 12(5) of the Act and the* ***Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary.*** *In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).*

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the

existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator.

16. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

17. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.

18. We may mention here that there are number of judgments of this Court even prior to the amendment of Section 12 where courts have appointed the arbitrators, giving a go-by to the agreed arbitration Clause in certain contingencies and situations, having regards to the provisions of unamended Section 11(8) of the Act which, inter alia, provided that while appointing the arbitrator, Chief Justice or the person or the institution designated by him shall have regard to the other conditions as are likely to secure the appointment of an independent and impartial arbitrator. *See Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* MANU/SC/0651/2000 : (2008) 8 SCC 151, *Punj Lloyd Ltd. v. Petronet MHB Ltd.* MANU/SC/2836/2005 : (2006) 2 SCC 638, *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.* MANU/SC/7792/2007 : (2007) 7 SCC 684, *Deep Trading Co. v. Indian Oil Corporation* MANU/SC/0275/2013 : (2013) 4 SCC 35, *Union of India v. Singh Builders Syndicate* MANU/SC/0490/2009 : (2009) 4 SCC 523 and *Northern Eastern Railway v. Tripple Engineering Works*

MANU/SC/0690/2014 : (2014) 9 SCC 288. Taking note of the aforesaid judgments, this Court in *Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited* MANU/SC/0837/2014: (2015) 2 SCC 52 summed up the position in the following manner:

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application Under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works MANU/SC/0690/2014 : (2014) 9 SCC 288: (2014) 5 SCC (Civ) 30]. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

6. The 'classical notion' that the High Court while exercising its power Under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : (2007) 5 SCC 304, wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India v. Bharat Battery Mfg. Co. (P) Ltd. MANU/SC/7792/2007 : (2007) 7 SCC 684 wherein following a three-Judge Bench decision in Punj Lloyd Ltd. v. Petronet MHB Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd. MANU/SC/2836/2005 : (2006) 2 SCC 638], it was held that once an aggrieved party files an application Under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in ACE Pipeline MANU/SC/7273/2007 : (2007) 5 SCC 304 and Bharat Battery Mfg. Co. (P) Ltd. MANU/SC/7792/2007 : (2007) 7 SCC 684 was reconciled by a three-Judge Bench of this Court in Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. [Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. MANU/SC/7953/2008 : (2008) 10 SCC 240], wherein the jurisdiction of the High Court Under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the necessary measure' appearing in Sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of Sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460 Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (Indian Oil

case [MANU/SC/1502/2009 : (2009) 8 SCC 520: (2009) 3 SCC (Civ) 460], SCC p. 537)

48.(vi) The Chief Justice or his designate while exercising power under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'

8. The above discussion will not be complete without reference to the view of this Court expressed in Union of India v. Singh Builders Syndicate [Union of India v. Singh Builders Syndicate MANU/SC/0490/2009 : (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246], wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate [Union of India v. Singh Builders Syndicate MANU/SC/0490/2009 : (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corporation [MANU/SC/0275/2013 : (2013) 4 SCC 35: (2013) 2 SCC (Civ) 449] followed the legal position laid down in Punj Lloyd Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd. MANU/SC/2836/2005 : (2006) 2 SCC 638] which in turn had followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. [MANU/SC/0651/2000 : (2000) 8 SCC 151] The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings Under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. [MANU/SC/0275/2013 : (2013) 4 SCC 35: (2013) 2 SCC (Civ) 449] subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. [Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. MANU/SC/7953/2008 : (2008) 10 SCC 240] not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction Under Section 11(6) of the Act. (Emphasis in original)

14. Speedy conclusion of arbitration proceedings hardly needs to be emphasised. It would be of some interest to note that in England also, Modern Arbitration Law on the lines of Uncitral Model Law, came to be enacted in the same year as the Indian law which is known as the English Arbitration Act, 1996 and it became effective from 31-1-1997. It is treated as the most extensive statutory reform of the English arbitration law. Commenting upon the structure of this Act, Mustill and Boyd in their Commercial Arbitration, 2001 companion volume to the 2nd Edn., have commented that this Act is founded on four pillars. These pillars are described as:

(a) The first pillar: Three general principles.
(b) The second pillar: The general duty of the Tribunal.
(c) The third pillar: The general duty of the parties.
(d) The fourth pillar: Mandatory and semi-mandatory provisions.

Insofar as the first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co. [2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314] In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: (QB p. 228, para 31)

> *31....Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness.*

Section 1 of the Act sets forth the three main principles of arbitration law viz.
(i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and
(iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles.

15. In the book O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms. Indu Malhotra), it is rightly observed that the Indian Arbitration Act is also based on the aforesaid four foundational pillars.

16. First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general Rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. [See Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. [MANU/SC/8227/2006 : (2006) 6 SCC 204] However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in paras 6 and 7 of Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works MANU/SC/0690/2014 : (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30]. We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers Under Section

11 of account of "default procedure". We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in Singh Builders Syndicate [Union of India v. Singh Builders Syndicate MANU/SC/0490/2009 : (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246].

17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasize is that Court is not powerless in this regard.

19. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Jivraj* v. *Hashwani* MANU/UKSC/0041/2011: (2011) UKSC 40 in the following words:

> the dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.

20. Similarly, Cour de cassation, France, in a judgment delivered in 1972 in the case of Consorts Ury1, underlined that "*an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator"*.

21. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

22. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.

23. Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry No. 1 is highlighted by the learned Counsel for the Petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the Petitioner was that the panel of arbitrators drawn by the Respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such person as ineligible as the panel indicates that these are the persons who have worked in the railways under the Central Government or Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the Respondent-DMRC. If this contention of the Petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the Petitioner.

24. Section 12 has been amended with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the 'circumstances' which give rise to 'justifiable doubts' about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, Seventh Schedule mentions those circumstances which would attract the provisions of Sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is

rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empaneled by the Respondent are not covered by any of the items in the said list.

25. It cannot be said that simply because the person is retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide 'to determine whether circumstances exist which give rise to such justifiable doubts'. Such persons do not get covered by red or orange list of IBA guidelines either.

26. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the Petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to the DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the arbitral tribunal.

27. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the arbitral tribunal. Even when there are number of persons empaneled, discretion is with the DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (Though in this case, it is now done away with). Not only this, the DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list, i.e., from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by the DMRC. Secondly, with the discretion given to the DMRC to choose five persons, a room for suspicion is created in the mind of the other side that the DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that Sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the

entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose third arbitrator from the whole panel.

28. Some comments are also needed on the Clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of 'serving or retired engineers of government departments or public sector undertakings'. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instill confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well

29. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in Government contracts, where one of the parties to dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by the DMRC. It, therefore, becomes imperative to have a much broad-based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, especially at the stage of constitution of the arbitral tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today.

30. Subject to the above, insofar as present petition is concerned, we dismiss the same, giving two weeks' time to the Petitioner to nominate its arbitrator from the list of 31 arbitrators given by the Respondent to the Petitioner.

No costs.

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Annexure – 2.2

Supreme Court of India

The Government of Haryana PWD vs M/s G. F. Toll Road Pvt. Ltd. on 03.01.2019

CIVIL APPEAL NO. 27/2019
(Arising out of S.L.P.(C) No. 20201 of 2018)

The Government of Haryana … Appellant
PWD Haryana (B and R) Branch

Versus

M/s. G.F. Toll Road Pvt. Ltd. & Ors. … Respondents

Author: INDU MALHOTRA, J.

JUDGMENT

Leave granted.

2. The present Civil Appeal has been filed by the Appellant – State of Haryana to challenge the Order dated 01.03.2018 passed by the High Court of Punjab and Haryana at Chandigarh in C.R. No. 3279/2017.

3. The factual matrix leading to the filing of the present Appeal, briefly stated is, as under:

3.1 On 12.12.2008 the Appellant – State issued a Letter of Acceptance to Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. for execution of a works contract for construction, operation and maintenance of Gurgaon- Faridabad Road and Ballabhgarh-Sohna Road on BOT (Build, Operate and Transfer) basis.

3.2 A Concession Agreement was entered into between the parties on 31.01.2009. The period of construction was 24 months from 31.05.2009. The said agreement contained a dispute resolution clause which is set out hereinbelow:

"39.2 Arbitration 39.2.1. Any dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2. sub-clause (b) below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration Act.

39.2.2. There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration."

3.3 During the execution of the Agreement, disputes arose between the parties. The Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. vide Letter dated 30.03.2015 to Respondent No. 2 – Indian Council of Arbitration ("ICA") invoked the Arbitration Clause, and requested the ICA to commence arbitration proceedings. On 05.05.2015, Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. appointed a retired Engineer-in-Chief – Mr. Surjeet Singh as their nominee Arbitrator. The Appellant – State herein also nominated a retired Engineer-in-

Chief, Mr. M. K. Aggarwal as their nominee arbitrator vide Letter dated 08.06.2015.

3.4 The Respondent No. 2 - ICA vide Letter dated 03.08.2015 raised an objection to the arbitrator nominated by the Appellant – State on the ground that he was a retired employee of the State, and there may be justifiable doubts with respect to his integrity and impartiality to act as an arbitrator. The Respondent No. 2 - ICA advised the State to reconsider its nomination. The Appellant – State refuted the objection raised by Respondent No. 2 – ICA on the ground that there was no rule which prohibited a former employee from being an arbitrator, and there could not be any justifiable doubt with respect to his impartiality since the nominee arbitrator had retired over 10 years ago. On 24.09.2015, Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. raised an objection regarding the independence and impartiality of the Appellant's nominee arbitrator – Mr. M. K. Aggarwal. Respondent No. 2 – ICA forwarded the said objection to the Appellant – State.

3.5 The Respondent No. 2 – ICA vide its Letter dated 30.10.2015 reiterated that it has been firmly established that Mr. M.K. Aggarwal had a direct relationship with the Appellant – State as its former employee, which may raise justifiable doubts as to his independence and impartiality in adjudicating the dispute. The Respondent No. 2 – ICA stated that it was in the process of appointing an arbitrator in place of Mr. M.K. Aggarwal and its decision shall be communicated to the Appellant.

3.6 In response, the Appellant – State vide Letter dated 16.11.2015 requested the Respondent No. 2 – ICA for a period of 30 days to appoint a substitute arbitrator. In the meanwhile, the Respondent No. 2 – ICA vide its Letter dated 23.11.2015 informed the Appellant – State that it had already appointed a nominee arbitrator on behalf of the Appellant, as well as the Presiding Arbitrator.

3.7 Aggrieved by the appointment made by Respondent No. 2 – ICA of the nominee arbitrator, the Appellant – State, filed an application under Section 15 of the Arbitration and Conciliation Act, 1996 ("the Act") before the District Court, Chandigarh on the ground that the constitution of the arbitral tribunal was illegal, arbitrary and against the principles of natural justice.

3.8 The Appellant – State also raised an objection before the Arbitral Tribunal under Section 16 on the issue of jurisdiction. On 08.12.2016, the arbitral tribunal ordered that it shall not hear the objection under Section 16 of the Act, and shall await the decision of the District Court, Chandigarh.

3.9 The District Court vide its Order dated 27.01.2017 held that the Petition was not maintainable, since the Arbitral Tribunal had been constituted, and an objection under Section 16 should be raised before the Tribunal to rule on its own jurisdiction.

3.10 Aggrieved by the Order dated 27.01.2017, the Appellant – State filed a Civil Revision Petition before the Punjab and Haryana High Court, Chandigarh being C. R. No. 3279 of 2017.

3.11 The learned Single Judge of the Punjab and Haryana High Court vide the impugned Order dated 01.03.2018 dismissed the Civil Revision Petition on the ground that the Appellant – State could raise the issue of jurisdiction under Section 16 before the arbitral tribunal. It was further held that in a situation where an objection is raised regarding the nomination of an arbitrator by one of the parties, and the agreement is silent with regards to the mode of appointment of a substitute arbitrator, the rules applicable would be those of the Institution under which the arbitration is held. Therefore, in the facts of the present case, Rules 25 and 27 of the ICA Rules would apply.

3.12 Subsequent to the impugned Judgment being passed, the Application under Section 16 filed by the Appellant – State was dismissed by a non-speaking Order of the Arbitral Tribunal dated 12.05.2018. 2.13. Aggrieved by the Order dated 01.03.2018 and 12.05.2018, the Appellant – State has filed the present Petition.

4. We have heard the learned Counsel for both the parties, and perused the pleadings.

4.1 The High Court while considering the application under Section 15 failed to take note of the provisions of Section 15(2) of the Act. Section 15(2) provides that a substitute arbitrator must be appointed according to the rules that are applicable for the appointment of the arbitrator being replaced. This would imply that the appointment of a substitute arbitrator must be according to the same procedure adopted in the original agreement at the initial stage. Section 15(2) of the Act reads as under:

"15. Termination of mandate and substitution of arbitrator: (1)

… (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced." (Emphasis supplied) 3.2. The provisions of Section 15(2) require that when the mandate of an arbitrator terminates either by his withdrawal from office, or pursuant to an agreement by the parties, or for any reason, a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the arbitrator being replaced."

This Court in ACC Ltd. v. Global Cements Ltd. held [(2012) 7 SCC 71] that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically provide so.

4.2 In the present case, Clause 39.2.2. of the agreement expressly provided that each party shall nominate one arbitrator, and the third arbitrator shall be appointed in accordance with the Rules of the ICA.

4.3 The Appellant – State had vide Letter dated 16.11.2015 requested for 30 days' time to appoint another nominee arbitrator, after objections were raised by the ICA to the first nomination. The ICA declined to grant the period of 30 days, and instead appointed the arbitrator on behalf of the Appellant – State. The ICA could have filled up the vacancy only if the Appellant – State had no intention of filling up the vacancy. The ICA could not have usurped the

jurisdiction over appointment of the nominee arbitrator on behalf of the State prior to the expiry of the 30 days' period requested by the Petitioner.

4.4 The appointment of the nominee arbitrator on behalf of the Appellant – State by the ICA was unjustified and contrary to the Rules of the ICA itself.

4.5 The objection raised by the ICA with respect to the appointment of Mr. M.K. Aggarwal as the nominee of the State was wholly unjustified and contrary to the provisions of the 1996 Act.

4.6 The objection raised by Respondent No. 2 – ICA to the arbitrator nominated by the Appellant – State, was that the nominee arbitrator was a retired employee of the Appellant – State, and as such there may be justifiable doubts to his independence and impartiality to act as an arbitrator.

4.7 The said objection was refuted by the Appellant – State on the ground that the nominee arbitrator was a Chief Engineer who retired over 10 years ago from the services of the State. The apprehension of the Respondents was hence unjustified since the test to be applied for bias is whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was in fact biased.

In Locabail Ltd. v. Bayfield Properties 2, the House of Lords held that:

"The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." The Court of Appeal in Re Medicaments and related Classes of Goods (No. 2) while propounding the 'real danger' test for bias held that:

"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

4.8 The 1996 Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. The fact that the arbitrator was in the employment of the State of Haryana over 10 years ago, would make the allegation of bias clearly untenable.

4.9 The present case is governed by the pre-amended 1996 Act. Even as per the 2015 Amendment Act which has inserted the Fifth Schedule to the 1996 Act which contains grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The first entry to the Fifth Schedule reads as under:

"Arbitrator's relationship with the parties or counsel

1. *The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."*

Entry 1 of the Fifth Schedule and the Seventh Schedule are identical. The Entry indicates that a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator. The words "is an" indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties.

An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees.

4.10 The ICA made only a bald assertion that the nominee arbitrator – Mr. M. K. Aggarwal would not be independent and impartial. The objection of reasonable apprehension of bias raised was wholly unjustified and unsubstantiated, particularly since the nominee arbitrator was a former employee of the State over 10 years ago. This would not disqualify him from act as an arbitrator. Mere allegations of bias are not a ground for removal of an arbitrator. It is also relevant to state that the appointment had been made prior to the 2015 Amendment Act when the Fifth Schedule was not inserted. Hence, the objection raised by the ICA was untenable on that ground also.

4.11 In this view of the matter, the impugned judgment dated 01.03.2018 passed by the Punjab & Haryana High Court in C. R. No. 3279.2017 is set aside.

5. During the conclusion of arguments, the counsel for both parties mutually agreed to the arbitration being conducted by a Sole Arbitrator in supersession of the arbitration clause in the agreement which provided for a three-member arbitration panel.

The Counsel for both parties mutually agreed to the appointment of Justice S. S. Nijjar (Retd.) as the Sole Arbitrator to adjudicate the disputes arising out of the Concession Agreement dated 31.01.2009.

Accordingly, the mandate of the three-member arbitral tribunal constituted under the ICA Rules on 05.12.2015 stands terminated. The Sole Arbitrator shall proceed in continuation of the previously constituted arbitral tribunal. The material already on record shall be deemed to have been received by the Sole Arbitrator.

The Appeal is disposed of accordingly.

…….....J. (ABHAY MANOHAR SAPRE)

……..J. (INDU MALHOTRA)

New Delhi January 3, 2019.

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ANNEXURE – 2.3

In the Supreme Court of India
Civil Appellate Jurisdiction

Civil Appeal Nos. 9486-9487 of 2019
(Arising out of SLP(C) Nos. 24173-74 of 2019)

Central Organisation for Railway Electrification ... Appellant
Versus
M/S ECI-SPIC-SMO-MCML (JV) A Joint Venture Company … Respondent

Judgment

R. BANUMATHI, J.

Leave granted.

2. These appeals have been preferred against the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 in and by which the High Court rejected the contention of the appellant that the arbitrator is to be appointed as per General Conditions 64 (3)(a)(ii) and 64 (3)(b) of the Contract and appointed Shri Justice Rajesh Dayal Khare as the sole arbitrator for resolving the dispute between the parties.

3. The appellant awarded work contract of Rs. 165,67,98,570/- to the respondent-Company by an agreement dated 20.09.2010 which contains the arbitration clause. Subsequently, after coming into force of Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23.10.2015), the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and issued a notification dated 16.11.2016 for implementation of modification. The modified Clause 64(3)(a)(ii) (where applicability of Section 12(5) has been waived off) inter alia provided that in cases where the total value of all claims exceeds Rs. 1 crore, the Arbitral Tribunal shall consist of a panel of three gazetted Railway Officers not below JA (Junior Administrative) Grade or two Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of Senior Administrative (SA) Grade officer as arbitrators. The procedure for constitution of the Arbitral Tribunal is provided thereon. Clause 64(3)(b) deals with the appointment of arbitrator where applicability of Section 12(5) of the Arbitration and Conciliation Act has not been waived off. Clause 64(3)(b) stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer as the arbitrators as per the procedure indicated thereon.

4. Since the respondent did not complete the work under the contract within the prescribed period, on 18.10.2017, the appellant issued "Seven days" notice under Clause 62 of the General Conditions of Contract to the respondent. Thereafter on 27.10.2017, the appellant issued a "48 hours' notice" to the respondent calling upon the respondent to make good the progress of work, failing which the contract will stand terminated. Since the respondent did not make adequate progress in the work, on 01.11.2017, the contract was terminated as per Clause 62 of the General Conditions of the Contract. The respondent was also

informed that their security deposit has been forfeited and the performance guarantee submitted by it shall also be encashed.

5. The respondent filed a Petition No.760 of 2017 before the High Court challenging the termination of the contract which came to be dismissed by the High Court vide order dated 28.11.2017 and the High Court directed the respondent to avail the alternative remedy by invoking arbitration clause. The respondent vide its letter dated 27.07.2018 requested the appellant for appointment of an Arbitral Tribunal for resolving the disputes between the parties and settle the claims value of Rs.73.35 crores. In reply dated 24.09.2018, the appellant sent a list of four serving Railway Electrification Officers of JA Grade to act as arbitrators. The respondent was asked to select any two and communicate to the appellant for formation of the arbitration tribunal panel. Vide letter dated 25.10.2018, the respondent was sent a list of another panel comprising four retired Railway officers. In terms of Clause 63(3)(b) of Railway's General Conditions of Contract, the respondent was asked to select any two from this list and communicate them to the appellant within thirty days for constitution of the arbitration tribunal.

6. The respondent did not send a reply to the above letters of the appellant; but filed Arbitration Petition No. 151 of 2018 before High Court under Section 11(6) of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator for resolution of differences. In its petition, the respondent suggested the name of one Shri Ashwani Kumar Kapoor, retired member Electrical from Railway Board to be appointed as an arbitrator in the matter. According to the respondent, there exists a valid and binding arbitration clause between the parties being clause 1.2.54 of Part I of Chapter 2 and also 64 of the General Conditions of Contract; but since no neutral arbitrator is contemplated to be appointed in the General Conditions of Contract, the respondent has no other recourse except by filing the petition under Section 11(6) of the Arbitration and Conciliation Act, 1996.

7. The High Court vide the impugned order dated 03.01.2019 rejected the argument of the appellant that the arbitrator ought to be appointed only from the panel of arbitrators in terms of General Conditions of Contract. The High Court observed that the powers of the Court to appoint arbitrator are independent of the contract between the parties and no fetters could be attached to the powers of the court. With those findings, the High Court appointed Shri Rajesh Dayal Khare, a retired judge of the Allahabad High Court as the sole arbitrator subject to his consent, under Section 11(8) of the Arbitration and Conciliation Act. Subsequently, vide order dated 29.03.2019, the High Court noted the consent of the arbitrator appointed by the court and directed the Arbitrator to proceed with the arbitration proceedings. Being aggrieved, the appellant has preferred these appeals.

8. Mr. A. N. S. Nadkarni, learned Additional Solicitor General (ASG) appearing for the appellant submitted that in terms of Clause 64(3)(a)(ii) of the General Conditions of Contract (where applicability of Section12(5) of the Amended Act has been waived off), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below Junior Administrative Grade or two Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer as the arbitrators. It was submitted that as per Clause 64(3)(b) of the General Conditions

of Contract (where applicability of Section 12(5) of the Act has not been waived off), the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators after compliance of the procedure stipulated in Clause 64(3)(b). It was contended that when the agreement and the General Conditions of Contract provided for appointment of Arbitral Tribunal consisting of three arbitrators from the Panel, the High Court erred in appointing the sole arbitrator outside the panel of the arbitrators. The learned ASG further submitted that the appointment of an independent arbitrator is in contravention of Clauses 64(3)(a)(i), 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned judgment appointing a former Judge of the High Court of Allahabad is not sustainable. In support of the contention, the learned ASG inter alia placed reliance upon *Union of India v. Parmar Construction Company* [(2019) SCC Online SC 442] and *Union of India v. Pradeep Vinod Construction Company* [(2019) SCC Online SC 1467] and other judgments.

9. Refuting the above contention, Mr. Sridhar Potaraju, learned counsel appearing for the respondent submitted that the Arbitration and Conciliation Act, 1996 was amended with effect from 23.10.2015 and in the present case, the demand for arbitration for resolution of disputes was made by the respondent on 27.07.2018 and hence, the provisions of the amended Act applies to the present case. It was submitted that by virtue of the provisions of Section 12(5) read with Schedule VII to the Arbitration and Conciliation Act, 1996, the panel of arbitrators proposed by the appellant vide letter dated 24.09.2018 were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the appellant. It was contended that as per the provisions of the Amendment Act, 2015, all employees present or past are statutorily made ineligible for appointment as arbitrators. The learned counsel further submitted that when the General Manager himself being ineligible to be appointed as an arbitrator under Section 12(5) read with Schedule VII of the Act, the General Manager cannot nominate any of the persons to be arbitrator. The learned counsel for the respondent inter alia placed reliance upon Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited [(2017) 4 SCC 665], TRF Limited v. Energo Engineering Projects Limited [(2017) 8 SCC 377] and number of other judgments which would be referred to at the appropriate place.

10. We have carefully considered the submissions and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in appointing an independent arbitrator in contravention of the Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract.

Appointment of an independent arbitrator without reference to the Clauses of General Conditions of Contract (GCC) – Whether correct ?

11. Learned counsel for the respondent submitted that being serving employees of the appellant, the panel of arbitrators proposed by the appellant vide letter dated 24.09.2018 were not eligible to be appointed as arbitrators in view of provisions of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act. Learned counsel further submitted that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant were also not eligible to be appointed as arbitrators

under Section 12(5) read with Schedule VII of the Act as the employees of the appellant are expressly made ineligible.

12. In support of the above contention, learned counsel for the respondent has placed reliance upon Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665 wherein, the Supreme Court held as under:

> *"24. …….The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC…….".*

13. On behalf of the respondent, reliance was also placed upon *Bharat Broadband Network Limited v. United Telecoms Limited* [(2019) 5 SCC 755] wherein, the Supreme Court held as under:

> *"15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."*

14. Per contra, on behalf of the appellant, Mr. A. N. S. Nadkarni, learned ASG, has submitted that the appointment of arbitrator is governed as per Clauses 64(3)(a)(i) and 64(3)(a)(ii) of the General Conditions of Contract (GCC) where applicability of Section 12(5) of the Arbitration and Conciliation Act has been waived off and the Arbitral Tribunal shall consist of a panel of three serving Railway Officers or two serving officers and one retired officer. Learned ASG submitted that Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. It was further submitted that Clause 64(3)(b) of GCC stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer and the Arbitral Tribunal to be constituted as per the procedure indicated thereon. Placing reliance upon *Union of India v. Parmar Construction Company* [(2019) SCC Online SC 442] and *Union of India v. Pradeep Vinod Construction Company* [(2019) SCC Online SC 1467], learned ASG has

submitted that when the agreement specifically provides for appointment of panel of arbitrators, the appointment should be in terms of the agreement and the appointment of independent sole arbitrator is in contravention of the General Conditions of Contract which govern the parties for appointment of arbitrators.

15. Clause 64 of the General Conditions of Contract deals with the procedure for resolution of the disputes and provides for "Demand for arbitration" and appointment of the arbitrators. Clause 64 of the General Conditions of Contract (GCC) reads as under:-

"64. (1) - Demand for Arbitration:

64. (1) (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 "excepted 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.

64. (1) (ii) (a): 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 or difference, 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.

64. (1) (ii) (b): The parties may waive of the applicability of sub-section 12(5) of Arbitration and Conciliation (Amendment) Act, 2015. If they agree or such waiver in writing after having arisen between them in the formation under Annexure XII of these conditions."

16. After coming into force of Arbitration and Conciliation (Amendment) Act, 2015, the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and the Railway Board issued a notification dated 16.11.2016 in this regard. The modified Clause 64(3)(a)(i) (where applicability of Section 12(5) of the Act has been waived off) inter alia provided that in case where the total value of all claims in question added together does not exceed rupees one crore, the arbitral tribunal shall consist of a sole arbitrator who shall be a Gazetted Officer of Railways not below JA Grade nominated by the General Manager. In terms of Clause 64(3)(a)(i), the sole arbitrator shall be appointed within sixty days from the day when a written and valid demand for arbitration is received by the General Manager. In the present case, since the value of the work contract is worth more than Rs.165 crores, Clause 64(3)(a)(i) is not applicable.

17. Clause 64(3)(a)(ii) of GCC deals with cases not covered by Clause 64(3)(a)(i) where applicability of Section 12(5) of the Act has been waived off. Clause 64(3)(a)(ii) of General Conditions of Contract reads as under:

64. (3) (a) (ii): In case not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazette Railway Officers not below JA Grade or two Railway Gazette Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the railway will send a panel of at least four (4) names of Gazette Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM……".

18. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. The modified Clause 64(3)(b) inter alia provided that the arbitral tribunal shall consist of a panel of three retired railway officers not below the rank of SAG officer as arbitrator. For this purpose, the Railway will send a panel of at least four names of retired railway officer(s) empanelled. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as the contractor's nominee and the General Manager shall appoint at least one out of them as the contractor's nominee. The General Manager will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel. The modified Clause 64(3)(b) of the General Conditions of Contract reads as under:

"64. (3)(b) Appointment of Arbitrator where applicability of Section 12(5) of A&C Act has not been waived off:

The Arbitrator Tribunal shall consist of a Panel of three retired Railway Officer retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four names of retired Railway Officer(s) empanelled to work as Railway. Arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators other from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the three arbitrators so appointed CM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

19. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified *inter alia* providing for constitution of Arbitral Tribunal consisting of three arbitrators either serving or retired railway officers, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the General Conditions of Contract.

20. It is pertinent to note that even in the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed under Section 11(6) of the Act, the respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of the work contract was worth more than Rs.165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of Contract. The respondent was not right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract.

21. Considering the various matters of railway contracts and interference with the appointment of independent arbitrators, after referring to Union of India and Another v. M. P. Gupta [(2004) 10 SCC 504] and Union of India and Another v. V. S. Engineering (P) Ltd. [(2006) 13 SCC 240] and other judgments, in Union of India v. Parmar Construction Company [(2019) SCC Online SC 442], the Supreme Court set aside the appointment of an independent arbitrator and directed the General Manager of Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In Para (44) of *Parmar Construction Company*, the Supreme Court held as under:

> *"44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties."*

22. Applying ratio of the Parmar Construction Company, in Pradeep Vinod Construction Company [(2019) SCC Online SC 1467], the Supreme Court held that the appointment of arbitrator should be in terms of the agreement and the High Court was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract. As held in Parmar Construction Company and Pradeep Vinod Construction Company, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of the arbitrators which has been prescribed under the General Conditions of Contract.

<u>RE: Contention: Retired Railway Officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act and were statutorily made ineligible to be appointed a an arbitrator</u>

23. Vide letter dated 27.07.2018, the respondent made a request for appointment of arbitrator/constitution of Arbitral Tribunal. In response to the same, the appellant sent a letter dated 24.09.2018 nominating the names of four serving railway officers and the respondent was asked to select any two names from the list of the four railway officers and communicate to the appellant. It is

seen from the record that the respondent vide their letter dated 26.09.2018 expressed their disagreement in waiving off the applicability of Section 12(5) of the Amendment Act, 2015. Referring to its own earlier letter dated 24.09.2018 and letter of the respondent dated 26.09.2018, the appellant had sent a communication dated 25.10.2018 nominating the panel of four retired railway officers to act as arbitrators and requesting the respondent to select any two names from the list in terms of Clause 64(3)(b) of GCC and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. According to the appellant, the respondent failed to select any of the nominee from the panel within the stipulated time of thirty days. The respondent neither responded to the appellant's letter dated 25.10.2018 not suggested the names of two arbitrators from the panel sent by the appellant. Instead the respondent approached the High Court under Section 11(6) of the Act for appointment of an independent sole arbitrator by filing a petition on 17.12.2018.

24. The contention of the learned counsel for the respondent is that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act. Further contention of the learned counsel for the respondent is that the panel of arbitrators drawn by the appellant consist of those persons who were railway employees or Ex-railway employees and therefore, they are statutorily made ineligible to be appointed as arbitrators.

25. Contending that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties, learned ASG has placed reliance upon *Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited* [(2017) 4 SCC 665]. After referring to various judgments and also the scope of amended provision of Section 12 of the Amendment Act, 2015 and the entries in the Seventh Schedule, the Supreme Court observed that merely because the panel of arbitrators drawn by the respondent-Delhi Metro Rail Corporation are the Government employees or Ex-Government employees, that by itself may not make such persons ineligible to act as arbitrators of the respondent-DMRC. It was observed that the persons who have worked in the Railways under the Central Government or the Central Public Works Department or Public Sector Undertakings cannot be treated as employee or consultant or advisor of the respondent-DMRC. In para (26) of *Voestalpine Schienen GmbH*, the Supreme Court held as under:

"26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. <u>The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators</u>. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with

the observation that the same would be treated as the guide "to determine whether circumstances exist which give rise to such justifiable doubts". Such persons do not get covered by red or orange list of IBA guidelines either." [Underlining added]

26. The same view was reiterated in Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others [(2019) 3 SCC 505] wherein, the Supreme Court held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of a retired employee to act as an arbitrator.

27. By the letter dated 25.10.2018, the appellant has forwarded a list of four retired railway officers on its panel thereby giving a wide choice to the respondent to suggest any two names to be nominated as arbitrators out of which, one will be nominated as the arbitrator representing the respondent-Contractor. As held in *Voestalpine Schienen GmbH* [(2017) 4 SCC 665], the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilizing their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.

RE: Contention: failure to act in terms of the contract in not responding within thirty days from the date of request

28. Learned counsel for the respondent has submitted that vide letter dated 27.07.2018, the respondent requested for referring the dispute to arbitration but, no steps were taken by the appellant within thirty days from the date of request dated 27.07.2018. It was submitted that on 17.12.2018, respondent filed application under Section 11(6) of the Act before the High Court for appointment of a sole arbitrator, by which time, no steps were taken by the appellant under the Contract, except sending two lists of persons by letters dated 24.09.2018 and 25.10.2018 who were *de jure* ineligible to be appointed as the arbitrators. In this regard, reliance was placed upon *Punj Lloyd Ltd. v. Petronet MHB Ltd.* [(2006) 2 SCC 638]. Considering the applicability of Section 11(6) of the Act, in *Punj Lloyd Ltd.*, the Supreme Court held as under:

"5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. (2000) 8 SCC 151, wherein this Court has held as under:

"So far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not

forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

As held in *Punj Lloyd Ltd.*, if the opposite party has not made any application for appointment of the arbitrator within thirty days of demand, the right to make appointment is not forfeited but continues; but the appointment has to be made before the former files application under Section 11 of the Act seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

29. In Union of India v. Bharat Battery Manufacturing Co. (P) Ltd. [(2007) 7 SCC 684], on 30.03.2006, the respondent thereon filed petition under Section 11(6) seeking appointment of an arbitrator. Union of India-the appellant thereon appointed Dr. Gita Rawat on 15.05.2006 as a sole arbitrator in terms of Clause 24 of the agreement. In such facts and circumstances of the case, considering the decision in Punj Lloyd Ltd., the Supreme Court held that "once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator….."

30. As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railway will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the Railway. Vide letter dated 27.07.2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24.09.2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) (where applicability of Section 12(5) of the Act has been waived off) sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of Arbitration Tribunal. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25.10.2018, in terms of Clause 64(3)(b) of GCC (where applicability of Section 12(5) has not been waived off) the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17.12.2018. When the respondent has not sent any reply to the communication dated 25.10.2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

RE: Contention: General Manager himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator.

31. Stand of the learned counsel for the respondent is that by virtue of Section 12(5) read with Schedule VII of the Act, General Manager himself is made ineligible to be appointed as an arbitrator and hence, he cannot nominate any other person to be an arbitrator. The essence of the submission is "that which cannot be done directly, may not be done indirectly". In support of his contention, the learned counsel for the respondent placed reliance upon *TRF Limited v. Energo Engineering Projects Limited* [(2017) 8 SCC 377] wherein the Supreme Court held as under:

> *"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."*

32. In *TRF Limited*, though the court observed that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator, in para (50), the Court has discussed about another situation where both the parties could nominate respective arbitrators of their choice and that it would get counter-balanced by equal power with the other party. In para (50) of *TRF Limited*, the Supreme Court held as under:

> "50. …..We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto…." [Underlining added]

33. Considering the decision in *TRF Limited*, in *Perkins Eastman Architects DPC and another v. HSCC (India) Limited* [(2019) SCC Online SC 1517], the Supreme Court observed that there are two categories of cases. The first, similar to the one dealt with in *TRF Limited* where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator

himself; but is authorized to appoint any other person of his choice or discretion as an arbitrator. Observing that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para (20) in *Perkins Eastman*, the Supreme Court held as under:

"20. ….If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator."

34. After referring to para (50) of the decision in TRF Limited, in *Perkins Eastman*, the Supreme Court referred to a different situation where both parties have the advantage of nominating an arbitrator of their choice and observed that the advantage of one party in appointing an arbitrator would get counter-balanced by equal power with the other party. In para (21), it was held as under:

"21. ….The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party….."

35. As discussed earlier, after Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide notification dated 16.11.2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below the rank of Junior Administrative Grade or two Railway Gazetted Officers not below the rank of Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the General Manager, Railway will send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the "Presiding Officer" from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of

appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees.

36. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railway will send a panel of at least four names of retired Railway Officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manger at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the "Presiding Officer" from amongst the three arbitrators. The exercise of appointing Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of Arbitral Tribunal is counterbalanced by respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee.

37. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Limited is not applicable to the present case.

38. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should

be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3) (b) of the General Conditions of Contract and the impugned orders cannot be sustained.

39. In the result, the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Judicature at Allahabad in Arbitration Application No.151 of 2018 are set aside and these appeals are allowed. The appellant is directed to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the General Conditions of Contract within a period of thirty days from today under intimation to the respondent-contractor. The respondent contractor shall select two from the four suggested names and communicate to the appellant within thirty days from the date of receipt of the names of the nominees. Upon receipt of the communication from the respondent, the appellant shall constitute the Arbitral Tribunal in terms of Clause 64(3)(b) of the General Conditions of Contract within thirty days from the date of the receipt of the communication from the respondent. Parties to bear their respective costs.

……..J.
[R. BANUMATHI]

……..J.
[A.S. BOPANNA]

……..J.
[HRISHIKESH ROY]

New Delhi;
December 17, 2019

****

Annexure – 2.4

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 10 OF 2019

Afcons Infrastructure Limited vs Konkan Railway Corporation, dated 02.06.2020, Civil Appeal No. 10/2019

Bench: N. J. Jamadar.

Afcons Infrastructure Limited, a company incorporated and registered under the provisions of the Companies Act, 1956, having its office at Afcons House, 16, Shah Industrial Estate, Off. Veera Desai Road, Andheri, (West), Mumbai - 400053.

... Petitioner

Versus

Konkan Railway Corporation Limited, a company incorporated under the Companies Act, 1956, having its registered office at Belapur Bhavan, Plot No.6, Sector-11, CBD, Belapur, Mumbai - 400 614

...Respondent

Mr. Naushad Engineer a/w. Ms. Meenakshi Iyer, i/b. Advaya Legal for Petitioner.

Mrs. Kiran Bhagalia, a/w. Mr. Musharaj Shaikh, for respondent.

CORAM: N.J. JAMADAR, J.

JUDGMENT

1. This is a petition under section 11 (6) of the Arbitration and Conciliation Act, 1996 as amended by the Amendment Act, 2015. The Petitioner has inter alia prayed for the following relief:

"(a) That this Court be pleased to appoint a fit and proper person to act as a second Arbitrator in terms of section 11(6) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration Act, 2015, for and on behalf of the Respondent and thereafter constitute an independent standing arbitral Tribunal under section 11(6) of the Arbitration and Conciliation Act, 1996 to adjudicate upon the dispute and differences between the parties in respect of the contract dated 12th December, 2005.

2. The background facts which led to this petition can be summarized as under:

(a) The Respondent had floated a tender vide tender notice dated 21st May, 2005 for construction of B.G. Single Line Tunnels on the Katra-Laole, section of Udhampur- Shrinagar- Baramulla Rail Link Project. The bid of the Petitioner was accepted. A contract bearing No. KR/PD/J&K/CONT/TUNNEL/T-38/47/ 2/ 2005

dated 12th December 2005 came to be executed between the Petitioner and a Respondent ('the principal contract'). Clause 46.0 of the special conditions of contract incorporated an arbitration agreement between the parties. Annexure 'P' thereto provides for the constitution of an arbitral tribunal. The relevant clauses of the principal agreement and the supplementary agreement which came to be executed between the parties, as regards the resolution of dispute through arbitration, read as under:

"Clause 46.0 : The contractor shall sign the arbitration agreement along with the contract. The standing Arbitral Tribunal clauses shall in force from the date of signature of the Arbitration Agreement. The details pertaining to Arbitral Tribunal is included in the relevant annexure."

Annexure 'P'

Arbitral Tribunal

1.0 The Arbitration Tribunal (hereinafter referred to as the "TRIBUNAL") shall be established on the date of signing of supplementary agreement.

1.1 The Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA Grade, as the Arbitrators. For this purpose, the Corporation will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway, to the Contractor who will be asked to suggest to Managing Director/KRCL, up to 2 names out of panel for appointment as Contractor's nominee. The Managing Director/KRCL shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of the Arbitrators either from the panel or from outside the panel, duly indicating the presiding Arbitrator from amongst the 3 Arbitrators so appointed. While nominating the Arbitrators, it will be necessary to ensure that one out of them is from the accounts department.

1.2 If the Contractor failed to select the members from the approved panel within 14 days of the date of signing of supplementary agreement, then upon the request of either or both parties, the Managing Director/KRCL shall select such member within 14 days of such request.

1.3 While nominating the panel of three arbitrators, it should be ensured that one member should be invariably from the Finance Department.

2.0 Reference to Arbitration:

2.1 Under clause 43 of the Standard General Conditions of Contract of Northern Railway, the Contractor has to prepare and furnish to the Engineer-in-charge and to Chief Engineer of Project, once in a month an account giving full and detailed particulars of all the claims for any additional expenses, to which the Contractors may consider himself entitled to an all extra and additional works ordered by the Engineer which he has executed during the preceding month. While submitting the said Monthly claim, if any dispute has arisen as regards execution of the works under the contract, the Contractor shall give full particulars of such disputes in the said submission.

2.2 The Contractor will submit a copy of the monthly claim to be furnished by the Contractor under Clause 43 of General Condition of Contract of Northern Railway, to Chief Engineer, along with particulars of any other disputes which may have arisen between the parties in respect of the execution of the Contract to the Arbitral Tribunal on a quarterly basis.

2.3 The parties while referring their claims to the TRIBUNAL shall submit all the relevant document in support of their claims and reasons for raising the dispute to the TRIBUNAL.

2.4 If the claims made by the Contractor in the said submission to Chief Engineer, is refuted or the payment is not made within one month from the date of the submission of the said monthly claim, a dispute would be deemed to have arisen between the parties. The Contractor, when the dispute arises or is deemed to have arisen, will communicate to the Arbitral Tribunal on a quarterly basis of the said refusal/non -payment. The said communication will be the reference of the disputes to the arbitral tribunal appointed under the present agreement."

(b) It is the claim of the Petitioner that the execution of the tunnel works was completed and even the defect liability period also expired. The Petitioner thus claims to have notified the Respondent about the completion of the works and the expiration of the defect liability period by letters dated 13th July, 2016 and 17th August, 2016. Thereupon, the Petitioner claims to have called upon the Respondent to finalize the accounts in relation to the work in accordance with the provisions of clause 51(1) of the General Conditions of Contract of Northern Railways read with clause 30 of the Special Conditions of Contract. Accordingly, the Petitioner claimed to have submitted full accounts of all claims to the Respondent vide its letter dated 21st November, 2016. Running account bills Nos. 112A, 112B and 112C along with a covering letter dated 27th June, 2017 were lodged with the Respondent. As the claims were disputed by the Respondent by its letters dated 12th December, 2017, in accordance with the stipulation in the contract the Petitioner claimed to have addressed the letter dated 4th January, 2018 to the Chief Engineer and called upon him to give a final decision on the claims submitted within a period of 120 days from the date of receipt, lest the Petitioner will proceed with an appropriate dispute redressal. As the Chief Engineer did not give his decision within the period stipulated under clause 64(1)(i) of general conditions of contract, the Petitioner invoked the arbitration vide its letter dated 2nd July, 2018.

(c) In the said letter, the Petitioner pointed out that the procedure laid down in the arbitration agreement for constitution of the arbitral tribunal comprising of the gazetted Railway Officers was in contravention of the provisions contained in section 12(5) read with Fifth and Seventh Schedule of the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation Amendment Act, 2015. Thus, the procedure prescribed under section 11(3) of the Act, 1996 would govern the constitution of the arbitral tribunal. The Petitioner, therefore, nominated Shri R. G. Kulkarni, Retired Secretary and Engineer-in-Chief, Government of Maharashtra to be its nominee arbitrator and called upon the Respondent to nominate its arbitrator in terms of the Act 1996, within a period of 30 days.

3. The Respondent, vide its letter dated 11th July, 2018, simply apprised the Petitioner that the case regarding appointment of arbitrator for the subject contract is subjudice before Hon'ble High Court of Jammu and Kashmir. The Petitioner joined the issue by a communication dated 3rd August, 2018 asserting, inter alia, that the reference to arbitration contained in the letter dated 2nd July, 2018 is a fresh reference distinct from and unrelated to the earlier reference dated 27th June, 2012, which is pending before the Hon'ble Jammu and Kashmir High Court. In response to the said letter, the Respondent, vide letter dated 29th August, 2018, countered by asserting that the arbitral tribunal was formed as per the terms and conditions of the contract for the entire contract and the same is under challenge at the instance of the Petitioner in the High Court of Jammu and Kashmir. Thus, the Respondent rejects the appointment of Mr. R.G. Kulkarni as Petitioner's nominee arbitrator. The Petitioner has, thus, approached this Court for exercise of the jurisdiction under section 11(6) of the Act 1996 as the Respondent has refused to nominate its arbitrator.

4. The Respondent has resisted the petition by filing an affidavit in reply. The tenability of the petition before this Court is called in question as a similar Petition for identical relief is subjudice before the High Court of Jammu and Kashmir, being Petition No. 28 of 2012, under section 11(3)(4) and (6) of Jammu and Kashmir Arbitration and Conciliation Act, 1997. The Respondent further contended that the Petitioner had filed an application bearing No. 25-22/11/2012 in the Court of Principal District Judge, Ramban purportedly under section 9 of the Act 1996. Elaborating the jurisdictional challenge, it is contended that in the said Arbitration Application No. 28 of 2012 pending before the Jammu and Kashmir High Court, the Petitioner claimed that though the provision for formation of the arbitral tribunal subsisted, the procedure for constitution of the arbitral tribunal failed due to the alleged failure and neglect on the part of the Respondent to adhere to the said procedure. Thus, in the said application the Petitioner herein prayed for an order of naming and appointing a fit person as a nominee of Respondent for adjudicating the disputes which arose between the parties out of the said contract. On the aspect of jurisdiction, according to the Respondent, in the said application before the Jammu and Kashmir High Court, the Petitioner herein had averred that as the parties to the petition and the cause of action accrued within the territorial jurisdiction of the High Court, the High Court of Jammu and Kashmir had jurisdiction to entertain the said application. In view of this positive stand of the Petitioner as regards the jurisdiction of Jammu and Kashmir High Court as the Court which exercises supervisory jurisdiction over the arbitration proceedings, the instant petition before this Court is not tenable.

5. The Respondent has endeavored to meet the contention of the applicant that the proceedings pending before the Jammu and Kashmir High Court relates to a different dispute, by asserting that, with the execution of the supplementary agreement for constitution of a standing arbitral tribunal, Annexure 'P' to the contract (extracted above), the parties have clearly and unequivocally agreed to the establishment of a standing arbitral tribunal to deal with each and every dispute that may arise out of the contract. The parties did not agree to have a different arbitral tribunal for each dispute which may arise out of the said contract. Lastly, it is contended that, in any event, in view of the provisions contained in section 11(12)(b) of the Act, 1996, the reference to the High Court shall be construed as a reference to the High Court, within whose local limits, the Principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situated and

thus as the Petitioner has already filed section 9 application before the Principal Civil Court at Ramban, the application under section 11 cannot be entertained by any Court other than the High Court of Jammu and Kashmir.

6. On the principal challenge that the procedure of constitution of arbitral tribunal, provided under the terms of the contract, is violative of the provisions contained in section 12 of the Act, 1996, the respondent contends that the applicant never challenged the said procedure as violative of section 12 nor the mere fact that the arbitrators to be appointed happen to be the employees of the respondent, by itself, is a ground for disqualification.

7. In the backdrop of aforesaid pleadings, I have heard Mr. Naushad Engineer, the learned counsel for the petitioner and Mrs. Kiran Bhagalia, the learned counsel for the respondent, at some length.

8. Mr. Naushad Engineer, the learned counsel for the Petitioner urged that the jurisdictional challenge to the tenability of the petition before this Court is wholly misconceived. The objection sought to be raised on behalf of the Respondent totally overlooks the jurisdictional connotation of the term "Court" under section 2(1)(e) of the Act, 1996; which is exhaustive, and section 42 of the Act, 1996; the inapplicability of the bar thereunder to an application under section 11 of the Act is now firmly established by a catena of precedents. Mr. Engineer urged with a degree of vehemence that the Respondent has failed to appreciate the true nature and import of the Amendment Act, 2015 especially the amendments brought about in section 12 of the Act, 1996 to ensure neutrality, independence and impartiality of the Arbitrators. Special emphasis was laid on sub section (5), introduced by the Amendment Act, 2015, which proclaims that 'notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator''. The first entry in the Seventh Schedule declares any person who is an employee, consultant, advisor or has any other past or present business relationship with a party ineligible to be appointed as an Arbitrator, urged Mr. Engineer. Thus, the stipulations in the contract regarding the appointment of a Standing Arbitral Tribunal comprising the gazetted Railway officers ex-facie stands foul of the provisions contained in section 12(5) of the Act, 1996.

9. Mr. Engineer would further urge that the fact that the Petitioner had invoked the jurisdiction of Jammu and Kashmir High Court in the year 2012, when a dispute had arisen between the parties, does not preclude the Petitioner from invoking the jurisdiction of this Court, especially after the significant changes brought about by the Amendment Act, 2015. Banking upon the provisions contained in section 21 of the Act, 1996 which govern the commencement of the arbitral proceedings, it was urged that the arbitral proceedings can be said to have commenced in respect of a particular dispute on invocation of the arbitration with regard to that particular dispute. Since the dispute at hand arose post the enforcement of the Amendment Act, 2015, the said dispute would be governed by the provisions of the Act, 1996 as amended by the Amendment Act, 2015. Consequently, the objection on behalf of the Respondent that only the High Court of Jammu and Kashmir has the exclusive jurisdiction to deal with an application under section 11 is legally unsustainable, submitted Mr. Engineer.

10. In opposition to this, Mrs. Bhagalia, the learned counsel for the Respondent stoutly submitted that the endeavor of the Petitioner to invoke the jurisdiction of this Court on the premise that each dispute furnishes a separate subject matter for arbitration has the effect of completely dislodging the dispute resolution mechanism agreed to between the parties. The parties have consciously agreed to constitute a Standing Arbitral Tribunal. All the disputes were agreed to be referred to the said Standing Arbitral Tribunal. As the Petitioner has invoked the jurisdiction of Jammu and Kashmir High Court for constitution of an Arbitral Tribunal, in the backdrop of the stipulations contained in the contract for the constitution of Standing Arbitral Tribunal, the Petitioner cannot be now permitted to approach another High Court and seek the very same remedies, urged Mrs. Bhagalia. Mrs. Bhagalia laid emphasis on the provisions contained in section 11(12)(b) to draw home the point that the reference to the High Court in sub sections (4), (5), (6), (7), (8) and (10) is to be construed as a reference to the High Court within whose local limits the Principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situated. Admittedly, the Petitioner has filed a section 9 Petition in the Court of the Principal District Judge, Ramban (in the then State of Jammu and Kashmir) and thus the High Court of Jammu and Kashmir would have the jurisdiction to deal with the application under section 11 of the Act.

11. Mrs. Bhagalia submitted with tenacity that the employees of a public sector organization like Railways are not per se disqualified to be appointed as Arbitrators. Being an employee is not in itself a disqualification to act as an Arbitrator. Thus, the challenge sought to be raised to the constitution of the standing arbitral Tribunal on the premise that the Tribunal is to be constituted of the employees of the Railways, is stated to be unworthy of acceptance.

12. In the light of the aforesaid facts and submissions canvassed across the bar the following points arise for determination of this Court:

1) Whether this Court has jurisdiction to entertain and decide the petition for appointment of Arbitrator under section 11 of the Act, 1996 ?

2) If the answer to the aforesaid question is in the affirmative, whether the procedure of appointment of Arbitral Tribunal contained in clause 1.1 of Annexure 'P' to the contract (extracted above) from amongst the panel of gazetted Railway Officers is in conformity with the provisions of the Act, 1996, as amended by the Amendment Act, 2015?

13. Before adverting to deal with the aforesaid contentious issues, it may be apposite to note that there is not much controversy between the parties over the material terms of the contract, including the arbitration agreement and the provisions in respect thereof. The fact that the Petitioner has initially filed an application under section 9 of the Act in the Court of Principal District Judge, Ramban in respect of fore poling item (for amount to be paid by adding contract percentage) is also not in dispute. There is not much controversy over the fact that the Petitioner herein filed an application, being Arbitration Application No. 28 of 2012, on 26th September, 2012 before the High Court of Jammu and Kashmir under section 11 (3) (4) and (6) of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 for appointment of Arbitrator. Admittedly, the said application still awaits final adjudication. From the perusal of the copy of the said

application, annexed by the Respondent to its affidavit in reply, it becomes evident that the Petitioner claimed that the dispute arose between the parties owing to wrongful deductions made by the Respondent from payment due to the Petitioner. It was, inter alia, alleged that there was failure on the part of the Respondent to adhere to the procedure prescribed for appointment for the Arbitrators under the governing arbitration clause.

Question No. 1:

14. In the backdrop of the aforesaid undisputed facts, the challenge to the jurisdiction of this Court to entertain and decide the petition is required to be appreciated. To appreciate the said challenge in a proper perspective, it may be advantageous to note following provisions of the Act, 1996:

1) SEC 2(1)(e)(i):"Court" means, in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject- matter of the arbitration if the said had been the subject matter of a suit, but does not includes any Civil Court of grade inferior to such principal Civil Court, or any Court of Small Causes.

2) Section 11(6): Where, under an appointment procedure agreed upon by parties,-

(a) A party fails to act as required under that procedure; or

(b) The parties or the two appointed arbitrators failed to reach agreement expected of them under that procedure; or

(c) A person, including an institution fails to perform any functions entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the Court or any person or institution designated by such Court to take necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

3) Section 11(11): Where more than one request has been made under sub-section 4 or sub-section 5 or sub-section 6 to different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

4) Section 12(b): Where the matters referred to in sub-section (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

5) Section 42: Jurisdiction: Notwithstanding anything contained elsewhere in this Part or in any other law for the time being enforce, where with respect to an arbitration agreement any application under this Part has been made in a Court,

that Court alone shall have jurisdiction over the arbitral proceeding and all subsequent applications arising out of that agreement and arbitral proceeding shall be made in that Court and in no other Court."

15. It would be contextually relevant to note that by section 6 clause (i) of the Amendment Act, 2015, the words "the Chief Justice or any person or institution designated by him" in sub-sections (4), (5) and (6) were substituted by the words, "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court". The power of appointment of Arbitrator, which was to be exercised under section 11 of the Act by the Chief Justice or any person or institution designated by him, is, post the Amendment Act, 2015, to be exercised by the Supreme Court or as the case may be the High Court or any person or institution designated by such Court.

16. From a plain reading of sub-section 2(1)(e) of the Act, 1996, it becomes evident that the Act provides an exhaustive definition designating only the Principal Civil Court of original jurisdiction in a District or a High Court having original civil jurisdiction in the State to be the Court "for the purpose of Part I of the Act, 1996". The exclusionary nature of the definition is underscored by further providing that such Court would not include any Civil Court of a grade inferior to such a Principal Civil Court or Court of Small Causes. The exhaustive nature of the definition of the "Court" is brought out by the use of the expression, "means and includes".

17. It is equally well recognized that the bar to the jurisdiction envisaged by section 42 of the Act to entertain any application in respect of an arbitration agreement under Part I, once such an application is made to a Court, by any other Court than the Court to which such application is first made, does not apply to the applications like the application to the judicial authority under section 8 of the Act, 1996 or the application for appointment of Arbitrator under section 11 of the Act, 1996.

18. It would be advantageous, in this context, to make a reference to a three Judge Bench decision of the Supreme Court in the case of State of West Bengal and Ors. Vs. Associated Contractors, wherein the Supreme Court was called upon to authoritatively determine the question as to which Court will have the jurisdiction to entertain and decide an application under section 34 of the Act ? After adverting to the previous pronouncements including the seven Judge Bench decision of the Supreme Court in the case of S.B.P. and Co. vs. Patel Engineering Ltd., the Supreme Court observed that it is obvious that section 11 applications are not to be moved before the Court as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be or their delegates. This is despite the fact that Chief Justice or his delegate have now to decide judicially and not administratively. Again, section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief justice or his delegate is not Court as defined by section 2(1)(e). The Supreme Court after an exhaustive consideration culled out the conclusions as regards the interplay between section 2(1)(e) and section (42) of the Act in paragraph 25 as under:

"25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part-I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part-I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part-I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain session after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part-I.

(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising Original Jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42."

19. As indicated above, with the amendment brought about by the Amendment Act, 2015, the power is now vested in the Supreme Court or High Court or its delegate instead of the Chief Justice or his delegate. This legislative change, however, does not seem to have any bearing upon the well recognized proposition that the bar under section 42 of the Act does not apply to the authority which is vested with the power to appoint Arbitrator under section 11 of the Act, 1996. It is plain that the Supreme Court or High Court or its delegate while exercising power under section 11 of the Act cannot be equated with the "Court" contemplated by section 42 of the Act, 1996 which has a definite and exhaustive meaning under section 2(1)(e) of the Act, 1996.

20. This position was, following the aforesaid judgment in Associated Contractors(supra), expounded by the Calcutta High Court in the case of Khazana

Projects & Industries Pvt. Ltd. Vs. Indian Oil Corporation Ltd., in the following words:

"19 From the above discussion, what emerges as a clear proposition of law is that section 42 is not attracted by virtue of the appellant having filed an application under section 11 of the Act before the Delhi High Court since an application under section 11 is not made to a "court" within the definition of section 2(1)(e). Although the phrase "Chief Justice or any person or 9 institution designated by him" has now been substituted by the 2015 amendment and replaced by the phrase "the Supreme Court, or as the case may be, the High Court or any person or institution designated by such Court", the findings of Associated Contractors and other similar cases, holding that section 42 would not apply to applications made under section 11, still holds true and is good law." (emphasis supplied)

21. Mrs. Bhagalia urged with a degree of vehemence that there is no quarrel with the aforesaid proposition. However, in view of the fact that the Petitioner has already invoked the jurisdiction of Jammu and Kashmir High Court in respect of the very same subject matter assailing the constitution of the Arbitral Tribunal, this Court cannot exercise the powers under section 11 of the Act, if the comity between the Courts is to be maintained. To draw support to this submission, the learned counsel for the Respondent banked upon the provisions of section 11(12)(b) of the Act, 1996, extracted above.

22. Per contra, Mr. Engineer urged that the question has to be decided in the backdrop of the context of arbitrable dispute and the time at which such dispute can be said to have arisen. The Petitioner was constrained to approach the Jammu and Kashmir High Court when the dispute arose in respect of the alleged unauthorized deductions by the Respondent. With the statutory change, the very provisions which provide for the constitution of standing arbitral Tribunal, under the contract, are in teeth of provisions of law. Since the dispute arose after the said provisions came into effect, the Petitioner cannot be deprived of the remedy of approaching the High Court, within whose jurisdiction a part of the cause of action arises. Evidently, the office of the Respondent is situated within the jurisdiction of this Court and the contract also came to be executed within the limits of jurisdiction of this Court. The learned counsel for the Petitioner banked upon the provisions contained in section 21 of the Act, 1996 which govern the commencement of the arbitral proceeding. Section 21 of the Act reads as under:

"Section 21: Commencement of arbitral proceedings: Unless otherwise agreed by the parties, the arbitral proceeding in respect of a particular dispute commence on the date on which request for that dispute to be referred to arbitration is received by the Respondent."

23. Mr. Engineer placed a strong reliance upon a judgment of the learned Single Judge of this Court in the case of ITD Cementation India Ltd. Vs. Konkan Railway Corporation Ltd. (the respondent herein). In the said case this Court considered the question whether the Standing Arbitral Tribunal, which was to be constituted by the Respondent as per clause 55 of the special conditions of the contract (like clause 1.1 extracted above, in our case) would satisfy the requirement of law as prescribed under section 12 read with the Schedule to the Arbitration Act, as incorporated by 2015 Amendment Act. While answering the question in the

negative, this Court adverted to the provisions of section 21 of the Act (extracted above) and enunciated the legal position as under:

"34. There is another facet which would have relevance, namely that the dispute between the parties can arise at any stage of the contract. It need not be that only when the work under the contract is concluded a reference to arbitration can be made. This is also clear from the facts of the present case that the dispute has arisen in an ongoing contract, when certain bills were raised by the petitioner and which are being disputed by the respondent. Thus once the dispute arises and the arbitration is required to be commenced, Section 21 of the Arbitration Act would get attracted which provides for commencement of arbitral proceedings. Section 21 provides that unless otherwise agreed between the parties, the arbitral proceedings in respect of a particular dispute would commence on the date on which the request of that dispute being referred to the arbitrator, is received by the respondent. Section 21 reads thus:

> *"21. Commencement of arbitral proceedings: Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

35. Once a request has been made by a party for reference of the disputes to an arbitral tribunal, normally only in that event the respondent to whom such a request is made, would be required to accept the request and appoint an arbitral tribunal. In case the request is rejected then the party is entitled to approach the Court under Section 11 of the Act praying for appointment of arbitral tribunal. Once the parties are before the Court for appointment of an arbitral tribunal, then certainly all the parameters falling under Section 12 read with Fifth and Seventh Schedule would become applicable.

36. In the present case considering the arbitration clause, the position in regard to the commencement of the arbitral proceedings is not different from what Section 21 provides. Clause 55 of the Contract which provides for constitution of "a standing arbitral tribunal" cannot be taken to be any agreement otherwise entered between the parties to be taken as an exception to deviate from the commencement of the arbitral proceedings, as stipulated by Section 21, namely from the date on which the request for a dispute to be referred to arbitration, is made. This more particularly considering the very next clause in the agreement namely Clause 55.5 providing for a reference to arbitration and the manner in which a reference would be made. On reading of Clause 55.5 it can be concluded that constitution of a Standing Arbitral Tribunal and reference of the disputes are independent from each other. Hence, mere constitution of an arbitral tribunal cannot be presumed to be any commencement of arbitral proceedings, even within the meaning of Section 21 of the Arbitration Act. Thus, necessarily the arbitration proceedings in the present case would commence when the petitioner by its letter dated 5 July 2017 addressed to the respondent, calling upon the respondent to constitute an arbitral tribunal as per law. Thus, the requirement of law, on the day such a request was made for the constitution of the arbitral tribunal, would be relevant, namely the applicability of Section 12 as amended by the 2015 Amendment Act along with the applicability of the provisions of Schedule V and Schedule VII."

24. It would be contextually relevant to note the provisions in the contract with regard to reference to arbitration. Under clause 2.1 and 2.2 the contractor is enjoined to submit the monthly claims to the Chief Engineer. Clause 2.4 thereafter provides that if the claims made by the contractor to the Chief Engineer is refuted or the payment is not made within one month from the date of submission of said monthly claim, a dispute would be deemed to have arisen between the parties. Thereafter, the contractor shall communicate to the arbitral Tribunal on a quarterly basis of the said refusal/ non-payment. The said communication shall constitute the reference of the dispute to the arbitral Tribunal.

25. The aforesaid provisions of the contract in the matter of reference to arbitration thus indicate that the parties were alive to the possibility of multiple disputes between the parties and thus the mechanism of submission of the claims to the Chief Engineer, decision thereon by the Chief Engineer and on failure to pay the amount or refusal of the claim, the dispute would be deemed to have arisen with regard to that claim. In this view of the matter, the fact that the dispute once arose between the parties in respect of a particular claim would not tie-down the parties to the rights and obligations which emanate at that point of time.

26. On a plain reading of section 21 of the Act, it becomes abundantly clear that the commencement of the arbitral proceeding is in respect of a particular dispute. This particularity of the arbitrable dispute is further reinforced by the use of the expression that the arbitral proceedings would commence on the date on which a request for that dispute is received by the Respondent.

27. In this context, the provisions of section 26 of the Amendment Act, 2015 shed light on the legislative intent. Section 26 of the Amendment Act, 2015 reads as under:

> *"Section 26: Act not to apply to pending arbitral proceeding. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

28. A conjoint reading of section 21 of the Principal Act,1996 with section 26 of the Amendment Act, 2015, in the context of the provisions in the contract as regards reference of the dispute to arbitration, especially the time at which the dispute is deemed to have arisen (after the claim is either refuted or payment is not made by the Chief Engineer), it becomes crystal clear that arbitrable dispute between the parties can be deemed to have arisen with the invocation of the arbitration clause by the Petitioner on 2nd July, 2018.

29. The submission on behalf of the Respondent that the provisions contained in section 11(12)(b) of the Act, 1996 precludes this Court from entertaining the application for appointment of Arbitrator appears attractive, at the first blush. However, on close scrutiny, I am afraid to accede to this submission. There are two principal reasons. One, again the definition of the Court under section 2(1)(e) of the Act, 1996 is of salience. A profitable reference, in this context, can be made to the Constitution Bench judgment of the Supreme Court in the case of Bharat Aluminium Co. vs. Kaiser Aluminum Technical Services Incorporation 5. Paragraph

96 of the said judgment is instructive and illuminates the connotation of the term "Court" under section 2(1)(e) with illustration:

"96. We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit".

The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located. (emphasis supplied)

30. This Court in the case of Konkola Copper Mines vs. Stewarts and Lloyds of India Ltd., after construing the pronouncement of the Supreme Court in the case of Bharat Aluminium Co. (supra) observed that the judgment of the Supreme Court in Bharat Aluminium Co. (supra) is declaratory of the position in law that the Court having jurisdiction over the place of arbitration can entertain a proceeding in exercise of its supervisory jurisdiction as indeed the court where the cause of action arises.

31. Evidently the object of section 11(12)(b) seems to be to provide with clarity that the High Court will only be such a High Court within whose local limits the Principal Civil Court referred to in section 2(1)(e) is situated. Since in Bharat Aluminium Co. (supra) the Supreme Court has clarified that the legislature has intentionally given jurisdiction to two Courts i.e. the Court which would have jurisdiction where the cause of action is located and the Court where the arbitration takes place, the provisions of sub section (12)b) cannot be so construed as to curtail the ambit of the definition of the "Court" under section 2(1)(e) of the Act. 6 2013 (4) ArbLR 19 (Bombay)

32. The provisions contained in sub-section (11) of section 11 further clarify the position. Sub-section (11) of section 11 provides that where more than one request has been made to different High Court or their designates under sub-sections (4), (5) and (6) of section 11, the High Court or its designate to whom the request has been first made under the relevant sub section shall alone be competent to decide the request. This provision indicates that the legislature was alive to the fact that in view of the definition of the Court under section 2(1)(e), in respect of the very same arbitrable dispute, more than one request can be made to different High Courts, and, thus, the legislature took care to provide that in such an eventuality the High Court to which the request has been first made, shall alone be competent to decide the request.

33. The upshot of the aforesaid consideration is that the fact that a request for constitution of arbitral Tribunal was made to the Jammu and Kashmir High Court in respect of a dispute which arose in the year 2012 would not preclude the Petitioner from approaching this Court for exercise of the power under section 11 of the Act especially when the arbitrable dispute arose subsequent to the coming into force of the Amendment Act, 2015 and the consequent commencement of the arbitration proceedings post enforcement of the Amendment Act, 2015. Thus, I am persuaded to hold that the dispute raised in the instant application being a distinct dispute, which arose in terms of the contract between the parties providing for reference to arbitration, this Court can exercise the powers under section 11 of the Act, 1996.

Question No. 2:

34. Arbitration is a preferred mode for resolution of commercial dispute as it is unencumbered by the procedural technicalities of traditional adjudicatory process. However, the determination is not at the expense of impartiality and dispassionate decision which is fundamental to any dispute resolution process. Impartiality and independence of the arbitrators is the very soul of the arbitration process. Though the arbitrators are usually appointed as the nominees of the parties to the dispute, yet the arbitrators are expected to discharge their duties with an element of detachment and impartiality.

35. On the aforesaid touchstone, if the constitution of the arbitral Tribunal envisaged by clause 1.1 (extracted above) is scrutinized and dissected, the following features emerge:

First and foremost, the arbitral Tribunal shall consist of three gazetted Railway officers not below JA Grade. Secondly, the panel of such gazetted Railway officers is to be prepared by the Respondent Corporation from amongst the officers of one or more departments of the Railway. Thirdly, the panel so prepared will be shared with the contractor (Petitioner), who would be asked to suggest up to two names out of the panel for appointment as contractor's nominee. Fourthly, and surprisingly, the power to appoint the nominee Arbitrator of the contractor vests with the Managing Director of the Respondent with the only rider that he shall appoint at least one out of the two names suggested by the contractor. Fifthly, the power to appoint the rest of the Arbitrators from within or outside the panel and the presiding Arbitrator from amongst those three Arbitrators, interestingly, vests with the Managing Director of the Respondent.

36. The learned counsel for the Petitioner urged that the aforesaid provisions in the contract for constitution of the arbitral Tribunal violate the spirit of neutrality and impartiality which is sought to be achieved by the provisions of section 12 of the Act, 1996, as amended by the Amendment Act, 2015. The aforesaid composition of the arbitral Tribunal flies in the face of the letter and spirit of the said amended provision. To buttress this submission the learned counsel for the Petitioner placed a strong reliance upon the judgment of the Supreme Court in the case of Voestalpine Schienen GmbH vs. Delhi Metro Rail Corp. Ltd., wherein the legislative purpose and import of the amended section 12 was expounded. The learned counsel for the Petitioner further submitted that this Court, in two arbitration Petitions, to which the Respondent was a party, has frowned upon the identical clauses in the arbitration agreement as regards the composition of the arbitral Tribunal and directed the Respondent to make its panel of Arbitrators broad based, in contradistinction to the panel comprising of the serving or retired officers of the Railways.

37. Attention of the Court was invited to the observations of this Court in Commercial Arbitration Application No. 135 of 2017 between the same parties Afcons Infrastructure Ltd. Vs. Konkan Railway, dated 23rd October, 2018, and ITD Cementation Ltd. (supra).

38. In the case of Voestalpine Schienen GmbH (supra), the Supreme Court, after adverting to the amended provisions of section 12 including the provisions of Seventh schedule, introduced by Amendment Act, 2015 enunciated that the main purpose for amending the provision was to provide for neutrality of Arbitrators. In order to achieve this, sub section (5) of section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in Seventh schedule, he shall be ineligible to be appointed as an Arbitrator. In such an eventuality, i.e. when the arbitration clause falls foul with the amended provisions extracted above, the appointment of an Arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such Arbitrator(s) as may be permissible. That would be the effect of non-obstante clause contained in sub section (5) of section 12 and the other party cannot insist on appointment of the Arbitrator in terms of the arbitration agreement. The observations of the Supreme Court in para Nos. 25, 26 and 28 are instructive and hence they are extracted below:

"25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling

influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.

26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide "to determine whether circumstances exist which give rise to such justifiable doubts". Such persons do not get covered by red or orange list of IBA guidelines either.

28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel."

39. Following the aforesaid judgment in the case of Voestalpine Schienen Gmbh (supra), this Court in the case of Afcons Infrastructure Ltd. (supra), in terms observed that "despite the observations of the Apex Court in Voestalpine Schienen Gmbh (supra) if the public sector organization like Respondent have such regressive one sided clauses for dispute resolution, I will not be surprised, in future if they have clauses under which Respondent will decide who will be the lawyer to represent the contractors like Petitioner. If the Government organizations and PSUs change their attitude, it would save substantial judicial time."

40. The learned Single Judge took pains to demonstrate with reference to the organization structure of the Indian Railways that even if the panel of 31 names recommended by the Respondent, in that case, did not contain any one who were the employees of KRCL or ex-employees of KRCL still all of them would fall under the common control of the Railway Board, Indian Railways as per the organization structure.

41. Commenting upon the procedure of constitution of the Arbitral Tribunal, indicated above, the learned Single Judge observed that the said procedure certainly falls foul of the requirement of neutrality of Arbitrators and even the clause which empowers the Chairman and Managing Director of the Respondent to even appoint the presiding Arbitrator is violative of section 11(3) of the Act, 1996. The learned Judge observed in emphatic terms that the two Arbitrators appointed by the parties shall decide who shall be the presiding Arbitrator.

42. In the case of ITD Cementation India Ltd.(supra), another learned Single Judge after adverting to clause 55 of the contract which provided for constitution of standing arbitral Tribunal (in almost identical terms with clause 1.1 above) and the amended provisions section 12, the pronouncement of the Supreme Court in Voestalpine Schienen Gmbh (supra) and the organization structure of the Indian Railways observed that, "the Indian Railways therefore qualifies as a parent entity of the Respondent. Thus, certainly the Respondent can be said to be an affiliate of the Indian Railways/ Northern Railways within the meaning of" an affiliate" as described in Explanation 2 to the Seventh schedule of the Arbitration Act. It thus cannot be said that the existing employees of Northern Railways would not have any relationship with the Respondent. It is also likely that the officers can very well be posted by the Ministry of Railways on deputation with Respondent in which case such employees under the Ministry of Railways would also be the employees of the Respondent. Hence, it can be said that an employee of the Railways can also be an employee of Northern Railways, Central Railways or any other Railways who can be appointed as an Arbitrator in connection with the dispute to which the Respondent is a party. In this situation it cannot be said that such an employee Arbitrator would be an independent or impartial Arbitrator having no relationship with the Respondent, and more particularly in the spirit of amended provisions of section 12 read with Fifth and Seventh Schedule as noted above".

43. In the process, the learned Single Judge went on to hold that the standing arbitral Tribunal constituted prior to coming into force of the Amendment Act, 2015 certainly would not clear the test of law when the arbitration itself commenced after the Amendment Act, 2015 come into force. Thus, the standing arbitral Tribunal constituted prior to the dispute in question having been arisen, by operation of law, is rendered invalid and wiped out applying the principles of law as laid down by Perkins Eastman Architects DPC vs. HSCC (India) Ltd. 9 8 2019 SCC Online 547 9 Arbitration Application No. 32 of 2019 dated 26th November, 2019.

44. The learned counsel for the Respondent attempted to salvage the position by canvassing a submission that the aforesaid pronouncement of this Court in the case of ITD Cementation (supra) is in conflict with the observations of the Supreme Court in the case of Aravali Power Co. Pvt. Ltd. Vs. Era Infra Engineering Ltd. In all fairness to the learned counsel for the Petitioner, it must be noted that

the learned Single Judge had, in fact, dealt with the pronouncement of the Supreme Court in the case of Aravali Power Co. Pvt. Ltd. (supra), in para No. 49, and observed that the said decision was of no assistance to the Respondent as the dispute had arisen after the coming into force of the Amendment Act, 2015.

45. It is true that in the case of Aravali Power Co. Pvt. Ltd. (supra), the Supreme Court has observed that the fact that the named Arbitrator happens to be an employee of one of the parties to the arbitration agreement has not by itself, before the Amendment Act came into force, rendered such appointment invalid and unenforceable. However, the context in which those observations were made, cannot be lost sight of. Those observations were made in the backdrop of the provisions of section 12 (1) as it stood before the Amendment Act came into force. This position becomes explicitly clear if the 10 (2017) 15 SCC 32 observations of the Supreme Court in the case of Aravali Power Co. Pvt. Ltd. (supra) in para No. 21 are considered, which read as under:

"21 Except the decision of this Court in Voestalpine Schienen GMBH (supra) referred to above, all other decisions arose out of matters where invocation of arbitration was before the Amendment Act came into force. Voestalpine Schienen GMBH (supra) was a case where the invocation was on 14.6.2016 i.e. after the Amendment Act and the observations in Para 18 clearly show that since "the arbitration clause finds foul with the amended provisions", the Court was empowered to appoint such arbitrator(s) as may be permissible. The ineligibility of the arbitrator was found in the context of amended Section 12 read with Seventh Schedule (which was brought in by Amendment Act) in a matter where invocation for arbitration was after the Amendment Act had come into force. It is thus clear that in pre-amendment cases, the law laid down in Northern Railway Administration (Supra), as followed in all the aforesaid cases, must be applied, in that the terms of the agreement ought to be adhered to and/or given effect to as closely as possible. Further, the jurisdiction of the Court under Section 11 of 1996 Act would arise only if the conditions specified in clauses (a), (b) and (c) are satisfied. The cases referred to above show that once the conditions for exercise of jurisdiction under Section 11(6) were satisfied, in the exercise of consequential power under Section 11(8), the Court had on certain occasions gone beyond the scope of the concerned arbitration clauses and appointed independent arbitrators."

46. In the case at hand, as indicated above, the particular arbitral dispute has arisen after the Amendment Act, 2015 came into force. The provisions under the contract for constitution of the standing arbitral Tribunal (clause 1.1 extracted above) are in flagrant violation of the amended provisions of section 12 read in conjunction with the Fifth and Seventh Schedule of the Act, 1996, introduced by the Amendment Act, 2015. Therefore, I am persuaded to hold that the endeavor on the part of the Respondent to urge that the mere fact that the arbitral Tribunal is to consist of gazetted Railway Officers does not reflect upon their independence and impartiality, does not deserve countenance. In view of the amended provisions of the Act, 1996, the officers of the Respondent or for that matter, Indian Railways (as demonstrated in the cases of Afcons Infrastructure Ltd. (supra) and ITD Cementation Ltd. (supra) are simply ineligible to be appointed as the Arbitrators. To add to this, the procedure of appointment which does not vest free choice to nominate an Arbitrator with the contractor and, conversely, vests the power to appoint the presiding Arbitrator with the Managing Director of the

Respondent also militates against the principles of autonomy and neutrality and impartiality, respectively. Thus, the prayer of the Petitioner to constitute an independent arbitral Tribunal appears justifiable.

47. The Petitioner had indicated its choice of Arbitrator by nominating Mr. R.G. Kulkarni, Retired Secretary and Engineer-in-Chief, Government of Maharashtra as its nominee Arbitrator while invoking the arbitration vide letter dated 2nd July, 2018. The Respondent has questioned the competence and authority of the Petitioner to nominate its Arbitrator to the arbitral Tribunal. However, no objection is raised to the eligibility, competence or impartiality of Mr. R.G. Kulkarni, to discharge functions of Arbitrator. In this view of the matter, I am inclined to allow the Petitioner to retain its choice of the Arbitrator and direct the Respondent to nominate its Arbitrator so that the two Arbitrators would then nominate a Presiding Arbitrator.

48. The Petition stands allowed in terms of the following order:

(1) The Petitioner is allowed to appoint Mr. R.G. Kulkarni, Retired Secretary and Engineer in Chief, Government of Maharashtra as a nominee Arbitrator on behalf of the Petitioner.

(2) The Respondent is directed to appoint an independent nominee Arbitrator, in conformity with the provisions of section 12 read with Fifth and Seventh Schedule of the Act 1996, as amended by the Amendment Act, 2015, within a period of four weeks from today.

(3) The nominee Arbitrators of both the parties shall appoint a Presiding Arbitrator, before entering the reference, in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(4) The prospective Arbitrators, before entering the reference, shall make a statement of disclosure in accordance with the requirements of section 11(8) read with section 12(1) of the Arbitration and Conciliation Act, 1996 and forward the same to the Prothonotary and Senior Master of this Court to be placed on the record of this Petition, with copies to both the parties.

(5) The Arbitration Petition stands disposed of in the above terms.

(N. J. JAMADAR, J.)

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Annexure – 2.5

Delhi High Court at New Delhi

M/S Arvind Kumar Jain vs Union of India

Date of Decision: 04.02.2020

ARB. P. 779/2019

M/S ARVIND KUMAR JAIN ..... Petitioner
Through: Mr. S. W. Haider
Mr. Raghav Agrawal, Advs.

Versus

UNION OF INDIA ..... Respondent
Through: Mr. Jagjit Singh
Ms. Preet Singh, Advs.
CORAM: HON'BLE Ms. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

Judgement

1. The present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) seeks appointment of an Arbitrator for adjudication of the disputes and differences that have arisen between the parties herein pertaining to the provision and laying of sewer line along the Railway boundary at Km 292/15 to 294/15 on DLI-BTI section under ADEN/JHI, which contract of work was awarded to the petitioner vide Acceptance Letter dated 15.12.2011.

2. Upon disputes having arisen, the petitioner vide its letter dated 03.09.2019 invoked the arbitration clause contained in paragraph 64 of the General Conditions of the Contract (GCC) signed between the parties, which reads as under:

"64(1) (i) Demand for Arbitration: 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 excepted 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".

3. On receiving the petitioner's request for appointment of an Arbitrator, in accordance with the GCC, the respondent, vide its reply dated 19.09.2019, did not deny that disputes had arisen between the parties but requested the petitioner to agree for a waiver of Section 12(5) of the Act. In essence the petitioner wanted the respondent to agree to the appointment of a Gazetted Officer (JAG/SAG) of the respondent/Railways as the arbitrator by waiving Section 12(5) of the Act.

4. Upon notice being issued, the respondent has filed its' reply, reiterating that the respondent is agreeable to arbitration in accordance with clause 64 of the GCC, but the appointment of an Arbitrator is held up for want of the requisite waiver from the petitioner. Learned counsel for the respondent also reiterates that the delay in referring the disputes to arbitration is only on account of the petitioner's failure to furnish the requisite waiver. He, therefore, submits that the petitioner be directed to furnish the requisite waiver, so as to enable the respondent to appoint any Gazetted Officer (JAG/SAG) of the Railway as the sole Arbitrator, in accordance with the terms of the Contract.

5. On the other hand, learned counsel for the petitioner submits that the petitioner has justifiable doubts regarding the impartiality of the arbitration proceedings when the respondent's own officer has been proposed as the sole Arbitrator. He further submits that once the respondent is aware that the appointment of an officer of the Railways as an Arbitrator would contravene the provisions of Section 12(5) of the Act, the respondent could not have directed the petitioner to furnish a waiver. He, therefore, prays that this Court appoint an independent Arbitrator.

6. Having considered the submissions of learned counsel for the parties, I find absolutely no merit in the pleas taken by the respondent. In the light of the admitted position that clause 64 of GCC requires disputes which have arisen between the parties to be adjudicated through arbitration, the question whether an Arbitrator needs to be appointed in the present case at all, need not detain me.

7. The question, however, is as to whether the respondent can insist on the appointment of a Gazetted Officer of Railways as the Arbitrator, especially in the light of the apprehension expressed by the petitioner and the expressed provisions of Section 12(5) of the Act. While recently considering this issue, the Supreme Court in Perkins Eastman Architects DPC v. HSCC (INDIA) LTD. [2019 SCC Online SC 1517] held as under:

"15. The communication invoking arbitration in terms of Clause 24 was sent by the Applicants on 28.06.2019 and the period within which the respondent was to make the necessary appointment expired on 28.07.2019. The next day was a working day but the appointment was made on Tuesday, the 30th July, 2019. Technically, the appointment was not within the time stipulated but such delay on part of the respondent could not be said to be an infraction of such magnitude that exercise of power by the Court under Section 11 of the Act merely on that ground is called for.

16. However, the point that has been urged, relying upon the decision of this Court in Walter Bau AG and TRF Limited, requires consideration. In the present case 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole arbitrator and said Clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In TRF Limited4, a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid one and whether at that stage an application moved under Section 11(6) of the

Act could be entertained by the Court. The relevant Clause, namely, Clause 33 which provided for resolution of disputes in that case was under:

"33. Resolution of dispute/arbitration
(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

(c) All disputes which cannot be settled by mutual consent, negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

(e) The award of the Tribunal shall be final and binding on both, buyer and seller."

17. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No. 3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under:

"7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing

Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator". The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognized by the decision of this Court in TRF Limited.

8. In the light of this legal position as also the petitioner's apprehensions regarding the impartiality of the Arbitrator proposed to be appointed by the respondent, I find that the respondent cannot be allowed to contend that only a Gazetted Railway Officer ought to be appointed as the Arbitrator. Similarly, the respondent cannot compel the petitioner to furnish a waiver from the applicability of Section 12(5) of the Act. In fact, I am of the view that the insistence of the respondent to seek a waiver from the petitioner would be contrary to the ratio of decision in Perkins Eastman Architects DPC (supra), and will contravene the very scheme of Section 12(5) of the Act.

9. In these circumstances, I am inclined to accept the petitioner's prayer for appointment of an independent Arbitrator under Section 11 of the Act. The petition is, accordingly, allowed and Mr. Siddhartha Shankar Ray, Advocate (Mobile No. 9871283416), is appointed as the sole Arbitrator to adjudicate the disputes and

differences arising between the parties out of the Acceptance Letter dated 15.12.2011, referred to hereinabove.

10. Before commencing arbitration proceedings, the Arbitrator will ensure compliance of Section 12 of the Act and the fees of the Arbitrator shall be governed by Schedule IV of the Act. The arbitration proceeding will be conducted under the aegis of Delhi International Arbitration Centre (DIAC).

11. A copy of this order be sent to the DIAC as also the learned Arbitrator, for information and necessary action.

12. The petition stands disposed of.

REKHA PALLI, J.

FEBRUARY 04, 2020

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Annexure – 3.1

DELHI HIGH COURT

Jain Refractory Erectors vs Cement Corporation of India Ltd., on 12.03.2003

Equivalent citations: 2003 VAD Delhi 417, 2003 (3) ARBLR 256 Delhi, 104 (2003) DLT 469, 2003 (2) RAJ 456

Author: P. Nandrajog, J.

Bench: U. Mehra, P. Nandrajog

JUDGMENT

1. An agreement was executed between the appellant and the respondent No. 1 for the works listed there. Appellant was awarded the work of "Erection of refractory materials at Akaltara Cement Project" at Bilaspur (M.P.).

2. On 15.12.1980, the work under the contract was executed and completed. The final bill was raised by the appellant. The bill contained payments for certain extra works, alleged to have been executed by the appellant.

3. The contract between the parties contained and arbitration clause being Clause No. 24. The same reads as under:

> *Clause 24: "In case of any dispute or difference arising between the parties of matters touching or the construction, meaning, operation or effect thereof the terms of the contract or with regard to working of the contract or breach thereof, the accredited representative from both sides shall consult each other and endeavour to settle the same. In case such settlement cannot be reached, the same shall be settled by a three member arbitration committee to be constituted as under:*
>
> ....."

4. The respondent did not agree to accept the final bill and release payment thereunder as claimed by the appellant. Differences arose between the parties pertaining to the final bill.

5. Since the arbitration clause provided that prior to the reference of dispute to arbitration, the parties would endeavour to settle the same, the appellant and the respondent, in faithful compliance with the said contractual terms undertook the exercise of "endeavouring to settle the dispute".

6. The endeavour between the parties towards settlement was successful. On 11.4.1980 the parties reduced in writing the settlement arrived at. The settlement was recorded and signed by the parties. The same is relevant and is being reproduced as under:

"In terms of negotiation between CCI, Akaltara Management and Shri S. K. Jain, proprietor of M/s. Jain Refractories, New Delhi, the following settlement have been arrived at against the extra claim submitted by Shri S. K. Jain.

(1) Dressing of Molar Bricks: 30,000 molar bricks for which cutting was necessary has been allowed for payment at the rate of Rs. 0.65 per brick.

(2) For corrugated mesh welding each point will be considered as two points as both sides of the corrugated mesh have been welded.

With the agreement of the above items all the claims of M/s. Jain Refractories are fully and finally settled and nothing is pending with Cement Corporation of India Ltd., Akaltara against Contract No. Nil dated 26.9.1979.

Sd/- *(S. M. Bharkatia)* *Head Burner (MECH.)*	*Sd/-* *(V. K. Rao)* *Deputy Manager*	*Sd/-* *Reps. Engg.*
Sd/- *(S. K. Jain)* *M/s. Jain Refractory Erectors*	*Sd/-* *(D. S. Parthar)* *Manager (M & S)*	*Sd/-* *(K. P. Ghosh)* *Deputy Manager (Finance)*

7. In pursuance of the aforesaid settlement, on 12.4.1980, the appellant issued a no claim certificate and thereafter in terms of the settlement recorded on 11.4.1980 received the final payment from the respondent in full and final settlement of the dues pertaining to the work done by the appellant. Having done so, the appellant wrote letters to the respondent on various dates claiming that all the dues payable to the appellant had not been paid. These letters were written on 2.7.1980, 6.2.1981, 19.7.1982, 4.3.1983, (sic.)4.1983, 27.4.1983 and 6.5.1983. Thereafter on 9.5.1983, the appellant served a notice upon the respondent, invoking the arbitration clause. Shri Ashok Kumar Sharma, Advocate, was nominated by the appellant as its Arbitrator and the respondent was requested to nominate their co-Arbitrator within 15 days. It was stated in the notice that if the respondent failed to nominate their co-Arbitrator, Shri Ashok Kumar Sharma, Arbitrator nominated by the appellant would function as the sole Arbitrator. Since the appellant had, on 6.5.1983 written a letter to the respondent to the effect that its dues were still pending, on 13.5.1983 the respondent wrote back, that in view of the settlement arrived at between the parties on 11.4.1980, the matter stood closed and the appellant was not entitled to any amount.

8. The respondent did not nominate their co-Arbitrator on the ground that no dispute subsisted between the parties, which requires to be adjudicated upon the matter on merit. Shri Ashok Kumar Sharma thereupon proceeded to act as sole Arbitrator. He published his award on 2.2.1984 in favour of the appellant and the same was sought to be made a Rule of the Court in proceedings initiated under Sections 14, 17 and 29 of the Arbitration Act, 1940, which proceedings were initiated by the appellant and were registered as Suit No. 232A/84.

9. The respondent filed objections to the award inter-alia on the ground that there was no subsisting dispute between the parties and therefore the Arbitrator had no jurisdiction to make the award. In the objections, it was pleaded that the perusal of the arbitration clause shows that at the first instance parties would

endeavour to settle their disputes and differences and only in the eventuality of no settlement being arrived at could the question of appointment of Arbitrator arise.

10. The said objection of the respondent was accepted and it was held that the award was without jurisdiction. The same was accordingly set aside.

11. Contention of Mr. A. P. S. Gambhir, learned Counsel for the appellant, is that the impugned judgment and order dated 23.7.1985 is liable to be set aside. It was argued that the issue of accord and satisfaction is itself a dispute and, therefore, the Arbitrator would have complete jurisdiction to decide the same. Reliance was placed on two judgments of the Apex Court being: Union of India v. L.K. Ahuja and Jayesh Engineering Works v. New India Assurance Company Ltd. The argument in response by Shri S. K. Taneja, Senior Advocate on behalf of the respondent, was that the arbitration clause between the parties itself required, at the first instance an endeavour to be made by the parties to settle the disputes or differences and it was only in the eventuality of no settlement being arrived at, could the matter be referred to arbitration. He argued that if there was a settlement arrived at between the parties, there subsisted no dispute or difference and the subsistence of a dispute or difference was a condition precedent for the Arbitrator to be clothed with jurisdiction. Mr. S. K. Taneja, learned Senior Counsel for the respondent relied upon three judgments of the Apex Court being: [1994 (Suppl.) 3 SCC 126] B. K. Ramaiah and Company v. Chairman and Managing Director, NTPC; [1995 (Suppl.) 3 SCC 324] Nathani Steels Ltd. v. Associated Constructions and [(2000) CLT 177 (SC) : 2000 (8) SCC 1], Union of India v. Popular Builders, Calcutta.

12. Before reverting to the judgments cited at the Bar, certain important facets of the case need to be noted. At the first instance it is relevant to note that the settlement arrived at on 11.4.1980 was pursuant to the final bill raised by the appellant. The appellant and the respondent had a disagreement on the amount payable to the appellant. Parties had endeavoured to arrive at a settlement. Negotiations were held. A settlement was arrived at. The terms of the settlement were reduced in writing on 11.4.1980, which has been extracted by us above, indicates the consensus ad-idem arrived at between the appellant and the respondent. Certain claims under the final bill were agreed to be paid by the respondent to the appellant and after recording what items were to be paid for, the parties clearly recorded that with the agreement of the above items all the claims of M/s. Jain Refractories are fully and finally settled and nothing is pending with Cement Corporation of India Ltd.

13. It is important to note that in the settlement the representatives of the respondent from the Mechanical, Engineering, and Finance Department were present and the appellant was represented by its sole Proprietor Shri S. K. Jain. The language of the settlement clearly brings out that there was a complete accord and satisfaction of the claim by the appellant. This settlement was followed by a 'no claim certificate' issued by the appellant on the next day i.e. 12.4.1980. In the said certificate, the appellant certified as under:

"We have no other claim against M/s. Cement Corporation of India Unit, Akaltara against contract dated 26.9.1979 for erection of refractory material at Akaltara project."

14. The second important point to be noted is that pursuant to the settlement, on 21.4.1980 the appellant was released the payment in terms of the settlement arrived at. At no stage till this date, did the appellant intimate that it had arrived at the settlement under some bona-fide mistake or that the settlement arrived at was a result of coercion or undue pressure. Thereafter on various dates noted by us above commencing from 2.7.1980 to 6.5.1983 the appellant wrote letters that it had further claims for the alleged extra works done. It is relevant to note that in none of these letters he had stated that the settlement arrived at was a result of coercion, pressure or undue influence. Even in the notice dated 9.5.1983 invoking the arbitration clause there is no mention of any coercion, pressure or undue influence being exercised upon the appellant.

15. Is there an accord and satisfaction between the parties on 11.4.1980? Did the Arbitrator have jurisdiction to adjudicate upon the claim? Was there any subsisting dispute or difference between the parties, which could be referred to the Arbitrator?

16. The aforesaid questions have received the attention of the Apex Court and are a subject matter of adjudication in the five cases noted above. Appellant relies upon two of them. The respondent relies upon three judgments of the Apex Court.

17. The judgment in U.O.I. v. L. K. Ahuja (supra), being the first on point of time may be noted. It is a judgment by a two-Judge Bench of the Apex Court. The issue arose in the context of limitation for invoking the arbitration clause and the invoking of the arbitration clause if the final payment was received by a party coupled with issuance of a no claim declaration. In the context of the twin issues raised it was held as under:

> *"In view of the well-settled principles we are of the view that it will be entirely wrong to mix-up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act, and, secondly, whether the claim to be adjudicated by the Arbitrator, was barred by lapse of time. The second is a matter which the Arbitrator would decide unless, however, if no admitted facts a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case, the claim for reference was made within three years commencing from April 16, 1976."*

18. The aforesaid observations were considered in the second judgment in a P. K. Ramaiah's case (supra). The said judgment is again by two Judges. It was noted in the said judgment that there was a dispute between the parties pertaining to measurement and payment under the final bill. Parties had deliberated upon the said difference and on May 19, 1981, the contractor had made, in his own hand the endorsement that: "*final measurement and payment accepted in full and final settlement of the contract*." Later on, the contractor sought to wriggle out of the same by pleading coercion. Matter was sought to be referred to arbitration. It

was declined and the matter came up before the Supreme Court. The contractor relied upon the judgment in L. K. Ahuja's case. Dealing with the issue, it was held as under:

".....In L. K. Ahuja and Company case this Court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of accord and satisfaction but one of pleading power of limitation without prior rejection of the claim. Therefore, the ratio therein is of little assistance."

19. It was held that admittedly the full and final satisfaction was acknowledged in writing and the amount was received unconditionally. Thus, there was accord and satisfaction by final settlement of the claims. It was held that the subsequent allegation of coercion is an after-thought and a device to get over the settlement of the dispute. The Apex Court held that there was no existing arbitrable dispute capable of reference to the arbitration. The decision of not referring the dispute to arbitration was upheld, the appeal was dismissed.

20. In the third case, Naithani Steels Ltd. (supra), we may note that the judgment is by a Three-Judge Bench. The facts were similar. Contractor's claim under the final bill was disputed. Parties sat across the table and negotiated. Settlement was arrived at. Payment was received and thereafter the contractor sought reference of the dispute to arbitration. It was held as under:

"It appears that the dispute which arose on account of the non-completion of the contract came to be settled by and between the parties and the settlement was reduced to writing as found in document dated 28.12.199 (Exh. 'F' at p. 236). By this document the disputes and differences were amicably settled by and between the parties in the presence of the Architect on the terms and conditions set out in Clauses 1 to 8 thereof. There is no dispute that the parties had, under the arrangement, arrived at a settlement in respect of disputes and differences arising under the contract then existing between the parties. This document bears the signatures of the respective parties. There is also a reference in regard to discussion that had ensued prior in point of time before the parties came to a final amicable settlement of the disputes and differences."
"In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non-est and proceed to invoke the arbitration clause. We are, therefore, of the opinion that the High Court was wrong in the view that it took."

21. In the 4th judgment, Union of India v. Popular Builders, which again is a judgment by a Three-Judge Bench, it was noted that the agreement between the parties contained an arbitration clause and that after completion of the work a final bill was raised. There was dispute pertaining to the claim under the final bill. A settlement was arrived at. The contractor agreed to accept the final bill without demur and indeed received payment for the same. Contractor claimed that dispute subsisted. Matter was referred to arbitration. Arbitrator made an award in favor of the contractor. Award was challenged as being without jurisdiction on the ground that there was no subsisting dispute, which could be referred to arbitration and hence the Arbitrator had no jurisdiction. Following the ratio of law in Naithani Steels Ltd. and P. K. Ramaiah's case it was held that the existence of a dispute

being the condition precedent for appointment of an Arbitrator, the matter being settled and the contractor receiving the payment pursuant to the settlement, there was no subsisting dispute, which could be made a subject matter of reference of an arbitrable dispute.

22. In the 5th judgment Jayesh Engineering Works (supra), which is a judgment by a two-Judge Bench, the Apex Court relying upon L. K. Ahuja's case came to the conclusion that notwithstanding the receipt of payment in full and final settlement of the works the appellant was entitled to have the matter referred to arbitration. The issue was decided by the Apex Court as under:

"(1) The appellant offered Tenders I and II to the respondents, pursuant to which certain civil works were carried out and in respect of which they made a claim for payment of money. Although several claims had been made by the appellant, ultimately on 6.2.1989, the respondents intimated the appellant to receive a cheque for a sum of Rs. 2,79,600/- in full and final settlement of the works relating to Tenders I and II. The appellant acknowledged the same by endorsing on the said letter stating that he had received the said amount as full and final settlement and he had no further claim in that regard. Thereafter, he wrote a letter dated 24.2.1989 stating that his statement that payment had been accepted by him on 6.2.1989 in full and final settlement is not correct and still there are outstanding dues which need to be paid otherwise the matter will have to be referred to arbitration in terms of Clause 37 of the agreement. Pursuant to the said notice each of the parties nominated their respective Arbitrators. At that stage, an application was filed under Section 33 of the Arbitration Act seeking a declaration that the agreement dated 7.4.1981 between the parties no longer subsists as the work has already been completed and the payment was received by respondent in full and final settlement. It was also contended that the clause providing for reference of disputes to arbitration is not attracted in such a situation. In an identical situation, this Court in Union of India v. L.K. Ahuja and Co., held that on completion of work, the right to get further payment gets weakened but whether the claim subsists or not, is a matter which is arbitrable. When this direction was cited before the High Court, the same was distinguished by stating that it was a decision on its own facts and has no application to the case. We find that this view does not appear to be correct. Whether any amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the Arbitrator. In fact, whether the contract has been fully worked out and whether the payments have been made in hill and final settlement are questions to be considered by the Arbitrator when there is a dispute regarding the same. We, therefore, set aside the order made by the High Court and dismiss the application filed under Section 33 of the Arbitration Act. Now proceedings before the Arbitrator/s will have to be continued in accordance with law.

(2) The appeal is allowed. No costs."

23. What would be the legal position pertaining to the issue of accord and satisfaction culled out from the aforesaid five judgments of the Apex Court? The observations made in L. K. Ahuja's case have been explained in P. K. Ramaiah's case, followed in Naithani Steel's case and reiterated in Jayesh Engineering Works. If there is a considered endeavour made by the parties to settle the dispute and the dispute is settled between the parties resulting in an accord and satisfaction

of the dispute, no dispute would subsist thereafter and as a result there would be no existing arbitrable dispute capable of being referred to arbitration.

24. In our aforesaid understanding of the law we proceed to apply facts of the present case. Admittedly, the work was completed on 15.2.1980. A final bill was raised thereafter. There were claims for extra works in the final bill. Respondent was not agreeing to the final bill as raised. The arbitration clause between the parties enjoined upon them to first sit across the table and endeavour to settle the disputes. Parties negotiated. A settlement was arrived at. The settlement was reduced in writing and it was specifically recorded that with the agreement arrived at all claims of the appellant are fully and finally settled and nothing is pending against the contract in question. The settlement was arrived at 11.4.1980. It was followed by a 'no claim certificate' issued on 12.4.1980. Payments were released pursuant to the settlement on 21.4.1980 and even at the time of receiving payment, the appellant did not allege any coercion. There was thus, a complete accord and satisfaction of the disputes pertaining to the contract in question. Even in the subsequent letters written from July, 1980 to May, 1983 there was not even a whisper that the settlement arrived at was a result of coercion. The conclusion is inescapable. As a result of complete accord and satisfaction between the parties, the disputes under the contract got resolved. The appellant acknowledged the settlement and received the full and final amount under the settlement. The accord and satisfaction got executed by the said acts. There was thus no existing arbitrable dispute, which could be referred to arbitration and the Arbitrator therefore had no jurisdiction to entertain the claim of the appellant.

25. We find no merit in the appeal. The same is accordingly dismissed. There shall, however, be no order as to costs.

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Annexure – 3.2

Supreme Court of India

Chairman & MD, N.T.P.C. Ltd. vs M/S. Reshmi Constructions, on 05.01.2004

CASE No.: Appeal (Civil) 2754 of 2002

Chairman & MD, N.T.P.C. Ltd. … Petitioner

vs

M/s. Reshmi Constructions, Builders & Contractors … Respondent

BENCH: CJI & S. B. Sinha.
JUDGMENT: V. N. KHARE, CJI.

Judgement

This appeal which arises out of a judgment and order dated 23.11.2001 passed by the High Court of Kerala at Ernakulam revolves round the question as to whether an arbitration clause in a contract agreement survives despite purported satisfaction thereof.

2. The parties to this appeal entered into an agreement for a project at Kayamkulam. Upon completion of the work the respondent herein submitted final bill which was allegedly not accepted by the appellant, whereafter they themselves prepared the final bill and forwarded the same along with a printed format being a "No Demand Certificate". The said "No Demand Certificate" was signed by the respondent herein which is in the following terms:

"NO DEMAND CERTIFICATE
Name of package: Earth filling in Temporary Township Part _ II

Letter of award: LOA No. KYM/CS/89/022/NIT- 005/LOA-065 dated 19.3.90

Name of the Contractor: Reshmi Construction, T.C. 4/1298, Keston Road, Kowdiar, P.O. Trivandrum - 3

1. This is to certify that we have received all payment in full and final settlement of the supplied and services rendered and/ or all work performed by us in respect of the above referred LOA/ Contract and we have no other claims whatsoever final or otherwise outstanding against NTPC. We further confirm that we shall have no claim/ demands in future in respect of this contract of whatsoever nature, final or otherwise.

2. We would now request you to please release our security deposit/ contract performance Guarantee."

3. However, on the same day a letter dated 20.12.1990 was written by the respondent to the appellant stating:

"We have completed the aforementioned work in the Kayamkulam Super Thermal Power Project's temporary township area at Nangiarkulangara by the end of November 1990 itself. We had submitted a pre-final bill in November itself but the authorities denied the bill and insisted final bill. But when the alleged final bill was prepared the authorities insisted that a "No Demand Certificate" should be executed by us in favour of the Corporation. They served us with a printed specimen of the document and insisted that it should be typed in our own letterhead and submitted to the N.T.P.C. We refused to submit such a document. But the authorities of N.T.P.C. threatened that unless and until we execute the said document in favour of the Corporation, the N.T.P.C. would not affect payment of our bill.

More than six lakhs of Rupees is pending for payment vide the alleged final bill. We have incurred huge losses in the execution of the work purely due to the latches and lapses of the corporation. More over lakhs and lakhs of rupees has to be paid to our Bankers, creditors suppliers, workers, truck owners etc. etc. Under such a situation we have no other way other than budging to the coercion of the authorities of N.T.P.C. Ltd. to get whatever they give merely for the necessity of our survival. We have to comply with the instructions of authorities of N.T.P.C. Ltd. out of our helplessness in order to receive payment. Hence this letter.

The certificates, undertakings, etc. as aforesaid have been executed without prejudice to our rights and claims whatsoever on account of the alleged final bill. The money invested in the work comprises loans from the Federal Bank Ltd., private financiers, etc. as well the Firm's own funds. Those additional sums raised by loans have to be paid to the Bank, financiers, etc. hence under duress, coercion and under undue influence we are signing the bill and execute such documents as aforesaid to receive payment. Under such coercive circumstances the alleged final bill cannot be constructed as final bill. We are signing the alleged final bill under coercion, under undue influence and under protest only without prejudice to our rights and claims whatsoever. There is no accord and satisfaction between the contracting parties.

You are therefore requested to kindly pass the final bill incorporating all the measurements of the items such as sinkage, in and under water execution of works, compensation for suspension of works, reimbursement of cost escalation due to price hike of petroleum products, cost of idling, enhanced rates for quantities executed beyond the contractual period, market rate for excess quantities, extra additional items etc. besides the losses and damages by way of idling of tools and plants, workmen, staff, establishment costs, capital outlay, interest etc. as per actuals. We hope and request that your goodself may do the needful in the matter."

4. The respondent thereafter invoked the arbitration clause by reason of a letter through his advocate dated 21.12.91 wherein the claims under several heads as enumerated in clause (a) to (p) thereof. Therein a request was made to refer all the disputes and differences to a sole arbitrator for adjudication with a direction to make and publish the award within the statutory period.

5. The appellant herein thereafter discussed the matter at the company level and in its proceedings it was recorded:

"4.0 In case of M/s. Reshmi Constructions, Trivandrum Kerala (1(c) above) and M/s. C.S. Prakash, (1(d) above) of Perumbavoor, Kerala, the total payment for the works done were effected, the final bills have been settled without protest and the no-dues certificate in the standard proforma have been submitted by the contractors.

5.0 To seek legal opinion in the matter, we have approached Mr. B.S. Krishnan, a leading advocate from Cochin. On detailed study of the claims of the agencies and considering legal conditions, the advocate has advised us to appoint arbitrator/s nominated by CMD of NTPC, immediately. Accordingly our advocate has written suitable replies to the contractor's advocate Shri NT John, of Trivandrum, informing them that they will hear from NTPC regarding appointment of an arbitrator in terms of the contract conditions.

6.0 Submitted to appoint arbitrator/s for the four contract packages at para 1.0 above, please."

6. The appellant thereafter by its letter dated 13.02.1992 replied thereto stating:

"My client acting upon the notice, though defective, takes it that all your claims are disputed ones and hence are to be resolved by Arbitration. Please note that the reference to arbitration does not mean that there is admission that the disputes are arbitrable. Many of the claims raised are beyond the terms of the contract and the Arbitrator will have not jurisdiction to deal with them. This is a matter which has to be taken up later and not at the stage of appointment of an Arbitrator.

As appointing authority, my client refrains from commenting upon in any manner, on the merits or otherwise of the disputes which your notice has set out.

It may be noticed that your client has already taken the final bill and has issued 'no dues' certificate. This is not merely accord and satisfaction, but bringing the contract to an end.

Your client will hear from my client as regards the appointment of the Arbitrator in terms of the contract conditions shortly."

7. A purported correction in the said notice was issued by the advocate of the appellant stating:

"Sub: Correction in the notice is issued by way of Reply notice is signed on behalf of M/s. Rashmi Constructions, Trivandrum _ reg.

Ref: My Regd. Notice No. P3-G1/92/582 dt. 13.2.92.

Under instructions from my clients, the Chairman & Managing Director, National Thermal Power Corporation Ltd. NTPC Bhavan, New Delhi - 110 003, I issue the following notice:

In the reply notice issued by me under reference number cited above, it was stated that the notice issued by you on behalf of your clients M/s. Rashmi Constructions, Trivandrum was returned since it was not signed by you and that the notice is sent back as the same was signed on your behalf by your client. On scrutiny I find that the notice is returned by you after the same is signed by you and not by your client on your behalf. In paragraph 2 of the reply notice, I stated that the notice is defective. It was so stated because of the mistaken impression that the notice is signed by your client and not by you. I stated that the mistake is in advert at and the same is regretted. I would like to bring to your notice one more fact which was omitted to be stated in the reply notice sent earlier. I have already stated that your client has issued 'no dues' certificate. The final bill is accepted by your client without any protest. This is further followed up by your client receiving the security deposit released on 21.1.92; that is after the expiry of the stipulated period reckoned from the date when the contract came to an end.

In all other respects the reply notice earlier sent stands."

8. The respondent herein filed an application under Section 20 of the Arbitration Act, 1940 before the Hon'ble Subordinate Judge's Court Mavelikkara and in terms of a judgment and order dated 30.6.1994 the said application was dismissed. Aggrieved, the respondent herein preferred an appeal before the High Court of Kerala which was allowed by reason of the impugned order.

Mr. Bhatt, the learned counsel appearing on behalf of the appellant urged that as the contract itself came to an end upon execution of the "No Demand Certificate" and together with the same the arbitration clause also perished. In support of the said contention, reliance has been placed on M/s. P.K. Ramaiah and Company Vs. Chairman & Managing Director, National Thermal Power Corpn. [1994 Supp (3) SCC 126] and Nathani Steels Ltd. Vs. Associated Constructions [1995 Supp (3) SCC 324]. Mr. Bhatt further urged that as in its application under Section 20 of the Arbitration Act, the respondent did not raise a plea that they had been coerced to submit the "No Demand Certificate", the High Court committed a manifest error in passing the impugned judgment.

9. The learned counsel appearing on behalf of the respondent, on the other hand, submitted that in the facts and circumstances of the case neither any new contract has come into being nor there was any accord and satisfaction of the contract agreement. The learned counsel appearing on behalf of the respondent also contended that despite coming to an end of the contract, the arbitration clause survives and all questions arising out of or in relation to the execution of the contract are referable to arbitration. Reliance in this connection has been placed on Damodar Valley Vs. K.K. Kar [(1974) 1 SCC 141], M/s. Bharat Heavy Electricals Limited Vs. M/s. Amar Nath Bhan Prakash [(1982) 1 SCC 625], Union of India and Another Vs. M/s. L.K. Ahuja and Co. [(1988) 3 SCC 76] and Jayesh Engineering Works Vs. New India Assurance Co. Ltd. [(2000) 10 SCC 178].

10. On the arguments of learned counsel for the parties, the questions that arise for our consideration are:

(i) Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuing

a No Demand Certificate by the contractor, can any party to the contract raise any dispute for reference to arbitration?

(ii) Whether in view of letter dated 20.12.1990 sent by the respondent contractor the arbitration clause contained in the agreement can be invoked?

(iii) Whether the arbitration clause in the agreement has perished with the contract?

In this context it is relevant to refer the arbitration clause contained in the agreement which runs as under:

"56. Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawing and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs drawing, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works; or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of National Thermal Power Corporation Ltd.; and if the General Manager is unable or unwilling to act: to the sole arbitration of some other person appointed by the Chairman and Managing Director; National Thermal Power Corporation Ltd. willing to act as such arbitrator.

There will be no objection if the arbitrator so appointed is an employee of National Thermal Power Corporation Ltd. and that he had to deal with the matters to which the contract relates and that in the course his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid should act as arbitrator and if for any reason, that is not possible; the matter is not to be referred to arbitration at all.

Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the disputes or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The work under the Contract shall, if reasonable possible, continue during the arbitration proceedings and no payment due or payable to the Contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

The award of the arbitrator shall be final, conclusive and binding on the all parties to this contract.

The cost of arbitration shall be borne by the parties to the dispute, as may be decided by the arbitrator(s).

In the event of disputes or differences arising between one public sector enterprise and a Govt. Department or between two public sector enterprises the above stipulations shall not apply, the provisions of B.P.E. Office Memorandum No. BPE/GL-001/76/MAN/2 (110-75-BPE(GM-1) dated 1st January 1976 or its amendments for arbitration shall be applicable."

Clause 52 of the agreement reads as follows:

"52. The final bill shall be submitted by the contractor within three months of physical completion of the works. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payment of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and at rates as approved by Engineer-in-Charge, shall be made within the period specified hereunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge:

(a) Contract amount not exceeding Rs. 5 lakhs - Four months.
(b) Contract Amount exceeding Rs. 5 lakhs - Six months.

After payment of the amount of the final bills payable as aforesaid has been made, the Contractor may if he so desires, reconsider his position in respect of the disputed portion of the final bill and if he fails to do so within 90 days, his disputed claim shall be dealt with as provided in contract."

11. The issues are required to be determined having regard to the facts as which arise for consideration whether by reason of the act of the parties the old contract was substituted by a new contract. Only in the event a new contract came into being, the arbitration agreement cannot be invoked. In Damodar Valley Corporation vs. K. K. Kar [(1974) 1 SCC 141], this Court held:

"It appears to us that the question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. These words are wide enough to cover the dispute sought to be referred."

12. Normally, an accord and satisfaction by itself would not affect the arbitration clause but if the dispute is that the contract itself does not subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that

the contract survives, recourse to the arbitration clause may be taken. [See Union of India Vs. Kishorilal Gupta (AIR 1959 SC 1362) and Majhati Jute Mills Vs. Khvalirsa (AIR 1968 SC 522).

In Bharat Heavy Electricals Limited (supra) this Court observed that whether there was discharge of the contract by accord and satisfaction or not is a dispute arising out of a contract and is liable to be referred to arbitration.

Yet again in L.K. Ahuja (supra) Sabyasachi Mukharji, J., as the learned Chief Justice then was, laid down the ingredients of Section 20 of the Arbitration Act stating:

"6. It appears that these questions were discussed in the decision of the Calcutta High Court in Jiwnani Engineering Works Pvt. Ltd. V. Union of India [AIR 1978 Cal 228] where one of us (Sabyasachi Mukharji, J.) was a party and which held after discussing all these authorities that the question whether the claim sought to be raised was barred by limitation or not, was not relevant for an order under Section 20 of the Act. Therefore, there are to aspects. One is whether the claim made in the arbitration is barred by limitation under the relevant provisions of the Limitation Act and secondly, whether the claim made for application under Section 20 is barred. In order to be a valid claim for reference under Section 20 of the Arbitration Act, 1940, it is necessary that there should be an arbitration agreement and secondly differences must arise to which the agreement in question applied and, thirdly, that must be within time as stipulated in Section 20 of the Act.

It was held that having regard to the fact that the existence of an arbitration agreement was not denied and there had been an assertion of claim and denial thereof, the matter would be arbitrable. It was observed:

"In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment get weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable."

13. This aspect of the matter has also been considered in Jayesh Engineering Works (supra) wherein following L.K. Ahuja (supra) it was held:

"Whether any amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the arbitrator. In fact, whether the contract has been fully worked out and whether the payments have been made in full and final settlement are questions to be considered by the arbitrator when there is a dispute regarding the same."

14. In M/s. P.K. Ramaiah and Company (supra) the amount was received unconditionally. The full and final satisfaction was acknowledged by a separate receipt in writing. In that situation the following finding was recorded:

"Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the

settlement of the dispute, acceptance of the payment and receipt voluntarily given."

15. We, however, may observe that the quotation from Russell on Arbitration may not be apt inasmuch as at the stage of reference what would be a good defence is not a matter to be taken into consideration.

16. Yet again in Nathani Steels Ltd. (supra) the disputes and differences were amicably settled by and between the parties and in that view of the matter it was held that unless and until the statement is set aside, the arbitration clause cannot be invoked. Such is not the position here.

The appellant herein did not raise a question that there has been a novation of contract. The conduct of the parties as evidenced in their letters, as noticed hereinbefore, clearly go to show that not only the final bill submitted by the respondent was rejected but another final bill was prepared with a printed format that a "No Demand Certificate" has been executed as other final bill would not be paid. The respondent herein, as noticed hereinbefore, categorically stated in its letter dated 20.12.1990 that as to under what circumstances they were compelled to sign the said printed letter.

It appears from the appendix appended to the judgment of the learned Trial Judge that the said letter was filed even before the trial court. It is, therefore, not a case whether the respondent's assertion of "under influence or coercion" can be said to have been taken by way of an afterthought.

Even when rights and obligations of the parties are worked out the contract does not come to an end inter-alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

Further, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position. We may, however, hasten to add that such a case has to be made out and proved before the Arbitrator for obtaining an award. At this stage, the Court, however, will only be concerned with the question whether triable issues have been raised which are required to be determined by the Arbitrators.

17. Circumstances leading to passing an order by the courts of law directing the parties to get their disputes determined by domestic tribunal selected by them having regard to the correspondences exchanged between the solicitors came up for consideration in Goodman Vs. Winchester and Alton Rly [(1984) 3 All ER 594] wherein it was held:

"As I have already recounted, the plaintiff's solicitor may have had in mind that if there were an arbitration clause various matters could be sorted out cheaply and quickly under it. There is no evidence, in my judgment, that when he drafted the terms of the arbitration clause he had in mind that it would not apply to a repudiation of the contract by the defendants. He is a solicitor; he is clearly an experienced solicitor; and he should have appreciated (and I feel certain he did) that the arbitration clause which he drafted, and which was accepted by the defendants, would cover every aspect of the contract, including repudiation. But, apart altogether from what the plaintiff's solicitor had in mind, there is no evidence at all as to what the defendant company had in mind when it agreed to accept the arbitration clause, and it was wrong, in my judgment, for the Judge to say that neither party had in mind that it would apply to the summary dismissal of the plaintiff. It follows, therefore, that at the very beginning of his judgment the judge misdirected himself as to the construction of the arbitration clause and what it was mended to deal with."

18. Even correspondences marked as without prejudice may have to be interpreted differently in different situations. What would be the effect of without prejudice offer has been considered in Cutts Vs. Head and Another [(1984) 2 WLR 349] wherein Oliver L.J. speaking for the Court of Appeals held:

"In the end, I think that the question of what meaning is given to the words "without prejudice" is a matter of interpretation which is capable of variation according to usage in the profession. It seems to be that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in Walker v. Wilsher, 23 Q.B.D. 335, and the court did not deal with it. I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs."

19. Yet again in Rush & Tompkins Ltd. Vs. Greater London Council and Another [(1988) 1 All ER 549]:

"The rule which gives the protection of privilege to 'without prejudice' correspondence, depends partly on public policy, namely the need to facilitate compromise, and partly on 'implied agreement' as Parker LJ stated in South Shropshire DC v Amos [1987] 1 All ER 340 at 343, [1986] 1 WLR 1271 at 1277. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'. The classic definition of the phrase is contained in the judgment of Lindley LJ in Walker v. Wilsher (1889) 23 QBD 335 at 337:

'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.'

Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this court in

Tomlin v Standard Telephones and Cables Ltd. [1969] 3 All ER 201 at 204, 205, [1969] 1 WLR 1378 at 1383, 1385 per Danckwerts LJ and Ormrod J. (Although he dissented in the result, on this point Ormrod J agreed with the majority). The definition was further cited with approval by both Oliver and Fox LJJ in this court in Cutts v. Head [1984] 1 All ER 597 at 603, 610, [1984] Ch. 290 at 303, 313. In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning, e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (See Cutts v. Head) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particular, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will cease if and when the negotiations 'without prejudice' come to fruition in a concluded agreement."

20. Meaning of the words "without prejudice" come up for consideration before this Court in Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur and Others Vs. Pratap Rai [(1978) 3 SCC 113] wherein it has been held:

"The Appellate Collector has clearly used the words "without prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term "without prejudice" has been defined in Black's Law Dictionary as follows:

> *Where an offer or admission is made 'without prejudice', or a motion is defined or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also Dismissal Without Prejudice.*

Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows:

> *The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.*

The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties – not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs. The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'.

In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred."

The appellant has in its letter dated 20th December, 1990 has used the term 'without prejudice'. It has explained the situation under which the amount under

the 'No Demand Certificate' had to be signed. The question may have to be considered from that angle. Furthermore, the question as to whether the respondent has waived its contractual right to receive the amount or is otherwise estoppel from pleading otherwise will itself be a fact which has to be determined by the arbitral tribunal.

21. In Halsbury's Laws of England, 4th Edition, Vol.16 (Reissue) para 957 at page 844 it is stated:

"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions:

(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

In American Jurisprudence, 2nd Edition, Volume 28, 1966, Page 677-680 it is stated:

"Estoppel by the acceptance of benefits: Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience."

22. The fact situation in the present case, would lead to the conclusion that the arbitration agreement subsists because:

(i) Disputes as regard final bill arose prior to its acceptance thereof in view the fact that the same was prepared by the respondent but was not agreed upon in its entirety by the appellant herein;

(ii) The appellant has not pleaded that upon submission of the final bill by the respondent herein any negotiation or settlement took place as a result whereof the final bill, as prepared by the appellant, was accepted by the respondent unequivocally and without any reservation therefor;

(iii) The respondent herein immediately after receiving the payment of the final bill, lodged its protest and reiterated its claims.

(iv) Interpretation and/or application of clause 52 of the agreement would constitute a dispute which would fall for consideration of the arbitrator.

(v) The effect of the correspondences between the parties would have to be determined by the arbitrator, particularly as regard the claim of the respondent that the final bill was accepted by it without prejudice.

(vi) The appellant never made out a case that any novation of the contract agreement took place or the contract agreement was substituted by a new agreement. Only in the event, a case of creation of new agreement is made out the question of challenging the same by the respondent would have arisen.

(vii) The conduct of the appellant would show that on receipt of the notice of the respondent through its advocate dated 21.12.1991 the same was not rejected outright but existence of disputes was accepted and the matter was sought to be referred to the arbitration.

(viii) Only when the clarificatory letter was issued the plea of settlement of final bill was raised.

(ix) The finding of the High Court that a prima facie in the sense that there are triable issues before the Arbitrator so as to invoke the provisions of Section 20 of the Arbitration Act, 1940 cannot be said to be perverse or unreasonable so as to warrant interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India.

(x) The jurisdiction of the arbitrator under the 1940 Act although emanates from the reference, it is trite, that in a given situation the arbitrator can determine all questions of law and fact including the construction of the contract agreement. (See Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission reported in 2003 (8) SCALE 553).

(xi) The cases cited by the learned counsel for the appellant [P.K. Ramaiah and Company (supra) and Nathani Steels (supra)] would show that the decisions therein were rendered having regard to the finding of fact that the contract agreement containing the arbitrator clause was substituted by another agreement. Such a question has to be considered and determined in each individual case having regard to the fact situation obtaining therein.

23. For the reasons aforementioned, we are of the opinion that there is no infirmity in the impugned judgment. This appeal is, therefore, dismissed. No Costs.

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Annexure – 3.3

Andhra High Court

Sai Engineering Contractors vs General Manager, South Central Railway, on 08.09.2006

Equivalent citations: 2006 (6) ALD 7, 2006 (5) ALT 710

Author: S. A. Reddy
Bench: S. A. Reddy

ORDER

S. Ananda Reddy, J.

1. This application is filed under Section 11 (6) and (8) of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), seeking appointment of an Arbitrator for adjudication of the disputes between the applicant and the respondents.

2. It is stated that the applicant was awarded the work of replacement of bridge timbers with new steel channel sleepers of various bridges referred to in the tender notice as well as in the agreement, the total value of which was Rs. 37,05,240/- and the work was to be executed within a period of six months from the date of acceptance letter. The acceptance letter is dated 13.05.1998. The work is to be completed by 12.11.1998. It is stated that subsequently a regular agreement was also executed between the parties on 31.12.1998. As per the terms of the agreement, the petitioner undertook to execute the work and, in the process, started manufacturing the sleepers and according to the applicant, by July, 1998 the applicant has completed the fabrication of 250 numbers of steel channel sleepers. However, for fixing the said sleepers, bearing plates and other fittings have to be supplied by the respondent railways. Though the applicant requested the respondents for arranging the supply of fittings and other required material, the respondents were not ready with the necessary fittings.

3. Further, according to the applicant, as T-angles of 100x100x10 mm were out of manufacturing range in the market, the same were altered, and as per the drawings supplied on 30.11.1998, though the work was to be completed by 12.11.1998, further there is variation in the quantity of steel for M.S. Pad plate. In view of the change in the drawings and as against the estimated quantity of 6.9 MT it has gone up to over 19 MT. This was the result of wrong estimations made by the respondents at the time of calling the tenders. Due to this, the applicant had suffered heavy loss. Though increased rate was demanded, the same was not considered.

4. It is further stated by the applicant that though the respondent department was unable to supply the fittings till December, 1998, having invested heavily in the manufacture and supply of sleepers, the applicant carried out the work and requested for release of 90% of the payment with reference to Item-1 of the schedule, but the respondents have released only a small amount by February, 1999 to the extent of Rs. 5.46 lakhs. Further, according to the applicant, because of the delay in execution of the work, the workmen engaged by the applicant, of which 15 are special workers apart from other unskilled workers for fixing the

sleepers, they were kept idle as fittings were not supplied, therefore, the applicant was made to incur additional expenditure due to the idle labour. Finally it was stated that the respondents have also changed certain works and got additional agreements executed, and finally the work was completed with reference to the 12 bridges by 08.01.2003, and final bill was prepared on 16.01.2003 and the amounts were paid.

5. Since the respondents did not consider the claim of the applicant for awarding suitable amounts for the claims, the applicant sent a letter dated 18.02.2003 specifying the claims and also seeking appropriate relief, and in case if the railways are not acceptable, requested to refer the same for arbitration. As there was no response to the same, again a letter dated 18.12.2004 was sent to the 1st respondent the General Manager, South Central Railway, reiterating the claims and seeking to resolve the same, failing which, to make a reference to the arbitration, for which a reply was received from the respondents dated 22.02.2005, rejecting all the claims referring to the 'no claim' certificate submitted by the applicant. It is stated that subsequently also another representation was made by letter dated 04.07.2005 which was received by the respondents on 06.07.2005, seeking a reference of the disputes for arbitration, even the said request also was rejected by the respondents, hence the applicant was constrained to file this application.

6. A counter is filed on behalf of the respondents, disputing and denying the claims of the applicant. In the counter it is specifically denied (sic. stated) that the delay if any was only on account of the applicant and not on account of the respondents. The respondents have admitted the fact that the tenders submitted by the applicant were accepted for execution of the replacement of timber sleepers with iron sleepers and also the execution of the agreement dated 31.12.1998 between the parties and also admitted that six months period is the time for completion of the execution of the work. But, however, it is stated that in view of the request made by the applicant, time was extended from time to time without imposing any penalty, and finally after completion of the work, the measurements were taken and even final bill was prepared against which the applicant submitted 'no claim' certificate and requested release of the security deposit which was also received without any protest, therefore, there is no further claim in terms of clause-42 of the General Conditions of the Contract, which was also made part of the agreement between the parties. In the counter, it is also disputed as to the receipt of the letter dated 18.02.2003 and according to the respondents, the earliest communication received from the applicant is only on 18.12.2004 and the said communication is clearly beyond 90 days as contemplated under clause-64 of the General Conditions of Contract, therefore, the applicant is not entitled to raise such a claim, especially in the light of Clause 43(2) of General Conditions of Contract which prohibits raising of any dispute after acceptance of the final measurements as well as submission of 'no claim' certificate and also having received the final bill amount as well as security deposit without raising any protest. In the counter, it was also referred to various decisions and even the claims made by the applicant with reference to each of the claims were also dealt with and negatived.

7. The learned Counsel for the applicant reiterating the averments made in the application, contended that Clause 43(2) of General Conditions of Contract was inserted only by way of amendments to the General Conditions of Contract

brought in December, 1998, since the tender submitted by the applicant was earlier to the said amendments, the said amended clause has no application to the present case. The learned Counsel contended that since there are number of variations with reference to the work entrusted to the applicant, with reference to which there were serious disputes and as the respondents did not resolve the said disputes even after completion of the work, a request was made either to resolve the said disputes or to refer the same for arbitration. The respondents, to the first communication after the completion of the work, there was no response and with reference to the second communication there was a communication rejecting the claim, therefore, a final legal notice was issued on 04.07.2005 which was also replied negativing the claim, therefore, the applicant has come up with the present application. The learned Counsel contended that when once the work was entrusted to the applicant even before the amendment of the General Conditions of Contract, the General Conditions of Contract that existed as on the date of entrusting the work would apply and not the subsequently amended clauses of General Conditions of Contract, therefore, there is no prohibition for the applicant to raise a claim even after accepting the final bill and also receiving the amount in pursuance of the said final bill without any protest, therefore, the claim made by the applicant, seeking reference for arbitration is not barred by Clause 43(2) as the same has no application to the present case. The learned Counsel also relied upon a decision of this Court in Union of India v. Vengamamba Engineering Co.. where a Division Bench of this Court held that the contractor having accepted the final bill without any protest, he had no arbitral dispute. However, in a case where by reason of subsequent agreement there has been negation of contract, the Court may not refuse to appoint an arbitrator as having regard to the provisions of 1996 Act all such disputes can be raised before the arbitrator, therefore, sought for appointment of an arbitrator.

8. The learned Counsel appearing for the respondents, on the other hand, opposed the contentions of the applicant. The learned Counsel reiterated the stand of the railways that the applicant having accepted the measurements as per the final bill and also submitted a 'no claim' certificate and thereafter received the final payment as well as the security deposit, there cannot be any claim subsequent to that, as such claims are clearly prohibited and barred under Clause 43(2) of the General Conditions of Contract. The learned Counsel also contended that there are certain variations with reference to the specifications as well as works executed, the same were negotiated and settled between the parties and in fact, additional agreements were also executed subsequent to the original agreement dated 31.12.1998, therefore, there cannot be any further claims. The learned Counsel also contended that even assuming that Clause 43(2) of General Conditions of Contract was as a result of the amendment which was made in December, 1998, but the final agreement between the parties was executed on 31.12.1998 well after the alleged amended General Conditions of Contract, therefore, Clause 43(2) equally applies to the present work as the original agreement was executed subsequent to the insertion of Clause 43(2) of the General Conditions of Contract, even though the tenders were called for prior to the said date and work was also entrusted. The learned Counsel also contended that as per various judgments referred to in the counter, it is well settled that when once a contractor accepted the measurements as well as the final bill and received the payment without any protest, he is not entitled to seek any reference of the alleged dispute since no disputes could be raised after the final bill when it was accepted without any demur. The learned Counsel also relied upon the decisions in Muddu Krishna

Rangaiah v. Union of India, in Y. Babu Rao v. Union of India, in P.K. Ramaiah v. Chairman and M.D. National Thermal Power Corporation [1994 Supp(3) SCC 126] and in Nathani Steels Ltd. v. Associated Constructions [1995 Supp. (3) SCC 324] in support of his contention that when once the final bill was accepted without any protest, the applicant is debarred from raising any disputes. The learned Counsel also reiterated the stand of the respondents that the applicant raised a dispute only in the month of December, 2004 by sending a communication dated 18.12.2004 which was replied suitably by rejecting the same, therefore, sought for dismissal of the application.

9. From the above rival contentions, the issue to be considered is whether an Arbitrator is required to be appointed in the facts and circumstances of the case.

10. Admittedly, the work was entrusted by the respondents to the applicant for replacement of timber sleepers with iron sleepers with reference to 12 bridges specified in the work order. The acceptance letter was dated 13.05.1998 and as per the said acceptance letter the work was to be completed by 12.11.1998, however, the work was not completed by the said date, even by his own version, the applicant got manufactured the sleepers only by July, 1998 and was awaiting for the supply of fittings and other material that are to be supplied by the respondents for execution of the work. It is also an admitted fact that the regular agreement between the parties was executed on 31.12.1998. It is the case of the applicant that there were variations of works that are specified under the work order placed with the applicant which was not seriously disputed by the respondents, but, however, the stand of the respondents was that there was mutual settlement by negotiations and additional agreements were also executed between the parties, and finally the work was extended within the extended period by 08.01.2003 and final bill was prepared on 16.01.2003. The amount payable under the final bill was received by the applicant even along with the security deposit amount having submitted 'no claim' certificate.

11. Now the dispute is that according to the applicant, a letter was sent on 18.02.2003 raising a demand with reference to certain claims for which there was no reply and thereafter only in December, 2004 i.e. after 20 months, the respondent (sic. applicant) sent another communication to the respondents, reiterating the claims. The said claims were rejected by the respondents by their communication dated 22.02.2005. Not satisfied with the said reply received by the applicant, a legal notice was sent on 04.07.2005 and therafter the applicant has come up with the present application.

12. The stand of the respondents was that since the applicant received the final bill amount having submitted 'no claim' certificate and also received the security deposit, is debarred from making a claim. It is the case of the applicant that Clause 43(2) of General Conditions of Contract was inserted by way of amendment in the month of December, 1998, since the work was entrusted to the applicant much prior to the said date, the said clause would not apply to the present case. But as admittedly the agreement was entered into between the parties on 31.12.1998. Therefore, it is not open to the applicant to contend that clause-43(2) of General Conditions of Contract would not apply to the agreement in question. The General Conditions of Contract are applicable to all the contract works entrusted by the respondents, therefore, Clause 43(2) would apply as any other clauses of the contract.

13. A perusal of the said Clause 43(2) of General Conditions of Contract clearly shows that once the final bill is accepted, the contractor shall not be entitled to make any claim whatsoever against the railway under or arising out of this contract, nor shall the railway entertain or consider any such claim, if made by the contractor, after he signed a 'No claim' certificate in favour of the railway. In view of the specific bar, the applicant is precluded from raising such a plea, and in fact, in terms of Clause 64 of General Conditions of Contract, the matter covered under Clause 43 would be an excepted matter where no arbitration could be allowed.

14. Though the applicant relied upon the decision of this Court in Union of India v. Vengamamba Engineering Co. (supra), but that is a case where the Division Bench accepted the claim for reference in view of the subsequent agreement entered into and further in view of the legal position as was on the date of the said judgment, the Division Bench also held that all the disputes can be raised before the arbitrator for adjudication. But the legal position has changed altogether, now with reference to the jurisdiction, this Court is obligated to decide before appointing an arbitrator for adjudication of the other disputes, in the light of the later decision of the Larger Bench of the Apex Court in S.B.P. & Co. v. Patel Engineering Ltd. and Anr. [2005 (7) SCJ 461 : (6) ALI 37. 1 (DN SC) : 2005 (7) Supreme 610]. Further, in all the decisions relied upon by the respondents, it was consistently held that where 'no claim' certificate was submitted, the dispute is not arbitrable.

15. In Muddu Krishna Rangaiah v. Union of India (2 supra), a learned single Judge of this Court took the said view which was confirmed by a Division Bench with reference to the same applicant. Again in Y. Babu Rao v. Union of India (4 supra), it was held that 'no claim' certificate filed and bill amount was received without any protest which was treated as a new agreement between the parties, not to lay any further claim in the matter, therefore, the application for referring the dispute to arbitration, invoking arbitration clause in the earlier agreement, which has perished in view of the fresh agreement, therefore, not maintainable.

16. In P.K. Ramaiah v. Chairman and M.D., National Thermal Power Corpn. (5 supra), the Apex Court held that where the contractor had voluntarily and unconditionally accepted in writing and received the payments in full and final settlement of the contract, the subsequent claim for further amount in respect of the same work was not an arbitral dispute. To the same effect is the decision in the case of Nathani Steels Ltd. v. Associated Constructions (6 supra) where it was held that once dispute is amicably settled between the parties finally, arbitration clause cannot be invoked by the party to resolve the same on the ground of mistake in the settlement unless the settlement is first set aside in proper proceedings.

17. In the light of the above legal position, if we examine the facts of the present case, admittedly, the work was completed by 08.01.2003 and final bill was prepared on 16.01.2003 with reference to which 'no claim' certificate was submitted by the applicant and received the amount payable under the said final bill. In view of the said acceptance of the final bill and receipt of the amount under the final bill without any protest, which was not even disputed, the applicant is prohibited from raising any dispute with reference to the execution of the work

executed under the agreement with reference to which, the final bill was made and accepted.

18. Under the above circumstances, the. Arbitration Application is devoid of merit, and the same is, accordingly, dismissed. No costs.

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Annexure – 3.4

Supreme Court of India

National Insurance Co. Ltd vs M/S. Boghara Polyfab Pvt. Ltd., on 18.09.2008

CIVIL APPEAL No. 5733 OF 2008
[Arising out of SLP(C) No.12056 of 2007]

National Insurance Co. Ltd. ... Appellant

Vs.

M/s. Boghara Polyfab Pvt. Ltd. ... Respondents

Author: R. V. Raveendran, J.
Bench: R. V. Raveendran, Lokeshwar Singh Panta

JUDGMENT

1. Leave granted. Heard both counsels. The question involved in this appeal is whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration.

2. The brief facts:

The respondent (Insured) obtained a standard Fire and Special Perils (with a floater) Policy from the appellant (`Insurer') to cover its goods in its godowns situated at Surat for the period 4.8.2003 to 3.8.2004. The sum insured was Rs. Three crores, subsequently increased to Rs. Six crores. On 27.5.2004, the respondent requested the insurer to increase the sum insured by another Rs. six crores for a period of two months. Accordingly, the appellant issued an additional endorsement increasing the sum insured by another Rupees six crores, in all Rupees twelve crores. The respondent alleges that the additional endorsement cover issued by the appellant was for 69 days, that is from 27.5.2004 to 3.8.2004. The appellant alleges that the additional endorsement cover was for a period of 60 days from 27.5.2004 to 26.7.2004. (Note: The appellant claims that during subsequent investigations, it came to light that its AAO (Dilip Godbole) had delivered to the respondent, a computer generated Additional Endorsement (unauthorisedly altered by hand) showing the period of additional cover as 69 days up to 3.8.2004, and departmental proceedings have been initiated against the said officer).

3. On 5.8.2004, the respondent reported loss/damage to their stocks on account of heavy rains and flooding which took place on 2/3.8.2004 and made a claim in that behalf. The surveyor submitted a preliminary report dated 14.8.2004 followed by a final survey report dated 6.12.2004 according to which the net assessed loss (payable to respondent) was Rs. 3,18,26,025/-. The said sum was arrived at on the basis that the sum insured was Rs. 12 crores, the actual value of stocks in the godowns at risk was Rs. 8,15,99,149/-, value of damaged goods was Rs. 5,22,81,001/-, and the recoverable salvage value was Rs. 1,87,79,922/-. The appellant informed the surveyor by letter dated 1.3.2005 that there was an error in the net assessed loss arrived at by the surveyor as it assumed the sum

insured as Rs.12 crores up to 3.8.2004 whereas the sum insured was only Rs. 6 crores after 26.7.2004 till 3.8.2004, and therefore instructed the surveyor to prepare the final report regarding net assessed loss by taking the sum insured as only Rs. 6 crores. The surveyor therefore gave an addendum to the final survey report on 22.3.2005 reassessing the net loss by taking the sum insured as only Rs. 6 crores. The value of goods at risk, the value of damaged goods and the value of recoverable salvage remained unaltered. By modifying the percentage of insurance at 75.53%, the `Net Assessed Loss' was re-worked as Rs. 2,34,01,740/- . The respondent protested against the loss being assessed by taking the sum insured as only Rupees six crores. The claim and the dispute were pending consideration for a considerable time.

4. The respondent alleged that the appellant forced the respondent to accept a lower settlement; that the appellant informed the respondent that unless and until the respondent issued an undated `Discharge voucher-in-advance' (in the prescribed form) acknowledging receipt of Rs. 2,33,94,964/- in full and final settlement, no amount would be released towards the claim; that in that behalf, the appellant sent the format of the discharge voucher to be signed by respondent on 21.3.2006; that on account of the non- release of the claim, it was in a dire financial condition and it had no alternative but to yield to the coercion and pressure applied by the appellant; that therefore the respondent signed and gave the said discharge voucher, undated, as required by the insurer during the last week of March, 2006. The payment was released by the appellant only after receiving the said discharge-voucher. It is extracted below:

"NATIONAL INSURANCE COMPANY LTD.
REGD. OFFICE: 3, MIDDLETON STREET, POST BOX NO.9229, KOLKATA 700071

FORM ACL - 10(1) Loss Voucher Non-Motor & PA

Received from National Insurance Company Limited through its policy issuing office (herein after called the Company) the sum of Rs. 2,33,94,964.00 (Rupees two crore thirty three lakh ninety four thousand nine hundred sixty four only) in full and final settlement of all my/our claims in respect of the property lost or damaged due to others on or about 03/08/2004 under Policy No. 250501/11/03/3100000145.

In consideration of such payment I/we hereby absolve the Company from all liability present or future arising directly or indirectly out of the said loss or damage under the said policy. Further I/We hereby assign to the company my/our rights to the affected property stolen which shall in the event of their recovery be the property of the company. I/We even agree that the sum insured under the said policy stand reduced by the amount paid under the next renewal." Sd/-

5. Simultaneously, the respondent lodged a complaint dated 24.3.2006 with the Insurance Regulatory and Development Authority wherein, after setting out the facts, it alleged:

"We lodged a claim with our insurers immediately and pursued the matter with them. Even after the Surveyor Mr. Mehernosh Todiwala of M/s. Bhatawadekar & Co. had submitted his report on 22nd March, 2005, the insurers refused to settle

our claim on various counts. We had various meetings at the Divisional, Regional and even the Head Office of the insurers, but to no avail.

In March, 2005, the insurer company forced us to accept a lower settlement and we were told that we would have to agree to a lower settlement to ensure expeditious settlement of the claim. Accordingly, on and around the 15th of March, 2005 nearly 8 months after the loss we gave our forced consent to the lower settlement offered in the hope that the claim amount would be received immediately. Thereafter for the next 1 year, the insurers failed to settle our claim and made us run from pillar to post for the settlement.

Finally, on March 21st 2006 the insurers have sent us a voucher for the sum of Rs. 2,33,94,94 which considering our dire financial condition, and the continuous failed promises from the insurers, we have had no choice but to accept. Sir, subsequent to the loss, since we could not pay our international suppliers on time they almost completely stopped all our shipments. This has resulted in tremendous financial loss to us. We have lost our long hard earned reputation in the market by becoming defaulters. The insurers have deliberately starved our unit of funds to ruin us financially.

You will appreciate that we are now faced with a situation where we have no choice but to accept the payment being released to us unconditionally as the insurers have made it very clear that the payment will not be released if there is any conditional discharge of the vouchers. In order to safeguard our right to claim the difference amount and any other claims arising out of the financial losses incurred by us a direct result of the deliberate delay in settlement of our claim by the insurers, we make a humble request to the I.R.D.A. to take up the matter with the insurers to ensure that justice prevails and we are paid the entire compensation due to us."

6. The respondent also issued a legal notice dated 27.5.2006 wherein it was alleged that the amount due by the insurer was Rs. 3,18,26,025/-, and that under duress and implicit coercion, it had accepted the payment of Rs. 2,33,94,964/-, by signing and handing over a `full and final discharge voucher'. By the said notice, the respondent demanded the difference amount with interest at the rate of 12% per annum from 6.12.2004 (date of final survey report) till the date of payment. The respondent also informed the appellant that if payment was not so made within 15 days, the notice should be treated as notice invoking arbitration. The appellant by its reply dated 2.8.2006, rejected the said demand. The appellant contended that the respondent had unconditionally accepted the claim settlement amount fully and finally; that respondent had not registered any protest while accepting the claim cheque; that the amount payable was arrived at amicably after discussing all aspects of the claim with the insured and at no juncture any protest was expressed; and that therefore the question of invoking the provision for arbitration did not arise.

7. In view of appellant's refusal to agree for arbitration, the respondent filed an application under section 11 of the Arbitration & Conciliation Act, 1996 (`Act' for short) in the Bombay High Court. The said petition was resisted by the appellant by reiterating that the respondent had accepted the payment of Rs. 233,94,964/- in full and final settlement and therefore, the respondent could not invoke the arbitration clause.

8. The learned Chief Justice of the Bombay High Court exercising power under section 11 of the Act, allowed the petition by order dated 19.4.2007. After considering the facts, he was of the view that there was a serious dispute between the parties as to whether `discharge voucher' was given voluntarily or under pressure or coercion, and that required to be settled by the Arbitral Tribunal. He therefore appointed Sri Justice S. N. Variava as the sole arbitrator. The learned Chief Justice left open the question whether there was any coercion/undue influence in regard to issue of full and final settlement discharge voucher by the respondent, and permitted the parties to lead evidence before the arbitrator on that question. The said order is challenged by the insurer in this appeal by special leave.

9. The rival contentions: Learned counsel for the appellant contended that once the insurance claim was settled and the insured received payment and issued a full and final discharge voucher, there was discharge of the contract by accord and satisfaction. As a result, neither the contract nor any claim survived. It is submitted that when a discharge voucher was issued by the respondent, acknowledging receipt of the amount paid by the appellant, in full and final settlement and confirming that there are no pending claims against the appellant, such discharge voucher should be accepted on its face value as a discharge of contract by full and final settlement. Consequently, it should entail ipso jure, rejection in limine of any subsequent claim or any request for reference of any dispute regarding any claim to arbitration. It was also contended that having received the payment under the said discharge voucher, the respondent cannot, while retaining and enjoying the benefit of the full and final payment, challenge the validity or correctness of the discharge voucher. The appellant contends that the subsequent claim of the respondent ought not to have been referred to arbitration. In support of its contentions, reliance was placed on three decisions of this Court in State of Maharashtra v. Nav Bharat Builders [1994 Supp (3) SCC 83], M/s. P. K. Ramaiah & Co. v. Chairman & Managing Director, National Thermal Power Corpn. [1994 Supp (3) SCC 126] and Nathani Steels Ltd. v. Associated Constructions [1995 Supp (3) SCC 324].

10. On the other hand the respondent contended that the scope of proceeding under section 11 of the Act was limited. It is submitted that once the petitioner establishes that the contract between the parties contains an arbitration agreement, and that the dispute raised is in respect of a claim arising out of such contract, the dispute has to be referred to arbitration; that any contention by the appellant that there is discharge of the contract by issue of full and final discharge voucher is a matter for the arbitral tribunal to examine and decide, and cannot be held out as a threshold bar to arbitration; and that the question whether there was accord and satisfaction, or whether there was discharge of a contract by performance, is itself a question that is clearly arbitrable. It is alternatively submitted that when the Chief Justice or his designate is required to consider whether the claimant has issued a full and final discharge voucher in settlement of all claims, any objection to the validity of such discharge voucher should also be considered. It is pointed out that where the discharge voucher is given under threat or coercion, resulting in economic duress and compulsion, such discharge voucher is not valid nor binding on the claimant, and the dispute relating to the claim survives for consideration and is arbitrable. According to respondent, where the person on whom the claim is made, withholds the admitted amount to coerce

and compel the claimant to accept a smaller payment in full and final settlement and give a discharge voucher, there is no accord and satisfaction in the eye of law; and the discharge voucher will not come in the way of a genuine and bona fide dispute being raised regarding the balance of the claim and seeking reference of such claim to arbitration. In support of the said contentions, reliance was placed on the decisions of this Court in Damodar Valley Corporation v. K. K. Kar [1974 (1) SCC 141], M/s. Bharat Heavy Electricals Ltd., Ranipur v. M/s. Amar Nath Bhan Prakash [1982 (1) SCC 625], Union of India vs. L. K. Ahuja & Co. [1988 (3) SCC 76], Jayesh Engineering Works v. New India Assurance Co. Ltd. [2000 (10) SCC 178], Chairman & Managing Director, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors [2004 (2) SCC 663] and Ambica Construction v. Union of India [2006 (13) SCC 475].

11. In reply, the learned counsel for the appellant submitted that the decisions relied on by the respondent were all rendered by two-Judge Benches of this Court, whereas the decision in Nathani Steels relied on by the appellant, was rendered by a three-Judge Bench; and therefore the principle laid down in Nathani Steels that there can be no reference to arbitration wherever there is a full and final settlement, resulting in the discharge of the contract, holds the field and will have to be followed in preference to the other decisions.

12. The questions for consideration: In this case existence of an arbitration clause in the contract of insurance is not in dispute. It provides that "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 to all other questions be referred to the decision of a sole Arbitrator."

The rival contentions give rise to the following question for our consideration: In what circumstances, a court will refuse to refer a dispute relating to quantum to arbitration, when the contract specifically provides for reference of disputes and differences relating to the quantum to arbitration? In particular, what is the position when a respondent in an application under section 11 of the Act, resists reference to arbitration on the ground that petitioner has issued a full and final settlement discharge voucher and the petitioner contends that he was constrained to issue it due to coercion, undue influence and economic compulsion?

13. In Union of India v. Kishorilal Gupta & Bros. [1960 (1) SCR 493], this Court considered the question whether the arbitration clause in the contract will cease to have effect, when the contract stood discharged as a result of settlement. While answering the question in the affirmative, a three Judge Bench of this Court culled out the following general principles as to when arbitration agreements operate and when they do not operate:

(i) An arbitration clause is a collateral term of a contract distinguished from its substantive terms; but none the less it is an integral part of it.

(ii) Howsoever comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; and the arbitration clause perishes with the contract.

(iii) A contract may be non-est in the sense that it never came legally into existence or it was void ab-initio. In that event, as the original contract has no

legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void.

(iv) Though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it, solely governing their rights and liabilities. In such an event, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it.

(v) Between the two extremes referred to in paras (c) and (d), are the cases where the contract may come to an end, on account of repudiation, frustration, breach etc. In these cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain limited purposes, in respect of disputes arising under it or in connection with it. When the contracts subsist for certain purposes, the arbitration clauses in those contracts operate in respect of those purposes.

The principle stated in para (i) is now given statutory recognition in section 16(1)(a) of the Act. The principle in para (iii) has to be now read subject to section 16(1)(b) of the Act. The principles in paras (iv) and (v) are clear and continue to be applicable. The principle stated in para (ii) requires further elucidation with reference to contracts discharged by performance or accord and satisfaction.

14. The decision in Kishorilal Gupta was followed and reiterated in several decisions including Naithani Jute Mills Ltd. vs. Khyaliram Jagannath (AIR 1968 SC 522), Damodar Valley Corporation vs. K. K. Kar [1974 (1) SCC 141] and Indian Drugs & Pharmaceuticals Ltd. vs. Indo Swiss Synthetic Gem Manufacturing Co. Ltd. (1996 (1) SCC 54). In Damodar Valley Corporation, this Court observed:

"A contract is the creature of an agreement between the parties and where the parties under the terms of the contract agree to incorporate an arbitration clause, that clause stands apart from the rights and obligations under that contract, as it has been incorporated with the object of providing a machinery for the settlement of disputes arising in relation to or in connection with that contract. The questions of unilateral repudiation of the rights and obligations under the contract or of a full and final settlement of the contract relate to the performance or discharge of the contract. Far from putting an end to the arbitration clause, they fall within the purview of it. A repudiation by one party alone does not terminate the contract. It takes two to end it, and hence it follows that as the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives. This is not a case where the plea is that the contract is void, illegal or fraudulent etc., in which case, the entire contract along with the arbitration clause is non-est, or voidable. As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree to bring it to an end or to treat it us if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to the arbitration clause, which is a part of it, also perishes along with it."

15. Section 16 of the Act bestows upon the arbitral tribunal, the competence to rule on its own jurisdiction. Sub-section (1) of the section reads thus:

"16. Competence of arbitral tribunal to rule on its jurisdiction.

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

In SBP & Co. vs. Patel Engineering Ltd. [2005 (8) SCC 618] a seven Judge Bench of this Court considered the scope of section 11 of the Act and held that the scheme of section 11 of the Act required the Chief Justice or his designate to decide whether there is an arbitration agreement in terms of Section 7 of the Act before exercising his power under Section 11(6) of the Act and its implications. It was of the view that sub-sections (4), (5) and (6) of section 11 of the new Act, combined the power vested in the court under sections 8 and 20 of the old Act (Arbitration Act, 1940). This Court held:

"It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

"47.(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators."

This Court also examined the `competence' of the arbitral tribunal to rule upon its own jurisdiction and about the existence of the arbitration clause, when the Chief Justice or his designate had appointed the Arbitral Tribunal under section 11 of the Act, after deciding upon such jurisdictional issue. This Court held:

"We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral tribunal".

"Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal."

16. It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void and if so whether the invalidity extends to the Arbitration clause also. It follows therefore that if the respondent before the Arbitral Tribunal contends that the contract has been discharged by reason of the claimant accepting payment made by the respondent in full and final settlement, and if the claimant counters it by contending that the discharge voucher was extracted from him by practicing fraud, undue influence, or coercion, the arbitral tribunal will have to decide whether the discharge of contract was vitiated by any circumstance which rendered the discharge voidable at the instance of the claimant. If the arbitral tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the arbitral tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits.

17. 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 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.

17.1) The issues (first category) which 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.

17.2) 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.

17.3) 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.

It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice of his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

18. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or under influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under section 11 of the Act or by the arbitral Tribunal as directed by the order under section 11 of the Act. A claim for arbitration cannot be rejected merely or solely

on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.

19. We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains - neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no due certificate as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim. Nor can he seek reference to arbitration in respect of any claim. When we refer to a discharge of contract by an agreement signed by both parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party who has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practiced by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.

20. While discharge of contract by performance refers to fulfillment of the contract by performance of all the obligations in terms of the original contract, discharge by `accord and satisfaction' refers to the contract being discharged by reason of performance of certain substituted obligations. The agreement by which the original obligation is discharged is the accord, and the discharge of the substituted obligation is the satisfaction. A contract can be discharged by the same process which created it, that is by mutual agreement. A contract may be discharged by the parties to the original contract either by entering into a new contract in substitution of the original contract; or by acceptance of performance of modified obligations in lieu of the obligations stipulated in the contract. The classic definition of the term `accord and satisfaction' given by the Privy Council in Payana Reena Saminathan vs. Pana Lana Palaniappa - 41 IA 142 (reiterated in Kishorilal Gupta) is as under:

"The `receipt' given by the appellants and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the `receipt'. It is a clear example of what used to be well known as common law pleading as `accord and satisfaction by a substituted agreement'. No matter what were the respective rights of the parties inter-se they are abandoned in consideration of

the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."

21. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both parties or by the party seeking arbitration):

(a) Where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt. Nothing survives in regard to such discharged contract.
(b) Where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations.
(c) Where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there is no outstanding claims or disputes.

22. We may next consider whether the decisions relied on by the appellant and the decisions relied on by the respondent express divergent views, as contended by the learned counsel for the appellant. We will first consider the three cases relied on by the appellant.

22.1) In P.K. Ramaiah, the appellant contractor made certain claims in regard to a construction contract. The employer rejected the claims, as also the request for reference to arbitration. On an application by the contractor, under the Arbitration Act, 1940 for appointment of an Arbitrator, the Civil Court appointed an Arbitrator. The said order of appointment was challenged by the employer. The High Court found that the contractor had unconditionally acknowledged the final measurement and accepted the payment in full and final settlement of the contract on 19.5.1981; that thereafter he had made a fresh claim on 1.6.1981 which was rejected on 12.8.1981; and that the contractor did not take action and sought reference to arbitration only several years thereafter. The High Court therefore held that there was no subsisting contract to enable reference to arbitration and consequently, set aside the reference to arbitration. On appeal by the contractor, this Court held that in view of the finding recorded by the High Court that the contractor had accepted the measurements and payment and had unconditionally acknowledged full and final settlement and satisfaction by issuing a receipt in writing, no arbitrable dispute arose for being referred to Arbitration. This Court further held that there was accord and satisfaction by final settlement of the claims and the subsequent allegation of coercion was an afterthought and only a ploy to get over the settlement of the dispute.

22.2) In Nav Bharat Builders, a dispute arose in regard to labour escalation charges. As the employer did not agree for escalation, the contractor made an application under section 20 of the Arbitration Act, 1940 for filing the agreement

and for reference of the dispute to arbitration. Pending the said application, the contractor made a representation to the employer for settlement of the claim. The government constituted a Committee to examine the labour escalation. The said Committee suggested acceptance of the claim subject to certain terms. The contractor by his letter dated 3.3.1989 agreed to receive the price escalation on account of the labour component, as worked out by the Committee. Thereafter, the recommended amount was paid to the contractor, who accepted the payment and agreed to withdraw the application under section 20 in regard to the claim for labour escalation. He subsequently contended that the said letter was obtained by coercion and he was not bound by it. The trial court and the High Court held that there was an arbitrable dispute which was challenged before this Court. It is in this background this Court following P. K. Ramaiah held:

".....the respondent contended that the appellant had accepted the principle on which the escalation charges are to be paid but in its working the amount was not calculated correctly and he expressly referred the same in his letter of acceptance and that, therefore, it is open to the respondent to contend before the arbitrator that in working the principle on which the amount offered by the Government the arbitrator has to decide as to what amount had been arrived at and if the working in principle is not acceptable any alternative principle would be applicable. If the arbitrator finds that the respondent is entitled to any claim, it is still an arbitrable dispute. We find no substance in the contention. Whatever be the principle or method or manner of working it out, a particular figure was arrived at by the Government. The respondent was then asked to consider its willingness to accept the offer and having accepted the same and received the amount, it is no longer open to the respondent to dispute the claim on any count or ground. The dispute was concluded and the respondent fully and finally accepted the (settlement of the) claim and thereafter received the amount.

Thus, there is accord and satisfaction of the claim relating to labour escalation charges. Thereby there is no further arbitrable dispute in that behalf."

22.3) Nathani Steels related to a dispute on account of non-completion of the contract. The Court found that the said dispute was settled by and between the parties as per deed dated 20.12.1980 signed by both parties. The deed referred to the prior discussions between the parties and recorded the amicable settlement of the disputes and differences between the parties in the presence of the Architect on the terms and conditions set out in clauses 1 to 8 thereof. In view of it, the Court rejected the contention of the contractor that the settlement was liable to be set aside on the ground of mistake. A three-Judge Bench of this Court, after referring to the decisions in P. K. Ramaiah and Nav Bharat Builders, held thus:

"....that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicable settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the

benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non-est and proceed to invoke the Arbitration clause."

22.4) What requires to be noticed is that in Nav Bharat Builders and Nathani Steels, this court on examination of facts, was satisfied that there were negotiations and voluntary settlement of all pending disputes, and the contract was discharged by accord and satisfaction.

In P. K. Ramaiah, the Court was satisfied that there was a voluntary acceptance of the measurements and full and final payment of the amount found due, resulting in discharge of the contract, leaving no outstanding claim or pending dispute. In those circumstances, this Court held that after such voluntary accord and satisfaction or discharge of the contract, there could be no arbitrable disputes.

23. We may next refer to the decisions relied on by the respondent:

23.1) In Damodar Valley Corporation, the question that arose for consideration of this Court was as follows:

"where one of the parties refers a dispute or disputes to arbitration and the other party takes a plea that there was a final settlement of all claims, is the Court, on an application under Sections 9(b) and 33 of the Act, entitled to enquire into the truth and validity of the averment as to whether there was or was not a final settlement on the ground that if that was proved it would bar a reference to the arbitration inasmuch as the arbitration clause itself would perish."

In that case the question arose with reference to a claim by the supplier. The purchaser required the supplier to furnish a full and final receipt. But the supplier did not give such a receipt. Even though there was no discharge voucher, the purchaser contended that the payments made by it were in full and final settlement of the bills. This Court rejected that contention and held that the question whether there has been a settlement of all the claims arising in connection with the contract also postulates the existence of the contract which would mean that the arbitration clause operates. This Court held that the question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising `upon' or `in relation to' or `in connection with' the contract; and where there is an arbitration clause in a contract, notwithstanding the plea that there was a full and final settlement between the parties, that dispute can be referred to arbitration. It was also observed that mere claim of accord and satisfaction may not put an end to the arbitration clause. It is significant that neither P.K. Ramaiah nor Nathani Steels disagreed with the decision in Damodar Valley Corporation but only distinguished it on the ground that there was no full and final discharge voucher showing accord and satisfaction in that case.

23.2) In Bharat Heavy Electricals Ltd., this Court observed that the question whether there was discharge of the contract by accord and satisfaction or not, is

a dispute arising out of the contract, which requires to be referred to arbitration. It was held that the Arbitrator shall first determine whether there was accord and satisfaction between parties and/or whether the contract was discharged; that if the decision was in favour of the employer, the Arbitrator will not proceed further in the matter but dismiss the claim of the contractor; and that if he finds that the contract was not discharged by accord and satisfaction or otherwise, he should proceed to determine the claim of the contractor on merits. In this case also, there was no acknowledgment of full and final settlement not any discharge voucher.

23.3) In Union of India vs. L.K. Ahuja & Co. [1988 (3) SCC 76] this Court observed:

"In order to be entitled to ask for a reference under section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable."

There was no full and final discharge or accord and satisfaction in that case. In Jayesh Engineering Works, There was an acknowledgment by the contractor that he had received the amount in full and final settlement and he has no further claim. This Court following L. K. Ahuja held that whether the contract has been fully worked out and whether the payments have been made in full and final settlement are questions to be considered by the arbitrator when there is a dispute regarding the validity of such acknowledgement and that the arbitrator will consider whether any amount is due to be paid and how far the claim made by the contractor is tenable. Jayesh Engineering Works did not refer to Kishorilal Gupta, Nav Bharat Builders, P.K. Ramaiah or Nathani Steels.

23.4) In Reshmi Constructions, the employer prepared a final bill and forwarded the same along with a `No-Demand Certificate' in printed format confirming that it had no claims. The contractor signed the no-demand certificate and submitted it. But on the same day, the contractor also wrote a letter to the employer stating that it had issued the said certificate in view of a threat that until the said document was executed, payment of the bill will not be released. In those circumstances, after considering P. K. Ramaiah and Nathani Steels, this Court held:

"26. ... The conduct of the parties as evidenced in their letters, as noticed hereinbefore, clearly goes to show that not only the final bill submitted by the respondent was rejected but another final bill was prepared with a printed format that a "No-Demand Certificate" has been executed as otherwise the final bill would not be paid. The respondent herein, as noticed hereinbefore, categorically stated in its letter dated 20.12.1990 as to under what circumstances they were compelled to sign the said printed letter. It appears from the appendix appended to the judgment of the learned trial Judge that the said letter was filed even before the trial court. It is, therefore, not a case whether the respondent's assertion of "under influence or coercion" can be said to have been taken by way of an afterthought.

27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investments, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

29. We may, however, hasten to add that such a case has to be made out and proved before the arbitrator for obtaining an award."

This decision dealt with a case where there was some justification for the contention of the contractor that the `No-demand Certificate' was not given voluntarily but under coercion, and on facts, this Court felt that the question required to be examined.

23.5) In Ambica Constructions (supra) this Court considered a clause in the contract which required the contractor to give a no claim certificate in the form required by Railways after the final measurement is taken and provided that the contractor shall be debarred from disputing the correctness of the items covered by `No claim certificate' or demanding a reference to arbitration in respect thereof. There was some material to show that the certificate was given under coercion and duress. This Court following Reshmi Constructions, observed that such a clause in contract would not be an absolute bar to a contractor raising claims which were genuine, even after submission of a no-claim certificate.

24. We thus find that the cases referred fall under two categories. The cases relied on by the appellant are of one category where the court after considering the facts, found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence. Consequently, this Court held that there could be no reference of any dispute to arbitration. The decisions in Nav Bharat and Nathani Steels are cases falling under this category where there were bilateral negotiated settlements of pending disputes, such settlements having been reduced to writing either in the presence of witnesses or otherwise.

P.K. Ramaiah is a case where the contract was performed and there was a full and final settlement and satisfaction resulting in discharge of the contract. It also falls under this category. The cases relied on by the respondent fall under a different category where the court found some substance in the contention of the claimants that `no due/claim certificates', or `full and final settlement Discharge Vouchers' were insisted and taken (either in a printed format or otherwise) as a condition precedent for release of the admitted dues. Alternatively, they were cases where full and final discharge was alleged, but there were no documents confirming such

discharge. Consequently, this Court held that the disputes were arbitrable. None of the three cases relied on by the appellant lay down a proposition that mere execution of a full and final settlement receipt or a discharge voucher is a bar to arbitration, even when the validity thereof is challenged by the claimant on the ground of fraud, coercion or undue influence. Nor do they lay down a proposition that even if the discharge of contract is not genuine or legal, the claims cannot be referred to arbitration. In all the three cases, the court examined the facts and satisfied itself that there was accord and satisfaction or complete discharge of the contract and that there was no evidence to support the allegation of coercion/undue influence. It is true that in Nathani Steels, there is an observation that "unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the arbitration clause". But that was an observation made with reference to a plea of `mistake' and not with reference to allegation of fraud, undue influence or coercion. It is also true that the observations in Damodar Valley Corporation and Jayesh Engineering Works, that whether contract has been fully worked out and whether payment has been made in full and final settlement are questions to be considered by the Arbitrator when there is a dispute regarding the same, even if there is a full and final settlement discharge voucher, seem to reflect a view at the other end of the spectrum. Though it is possible to read them harmoniously, such an exercise may not be necessary. All those decisions were rendered in the context of the provisions of the Arbitration Act, 1940. The perspective of the new Act is different from the old Act. The issue is not covered by the decision in SBP & Co.

25. In several insurance claim cases arising under Consumer Protection Act, 1986, this Court has held that if a complainant/ claimant satisfies the consumer forum that discharge vouchers were obtained by fraud, coercion, undue influence etc., they should be ignored, but if they were found to be voluntary, the claimant will be bound by it resulting in rejection of complaint. In United India Insurance Co. Ltd., vs. Ajmer Singh Cotton & General Mills [1999 (6) SCC 400] this Court held :

"The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief. In the instant cases the discharge vouchers were admittedly executed voluntarily and the complainants had not alleged their execution under fraud, undue influence, misrepresentation or the like. In the absence of pleadings and evidence the State Commission was justified in dismissing their complaints."

The above principle was followed and reiterated in National Insurance Co. Ltd. vs. Nipha Exports (P) Ltd. [2006 (8) SCC 156] and National Insurance Co. Ltd., vs.

Sehtia Shoes [2008 (5) SCC 400]. It will also not be out of place to refer to what this Court had said in Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly [1986 (3) SCC 156] in a different context (not intended to apply to commercial transactions):

"(This) principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra- structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

26. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually, that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government Departments, statutory Corporations and government Companies for issue of undated `no due certificates' or a `full and final settlements vouchers' acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final

settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.

27. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/undue influence/coercion, it will ignore the same, examine whether plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration. The Chief Justice/his designate exercising jurisdiction under section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the arbitral tribunal with a specific direction that the said question should be decided in the first instance.

28. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the Conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment

of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The `accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.

29. Let us now examine the receipt that has been taken in this case. It is undated and is in a proforma furnished by the appellant containing irrelevant and inappropriate statements. It states:

"I/we hereby assign to the company, my/our right to the affected property stolen which shall, in the event of their recovery, be the property of the company".

The claim was not in regard to theft of any property nor was the claim being settled in respect of a theft claim. We are referring to this aspect only to show how claimants are required to sign on the dotted line, and how such vouchers are insisted and taken mechanically without application of mind.

30. The discharge voucher form was handed over to the respondent on 21.3.2006. It was signed and delivered to the appellant immediately thereafter acknowledging that a sum of Rs. 2,33,94,964/- had been received from the insurer (appellant) in full and final settlement, and that in consideration of such payment, the respondent absolved the appellant from all liabilities, present and future, arising directly or indirectly, out of said loss or damage under the policy. Admittedly, on the date when such discharge voucher was signed and given by the respondent, the payment of Rs. 233,94,964/- had not been made. It was made after receiving the voucher. Therefore, at the time of signing the voucher by the respondent and at the time of delivery of voucher by the respondent to the appellant, the contents of the voucher that the said amount had been received,

that such amount had been received in full and final settlement of all claims, and that in consideration of such payment, the company was absolved from any further liability, are all false and not supported by consideration.

31. In this case the High Court examined the issue and found that prima facie there was no accord and satisfaction or discharge of the contract. It held that the appellant is still entitled to raise this issue before an arbitrator and the arbitrator has to decide it. On the facts and circumstances and the settled position of law referred by us above, we are also prima facie of the view that there is no accord and satisfaction in this case and the dispute is arbitrable. But it is still open to the appellant to lead evidence before the arbitrator, to establish that there is a valid and binding discharge of the contract by way of accord and satisfaction.

32. We therefore find no reason to interfere with the order of the High court. The appeal is accordingly dismissed. We make it clear nothing stated by the High Court or by us shall be construed as expression of any final opinion on the issue whether there was accord and satisfaction nor as expression of any views on merits of any claim or contentions of the parties.

.....J.
(R V Raveendran)

.....J.
(Lokeshwar Singh Panta)

New Delhi;
September 18, 2008.

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Annexure – 3.5

SUPREME COURT OF INDIA

Union of India & Ors vs M/S Onkar Nath Bhalla & Sons, on 17.04.2009

CIVIL APPEAL No. 2622 OF 2009
(Arising out of SLP(C) No. 7221 of 2008)

Union of India & Ors. ..... Appellants

Versus

M/s. Onkar Nath Bhalla & Sons ..... Respondent

Author: H. L. Dattu, J.

Bench: Tarun Chatterjee, H.L. Dattu

JUDGMENT

1. Leave granted.

2. This appeal is directed against the judgment and the order passed by the Punjab and Haryana High Court at Chandigarh in A.A. No. 193/2006 dated 26.4.2007. By the impugned judgment, the High Court has appointed Justice G. C. Mittal (retired Chief Justice) as the sole Arbitrator.

3. The facts in brief are: the appellant, Engineer-in-Chief, had entered into a contract agreement with respondent/contractor. The contract was completed on 20.9.2002. A final bill was prepared, settling all claims, by the respondent and was forwarded to the appellants. Respondent after receiving payment of final bill signed the same, without any protest or reservation on 27.3.2001. Again after two years, respondent submitted a list of 20 claims to the appellants. Appellants in their reply stated that as per condition 65 of IAFW 2249 (General Conditions of Contracts) forming part of CA, no further claim shall be made by the contractor after submission of final bill and the claim now submitted are deemed to have been waived and extinguished. Respondent then approached E-in-C for appointment of arbitrator on 17.8.2003. Appellants did not appoint an Arbitrator as no dispute existed. Respondent went before the Civil Judge (Senior Division) Amritsar on 19.9.2003. Civil Judge transferred the same to the Distt. Judge, which was further transferred to Punjab & Haryana High Court.

4. High Court allowing the application of the respondent, stated, that, as per the arbitration clause, as no affidavit has been filed with in the stipulated period of the notice invoking the arbitration clause, the appellants have forfeited their right to appoint the Arbitrator. Aggrieved by the said order, appellants are before us by this special leave petition.

5. The Learned counsel for the appellants would contend, that, the final bill of the work was signed by the applicant on 21.12.2000 and the payment for the same was made to the applicant on 27.3.2001. The applicant signed the final bill and no further claim certificate was also signed without any reservation and also got the payment of final bill by signing the same without any protest. It is further

contended that when the agreement provided for arbitration by serving officer having degree in Engineering or equivalent, then a Retired High Court Judge cannot be appointed as an Arbitrator. To support his contentions he would rely on the decision of this court in P. K. Ramaiah & Co. v. N.T.P.C. [1994 (3) SCC 126], wherein this Court has held that:

".....Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus, there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In Russell on Arbitration, 19th Edn., p. 396 it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence.

Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction."

6. Learned Counsel would also invite our attention to the case of SBP & Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618], wherein this Court has observed that:

a) The function performed by the Chief Justice of the High Court or the Chief Justice of India under sub-section (6) of Section 11 of the Act (i.e. the Arbitration and Conciliation Act, 1996) is administrative, pure and simple, and neither judicial nor quasi-judicial.

b) The function to be performed by the Chief Justice under sub-section (6) of Section 11 of the Act may be performed by him or by "any person or institution designated by him".

c) While performing the function under sub-section (6) of Section 11 of the Act, the Chief Justice should be prima facie satisfied that the conditions laid down in Section 11 are satisfied.

7. In the present case, appellants made the full and final payment of the final bill and to which respondent certified by signing the bill without any protest or reservation. Respondent with the intention of receiving further payments, after two years, raised yet another claim and tried to bring up a dispute. And when the claim was denied by the appellants, respondent requested to appoint an Arbitrator.

8. The condition 65 of General conditions of contract IAFW-2249 states that no further claim shall be made by the contractor after submission of final bill and these shall be deemed to have been waived and extinguished. Also condition 70 states that, all dispute between the parties to the contract shall after written notice by either party to the contract, be referred to the sole arbitration of a serving officer having degree in Engineering or equivalent.

9. While appointing an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, two things must be kept in mind:

i. That there exists a dispute between the parties to the agreement and that the dispute is alive.

ii. Secondly, an Arbitrator must be appointed as per the terms and conditions of the agreement and as per the need of the dispute.

10. It is the specific case of the appellants, respondent could not have raised yet another claim, as the respondent after signing on the final bill without any protest or reservation has waived his right as per the conditions of the contract. The Court without considering that whether any dispute exists between the parties, could not have appointed an Arbitrator.

11. Therefore, the Court was not justified in appointing a Retired High Court Judge as the sole Arbitrator in the present case.

12. In view of the above discussion, the appeal is allowed. The impugned order passed by the High Court is set aside. No order as to costs.

.....J.
[TARUN CHATTERJEE]

.....J.
[H. L. DATTU]

New Delhi, April 17, 2009.

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Annexure – 3.6

SUPREME COURT OF INDIA

Union of India & Ors vs Hari Singh, on 10.09.2010

CIVIL APPEAL No. 7970 OF 2010
(Arising out of SLP(C) No.8306/2008)

Union of India and Ors. ……. Appellant(s)

Versus

Hari Singh ……. Respondent(s)

Author: Dalveer Bhandari, J.
Bench: Dalveer Bhandari, Deepak Verma

JUDGMENT

1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order dated 12.01.2007 passed by the High Court of Punjab and Haryana at Chandigarh in Arbitration Case No. 34 of 2004.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

The respondent contractor was awarded a contract by the Northern Railway vide Contract Agreement No. 74-W/1/1/307/WA/CDG dated 01.05.2002, for execution of "Earthwork in formation in filling Construction of all minor bridges within the Zone, including retaining wall, side drains and other protection works and allied works in Zone No. 8 from Km.25 to Km.42 in Punjab area in connection with new BG Rail Link from Chandigarh to Ludhiana". The Contract Agreement also provided for execution of Supplementary Agreement. The contract was executed by the respondent and the entire amount due and payable to the contractor - respondent was paid to him by a Supplementary Agreement dated 27.04.2004, which reads as under:

"SUPPLEMENTARY AGREEMENT

Article of agreement made this day 27th April in the year two thousand four between the President of India, acting through the Northern Railway administration having his office at Dy.CE/C-II/CD hereinafter called the Railway of the one part and nil of the second part. Whereas the party hereto of the other part executed on agreement with the party hereto of the first part being agreement number 740/1/1/207 dated 13.2.2001 for the performance nil hereinafter called the 'Principal Agreement'.

And whereas it was agreed by and between the parties hereto that the works would be completed by the party hereto the second part on 31.10.2003 dated last extended' and whereas the party hereto of the second part has executed the work to the entire satisfaction of the party hereto of the first part already made payment of the party hereto of the second part diverse sums from time to time

aggregating to Rs. 1,98,91,584.07 including the final bill bearing voucher No. 362-C/C-II/CDG dated 27.3.2004 the receipt of which is hereby acknowledged by the party hereto of the second part in full and final settlement of all his/its claims under the principal agreement.

And whereas the party hereto of the second part have received further sum of Rs. 2,68,49,531 through the final bill bearing voucher No. 362-C/0-II CDG dated 27.3.2004 (the receipt of which is hereby acknowledge by the party thereto of the second part) from the party hereto the first part in full and final settlement of all his/its disputed claims under principal agreement.

Now it is hereby agreed by and between the parties in the consideration of sums already paid (by the party hereto of the first part to the party hereto of the second part against all outstanding dues and claims for, all works done under the aforesaid principal agreement including/excluding the security deposit the party hereto of the second part have no further dues of claims against the party hereto the first part under the said Principal Agreement. It is further agreed by and between the parties that the party hereto of the second part has accepted the said sums mentioned above in full and final satisfaction of all its dues and claims under the said Principal Agreement.

It is further agreed and understood by and between the parties that in consideration of the payment already made, under the agreement, the said Principal Agreement shall stand finally discharged and rescinded all the terms and conditions including the arbitration clause.

It is further agreed and understood by and between the parties that the arbitration clause contained in the said principal agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes."

6. The respondent Contractor had sent a legal notice to the General Manager, Northern Railways, Baroda House, New Delhi immediately after receiving the entire amount in pursuance to the settlement of his full and final claim with the appellant. The legal notice sent by the respondent did not even mention the fact of entering into the supplementary agreement with the appellant and receiving the entire amount of Rs. 2,07,49,099/-. The respondent deliberately suppressed the material facts and thereafter filed an Arbitration Case No. 34/2004 before the High Court of Punjab and Haryana. The court without appreciating these facts, by an impugned judgment, referred the claim of the respondent-Contractor to the two arbitrators.

7. The appellant-Union of India is seriously aggrieved by the impugned judgment of the High Court and submitted that after receiving the entire amount, the respondent also signed the supplementary agreement and thereafter the respondent was not justified in invoking the arbitration.

8. Learned Additional Solicitor General appearing on behalf of the Union of India has strenuously submitted that the matter is no longer res integra and is covered by a series of judgments for almost a century. He referred to the judgment of Privy Council in Payana Reena Saminathan v. Pana Lana Palaniappa [14 (1913-14) 41 IA 142], reiterated in Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] which reads as under:

".....The `receipt' given by the appellants and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the `receipt'. It is a clear example of what used to be well known as common law pleading as `accord and satisfaction by a substituted agreement'. No matter what were the respective rights of the parties inter-se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."

9. He submitted that this judgment has been approved and followed by this court even in the year 2009.

10. Learned Additional Solicitor General also placed on record the judgment of this court in State of Maharashtra v. Nav Bharat Builders [1994 Supp (3) SCC 83]. In this case, the court observed that the dispute between the parties were conclusive and the respondent fully and finally accepted the claim and thereafter received the amount. Thus, there was accord and satisfaction of the claim relating to labour escalation charges and thereafter the matter could not have been referred to the arbitration.

11. Learned Additional Solicitor General also relied on another judgment of this court in M/s P.K. Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corpn. [1994 Supp (3) SCC 126]. In this case also the respondent received the amount in full and final settlement of his claim. Consequently, there was an accord and satisfaction and thereafter no arbitrable dispute remained for reference to the arbitration.

12. This court in Nathani Steels Ltd. v. Associated Constructions [1995 Supp (3) SCC 324] also had an occasion to examine the similar case. The court observed that after settling the entire matter and receiving the payment, it was not open to the respondent to treat the settlement as non-est and proceed to invoke the Arbitration clause.

13. This court in a relatively recent case has examined the legal position once again in the case of National Insurance Company Limited v. Boghara Polyfab Private Limited [(2009) 1 SCC 267]. In para 25 of the said judgment, the court observed as under:

"25.....Where both parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no due certificate as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim. Nor can he seek reference to arbitration in respect of any claim."

14. The court further observed in para 29 as under:

"29.....It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both parties or by the party seeking arbitration):

(a) Where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt. Nothing survives in regard to such discharged contract.

(b) Where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations.

(c) Where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there is no outstanding claims or disputes."

15. In this case, the court relied on earlier judgments of this court and reiterated the legal position which has been crystallized by a series of judgments where both the parties to a contract confirmed in writing that the contract has been fully and finally discharged by the parties and there was no outstanding claim or dispute and thereafter the matter could not have been referred to the arbitration.

16. In a celebrated book, Russell on Arbitration, 19th Edn., p.396, it is stated that "*an accord and satisfaction may be pleaded in an action on award and will constitute a good defence*".

17. In our considered view, on the basis of the above settled legal position that when the parties by a supplementary agreement obtained a full and final discharge after paying the entire amount, which was due and payable to the contractor, thereafter the contractor would not be justified in invoking arbitration because there was no arbitral dispute for reference to the arbitration.

18. In view of the settled legal position, the impugned judgment is unsustainable and is accordingly set aside. The appeal is allowed accordingly. The parties to bear their own costs.

.....J.
(DALVEER BHANDARI)

.....J.
(DEEPAK VERMA)

New Delhi; September 10, 2010

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Annexure – 3.7

Supreme Court of India

R. L. Kalathia & Co. vs State of Gujarat, on 14.11.2011

CIVIL APPEAL No. 3245 OF 2003

R.L. Kalathia & Co. .... Appellant(s)

Versus

State of Gujarat .... Respondent(s)

Author: P. Sathasivam

Bench: P. Sathasivam, B. S. Chauhan

JUDGMENT

1. This appeal is directed against the judgment and final order dated 07.10.2002 passed by the Division Bench of the High Court of Gujarat whereby the High Court set aside the judgment and decree dated 14.12.1982 passed by the Civil Judge, (S.D.), Jamnagar directing the State Government to pay a sum of Rs. 2,27,758/- with costs and interest and dismissed the Civil Suit as well as cross objections filed by the appellant Firm for recovery of the aggregate amount of Rs. 3,66,538.05 on account of different counts as specified in the claim of the said suit.

2. Brief facts:

a) The appellant Firm, a partnership firm registered under The Indian Partnership Act, is carrying on the business of construction of roads, buildings, dams etc. mostly in Saurashtra and also in other parts of the State of Gujarat. In response to the invitation of tender by the State Government for construction of Fulzer Dam II in Jamnagar District, the appellant-Firm quoted and offered to construct the same for the quotation, specifications and design of the Dam vide covering letter dated 05.06.1970. In the said letter, the appellant Firm also offered that they would give rebate of 3/4% provided the final bill be paid within three months from the date of completion of the work. The offer of the appellant being the lowest amongst other parties, it was accepted by the State Government with the clause that the construction work was to be completed within a period of 24 months from the works order dated 07.09.1970 which was subsequently clarified that the period of 24 months was to be commenced from the date of commencement of work i.e., 29.11.1970.

b) During execution of the said work, the Executive Engineer, who was in-charge of the project, made certain additions, alterations and variations in respect of certain items of work and directed the appellant to carry out additional and alteration work as specified in writing from time to time. The final decision as to the alteration in respect of certain items of work and particularly, in respect of the depth of foundation which is known as cut off trenches (COT) took long time with the result that the Firm was required to attend the larger quantity of work and thus entitled for extra payment for the additional work. As per the works

contract, the Firm was not paid the running bill within the specified time and, therefore, suffered loss.

c) On 16.07.1976, the Firm lodged a consolidated statement of their claims for the additional or altered works etc. to the Executive Engineer. As there was no response, the Firm served a statutory notice dated 04.01.1977 under Section 80 of the Code of Civil Procedure (hereinafter referred to as `the Code'). Again, on 24.03.1977, after getting no reply, the Firm filed Civil Suit No. 30 of 1977 on the file of the Civil Judge (S.D.), Jamnagar praying for a decree of the aggregate amount of Rs. 3,66,538.05 with running interest at the rate of 9% p.a. from the date of final bill till the date of Suit and at the rate which may be awarded by the Court from the date of Suit till payment. Vide order dated 14.12.1982, the Civil Judge allowed the suit and passed a decree for a sum of Rs. 2,27,758/- with proportionate costs together with interest @ 6% p.a. from the date of suit till realization.

d) Being aggrieved by the said judgment and decree, the State Government filed First Appeal No. 2038 of 1983 before the High Court of Gujarat at Ahmedabad. The Division Bench of the High Court, vide its order dated 07.10.2002, allowed the appeal of the State Government and dismissed the suit of the appellant Firm and also directed that the decretal amount deposited by the State Government and as permitted to be withdrawn by the Firm should be refunded within a period of four months from the date of the judgment. Being aggrieved by the said judgment, the appellant Firm has filed this appeal by way of special leave petition before this Court.

3. Heard Mr. Altaf Ahmed, learned senior counsel for the appellant and Ms. Madhavi Divan, learned counsel for the respondent-State.

4. Though the trial Court after accepting the claim of the plaintiff granted a decree to the extent of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of suit till realization, in the appeal filed by the State after finding that the plaintiff was estopped from claiming damages against the Department as the final bill was accepted, the High Court allowed the appeal of the State and dismissed the suit of the plaintiff. The High Court non-suited the plaintiff mainly on the ground of Clauses 8 and 10 of the agreement and of the fact that the final bill was accepted by the plaintiff under protest. In view of the same, it is relevant to refer Clauses 8 and 10 of the agreement which are as follows:

"Clause 8. No payment shall be made for any work estimated to cost less than Rs 1,000/- till after the whole of the said work shall have been completed and a certificate of completion given. But in the case of work estimated to cost more than Rs 1,000/- the contractor shall, on submitting a monthly bill therefore, be entitled to receive payment proportionate to the part of the work then approved and passed by the engineer in charge whose certificate of such approval and passing of the sum so payable shall be final and conclusive against the contractor. All such intermediate payments, shall be regarded as payments by way of advance against the final payments only and not as payments for work actually done and completed and shall not preclude the engineer in charge from requiring bad, unsound, imperfect or unskillful work to be removed and taken away and reconstructed or re-erected, nor shall any such payment be considered

as an admission of the due performance of the contract or any part thereof in any respect of the occurring of any claim nor shall it conclude, determine, or effect any way of the powers of the engineer in charge as to the final settlement and adjustments of the accounts of otherwise, or in any other way vary or affect the contract. The final bills shall be submitted by the contractor within one month of the date fixed for the completion of the work, otherwise the engineer in charge's certificate of the measurement and of the total amount payable for the work shall be final and binding on all parties.

Clause 10. A bill shall be submitted by the contractor each month on or before the date fixed by the engineer in charge for all work executed in the previous months and the engineer in charge shall take or caused to be taken the requisite measurement for the purpose of having the same verified, and the claim, so far as it is admissible, shall be adjusted, if possible within 10 days from the presentation of the bill. If the contractor does not submit the bill within the time fixed as aforesaid, the engineer in charge may depute a subordinate to measure up the said work in the presence of the contractor or his duly authorized agent whose counter signature to the measurement list shall be sufficient warrant, and the engineer in charge may prepare a bill from such list which shall be binding on the contractor in all respects."

It is the stand of the State and accepted by the High Court that the plaintiff-Firm has not fully complied with Clauses 8 and 10 of the agreement. It is also their stand that mere endorsement to the effect that the plaintiff has been accepting the amount as per final bill "under protest" without disclosing real grievance on merits is not sufficient and it amounts to accepting the final bill without any valid objection and grievance on merits by the plaintiff. The High Court has also accepted the claim of the State that by the conduct of the plaintiff in accepting the final bill and the Department has made full payment to the plaintiff, sending statutory notice and filing suit for recovery of the differential amount was barred by the principle of estoppel.

On going through the entire materials including the oral and documentary evidence led in by both the parties and the judgment and decree of the trial Judge, we are unable to accept the only reasoning of the High Court in non-suiting the plaintiff.

5. It is true that when the final bill was submitted, the plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the plaintiff that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the terms of agreement. Merely because the plaintiff had accepted the final bill, it cannot be deprived of its right to claim damages if it had incurred additional amount and able to prove the same by acceptable materials.

6. Before going into the factual matrix on this aspect, it is useful to refer the decisions of this Court relied on by Mr. Altaf Ahmed. In the case of Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors [(2004) 2 SSC 663] which relates to termination of a contract, one of the questions that arose for consideration was "Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuance a `No Due Certificate' by the contractor, can any party to the

contract raise any dispute for reference to arbitration? While answering the said issue this Court held:

"27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

7. In Ambica Construction vs. Union of India [(2006) 13 SCC 475] which also deals with issuance of "No-claim Certificate" by the contractor, the following conclusions are relevant which read as under:

"16. Since we are called upon to consider the efficacy of Clause 43(2) of the General Conditions of Contract with reference to the subject-matter of the present appeals, the same is set out hereinbelow:

"43. (2) Signing of `no-claim' certificate. The contractor shall not be entitled to make any claim whatsoever against the Railways under or by virtue of or arising out of this contract, nor shall the Railways entertain or consider any such claim, if made by the contractor, after he shall have signed a `no claim' certificate in favour of the Railways, in such form as shall be required by the Railways, after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by `no-claim certificate' or demanding a reference to arbitration in respect thereof."

17. A glance at the said clause will immediately indicate that a no-claim certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a no-claim certificate had been issued by the appellant. On the other hand, even the first arbitrator, who had been appointed, had come to a finding that no-claim certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such no-claim certificate had not been submitted under coercion and duress.

18. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous

claims after final measurement. Having regard to the decision in Reshmi Constructions it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no-claim certificate.

19. We are convinced from the materials on record that in the instant case the appellant also has a genuine claim which was considered in great detail by the arbitrator who was none other than the counsel of the respondent Railways."

8. In National Insurance Company Limited vs. Boghara Polyfab Private Ltd. [(2009) 1 SCC 267] the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant:

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."

9. From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing `No Due Certificate'.

10. In the light of the above principles, we are convinced from the materials on record that in the instant case, the appellant/plaintiff also had a genuine claim which was considered in great detail by the trial Court and supported by oral and documentary evidence. Though the High Court has not adverted to any of the factual details/claim of the plaintiff except reversing the judgment and decree of the trial Court on the principle of estoppel, we have carefully perused and considered the detailed discussion and ultimate conclusion of the trial Judge. Though we initially intend to remit the matter to the High Court for consideration in respect of merits of the claim and the judgment and decree of the trial Court,

inasmuch as the contract was executed on 05.06.1970 and work had been completed in August, 1973, final bill was raised on 31.03.1974 and additional claim was raised on 16.07.1976. To curtail the period of litigation, we scrutinized all the issues framed by the trial Court, its discussion and ultimate conclusion based on the pleadings and supported by the materials. The trial Court framed the following issues:

" The following issues were framed at Ex. 16:

1. Whether Plaintiff proves that he executed extra work of change and entitled to claim Rs. 3,600/-?
2. Whether Plaintiff proves that he did extra work of C.O.T. filing and hence entitled to claim Rs. 1,800/-?
3. Whether Plaintiff is entitled to claim Rs. 15,625/- in connection with excavated stuff?
4. Whether Plaintiff is entitled to claim Rs. 7,585/- for guide bunds?
5. Whether Plaintiff is entitled to claim Rs 5,640/- for pitching work?
6. Whether Petitioner is entitled to claim Rs. 13,244/- for providing sand filter in river?
7. Whether Plaintiff is entitled to claim Rs. 1,375/- for waster weir back filling?
8. Whether Plaintiff is entitled to claim Rs. 30,600/- for extra item of masonry?
9. Whether Plaintiff is entitled to claim Rs. 14,339.84 for breach of condition and irregular payment?
10. Whether Plaintiff is entitled to claim Rs 12,386.64 ps. for providing heavy gate?
11. Whether Plaintiff is entitled to claim Rs. 1,37,478.17 ps for rising of prices?
12. Whether Plaintiff is entitled to claim Rs. 30,000/- for establishment charges?
13. Whether Plaintiff is entitled to claim Rs. 93,049.76 towards interest?
14. Whether notice under Section 80 of the CPC is defective?
15. Whether Plaintiff is estopped from filing suit in view of fact that he has signed and accepted bills prepared by Defendant?
16. Whether suit is barred by time?
17. Whether Court has jurisdiction to decide the present suit?
18. What order and decree?"

11. We have already considered and answered the issue relating to No. 15 in the earlier paragraphs and held in favour of the plaintiff. In respect of other issues relating to execution of extra work, excavation, construction of guide bunds, pitching work, providing sand filter in river, waste weir back filling, extra masonary, providing heavy gate, additional amount due to raising of prices, additional amount towards establishment charges, interest etc., the trial Court based on the materials placed accepted certain items in toto and rejected certain claims and ultimately granted a decree for a sum of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of the suit till realization. On going through the materials placed, relevant issues framed, ultimate discussion and conclusion arrived at by the trial Court, we fully agree with the same and the plaintiff is entitled to the said amount as granted by the trial Court.

12. In the result, the impugned judgment of the High Court in First Appeal No. 2038 of 1983 dated 07.10.2002 is set aside and the judgment and decree of the

trial Court in Civil Suit No. 30 of 1977 dated 14.12.1982 is restored. The civil appeal is allowed with no order as to costs.

.....J.
(P. SATHASIVAM)

.....J.
(DR. B.S. CHAUHAN)

NEW DELHI;
JANUARY 14, 2011

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Annexure – 3.8

Supreme Court of India

Union of India & Ors vs M/S Master Construction Co., on 25.04.2011

CIVIL APPEAL No. 3541 OF 2011
(Arising out of SLP (Civil) No. 8162 of 2007)

Union of India & Ors. .... Appellants

Versus

M/s. Master Construction Co. .... Respondent

Author: R. M. Lodha, J.

Bench: Aftab Alam, R.M. Lodha

JUDGMENT

Leave granted.

2. This appeal, by special leave, arises from the order dated December 8, 2006 passed by the Chief Justice of the Punjab and Haryana High Court in the proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, `1996 Act') whereby he held that all disputes between the parties to the contract have to be referred to the arbitration and appointed Mr. M. S. Liberahan, retired Chief Justice of Andhra Pradesh High Court, as sole arbitrator to decide the disputes between the parties.

3. The respondent - M/s. Master Construction Company (for short, `the contractor') was awarded a contract (CA No. CEBTZ--14/95-96) on September 17, 1995 by the first appellant - Union of India - for the work "provisions of OTM accommodation and certain essential technical buildings" to be erected and installed at Bhatinda. The first phase of the work was to be completed by July 20, 1996 and the second phase by January 20, 1997.

4. The agreement between the parties made IAFW-2249 an integral part of the contract. Condition 70 thereof provided mode for resolution of disputes and differences between the parties through arbitration.

5. The work is said to have been completed by the contractor, albeit belatedly, on August 31, 1998. The completion certificate was issued on September 9, 1999.

6. The contractor furnished no-claim certificates on April 3, 2000, April 28, 2000 and May 4, 2000 and the final bill was signed on May 4, 2000.

7. The payment of final bill was released to the contractor on June 19, 2000. Thereafter, the bank guarantee amounting to Rs. 21,00,000/- was also released on July 12, 2000. Immediately after release of the bank guarantee, on that very day, i.e. July 12, 2000, the contractor wrote to the appellants withdrawing `no-claim certificates'; it also lodged certain claims.

8. The Chief Engineer, Bhatinda Zone, Bhatinda (Appellant No. 3 herein) vide his letter dated July 13, 2000 declined to entertain the claims of the contractor on

the ground that the final bill has been accepted by the contractor after furnishing the `no-claim certificates' and no claim under the contract remained.

9. The contractor vide its letter dated September 10, 2000 requested the Engineer-in-Chief, Army Headquarters, Kashmir House, New Delhi (Appellant No. 2 herein) to refer the disputes between the parties for resolution to the arbitrator. The contractor stated in that letter that if the arbitrator was not appointed within 30 days from the date of request, it may be constrained to seek the remedy as may be available under the law.

10. As no arbitrator was appointed by the appellants despite the request made in the letter dated September 10, 2000, the contractor made an application under Section 11 of the 1996 Act before the Civil Judge, (Senior Division), Bhatinda on January 10, 2001. The application, after contest, was dismissed by the Civil Judge, Senior Division, Bhatinda on January 6, 2003.

11. Being not satisfied with the order dated January 6, 2003, the contractor challenged that order by filing a writ petition before the High Court of Punjab and Haryana.

12. The Division Bench of the High Court heard the parties and by its order dated May 20, 2004 dismissed the contractor's writ petition.

13. The contractor challenged the High Court's order by filing a special leave petition before this Court. This Court disposed of the special leave petition on January 3, 2006 by directing that the application filed by the contractor under Section 11 of the 1996 Act shall be placed before the Chief Justice of the Punjab and Haryana High Court, for appropriate order thereon. This Court, consequently, set aside the orders of the High Court and the lower court.

14. It was then that the Chief Justice of the Punjab and Haryana High Court decided the application filed by the contractor under Section 11(6) of the 1996 Act and passed the order impugned in the present appeal.

15. Mr. Brijender Chahar, learned senior counsel for the appellants made two-fold submission: (i) that no arbitrable dispute existed between the parties as full and final payment has been received by the contractor voluntarily after submission of `no-claim certificates' and the final bill, and (ii) that, in any case, the Chief Justice in exercise of his power under Section 11(6) ought to have given due regard to the arbitration clause and appointed the arbitrator in terms thereof.

16. Ms. Indu Malhotra, learned senior counsel for the contractor, on the other hand, vehemently contended that the whole case of the contractor from the very beginning had been that `no- claim certificates' were given by the contractor under the financial duress and coercion as the appellants had arbitrarily withheld the payment. She would submit that the issue whether `no-claim certificates' were given voluntarily or under financial duress, is an issue which must be decided by the arbitrator alone and it is for this reason that the Chief Justice, in the proceedings under Section 11(6), has referred the disputes between the parties to the arbitrator. In this regard, she heavily relied upon a recent decision of this Court in the case of National Insurance Company Limited v. Boghara Polyfab Private Limited [(2009) 1 SCC 267 2 (2004)]. She also referred to two earlier

decisions of this Court, namely, Chairman & M.D., NTPC Ltd. v. Reshmi Constructions, Builders and Contractors [SCC 663 3] and Ambica Construction v. Union of India [(2006) 13 SCC 475].

17. That IAFW--2249 was made an integral part of the contract between the parties and condition 70 thereof provided for mode of resolution of disputes and differences between the parties through arbitration is not in dispute. Condition 70 (arbitration clause) reads as under:

"70. Arbitration: All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents. Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the works or termination or determination of the contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies. Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, ex-parte, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters, referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitrator shall be such place or places as may be fixed by the Arbitrator in his sole discretion. The award of the Arbitrator shall be final and binding on both parties to the contract.

If the value of the claims or counter claims in an arbitration referred exceeds Rs. 1 lakh the arbitrator shall give reasons for the award".

18. The controversy presented before us does not concern the existence of arbitration agreement but it relates to whether after furnishing `no-claim certificates' and the receipt of payment of final bill, as submitted by the contractor, any arbitrable dispute between the parties survived or the contract stood discharged. Before we turn to the factual aspect, it is appropriate to carefully consider the decision of this Court in Boghara Polyfab Private Limited at some length as the learned senior counsel for the contractor placed heavy reliance on it.

19. In Boghara Polyfab Private Limited1, this Court surveyed a large number of earlier decisions of this Court, namely, The Union of India v. Kishorilal Gupta & Bros [AIR (1959) SC 1362], The Naihati Jute Mills Ltd. v. Khyaliram Jagannath [AIR (1968) SC 522], Damodar Valley Corporation v. K.K. Kar [(1974) 1 SCC 141], M/s. Bharat Heavy Electricals Limited, Ranipur v. M/s. Amar Nath Bhan Prakash [(1982) 1 SCC 625], Union of India & Anr. v. M/s. L.K. Ahuja & Co. [(1988) 3 SCC 76], State of Maharashtra v. Nav Bharat Builders [1994 Supp (3) SCC 83], M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, National Thermal Power Corpn. [1994 Supp (3) SCC 126], Nathani Steels Ltd. v. Associated Constructions [1995 Supp (3) SCC 324], Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. & Ors. [(1996) 1 SCC 54], United India Insurance v. Ajmer Singh Cotton & General Mills & Ors. [(1999) 6 SCC 400], Jayesh Engineering Works v. New India Assurance Co. Ltd. [(2000) 10 SCC 178], SBP & Co. v. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618], National Insurance Co. Ltd. v. Nipha Exports (P) Ltd. [(2006) 8 SCC 156] and National Insurance Company Limited v. Sehtia Shoes [(2008) 5 SCC 400]. With regard to the jurisdiction of the Chief Justice/his designate in the proceedings under Section 11 of the 1996 Act, this Court culled out the legal position in paragraph 51 (page 294) of the report as follows :

"51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/ undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance."

20. The Bench in Boghara Polyfab Private Limited in paragraphs 42 and 43 (page 291), with reference to the cases cited before it, inter alia, noted that there were two categories of the cited cases; (one) where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, it was held that there could be no reference of any

dispute to arbitration and (two) where the court found some substance in the contention of the claimants that `no dues/claim certificates' or `full and final settlement discharge vouchers' were insisted and taken (either in printed format or otherwise) as a condition precedent for release of the admitted dues and thereby giving rise to an arbitrable dispute.

21. In Boghara Polyfab Private Limited, the consequences of discharge of the contract were also considered. In para 25 (page 284), it was explained that when a contract has been fully performed, then there is a discharge of the contract by performance and the contract comes to an end and in regard to such a discharged contract, nothing remains and there cannot be any dispute and, consequently, there cannot be reference to arbitration of any dispute arising from a discharged contract. It was held that the question whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, such question is arbitrable. The Court, however, noted an exception to this proposition. The exception noticed is that where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Yet another exception noted therein is with regard to those cases where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim. It was observed that issuance of full and final discharge voucher or no-dues certificate of that kind amounts to discharge of the contract by acceptance or performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.

22. In paragraph 26 (pages 284-285), this Court in Boghara Polyfab Private Limited held that if a party which has executed the discharge agreement or discharge voucher, alleges that the execution of such document was on account of fraud/coercion/undue influence practiced by the other party, and if that party establishes the same, then such discharge voucher or agreement is rendered void and cannot be acted upon and consequently, any dispute raised by such party would be arbitrable.

23. In paragraph 24 (page 284) in Boghara Polyfab Private Limited, this Court held that a claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher has been executed by the claimant. The Court stated that such dispute will have to be decided by the Chief Justice/his designate in the proceedings under Section 11 of the 1996 Act or by the Arbitral Tribunal.

24. In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute

for arbitration at all. It cannot be overlooked that the cost of arbitration is quite huge - most of the time, it runs in six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.

25. In light of the above legal position, we now turn to the facts of the present case.

26. At the time of receiving payment on account of final bill, the contractor executed the certificate in the following terms:

"a) I/we hereby certify that I/we have performed the work under the condition of the contract agreement No. CEBTZ-14/95-96, for which payment is claimed and that I/we have no further claims under CA No. CEBTZ-14/95-96.

b) Received rupees two lakhs fifteen thousand one hundred seventy eight only. This payment is in full and final settlement of all money dues under CA No. CEBTZ-14/95-96 and I have no further claims in respect of the CA No. CEBTZ-14/95-96."

27. The contractor also appended the following certificate:

"It is certified that I have prepared this final bill for claiming entire payment due to me from this contract agreement. The final bill includes all claims raised by me from time to time irrespective of the fact whether they are admitted/accepted by the department or not. I now categorically certify that I have no more claim in respect of this contract beyond those already included in this final bill by me and the amount so claimed by me shall be in full and final satisfaction of all my claims under this contract agreement. I shall however, receive my right to raise claim to the extent disallowed to me from this final bill."

28. The above certificates leave no manner of doubt that upon receipt of the payment, there has been full and final settlement of the contractor's claim under the contract. That the payment of final bill was made to the contractor on June 19, 2000 is not in dispute. After receipt of the payment on June 19, 2000, no grievance was raised or lodged by the contractor immediately. The concerned authority, thereafter, released the bank guarantee in the sum of Rs. 21,00,000/- on July 12, 2000. It was then that on that day itself, the contractor lodged further claims.

29. The present, in our opinion, appears to be a case falling in the category of exception noted in the case of Boghara Polyfab Private Limited (Para 25, page 284). As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial

duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute.

30. The conduct of the contractor clearly shows that `no claim certificates' were given by it voluntarily; the contractor accepted the amount voluntarily and the contract was discharged voluntarily.

31. We are, thus, unable to sustain the order of the Chief Justice in the proceedings under Section 11(6) of the 1996 Act. In view of our finding above, it is not necessary to consider the alternative submission made by the senior counsel for the appellants that the Chief Justice in exercise of his power under Section 11(6) ought to have appointed the arbitrator in terms of the arbitration clause and the appointment of Mr. M. S. Liberahan, retired Chief Justice of Andhra Pradesh High Court, was not in accord with the arbitration agreement.

32. The appeal is, accordingly, allowed. The impugned order dated December 8, 2006 passed by the Chief Justice of the High Court of Punjab and Haryana is set aside. The parties shall bear their own costs.

.....J.
(Aftab Alam)

..... J.
(R.M. Lodha)

NEW DELHI,
APRIL 25, 2011.

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Annexure – 3.9

IN THE HIGH COURT OF DELHI AT NEW DELHI

GAIL (India) Ltd. vs Hindustan Construction Co., on 09.01.2012

O.M.P. No. 170/2004

GAIL (India) Limited ..... Petitioner
(Formerly known as Gas Authority of India Limited)
Through: Mr. Rajiv Bansal with
Mr. Rahul Bhandari, Advocates.

Versus

Hindustan Construction Corporation ..... Respondent
Through: Mr. Anurag Kumar, Advocate.

Reserved on: December 2, 2011

Decision on: January 9, 2012

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

1. GAIL (India) Ltd. (formerly Gas Authority of India Limited) (hereafter `GAIL') has, in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (`Act') challenged an Award dated 11th August 2003 passed by the learned Sole Arbitrator in the dispute between GAIL and Hindustan Construction Corporation (`HCC').

2. On 6th July 1994 GAIL awarded HCC a contract for upgradation of the Auraiya Gas Compressor Station for HBJ Pipeline. The contract was to be completed by 27th February 1995. However, the contract was actually completed on 31st October 1996 with a delay of about twenty months. It is claimed by GAIL that HCC was not serious about the execution of the job awarded to it and various notices/letters were issued to HCC by GAIL, and also by Engineers India Ltd. (`EIL') who were the Engineer-in-charge of the project. It is stated that under Clause 27 of the General Conditions of Contract (`GCC'), GAIL was entitled to liquidated damages (`LD') for the delay in HCC completing the work. GAIL states that after great persuasion HCC completed the work on 31st October 1996 and submitted its final bill. Since HCC had already submitted its `no claim certificate' (`NCC') while requesting extension of the period of conclusion of contract by the letter dated 7th March 1997, GAIL by its letter dated 14th January 1998 requested HCC to submit a fresh NCC. This was done by the HCC on 16th January 1998. GAIL claims that apart from the above NCC, HCC also issued another letter dated 16th April 1999 nearly fourteen months after the receipt of the final payment confirming that no further amount is due to it under the contract in question.

3. According to the GAIL, under Clause 91 (i) of Volume I of GCC, HCC had to raise any objection as regards payments due to it by giving a written notice within ten days of the final payment. However, HCC for a period of over 1½ years, after receipt of final payment, did not raise any claim. On 6th October 1999 HCC filed

its claims before the learned Arbitrator. GAIL in its reply raised the question of maintainability of the claim on the ground that HCC had on two occasions, i.e., 7th March 1997 and 16th July 1998 submitted NCCs voluntarily. Further, at the time of acceptance of the final payment, no protest had been raised by HCC. The claim was also resisted on merits.

4. GAIL's objection as to maintainability of HCC's claim was rejected by the learned Arbitrator in the impugned Award dated 11th August 2003. The learned Arbitrator proceeded to allow most of the claims of the Respondent and rejected the counter claim of GAIL.

5. Mr. Rajiv Bansal, learned counsel appearing for GAIL, submitted that the learned Arbitrator erred in rejecting the plea of GAIL that there was full 'accord and satisfaction' of the Respondent's claims and therefore there was no arbitrable dispute remaining to be adjudicated. The plea of the Respondent that it gave the NCC under coercion was an afterthought. At no time did the Respondent raise any such protest. Mr. Bansal referred to a further letter dated 16th April 1999 written to GAIL by HCC which reiterated that they had no further claims against GAIL.

6. Mr. Anurag Kumar, learned counsel for the HCC on the other hand relied on the judgment of this Court in GAIL v. Bansal Contractors (India) Ltd. [2010 (120) DRJ 332] and submitted that the NCC given by HCC was under coercion since otherwise it could not expect to receive any payment from GAIL. It was a practice that the contractor had to submit an NCC along with the final bill itself, and there was no choice with HCC not to do so. He pointed out that the letter dated 16th April 1999 issued by HCC did not pertain to the contract in question. Mr. Anurag Kumar also relied on the judgments in Hindustan Tea Co. v. K. Sashikant Co. [AIR 1987 SC 81] and State of Rajasthan v. Puri Construction Co. Ltd. [1994 (6) SCC 485] to urge that since the Award was a reasoned one, it did not call for any interference unless there was an error on the face of it.

7. The issue that falls for consideration on the above submissions is whether the learned Arbitrator's rejection of GAIL's objection concerning maintainability of HCC's claim was tenable in law. The question whether submission of no claim certificate by a contractor would constitute 'accord and satisfaction' and would preclude such contractor from subsequently raising a claim for reference to arbitration came up for consideration by the Supreme Court in P. K. Ramaiah & Co. v. NTPC [1994 Supp (3) SCC 126]. On the facts of that case it was observed (SCC, p.129):

> *"Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In Russell on Arbitration, 19th Edn., p. 396 it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence". Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration."*

8. The above decision was followed in Union of India v. Onkar Nath Bhalla & Sons [(2009) 7 SCC 350] where it was held that the contractor had after signing on the final bill without any protest or reservation waived its right to raise a further claim and therefore there was no live dispute between the parties that could be referred to arbitration. In National Insurance Company Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267], the Supreme Court set out the possible circumstances in which a claim need not be entertained in arbitration proceedings except "in certain circumstances". The relevant portion of the said judgment reads as under (SCC @ pp 295-296):

"52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject:

(i) …

(ii) …

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) …

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration."

9. The above decision was further considered and explained by the Supreme Court in Union of India v. Master Construction Co. [2011 (5) SCALE 165]. It was held that (SCALE, p.171): "*A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate…if such plea is found to be an after-thought, make believe or lacking in credibility, the matter must be set at rest then and there*." In the said case, the Respondent after submitting no claim certificates and release of the final bill amount and its

bank guarantee, withdrew the no claim certificates and lodged certain claims. It was contended that the no claim certificates were given under financial duress and coercion. However, the Supreme Court found that the 'no claim certificates' were given and the contract discharged by the Respondent voluntarily. It held (SCALE, p.172): "*Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute*".

10. Turning to the case on hand, the relevant facts are that after completion of the work on 31st October 1996, HCC submitted its final bill. Going by the first NCC issued on 7th March 1997, it appears that HCC had imposed a condition for issuance of such NCC. The said letter reads as under:

"Date: 7th March 1997.

The Resident Construction Manager,
M/s. Engineers India Limited,
Gas Rehabilitation and Expansion Project,
P.O. Vaghodia, Dist.: BARODA – 391 760

Dear Sir,
(Kind Attn.: Shri L. C. Khatwani, R.C.M.)

Sub.: No Claim Letter.

We shall have no claim whatsoever of any kind towards the Contract No.2986/T-30/93-94/SKD/18/C-23 dtd. 6.7.1994 and the works executed at GAIL Dibiyapur subject to sanction of final extension of time without levy of Liquidated Damages and payment of our final bill.

Thanking you,

Yours faithfully,

For HINDUSTAN CONSTRUCTION CORPORATION"

11. On 14th January 1998, GAIL wrote to HCC as under:

"Dear Sir,

This has reference to the settlement of final bill pertaining to the upgradation of Auraiya Compressor Station. PUF insulation of Control Building roof was carried out by you through a specialized agency viz. M/S LLOYDS INSULATIONS in terms of the Contract Clause no. 60.2-I (d). As per this clause, when the item of work is executed through nominated specialist agency as approved by EIC, then actual amount paid to such nominated agency supported by documentary evidence is required to be submitted by you. While verifying the records, it is observed that no such documentary evidence has been submitted by you. You are, therefore, requested to submit the documentary evidence of actual payments made to M/s. LLOYD INSULATIONS by you and acknowledgement of the same by them for carrying out the above mentioned PUF insulation job.

You had submitted conditional No Claim Certificate subject to extension of contractual completion period without imposition of LD. Since extension of contractual completion period has been approved without imposition of LD, you are hereby advised to submit the No claim certificate afresh without any condition immediately.

You are also required to submit the copy of your application to Regional Labour Commissioner along with completion certificate for upgradation of Auraiya Compressor Station and Order passed by the R.L.C. for release of Security Deposit.

This is for your kind information that the final bill has almost been processed/checked and the same will be released after getting the above cited clarifications."

12. It appears from the above exchange of letters that far from being compelled or 'coerced' into issuing an NCC, HCC insisted on GAIL extending the period of completion of the contract without imposition of LD as a pre-condition to issuing the NCC. GAIL acceded to the said condition and thereafter HCC issued the NCC in the following terms:

"Sir,

We hereby submit that we have no claim whatever for the work of Auriya Compressor Station upgradation, GAIL, Dibiyapur vide your Order No. 2486/T-30/93-94/SK D/18 e-23 dated 06.07.1994.

This certificate is being issued as desired vide letter no. GAIL/AUR 108M/12/21/95 dated 14.01.1995 of Sr. Manager (O&M)."

13. The copy of the above letter as enclosed with the petition does not bear a date. The learned Arbitrator refers to it as dated 16th January 1998 whereas in the present petition GAIL states that it is dated 16th July 1998. Be that as it may, HCC does not deny having issued an NCC in the above terms. As far as the subsequent letter dated 16th April, 1999 is concerned HCC is right in its contention that it pertained to a different contract. In any event, the said letter does not appear to have been relied upon or exhibited as a document by GAIL in the arbitral proceedings.

14. The above correspondence shows that the two parties were in negotiation as regards the settlement of the final bill and there was no compulsion on HCC, much less any coercion, to issue an NCC. The learned Arbitrator has failed to consider this important aspect while concluding that: "*In the present case the NCC was demanded before the bill was finalized and before the amount of final payment intimated to claimants-HCC. Accordingly, I do not agree that the NCC constitutes sufficient cause for denying consideration of the claims made by Claimants-HCC before me*." The said conclusion is contrary to the evidence which shows that the NCC was issued after HCC's condition for issuing it was acceded to by GAIL. Also, in terms of the law as explained in the above decisions, the learned Arbitrator failed to notice that HCC had not issued the NCC under coercion or duress. The NCC issued by HCC to GAIL constituted 'accord and satisfaction' of HCC's claims and there was therefore no arbitrable dispute.

15. For the aforementioned reasons, this Court sets aside the impugned Award dated 11th August 2003. The petition is allowed with costs of Rs. 5,000/- which should be paid by HCC to GAIL within a period of four weeks from today.

Sd/-
S. MURALIDHAR, J.

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Annexure – 4.1

Supreme Court of India

General Manager Northern Railway vs Sarvesh Chopra, on 01.03.2002

CASE No.: Appeal (Civil) 1791 of 2002

General Manager Northern Railways & Anr. ……. Petitioner
Versus
Sarvesh Chopra ……. Respondent

Author: R. C. Lahoti, J.

Bench: R.C. Lohati & Brijesh Kumar

JUDGMENT

1. The respondent was granted by the appellants work of construction on bored piles 500 mm dia. by cast in Situ method for widening and raising of Pul Mithai (S). A contract was entered into between the parties on 27.4.1985. The contract is subject to the General conditions of Contract of Railways read with Special Conditions. Disputes arose between the parties and the respondent moved a petition under Section 20 of the Arbitration Act, 1940 praying for the arbitration agreement being filed in the Court and six claims set out in the petition being referred to the Arbitrator for settlement. The learned Single Judge of the High Court of Delhi (Original Side) directed two claims to be referred, but as to claims numbers 3 to 6 formed an opinion that the claims being 'excepted matters' within the meaning of Clause 63 of General Conditions of Contract were not liable to be referred to arbitration. An intra-Court Appeal preferred by respondent has been allowed and the four claims have also been directed to be referred by the Division Bench to arbitrator on forming an opinion that they were not covered by 'excepted matters'. The appellants have filed this petition seeking special leave to appeal against the decision of Division Bench.

2. Leave granted.

3. Clause 63 of the General Conditions of the Contract provides as under:

"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 Railway and the Railway shall within a reasonable time 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 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1) (XII)(B)(e)(b) of the General conditions of Contract or in any clauses of the special conditions of the contract shall be deemed as excepted matters and decisions thereon shall be final and binding on the contractor provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration."

4. Clauses 9.2, 11.3 and 21.5 of Special Conditions of contract are as under:

"9.2. No material price variation or wages escalation on any account whatsoever and compensation for "Force Majeure" etc. shall be payable under this contract.

11.3. No claim whatsoever will be entertained by the Railway on a/c of any delay or hold up of the works arising out of delay in supply of drawings, changes, modifications, alterations, additions, omissions, omissions in the site layout plans or detailed drawings or designs and or late supply of such materials as are required to be arranged by the Railway or due to any other factor on Railway Accounts.

21.5. No claim for idle labour and/or idle machinery etc. on any account will be entertained. Similarly no claim shall be entertained for business loss or any such loss."

5. Claims numbers 3 to 6 whereon reference is sought for by the respondent to the Arbitrator are as under:

"3. There occurred tremendous increase in cost of building materials. 52 Nos. of piles were bored after the expiry of stipulated completion period and particularly when the prices were too high. Additional cost incurred @ Rs. 250/- for these 42 Nos. of piles may please be paid. This has also been verified by your staff at site, Rs. 250 x 42 Rs. 10500/-.

4. Piling rig with diesel driven wench, mixture, machine, driving pipe, wheel barrows, hoppers and other tools and plants remained idle at site for 24 months, i.e. for 75 days. The entire machinery was procured from the market on hire charges. Rent was paid @ Rs. 1070/- per day for this machinery. Hire charges amounting to Rs. 80,250/- (1070x75) may please be reimbursed.

5. The site was not made available for one month. Changes took place and decisions were delayed. The Work which was required to be completed within 3½ months but dragged on for additional period of 6 months. Establishment period of 6 months at a cost of Rs. 10,000/- per month. These losses may please be paid. (Rs. 10,000/- x 6 = Rs.60,000).

6. The work of Rs. 5,95,000/- was required to be completed within 3½ months meaning thereby, monthly progress would not be less than Rs. 1,75,000/-. As against the entire work could be completed within a period of 9½ months i.e. Rs. 75,000/- per month. The losses sustained for less output may be compensated and this comes to Rs. 40,000/-."

6. According to the appellants, claims numbers 3, 4 and 5 are covered respectively by Clauses 9.2, 21.5 and 11.3. Claim No. 6 is covered by Clause 11.3 of Special Conditions. On this there does not appear to be any serious controversy. The core issue is the interpretation of Clause 63 of the General Conditions and Section 20 of the Arbitration Act, 1940.

7. A bare reading of Clause 63 shows that it consists of three parts. Firstly, it is an Arbitration Agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for

adjudication by arbitration, by the Railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with 'excepted matters'. 'Excepted matters' are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any clauses of the Special Conditions of the Contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause and hence shall not be referred to arbitration. The source of controversy is the expression "matters for which provision has been made in any clauses of the Special Conditions of the contract shall be deemed as 'excepted matters' and decisions thereon shall be final and binding on the contractor." It is submitted by the learned counsel for the respondent that to qualify as 'excepted matters' not only the relevant clause must find mention in that part of the contract which deals with special conditions but should also provide for a decision by an authority of the Railways by way of an 'in-house remedy' which decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an 'excepted matter'. The learned counsel supported his submission by reading out a few clauses of General Conditions and Special Conditions. For example, vide Clause 18 of General Conditions any question or dispute as to the commission of any offence or compensation payable to the Railway shall be settled by the General Manager of the Railway in such manner as he shall consider fit and sufficient and his decision shall be final and conclusive. Vide Clause 2.4.2.(b) of Special Conditions a claim for compensation arising on account of dissolution of contractor's firm is to be decided by Chief Engineer (Construction) of the Railway and his decision in the matter shall be final and binding on the contractor. Vide clause 12.1.2 of Special Conditions a dispute whether the cement stored in the godown of the contractor is fit for the work is to be decided by the Engineer of Railways and his decision shall be final and binding on the contractor. The learned counsel submitted that so long as the remedy of decision by someone though he may be an authority of the Railways is not provided for, the contractor's claim cannot be left in lurch by including the same in 'excepted matters'. We find it difficult to agree.

8. In our opinion those claims which are covered by several clauses of the Special Conditions of the Contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2, 11.3 and 21.5 of Special Conditions are illustrative of such claims. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railway", or "no claim will/shall be entertained". These are 'no claim', 'no damage', or 'no liability' clauses. The other category of claims is where the dispute or difference has to be determined by an authority of Railways as provided in the relevant clause. In such other category fall such claims as were read out by the learned counsel for the respondent by way of illustration from several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clause 2.4.2.(b) and 12.1.2. The first category is an 'excepted matter' because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within 'excepted matters' because the claim is liable to be adjudicated upon by an authority of the Railways

whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to the second category of 'excepted matters'.

9. The learned counsel for the respondent placed reliance on Vishwanath Sood Vs. Union of India & Anr. [(1989) 1 SCC 657] and Food Corporation of India Vs. Sreekanth Transport [(1999) 4 SCC 491] to strengthen his submission that an 'excepted matter' should be one covered by a clause which provides for a departmental remedy and is not arbitrable for that reason. We have carefully perused both the decisions. Vishwanath Sood's case is one wherein Clause 2 of the contract envisaged determination of the amount of compensation for the delay in the execution of work only by the Superintending Engineer whose decision in writing shall be final. In Food Corporation of India's case also the relevant clause provided for the decision of Senior Officer being final and binding between the parties. Both were considered to be 'excepted matters'. A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on. The two decisions relied on by the learned counsel for the respondent hold a Clause providing a departmental or in-house remedy and attaching finality to decision therein to be an 'excepted matter' because such were the Clauses in the contracts which came up for the consideration of this Court. Those decisions cannot be read as holding nor can be relied on as an authority for the proposition by reading them in a negative way that if a departmental remedy for settlement of claim was not provided then the claim would cease to be an 'excepted matter' and such should be read as the decision of this Court.

10. It was next submitted by the learned counsel for the respondent that if this Court was not inclined to agree with the submission of the learned counsel for the respondent and the interpretation sought to be placed by him on the meaning of 'excepted matter' then whether or not the claim raised by the contractor is an 'excepted matter' should be left to be determined by the arbitrator. It was submitted by him that while dealing with a petition under Section 20 of the Arbitration Act, 1940 the Court should order the agreement to be filed and make an order of reference to the arbitrator appointed by the parties leaving it open for the arbitrator to adjudicate whether a claim should be held to be not entertainable or awardable being an 'excepted matter'. With this submission too we find it difficult to agree. While dealing with a petition under Section 20, the Court has to examine: (i) whether there is an arbitration agreement between the parties, (ii) whether the difference which has arisen is one to which the arbitration agreement applies, and (iii) whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. The word 'agreement' finding place in the expression 'where a difference has arisen to which an agreement applies', in sub-section(1) of Section 20 means 'arbitration agreement'. The reference to arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or ministerially by the Court; it is a consequence of judicial determination, the Court having applied its mind to the requirements of Section 20 and formed an opinion, that the difference sought to be referred to arbitral adjudication is one to which the arbitration agreement applies. In the case of Food Corporation of India (supra), relied on by the learned counsel for the respondent, it has been held as the consistent view of this Court that in the event of the claims arising within the ambit of 'excepted matters', the question of assumption of

jurisdiction by any arbitrator either with or without the intervention of the Court would not arise. In Union of India Vs. Popular Builders, Calcutta [(2000) 8 SCC 1] and Steel Authority of India Ltd. Vs. J.C. Budharaja, Government and Mining Contractor [(1999) 8 SCC 122], Ch. Ramlinga Reddy Vs. Superintending Engineer & Anr. [(1994) 5 Scale 12 (pr.18)], M/s Alopi Parshad Vs. Union of India [(1960) 2 SCR 793 at page 804] this Court has unequivocally expressed that an award by an arbitrator over a claim which was not arbitrable as per the terms of contract entered into between the parties would be liable to be set aside. In M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project & Anr. [(1991) 1 SCC 498], a claim covered by 'excepted matter' was referred to arbitrator in spite of such reference having been objected to and the arbitrator gave an award. This court held that the arbitrator had no jurisdiction in the matter and that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void. In Continental Construction Co. Ltd. Vs. State of Madhya Pradesh [(1988) 3 SCC 82] the contract provided for the work being completed by the contractor in spite of rise in prices of material and labour charges at the rates stipulated in the contract. It was held that on the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. An award given by the arbitrator for extra claim given by the contractor was held to be vitiated on the ground of misconduct of arbitrator. There were specific clauses in the agreement which barred consideration of extra claims in the event of price escalation.

11. In Ch. Ramalinga Reddy Vs. Superintending Engineer & Anr. [1994 (5) Scale 67] claim was allowed by arbitrator for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". Clause 59 of A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim was found to be outside the defined exceptions. When extensions of time were granted to the appellant to complete the work the respondents made it clear that no claim for compensation would lie. For both these reasons, this Court held that it was impermissible to award such claim because the arbitrator was required to decide the claims referred to him having regard to the contract between the parties and, therefore, his jurisdiction was limited by the terms of the contract.

12. A Division Bench decision of High Court of Andhra Pradesh in State of A.P. Vs. M/s. Associated Engineering Enterprises, Hyderabad [AIR 1990 A.P. 294] is of relevance. Jeevan Reddy, J. (as His Lordship then was), speaking for the Division Bench, held that where clause 59 of the standard terms and condition of the contract provided that neither party to the contract shall claim compensation "on account of delays or hindrances of work from any cause whatever", an award given by an arbitrator ignoring such express terms of the contract was bad. We find ourselves in agreement with the view so taken.

13. In Hudson's Building and Engineering Contracts (11th Edition, pp.1098-9) there is reference to 'no damage' clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined 'delays' including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only

right or remedy of the contractor and, whether expressly or by implication, that damages or compensation are not to be recoverable therefor. These 'no damage' clauses appear to have been primarily designed to protect the owner from late start or co-ordination claims due to other contractor delays which would otherwise arise. Such clauses originated in Federal Government contracts but are now adopted by private owners and expanded to cover wider categories of breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result of positive acts of interference by the owner, and (iv) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and Commonwealth. Not dissimilar principles have enabled some commonwealth courts to avoid the effect of 'no damage' clauses. [See Hudson, ibid].

14. In our country question of delay in performance of contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (Twenty-Eighth Edition, 1999, at p.1106, para 22-015) states "a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract- breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")." If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

15. Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of "excepted matters". While dealing with a petition under Section 20 of the Arbitration Act, the Court will look at the nature

of the claim as preferred and decide whether it falls within the category of "excepted matters". If so, the claim preferred would be a difference to which the arbitration agreement does not apply, and therefore, the Court shall not refer the same to the arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the Court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator. Russell on Arbitration (Twenty-First Edition, 1997) states vide para 1-027 (at p.15) "Arbitrability. The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement. The New York Convention, for example, refers to non-arbitrability as a ground for a court refusing to recognize and enforce an award." To sum up, our conclusion are: (i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the Court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or 'in-house' remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, (iii) an issue as to arbitrability of claim is available for determination at all the three stages - while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the Court.

16. In the case before us, the claims in question as preferred are clearly covered by "excepted matters". The statement of claims, as set out in the petition under Section 20 of the Arbitration Act, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was, in our opinion, not right in directing the said four claims to be referred to arbitration.

17. After the hearing was concluded the learned counsel for the respondent cited a few decisions by making a mention, wherein the view taken is that 'interpretation of contract' is a matter for arbitrator to decide and the Court cannot substitute its own decision in place of the decision of the arbitrator. We do not think that the cited cases have any relevance for deciding the question arising for consideration in this appeal. None of the cases is an authority for the proposition that the question whether a claim is an 'excepted matter' or not must be left to be decided by the arbitrator only and not adjudicated upon by the Court while disposing of a petition under Section 20 of the Arbitration Act, 1940. We cannot subscribe to the view that interpretation of arbitration clause itself can be or should be left to be determined by arbitrator and such determination cannot be done by Court at any stage.

18. For the foregoing reasons we are of the opinion that the view of the 'excepted matters' taken by the Division Bench of the High Court cannot be sustained. The appeal is allowed, the impugned decision of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored. No order as to the costs.

……..J.
(R. C. LAHOTI)

…….……J.
(BRIJESH KUMAR)

March 1, 2002

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Annexure – 4.2

Andhra High Court

A. R. K. Murthy V/s Senior Divisional Engineer/South Central Railway, on 31.08.2006

Equivalent citations: 2006 (6) ALT 37

Author: G. Raghuram

Bench: G. Raghuram

ORDER

Goda Raghuram, J.

1. This application filed seeks appointment of an Arbitrator for settlement of the claims and disputes between the parties herein with regard to the amounts claimed as due and payable by the respondents to the petitioner in respect of an agreement No. 53/DEN/S/BG/SC dated 3.10.1990.

2. The petitioner asserts that the 1st respondent issued a tender notice for the work "Warangal: Water Supply Bulk Water Drawl from Warangal Municipality and provision of overhead tank and pipelines". The petitioner was one of the bidders in the tender. His bid was accepted and he was awarded the work. The work could not be completed within the time stipulated and the petitioner's request for extension of time was also accorded.

3. During the currency of the work, the petitioner asserts, the capacity of the overhead tank was raised from 20,000 gallons to 33,000 gallons. The petitioner executed this increased quantum of work. The petitioner asserts that the scope of the work was enhanced in excess of the specifications as per the agreed items under the agreement between the parties and as a consequence, the value of the work increased from Rs. 4,20,858.25 to Rs. 10,61,121.70. The respondents failed to settle and pay in full the amounts due to the petitioner and therefore he preferred writ petition W.P. No. 26369 of 1995 seeking settlement of the final bill. By the judgment dated 1.8.1996, W.P. No. 26369 of 1996 was disposed of by this Court directing the 1st respondent to pay the admitted amount of Rs. 1,00,000.00 to the petitioner for construction of the original specification of the overhead tank, within three weeks from the date of receipt of a copy of the judgment of this Court. This Court further directed the respondents to hold negotiations with the petitioner for payment with regard to the additional works claimed to have been executed by the petitioner viz., the construction of 33,000 gallons capacity overhead tank; and if the negotiations failed, the respondents were directed to pay to the petitioner the amounts admitted by them for both the works and refer the matter to the arbitrator or review committee for resolution of disputes that still remained unresolved and that such arbitration or review shall be completed within eight weeks from the date of reference.

4. As the respondents have, despite the order of this Court above, failed to refer the dispute between the parties to the arbitration, despite the petitioner making several representations in this behalf, this arbitration application is filed.

5. It is the defence of the respondents, in particular the 1st respondent that the total work executed by the petitioner (both the original and additional) is of a value of Rs.10,40,164.87 (the value of the original work at Rs. 1,29,693.65 and the value of the additional work at Rs. 9,10,471.22). This was a figure arrived at in a negotiating committee meeting held on 28.10.1996. As against this amount payable to the petitioner, the amount due from the petitioner is Rs. 35,191.53. Some of the details are: the value of the unreturned cement bags at Rs. 390.00 and the unreturned value of the steel supplied for execution of the work Rs. 18,357.00. The petitioner was stated to have been paid Rs. 10,56,809.00. Thus, according to the respondents, the petitioner himself is due to the respondents a sum of Rs. 35,191.53.

6. The above is the dispute between the parties on the amounts claimed by the petitioner as due from the respondents and claimed by the respondents as due from the petitioner.

7. On the substantive merit of the petitioner's application seeking reference to arbitration, the respondents contend that as the dispute is with regard to the additional work done by the petitioner, the same is not covered by the arbitration clause and falls within the 'excepted matters' and therefore no reference to arbitration could be made and the petitioner cannot invoke the arbitration clause.

8. It is the admitted position between the parties to the agreement that they are governed, including in the matter of reference to arbitration, by the terms of the Standard General Conditions of Contract for short 'SGCC' which are terms that adhere and are integral to the agreement between the parties. Clause 39 of SGCC states that any item of work carried out by the Contractor, on the instructions of the Engineer, which is not included in the accepted schedule of rates, shall be executed at the rates set forth in the Schedule of Rates of South Central Railway modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contract or shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved. As is apparent from Clause 39 of the SGCC if the Contractor is not satisfied with the decision of the Engineer in respect of the matters specified in Clause 39 of the SGCC, he may appeal to the Chief Engineer within thirty days of getting the decision of the Engineer supported by the analysis of the rates claimed. The clause further specifies that the Chief Engineer's decision, after hearing both the parties in the matter, is final and binding on the Contractor and the Railway.

9. Clause 39 of the SGCC reads as under:

"39. Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the "Schedule of Rates of South Central Railway" modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractor shall be bound to notify the Engineer at least seven days before the necessity arises

for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved.

The rates payable for such items shall be decided at the meeting to be held between the Engineer and the contractor in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure. Provided that if the Contractor commences work or incurs any expenditure in regard thereto before the rates are determined and agreed upon as lastly mentioned, then and in such a case the Contractor shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the rates as aforesaid according to the rates as shall be fixed by the Engineer. However, if the contractor is not satisfied with the decision of the Engineer in this respect, he may appeal to the Chief Engineer within 30 days of getting the decision of the Engineer supported by the analysis of the rates claimed. The Chief Engineer's decision after hearing both the parties in the matter would be final and binding on the contractor and the Railway."

10. Clauses 63 and 64 of the SGCC govern the area of settlement of disputes under the agreement entered into between the parties. To the extent relevant and material, Clauses 63 and 64 of the SGCC read as under:

"63. 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 Railway and the Railway shall within a reasonable time after receipt of the contractor's presentation 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 19, 22(5), 39, 45(a), 55, 55-A(5) 61(2) and 62(1)(xiii)(B)(e)(b) of the General conditions of contract or in any Clause of the Special conditions of the contract shall be deemed as 'Excepted matters' and decisions thereon shall be final and binding on the contractor: provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

64. (1)(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 decision within a reasonable time, then and in any such case, save the 'excepted matters' referred to in clause 63 of these conditions, the contractor after 90 days but within 180 days of his presenting his final claim on disputed matter, shall demand in writing that the dispute 'or difference' be referred to arbitration."

11. As is apparent, on a true and fair construction of Clauses 63 and 64 of the SGCC, governing the relationship between the parties to the agreement, matters for which provision has been made in Clause 39 of the SGCC, are 'excepted matters' and the decisions under Clause 39 of the SGCC are to be treated as final

and binding on the Contractor and it is further provided exabundanti cautela, in Clause 63 of the SGCC that the 'excepted matters' stand specifically excluded from the purview of the arbitration clause and are not to be referred to arbitration. The exclusion is reiterated in Clause 64 of the SGCC.

12. The additional work executed by the petitioner is admittedly and demonstrably one falling within the matters specified in Clause 39 of the SGCC. The case of the petitioner is that the procedural and substantive discipline of Clause 39 of the SGCC was not followed by the respondents while calling upon the petitioner to execute the additional items of work. There was no prior agreement of the terms between the parties to the agreement nor on the rate, for execution of the additional items of work. The additional items were far beyond the quantities of work to be executed under the original agreement entered between the parties and the other parameters for a fair settlement of the compensation to the petitioner were also not determined, as required under Clause 39 of the SGCC, is the substance of the petitioner's grievance.

13. According to Sri K. V. N. Bhupal, learned Counsel for the petitioner, since the terms of Clause 39 of the SGCC were not followed by the respondents while calling upon the petitioner to execute the additional items of work, the arbitral remedy is available under Clause 64 of the SGCC. According to the learned Counsel for the petitioner, since there had been a breach of the terms of Clause 39 of the SGCC by the respondent-employer, though the additional items of work executed by the petitioner fall under Clause 39 of the SGCC, it is not an 'excepted matter' and falls within the purview of the arbitration clause under Clause 64 of the SGCC; and could be referred to arbitration.

14. The contentions urged on behalf of the petitioner constitute a creative reading of the terms of contract which does violence to the language employed in Clauses 39, 63 and 64 of the SGCC. The parties to the agreement have agreed that all matters for which provision has been made inter alia in Clause 39 of SGCC are to be deemed 'excepted matters'. 'Excepted matters' are specifically excluded from the purview of arbitration and are not to be referred to arbitration.

15. Arbitration is not a process of compulsive adjudication as before a civil court of competent jurisdiction. The power, authority and jurisdiction of an arbitrator to arbitrate upon the disputes referred, is founded on agreement between the parties to an agreement, contained in an arbitration clause. In matters of arbitration, the parties to the agreement are at liberty to agree on which disputes are to be referred to arbitration. If any dispute or classes of disputes are excluded from the purview of arbitration, arbitration of such excepted matter is excluded and an arbitrator is denuded of power, authority or jurisdiction to arbitrate upon such areas. These principles are too well settled to invite an idle parade of familiar authority.

16. In General Manager, Northern Railway V/s Sarvesh Chopra, on an extensive survey of earlier authorities, the Supreme Court, on an analysis of Clause 63 of the SGCC which is same as in the case on hand held:

> *"7. A bare reading of clause 63 shows that it consists of three parts. Firstly, it is an arbitration agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for*

adjudication by arbitration, by the Railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with "excepted matters". "Excepted matters are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any clauses of the Special Conditions of the contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and hence shall not be referred to arbitration."

17. In the above decision, the Apex Court also dealt with a contention urged on behalf of the Contractor therein that in case of a grey area in the interpretation of the arbitration clause and in particular whether a particular dispute falls within the 'excepted matter' or otherwise, the issue should be left to be determined by the arbitrator. The court declined to countenance this contention and held that while dealing with a petition under Section 20 of the Arbitration Act, 1940, the court has to examine whether there is an arbitration agreement entered into between the parties, whether the difference, which had arisen, is one to which the arbitration agreement applies; and whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. Existence of an arbitration agreement is the foundation for the jurisdiction to refer to arbitration, held the Supreme Court. The Apex Court further held, relying upon an earlier decision in Prabartak Commercial Corporation Ltd. V/s Chief Administrator, Dandakaranya Project, that when an arbitrator has no jurisdiction in the matter and reference of a dispute to an arbitrator was invalid, the entire proceedings before the arbitrator, including the award made by him, were null and void.

18. It further requires to be noticed that in several decisions, including Alopi Parshad and Sons Ltd. V/s Superintending Engineer, Continental Construction Co. Ltd. V/s State of M. P., Steel Authority of India Ltd. V/s J. C. Budharaja, Mining Contractor Ch. Ramalinga Reddy V/s Superintending Engineer and Union of India V/s Popular Builders, the Supreme Court clearly spelt out the principle that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract entered into between the parties, would be liable to be set aside. In Food Corporation of India V/s Sreekanth Transport, the Supreme Court held to the consistent view that in the event of the claims arising within the ambit of 'excepted matters', the question of assumption of jurisdiction by any arbitrator either with or without the intervention of the court would not arise.

19. The decision of the Constitution Bench of the Supreme Court in SBP and Co. V/s Patel Engineering Ltd., while considering the scope of the power of the Chief Justice of the High Court and the Chief Justice of India under, Section 11 of the Arbitration and Conciliation Act, 1996 Act 26 of 1996 for short 'the Act, did not mark a departure from the settled principle that existence of an arbitration agreement is the foundation for the exercise of an arbitral jurisdiction and the authority by an arbitrator. Emphasizing this aspect of the matter, P. K. Balasubramanyan, J. speaking for the majority pointed out: *"Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal".* The Supreme Court majority held

that it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal, while exercising jurisdiction under Section 11(6) of the Act.

20. From the abundance of precedential authority, the position is beyond disputation and the legal principle is established that 'excepted matters' are not to be referred to arbitration. On text and authority and the clear text of the provisions of Clause 39 of SGCC, the additional items claimed to have been executed by the petitioner and the disputes in relation to those additional items of work that have arisen between the parties to the agreement, clearly comprise 'excepted matters' and are therefore not liable to be referred to arbitration as arbitral jurisdiction is specifically excluded in respect of 'excepted matters'. This is the unambiguous position on a true and fair construction of the provisions of Clauses 39, 63 and 64 of the SGCC which govern the relationship between the parties and define the contours of the jurisdiction, power and authority of an arbitrator.

21. In the light of the aforesaid analysis, there are no merits in this arbitration application. The relief sought cannot be granted. The application is accordingly dismissed. The petitioner is however at liberty to pursue appropriate remedies before the appropriate forum in respect of the grievances for which he seeks reference to arbitration. No costs.

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Annexure – 4.3

IN THE SUPREME COURT OF INDIA

M/s Harsha Constructions vs Union of India & Ors., on 05.09.2014

CIVIL APPEAL No. 534 OF 2007

M/s Harsha Constructions ……. Appellant

Versus

Union of India & Ors. ……. Respondents

J U D G M E N T

ANIL R. DAVE, J.

1. Aggrieved by the judgment dated 9th September, 2005 delivered by the High Court of Judicature, Andhra Pradesh at Hyderabad, in CMA No.476 of 2005, this appeal has been filed by M/s Harsha Constructions, a contractor, against Union of India and its authorities. Hereinafter, the appellant has been described as a 'Contractor'.

2. The Union of India had entered into a contract for construction of a road bridge at a level crossing and in the said contract there was a clause with regard to arbitration. The issue with which we are concerned in the instant case, in a nutshell, is as under:

> When in a contract of arbitration, certain disputes are expressly excepted, whether the Arbitrator can arbitrate on such excepted issues and what are the consequences if the Arbitrator decides such issues?

3. For the purpose of considering the issue, in our opinion, certain clauses incorporated in the contract are relevant and those clauses are reproduced herein below:

> *"Clause 39. Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the Schedule of Rates, South Central Railway modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractor shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved.*
>
> *The rates payable for such items shall be decided at the meeting to be held between the Engineer and the contractor in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure. Provided that if the Contractor commences work or incurs any expenditure in regard thereto before the rates are determined and agreed upon as lastly mentioned, then and in such a case the Contractor*

shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the rates as aforesaid according to the rates as shall be fixed by the Engineer. However, if the contractor is not satisfied with the decision of the Engineer in this respect he may appeal to the Chief Engineer within 30 days of getting the decision of the Engineer supported by the analysis of the rates claimed. The Chief Engineer's decision after hearing both the parties in the matter would be final and binding on the contractor and the Railway. Clause-63. 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 Railway and the Railway shall within a reasonable time after receipt of the contractor's presentation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clause 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(xiii)(B)(e)(b) of the General Conditions of contract or in any Clause of the Special conditions of the contract shall be deemed as 'Excepted matters' and decisions thereon shall be final and binding on the contractor; provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration."

4. Upon perusal of Clause 63 of the aforestated contract, it is quite clear that the matters for which provision had been made in Clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(xiii)(B)(e)(b) of the General Conditions of Contract were excepted matters and they were not to be referred to the arbitrator.

5. In the instant case, we are concerned with a dispute which had arisen with regard to the amount payable to the contractor in relation to extra work done by the contractor.

6. Upon perusal of Clause 39, we find that in the event of extra or additional work entrusted to the contractor, if rates at which the said work was to be done was not specified in the contract, the amount payable for the additional work done was to be discussed by the contractor with the concerned Engineer and ultimately the rate was to be decided by the Engineer. If the rate fixed by the Engineer was not acceptable to the contractor, the contractor had to file an appeal to the Chief Engineer within 30 days of getting the decision of the Engineer and the Chief Engineers decision about the amount payable was to be final.

7. It is not in dispute that some work, which was not covered under the contract had been entrusted to the contractor and for determining the amount payable for the said work, certain meetings had been held by the contractor and the concerned Engineer but they could not agree to any rate. Ultimately, some amount was paid in respect of the additional work done, which was not acceptable to the contractor but the contractor accepted the same under protest.

8. In addition to the aforestated dispute with regard to determination of the rate at which the contractor was to be paid for the extra work done by it, there were some other disputes also and in order to resolve all those disputes, Respondent No. 5, a former Judge of the High Court of Andhra Pradesh, had been appointed as an Arbitrator.

9. The learned Arbitrator decided all the disputes under his Award dated 21.9.2002 though the respondent had objected to arbitrability of the disputes which were not referable to the Arbitrator as per Clause 39 of the Contract. Being aggrieved by the Award, Union of India had preferred an appeal before the Chief Judge, City Civil Court, Hyderabad under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) and the said appeal was allowed, whereby the Award was set aside.

10. Before the City Civil Court, in the appeal filed under Section 34 of the Act, the following two issues had been framed:

(a) Whether the dispute was in relation to an excepted matter and was not arbitrable?

(b) Whether the claimant was entitled to the amounts awarded by the Arbitrator?

11. The Court decided the appeal in favour of the respondent and against the contractor. Being aggrieved by the order dated 8.4.2005 passed by the XIVth Additional Chief Judge, City Civil Court, Hyderabad, CMA No. 476 of 2005 was filed by the contractor before the High Court and the High Court was pleased to dismiss the same by virtue of the impugned judgment and therefore, the contractor has filed this appeal.

12. The learned counsel appearing for the appellant-contractor had mainly submitted that as per Clause 39 of the contract, the Engineer of the respondent authorities was duty bound to decide the rate at which payment was to be made for the extra work done by the contractor, through negotiations between the parties. A final decision on the said subject was taken by the respondent authorities without the contractor's approval and therefore, there was a dispute between the parties. He further submitted that no decision was taken by the Engineer and therefore, there was no question of filing any appeal before the Chief Engineer and as the Chief Engineer did not take any decision, the aforestated clauses, viz. Clauses 39 and 64 would not apply because clause 64 would except a decision of the Chief Engineer, but as the Chief Engineer had not taken any decision, there was no question with regard to excepting clause 39. He had, therefore, submitted that the Award in toto was correct and the High Court had wrongly upheld the dismissal of the Award by the trial Court.

13. The learned counsel had, thereafter, referred to the judgments delivered by this Court in General Manager, Northern Railway and another v. Sarvesh Chopra [(2002) 4 SCC 45] and Madnani Construction Corporation (P) Limited v. Union of India & ors.[(2010) 1 SCC 549] to substantiate his case.

14. The learned counsel had, thereafter, submitted that the appeal deserved to be allowed and the judgment delivered by the High Court confirming the order passed by the City Civil Court deserved to be quashed and set aside.

15. There was no representation on behalf of the Union of India and therefore, we are constrained to consider the submissions made by learned counsel for the appellant only.

16. Upon perusal of both the clauses included in the contract, which have been referred to hereinabove, it is crystal clear that all the disputes were not arbitrable. Some of the disputes which had been referred to in Clause 39 were specifically not arbitrable and in relation to the said disputes the contractor had to negotiate with the concerned Engineer of the respondent and if the contractor was not satisfied with the rate determined by the Engineer, it was open to the contractor to file an appeal against the decision of the Engineer before the Chief Engineer within 30 days from the date of communication of the decision to the contractor.

17. In the instant case, there was no finality so far as the amount payable to the contractor in relation to the extra work done by it is concerned, because the said dispute was never decided by the Chief Engineer. In the aforestated circumstances, when the disputes had been referred to the Arbitrator, the disputes which had been among excepted matters had also been referred to the learned Arbitrator.

18. Upon perusal of the case papers we find that before the learned Arbitrator, the respondent did object to the arbitrability of the disputes covered under Clause 39, but the Arbitrator had decided the said issues by holding that the same were not excepted matters but arbitrable.

19. The question before this Court is whether the Arbitrator could have decided the issues which were not arbitrable.

20. 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.

21. 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.

22. 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.

23. We also take note of the fact that the contract had been entered into by the parties on 24.4.1995 and the contractual work had been finalised on 31.3.1997. The Award was made on 21.9.2002 and therefore, we uphold the portion of the

award so far as it pertains to the disputes which were arbitrable, but so far as the portion of the arbitral award which determines the rate for extra work done by the contractor is concerned, we quash and set aside the same.

24. Needless to say that it would be open to the contractor to take appropriate legal action for recovery of payment for work done, which was not forming part of the contract because the said issue decided by the Arbitrator is now set aside.

25. For the reasons recorded hereinabove, the appeal is partly allowed with no order as to costs.

.....J.
(ANIL R. DAVE)

.....J.
(VIKRAMAJIT SEN)

New Delhi September 05, 2014.

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Annexure – 5.1

Supreme Court of India

Dolphin Drilling Limited vs Oil & Natural Gas Corporation Limited, on 17.02.2010

ARBITRATION PETITION NO. 21 OF 2009

Dolphin Drilling Limited ..... Petitioner

Versus

Oil and Natural Gas Corporation Limited ..... Respondent

Author: Aftab Alam, J.
Bench: Aftab Alam

ORDER

1. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator for and on behalf of the respondent and to refer the dispute(s) between the parties for arbitration. The applicant and the respondent entered into an agreement dated October 17, 2003 for "Charter Hire of Deepwater Drilling Rig DP-Drill Ship `Belford Dolphin' along with Services on Integrated Basis". In terms of the agreement, the applicant was to carry out drilling operations for the respondent in the offshore waters of India as allocated by the respondent. Clause 28 of the agreement contained the arbitration clause. According to the applicant, though the period of the agreement came to an end on February 13, 2007, on being called upon by the respondent, it continued to provide further services till April 10, 2007 for which it was entitled to be paid additionally on comparable rates under the agreement.

2. The applicant makes the grievance that a number of its invoices were not paid or only paid in part by the respondent and on demands made by it the respondent did not even give any satisfactory reply for non-payment/part-payment of those invoices. Failing to get any positive response from the respondent despite demands and reminders, the applicant was left with no option but to invoke the arbitration clause under the agreement. It accordingly, addressed a notice to the respondent on January 29, 2008 invoking arbitration on the disputes broadly set-out in the notice and nominating Mr. Justice S. P. Bharucha, a former Chief Justice of India, as its arbitrator. The applicant further states that the respondent did not respond to the arbitration notice in the manner as provided in the arbitration clause in the agreement and hence, it was forced to move this application before the court.

3. Mr. Gaurav Agrawal, learned counsel appearing for the respondent, accepted the provision for arbitration vide clause 28 of the agreement dated October 17, 2003. He also acknowledged that the dispute(s) raised by the applicant in the arbitration notice dated January 29, 2008 arose under the agreement dated October 17, 2003 and was/were fully arbitrable. Nevertheless, he resisted the applicant's prayer to refer the dispute(s) raised in the arbitration notice dated January 29, 2008 to arbitration on the plea that the applicant had already invoked the arbitration clause albeit in connection with a different dispute earlier arising under the agreement.

4. Mr. Agrawal submitted that the remedy of arbitration under clause 28 of the agreement was a one-time measure and it could not be taken recourse to repeatedly even though the disputes may be different and unconnected to each other. Learned counsel further submitted that the arbitration was an expensive proposition and even though the respondent was liable to bear only half of the expenses, the financial burden cast by the arbitration proceedings in terms of fees for the learned arbitrators and counsel/solicitors and other incidental expenses was quite onerous. Hence, the arbitration clause in the agreement envisaged one, single arbitration for all disputes between the parties and not repeated arbitrations for different disputes arising between the parties at different times under the same agreement. The gist of the respondent's objection is contained in sub-paragraphs (d) and (e) of paragraph 4 of its counter affidavit which are reproduced below:

"(d) The respondent would further beg leave of this Hon'ble Court to submit that in the List of Dates and in the Arbitration Application, the Petitioner did not refer to the fact that the petitioner had already invoked clause 28 of the agreement in 2004. Pursuant to the said request for arbitration, an Arbitration Tribunal consisting of Hon'ble Mr. Justice B. P. Sharaf (Retd.), Hon'ble Mr. Justice S. C. Pratap and Hon'ble Mr. Justice A. K. Dutta (Retd.) was constituted in the year 2005. The said arbitration has continued for the last more than four years. Needless to mention, the Respondent has incurred heavy expenses in the arbitration which is at the concluding stage, i.e. arguments have been completed and written submissions to be filed.

(e) In view of the aforesaid invocation of Clause 28 by the Petitioner, the notice issued by the Petitioner on 29.01.2008 purportedly invoking the arbitration clause once again and raising further disputes was not permissible under the contract. It is most respectfully submitted that there cannot be repeated arbitrators in relation to the very same contract. The arbitration agreement cannot be interpreted to imply that for every dispute under the contract, the parties can invoke a fresh arbitration. As per the contract, all disputes should have been referred to arbitration at one go."

5. The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time-consuming means for resolution of disputes. But on that basis, it is difficult to read the arbitration clause in the agreement as suggested by the respondent. Clause 28 of the agreement dated October 17, 2003 reads as follows:

"28. SETTLEMENT OF DISPUTES
28.1 Except as otherwise provided elsewhere in the Agreement, if any dispute, difference, question or disagreement or matter whatsoever shall, before or after completion or abandonment of work or during extended period, hereafter arises between the parties hereto or respective representative or assignees concerning with the construction, meaning, operation or effect of the Agreement or out of or relating to the Agreement or breach thereof shall be referred to arbitration.

28.2 The reference to arbitration shall be to an arbitral tribunal consisting of three arbitrators. Each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator.

28.3 The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration clearly stating all disputes to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days. If the other party fails to appoint its arbitrator within stipulated period or the two arbitrators fail to appoint the third arbitrator, Chief Justice of High Court of competent jurisdiction or Chief Justice of India as the case may be or any person or institution designated by them shall appoint the Second Arbitrator and/or the Presiding arbitrator as the case may be."

6. The plea of the respondent is based on the words "disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

7. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non- arbitrable.

8. For the reasons aforesaid I am unable to sustain the objection raised on behalf of the respondent.

9. In the result, the application is allowed. The applicant has nominated Justice S. P. Bharucha, a former Chief Justice of India, as its arbitrator. Justice Mrs. Sujata V. Manohar, a former judge of this court, is appointed arbitrator on behalf of the respondent, subject to her consent and on such terms as she may deem fit and proper.

10. The Registry is directed to communicate this order to the learned Arbitrator to enable her to enter upon the reference and decide the matter as expeditiously as practicable.

11. The petition stands disposed of with no order as to costs.

.....J
(AFTAB ALAM)

New Delhi, February 17, 2010.

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Annexure – 5.2

High Court of Delhi at New Delhi

Gammon Indian Limited vs NHAI, on 23.06.2020

OMP 680/2011 [New No. O.M.P. (COMM)392/2020] & I.A. 11671/2018

Gammon India Limited & Anr. ……..... Petitioners
Through: Dr. P. C. Markanda, Senior Advocate
with Mr. Chirag Shroff and
Ms. Neihal Dogra, Advocates.

Versus

National Highway Authority of India ……..... Respondent
Through: Ms. Padma Priya and
Mr. Dhruv Nayar, Advocates.

Reserved on: 10th January, 2020

Date of decision: 23rd June 2020

CORAM: Justice Prathiba M. Singh

JUDGMENT

1. Arbitration was to be the panacea for the woes of litigation. As an `alternate dispute resolution' mechanism, arbitration has however become complex, owing to several reasons such as long delays, challenges in enforcement, high costs etc., One other reason rendering arbitral processes complex is `MULTIPLICITY' - multiple invocations, multiple references, multiple Arbitral Tribunals, multiple Awards and multiple challenges, between the same parties, in respect of the same contract or the same series of contracts. Repeated steps have been taken in judgments and by amendments to the law, to make the system efficient, but more needs to be done.

Brief Facts

2. In the present case, a contract was executed between Gammon- Atlanta JV, a Joint Venture of Gammon India Ltd. and Atlanta Ltd. (hereinafter "Contractor") and National Highways Authority of India (hereinafter "NHAI") on 23rd December, 2000 for the work of widening to 4/6 lanes and strengthening of existing 2 lane carriageway of NH-5 in the State of Orissa from km 387.700 to 414.000 (Khurda to Bhubaneswar) Contract Pkg. OR-1 (hereinafter "Project"). The value of the work was approximately Rs. 118.9 crores. The date of commencement of the contract was fixed as 15th January, 2001 and the project was to be executed within 36 months i.e., by 14th January, 2004.

3. The Project was not executed within the prescribed time. Extensions for completing the Project were granted till 31st December, 2006. Vehicular traffic was allowed on the main carriageway in March, 2007 and according to the Contractor, this amounted to a deemed 'taking over' of the carriageway by NHAI and hence completion.

Award No. 1 - 5th October, 2007

4. During the course of execution of the Project, disputes had arisen between the parties in respect of some claims. The same were raised both by the Contractor and by NHAI. On 1st August, 2004, the Disputes Review Board (hereinafter "DRB") was constituted in terms of sub-clause 67.1 of the Conditions of Particular Application (hereinafter, "COPA"). The DRB is stated to have expressly communicated its inability to resolve issues pertaining to a period earlier to its constitution. The DRB thus did not resolve the issues and accordingly, the Contractor invoked arbitration under sub-clause 67.3 of COPA vide notice dated 27th January, 2005. The relevant claims referred for arbitration are as under:

"Claim 2.1: Compensation for losses incurred on account of overhead and expected profit
Claim 2.2: Compensation for reduced productivity of machinery and equipment deployed.
Claim 2.3: Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement."

5. The Arbitral Tribunal, consisting of Mr. P. B. Vijay, Mr. C. C. Bhattacharya and Mr. R. T. Atre, was appointed and the award was rendered on 5th October, 2007 (hereinafter "Award No.1"). The findings in Award No. 1 with respect to Claim Nos. 2.1, 2.2 & 2.3 are as under:

- Claim No. 2 was found to not be barred by limitation as even though the DRB was constituted on 1st August, 2004, it expressed its inability to give its recommendation only on 17th November, 2004. Thus, the limitation period of 56 days was considered to begin from 17th November, 2004, making the notice dated 27th January, 2005 within the prescribed limitation period.

- The Contractor claimed compensation on the basis of the following six alleged breaches by NHAI: (1) Late appointment of key personnel, (2) Delay in payments, (3) Virtual suspension of BC work from December, 2003 to March, 2005, (4) Failure to sanction adequate extension of time, (5) Failure to constitute Dispute Review Board and (6) Delay in handing over of site.

- As regards the first five alleged breaches, the Arbitral Tribunal (hereinafter, "AT") found that the actions of NHAI either did not materially affect the progress of the work, the Claimant's preparedness itself was inadequate or that alternate relief is available/has been availed by the Contractor. It was therefore held that the Contractor did not deserve any compensation on these grounds.

- As regards the sixth alleged breach, the AT concluded that the initial work of the Contractor was affected by NHAI's inability to fulfill its obligations under Clause 42.01, however, once the hindrances were removed, the Contractor was not able to accelerate the progress of the work. The Contractor's claim for compensation was therefore restricted to the initial contract period during which time approximately Rs. 37/- crores worth of work is estimated to have been affected.

- With respect to Claim 2.1, since the Contractor's deployment of resources on overheads and their underutilization was admitted to the extent of 14.28%,

compensation of Rs. 5.28 crores (14.28/100 x 37) was awarded to the Contractor. The claim for loss of profits was, however, rejected on the ground that the Contractor is still executing the work and will earn profit/loss commensurate with the work done.

• With respect to Claim 2.2, the AT held that though work worth Rs. 37 crores was affected during the initial contract period, since the Contractor itself was responsible for underutilization of machinery and equipment, compensation of only 5% i.e., Rs. 1.85 crores (5/100 x 37), could be awarded.

• With respect to Claim 2.3, it was observed that this sub-claim had not been mentioned in the list of claims included in the notice dated 27th January, 2005 invoking arbitration, followed by letter dated 21st February, 2005. Claim 2.3 was therefore considered outside the AT's terms of reference.

6. Thus, as per Award No. 1, Claim Nos. 2.1 and 2.2 were allowed and Claim No. 2.3 was rejected on the ground that it was outside the terms of reference.

7. Award No. 1 was challenged by the Contractor and by NHAI in OMP 99/2008 and OMP 107/2008. In OMP 99/2008, the Contractor withdrew the challenge in respect of Claim No. 2.3, which was rejected and sought liberty to approach the 2nd Arbitral Tribunal. Vide order dated 13th March, 2009, the same was permitted in the following terms:

"The petitioner seeks to withdraw the challenge to the claim 2.3 with liberty to agitate the same before the arbitrator. The counsel for the respondent without prejudice to the rights and contentions of the respondent, to take pleas qua the said claim before the arbitrator has no objection to the amendment being allowed.

Accordingly, the application is allowed. The grounds XVI and XVII raised with regard to claim 2.3 and the prayer paragraph also in relation to claim 2.3 is allowed to be amended in the aforesaid terms with liberty to the petitioner to pursue the said claim before the Arbitral Tribunal and without prejudice to the rights of the respondent to take all pleas in opposition thereto before the Arbitral Tribunal."

8. Award No. 1 was thereafter upheld by a learned Single Judge of this Court on 15th November, 2016. Two learned Division Benches also upheld the award vide judgments dated 18th January, 2017 and 20th February, 2017. Two SLPs, being SLP (C) No. 17022/2017 and 22663/2017, were dismissed on 8th August, 2017 and 11th September, 2017 respectively. Thus, Award No. 1 attained finality.

Award No.2 - 21st February, 2011 (Impugned Award)

9. In 2007, the Contractor had invoked the jurisdiction of the DRB in respect of payment of Tack Coat under bill of quantities (hereinafter, "BOQ") item No. 4.02 (b). The DRB rejected the said claim. Thus, the said claim, along with certain other claims, were referred to the Arbitral Tribunal consisting of three members, namely, Mr. Sarup Singh, Mr. C. C. Bhattacharya and Justice E. Padmanabhan (Retd.). This Tribunal was constituted on 2nd January, 2008. Claim 2.3 of Award No. 1 was then filed before this AT owing to the permission granted by the Court

on 13th March 2009. Vide award dated 21st February, 2011 (hereinafter, "Award No.2") by a 2:1 majority, claims of the Contractor were rejected. The minority award granted the claims of the Contractor.

10. The various claims referred to the second Arbitral Tribunal, which rendered Award No. 2, are as under:

"1. Compensation for losses incurred on account of extra expenditure incurred on increased cost of materials, labour, POL etc. for the balance work executed beyond the stipulated date of completion - Rs. 1456.83 lacs (Claim 2.3 in AT 1)
2. Payment of tack coat - Rs. 49,17,00,822/-
3. Interest pendente lite and future @ 18% p.a. of the award sum under claim No. 1 and claim No.2.
4. Cost of Arbitration proceedings."

11. The findings of the majority award in respect of Claim No.1 are set out herein-below:

- That claim no.1 is not barred by limitation. The finding of the Arbitral Tribunal is as under:

"1.41 The claim was referred to DRB on 17.11.2004 (C-94). DRB could not make recommendations within 56 days. The contractor invoked the Arbitration clause on 25.1.2002 (C-98) for certain claims including Claim No. 2.3 (which is claim no. 1 here). The first AT ruled that the said claim was outside the reference made to Tribunal. This observation/order is recorded in the award dated 05-10-2007 (C-101). This claim is for seeking compensation for losses incurred on account of extra expenditure incurred on increased cost of material, labour, POL etc. beyond 14-01-2004. The contractor invoked Arbitration clause on 25-1-2005, i.e. when the work was still in progress. This period is well within the provision of Article 137 of Limitation Act. This Claim has not been adjudicated upon by the 1st Tribunal."

- On merits, the 2nd AT held that the delay of two weeks in the appointment of the engineer and delay of five weeks, by the NHAI, in intimating the Contractor, was a short delay and did not affect the progress of the work.

- That there was a delay in providing a hindrance-free work site to the Contractor by NHAI.

- The 2nd AT further analysed that the total value of the work was approximately Rs.118.90 crores. Work worth Rs. 5031.43 lakhs was carried out by January, 2004 i.e., the stipulated period for completion of the contract. This constituted 42.3% of the work in monetary terms. The balance work was 57.7%, for which a hindrance-free site was already available. To execute this work, the Contractor took 4 years. Thus, there was clearly a low level of performance by the Contractor despite the site being available, which is, in fact, recorded in minutes dated 15th June, 2004.

- Insofar as delay in payment was concerned, there were three bills which were to be paid. Payments in respect thereof were released on 15th October 2003, 16th December, 2003 and 6th March, 2004. It was held that the delay in payment

was very small and did not cause hindrance in the work. It was further observed that in any case, under clause 60.8, the Contractor was entitled to interest for the delayed period.

• The ground taken that there was suspension of the entire BC work due to delays by NHAI was rejected after a detailed factual analysis of the Arbitral Tribunal. The Arbitral Tribunal also relied upon Award No.1, which dealt with this very issue, to reject the claim of the Contractor for compensation.

• Non-grant of time extension was not considered in Award No.2 as the same was pending before the DRB.

• The 2nd AT held that there was no delay in constitution of the DRB.

• In view of the above findings, the Arbitral Tribunal in Award No.2 considered Clause 70.3 and 70.2 of the contract. The said clauses are extracted herein below:

"Sub- Clause 70.2: Other changes in cost
To the extent that full compensation for any rise or fall in the costs to the Contractor is not covered by the provisions of this or other clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall in cost.

Sub-Clause 70.3: Adjustment formula
The adjustment to the Interim Payment Certificates in respect of changes in cost and legislation shall be determined from the following formula:

*Pn = A + b (Ln/Lo) + c * (Mn/Mo) + d*(Fn/Fo) + Bn/B3*

Where:
Pn is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-Clause 60.1(d), and with Sub-Clauses 60.1 (e) and (f), where such variations and Daywork are not otherwise subject to adjustment.

A = 0.50, b = 0.15, c = 0.25, d = 0.10

Ln, Mn, Fn etc., are the current cost indices or reference prices of the cost elements in the specific currency for month "n" determined pursuant to Sub-Clause 70.5, applicable to each cost element: and

Lo, Mo, Fo etc. are the base cost indices or reference prices corresponding to the above cost elements at the date specified in Sub-Clause 70.5.

The amounts, determined as payable to the contractor as a price adjustment factor in a currency or currencies other than the Indian Rupee. Will be converted from Indian Rupees to the currency or currencies of payment at the exchange rate (s), as determined by the Reserve Bank of India, on the date of current index and not at the rate (s) established in the Appendix to Bid, if any."

• After analysing the two clauses, the Arbitral Tribunal arrived at the following conclusion:

"1.49 Every contract for construction work has some inbuilt uncertainties. Such uncertainties arise during construction period due to lack of complete and timely fulfilment of the obligations by the claimant and the respondent towards the other party. It leads to delay in the completion of work. The financial effect of some of such uncertainties cannot be truly quantified. Therefore, it is regulated by making certain provision/conditions in the contract agreement.

1.50 The 1st AT has awarded Rs. 5.28 crores and Rs. 1.85 crores towards claim 2.1 and claim No. 2.2 respectively. Apparently, the provisions of section 55 of Indian Contract Act, whereever applicable, stand covered through the award order passed by 1st AT.

1.51 With the provisions under clause 70.2 of the contract agreement, statement of the witness CW-1 during cross examination does not provide any support to the claimant.

1.52 The Arbitral Tribunal holds that under the provisions of Sub Clause 70.2, this claim does not succeed. Nothing more is admissible for payment beyond the provisions of sub clause 70.3. Hence amount awarded is Rs. Nil only."

12. The present petition challenges Award No.2.

Award No. 3 - 20th February, 2012

13. NHAI imposed liquidated damages on the Contractor for the delay caused. Seven disputes were referred to the DRB on 24th March, 2008. However, dissatisfied with the recommendations of the DRB, a third arbitration was invoked by the Contractor vide letter dated 23rd December, 2008. The following claims were referred to the Arbitral Tribunal consisting of Mr. R. H. Tadvi, Mr. V. Velayutham and Mr. V. S. Karandikar:

"1. Recovery of alleged Liquidated Damages
2. Recovery of Building and other construction Workers Welfare Cess
3. Recovery of Alleged Penalty for not providing vehicles to the Engineer
4. Premature recovery of discretionary advance
5. Interest on Discretionary Advance
6. Earthworks pertaining to Clearing and Grubbing
7. Claim for payment of interest due to premature deductions of secured advance by the Respondent.
8. Interest pendente lite and future
9. Cost of Arbitration Proceeding"

14. Vide award dated 20th February, 2012 (hereinafter, "Award No.3") the Contractor's claim for recovery of amounts paid as liquidated damages was allowed. The findings in Award No. 3 in respect of Claim No. 1 are summarised below:

• Claim 1: The Contractor was allowed a refund of the entire amount of liquidated damages imposed. Refund was given on the ground that the Contractor was

entitled to a further extension of time and hence the imposition of liquidated damages was illegal. It was observed that NHAI could not impose liquidated damages on the Contractor when it had failed to provide a hindrance-free site and had also taken over the road. It was also found that in contravention of the contract, prior notice for imposition of liquidated damages was not issued. Furthermore, since certified payments to the Contractor were withheld, it was held that the Contractor had the right to slow down the rate of work as per the terms of the contract. The Contractor was also awarded interest @10% p.a. compounded monthly for the payments withheld against the liquidated damages. A declaratory award, prohibiting the imposition of further liquidated damages, was also given.

15. Award No. 3 has been upheld by a learned Single Judge and a learned Division Bench of this Court. NHAI has paid the awarded sum and the award has attained finality.

Procedural History of the Present Petition

16. The present petition was filed in August, 2011. Initially itself, it was submitted by the Contractor that it does not press objections qua Claim No. 2 i.e., payment of tack-coat. This was recorded in order dated 20th September, 2011 as under:

"Learned counsel for the petitioner, on instructions, submits that the petitioner does not press the objections to the award made on claim No.2. Mr. Bansal also submits that another arbitration proceeding in relation to levy of liquidated damages under the same contract, by the respondent, is pending disposal before another tribunal. Arguments have been heard and the award has been reserved in those proceedings."

17. The petition was then dismissed for non-prosecution on 20th January, 2017. The same was, however, restored on 15th March, 2017. Vide order dated 6th August, 2019, the counsel for the parties, on a query from the Court, submitted as under:

"Dr. P. C. Markanda, learned senior counsel for the Petitioner submits that according to his client, the indices were frozen as in the original contract period. He relies on a few letters which have been placed on record. Hence according to him, no escalation was in fact paid.

On the other hand, learned counsel for NHAI submits that the escalation as per Clause 70.3 has been paid to the Petitioner to the tune of Rs. 15,29,15,363/- up to the last IPC No. 94.

In view of the Full Court Reference, further hearing is deferred to 4th September, 2019."

18. Thus, the only claim to be considered in this petition is Claim No. 1, wherein the case of the Contractor is that the revision of rates did not take place and hence, the Contractor is entitled to additional amounts.

Submissions of Learned Counsels

19. Mr. Markanda, learned Senior Counsel appearing for the Contractor, has raised a two-fold argument. First, it is submitted that the finding in Award No. 3 that NHAI was responsible for the delay would bind the present proceedings as well. Secondly, that even otherwise, the delay was clearly caused by NHAI and the Contractor is entitled to escalation/compensation for the losses due to the said delays. The submission is that there were delays in the appointment of the engineer and handing over of the site and delays caused due to non-payment of dues, placing of variation order which had to be executed by the Contractor, non-grant of extension of time to the Contractor and default/delay in constituting the DRB.

20. The findings of the Arbitral Tribunal in Award No. 2 with respect to Claim No. 1 are that the consequences for uncertainties and delays during construction work are fully provided for in the contract itself. Insofar as any damages/compensation are concerned, which the Contractor may be entitled to claim under Section 55 of the Indian Contract Act, 1872 (hereinafter, "ICA"), the same were found to be covered by Award No. 1 which awarded Rs. 5.28 crores and Rs. 1.85 crores towards Claims 2.1 and 2.2 of the Contractor. Submission of Mr. Markanda, learned Senior Counsel, is that the claim has been confused by the Arbitral Tribunal as being an award under Section 55 of the ICA whereas, in fact, Claim No. 1 was not a claim under Section 55.

21. It is further argued by Mr. Markanda, that in Award No. 3 there was a clear finding that NHAI had caused a delay on various counts and hence, in view of the finding in Award No.3, this claim ought to be automatically allowed. Reliance is placed on the minority award of the 2nd AT to argue that the minority award clearly distinguishes between compensation payable under Section 55 and Section 73 of the ICA. He urges this Court to uphold the minority award under which the Contractor has been awarded the following sum:

"In the result there will be an Award in the following terms:

I. The Respondent is directed to pay to the Claimant the sum of Rs. 49,17,00,822/- with subsequent interest @ of 18% P.A. on Rs. 32,97,36,489/- from 22.10.2007 till date of payment towards tack-coat work executed falling under BOQ entry 4.02 (b).
II. The Claimant is entitled to the relief of declaration declaring that the Claimant is entitled to payment for the balance of work falling under BOQ entry 4.02 (b) Tack-coat as and when executed at the rate of Rs. 400/sq.m.
III. The Respondent is directed to pay Rs. 1456.83 Lakhs to the Claimant towards loss incurred on account of extra expenditure incurred on increased cost of materials, labour, POL etc. with interest @ 12% P.A from 01.02.2005 the date of claim and till the date of payment.
IV. The relief of declaration prayed for as to compensation for the future period and balance of work executed during such period is left open to be agitated in future.

And

V. Both the parties shall bear their respective costs in the present proceedings throughout."

22. On the other hand, on behalf of NHAI, Ms. Padma Priya, learned Counsel, submits that Award No. 2 is detailed. The Contractor had multiple opportunities before the Arbitral Tribunal and has lost on both counts. The minority award is of no consequence once the majority award has rejected the claims of the Contractor. Learned Counsel further submits that there was no reason as to why this Claim was not included in the reference leading to Award No. 1. This claim according to her is barred. It is further submitted by learned Counsel that escalation has in fact been granted under Clause 70.3. She further urges that the findings by the DRB, 1st AT and the 2nd AT are consistent and thus the petition is liable to be dismissed.

Analysis and Findings

23. The chronology of facts set out above shows that the parties had appointed three Arbitral Tribunals which adjudicated different disputes and claims. There were three Awards. Award No. 1 and 3 have attained finality. In this petition, the challenge is to Award No. 2. The Contractor's submission is that the findings in Award no. 3 be relied upon, for setting aside Award no. 2. The question that arises is whether it is permissible for the Contractor to jettison the findings in Award No. 3 to argue that Award No. 2 ought to be set aside and the claims of the Contractor ought to be allowed. Before going into the challenge to Award no. 2, the legal position on multiple arbitrations and multiple awards needs to be analysed.

24. A perusal of the provisions of the Arbitration and Conciliation Act, 1996 shows that the statute envisages that disputes can be raised at different stages and there can be multiple arbitrations in respect of a single contract. By way of illustration, Section 7(1), Section 8(3) and Section 21, can be seen, which read:

"7. Arbitration agreement. - (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

8. Power to refer parties to arbitration where there is an arbitration agreement–

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

21. Commencement of arbitral proceedings - Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

Under Sec. 7 the agreement to arbitrate could be for "all or certain disputes which have arisen or which may arise". Under Sec.8 if a particular proceeding is pending in court and there is a lis as whether a particular dispute is arbitrable, for other disputes, arbitration can be commenced or continued and even the award can be made. This means that, if the court, thereafter comes to the conclusion that the dispute is arbitrable, after the first reference is either pending or concluded, a second reference can be made. The commencement of proceedings under Section 21 is to be construed in respect of a particular dispute. Thus, if there are multiple

disputes which have been raised at different times, the commencement of proceedings would be different qua each of the disputes. All these provisions show that there can be multiple claims and multiple references at multiple stages.

25. Filing of different claims at different stages of a contract or a project is thus permissible in law, inasmuch as the contract can be of a long duration and the parties may wish to seek adjudication of certain disputes, as and when they arise. Despite this permissibility, multiplicity ought to be avoided as discussed hereinafter.

26. The endeavour of Courts in the domain of civil litigation is always to ensure that claims of parties are adjudicated together, or if they involve overlapping issues, the subsequent suit is stayed until the decision in the first suit. It is with the intention of avoiding multiplicity that the principles enshrined in Order 2 Rule 2 CPC, Section 10 CPC and Res Judicata are part of the Code of Civil Procedure from times immemorial. However, since arbitral proceedings are strictly not governed by the Code of Civil Procedure, 1908, it is possible for parties to invoke arbitration as and when the disputes arise, but should the same be permissible without any limitation and ignoring the principles of public policy as enshrined in these provisions.

27. Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive.

28. Typically, in construction contracts, the claims may be multiple in number but the underlying disputes about breach, delays, termination etc., would form the core of the disputes for almost all claims. As is seen in the present case, parties have invoked arbitration thrice, raising various claims before three different Tribunals which have rendered three separate Awards. Considering that a previously appointed Tribunal was already seized of the disputes between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable. A situation where multiple Arbitral Tribunals parallelly adjudicate different claims arising between the same parties under the same contract, especially raising overlapping issues, is clearly to be avoided.

29. Multiple arbitrations can be of various categories:

(i) Arbitrations and proceedings between the same parties under the same contract.
(ii) Arbitrations and proceedings between the same parties arising from a set of contracts constituting one series, which bind them in a single legal relationship.
(iii) Arbitrations and proceedings arising out of identical or similar contracts between one set of entities, wherein the other entity is common.

30. In Category (i) cases seeking a second reference under Section 11 of the Arbitration and Conciliation Act, 1996 for adjudication of disputes, the Supreme Court and High Courts have referred disputes between the same parties arising under the same contract, to arbitration. In Indian Oil Corporation Vs. SPS Engg. Co. Ltd, a claim relating to risk-execution of balance work, which was not referred

to the first Tribunal, was referred to arbitration. Similar is the position in Sam India Built Well (P) Ltd. v. UOI [(2011) 3 SCC 507[& Ors. [Arb. P. 106/17, decided on 8th September, 2017]; Parsvnath Developers Limited and Ors. v. Rail Land Development Authority [Arb. P. 724/18, decided on 31st October, 2018]; Parsvnath Developers Limited and Ors. v. Rail Land Development Authority [Arb. P. 710/19, decided on 19th May, 2020].

31. In a set of petitions involving several caterers and the Indian Railway Catering & Tourism Corporation Limited2 (IRCTC cases) involving 25 petitions which fell in category (iii) above, the Delhi High Court recently appointed a single arbitrator to adjudicate the disputes.

32. However, what can lead to enormous uncertainty and confusion which ought to be avoided is the constitution of separate Arbitral Tribunals for separate claims in respect of the same contract, especially when the first Arbitral Tribunal is still seized of the dispute or is still available to adjudicate the remaining claims. In Dolphin Drilling Ltd. v. ONGC, the Supreme Court, while considering the question as to whether a second reference for arbitration ought to be made, observed as under:

"5. The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time-consuming means for resolution of disputes. But on that basis, it is difficult to read the arbitration clause in the agreement as suggested by the respondent. …

6. The plea of the respondent is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all ARB.P. 745-51/2019; ARB.P. 753/2019; ARB.P. 755-61/2019; ARB.P. 763/2019; ARB.P. 765-70/2019; ARB.P. 780/2019; ARB.P. 789/2019 & ARB.P. 797/2019 AIR 2010 SC 1296 disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future."

33. A perusal of the above finding of the Supreme Court clearly shows that the Court has expressed its displeasure about the arbitration process becoming a highly expensive and time-consuming means for resolution of disputes. Owing to the wording of the clause, in the said case, the Supreme Court referred the parties to arbitration for the second time. The underlying ratio of Dolphin (supra), on a careful reading, is that all disputes that are in existence when the arbitration clause is invoked, ought to be raised and referred at one go. Though there is no doubt that multiple arbitrations are permissible, it would be completely contrary to public policy to permit parties to raise claims as per their own convenience. While provisions of the CPC do not strictly apply to arbitral proceedings, the

observations of the Supreme Court in Dolphin (supra) show that when an arbitration clause is invoked, all disputes which exist at the time of invocation ought to be referred and adjudicated together. It is possible that subsequent disputes may arise which may require a second reference, however, if a party does not raise claims which exist on the date of invocation, it ought not to be given another chance to raise it subsequently unless there are legally sustainable grounds. This is necessary in order to ensure that there is certainty in arbitral proceedings and the remedy of arbitration is not misused by parties. The constitution of separate arbitral tribunals is a mischief which ought to be avoided, as the intent of parties may also not be bona fide.

34. It is the settled position in law that the principles of res judicata apply to arbitral proceedings. The observations of the Supreme Court in Dolphin (supra) also clearly show that principles akin to Order II Rule 2 CPC also apply to arbitral proceedings. The issue as to whether any claims are barred under Order II Rule 2 CPC or whether any claim is barred by res judicata is to be adjudicated by the arbitral tribunal and not by the Court 5. Keeping in mind the broad principles which are encapsulated in Order II Rule 2 CPC, as also Section 10 and Section 11 of the CPC, which would by itself be inherent to the public policy of adjudication processes in India, it would be impermissible to allow claims to be raised at any stage and referred to multiple Arbitral Tribunals, sometimes resulting in multiplicity of proceedings as also contradictory awards. Thus, this Court is of the considered opinion that:

(i) In respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one Arbitral Tribunal. The solution proposed by the Supreme Court (Aftab Alam, J.,) in paragraph 9 of Dolphin (supra) i.e., to draft arbitration clauses in a manner so as to ensure that claims are referred at one go and none of the claims are barred by limitation, may be borne in mind. The said observation in Dolphin (supra) reads:

"9. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/ cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable."

(ii) If under a contract, disputes have arisen and the arbitration clause is to be invoked, at different stages, the party invoking arbitration ought to raise all the claims that have already arisen on the date of invocation for reference to arbitration. It would not be permissible for the party to refer only some disputes that have arisen and not all. If a dispute and a claim thereunder has arisen as on the date of invocation and is not mentioned, either in the invocation letter or in the terms of reference, such claim ought to be held as being barred/waived, unless permitted to be raised by the Arbitral Tribunal for any legally justifiable/sustainable reasons.

(iii) If an Arbitral Tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references, however, since the Tribunal would be the same, the possibility of contradictory and irreconcilable findings would be avoided.

(iv) In cases belonging to Category (iii) involving different parties and the same organisation, where common/overlapping issues arise, an endeavour could be made as in the IRCTC cases (supra) to constitute the same Tribunal. If that is however not found feasible, at least challenges to the Awards rendered could be heard together, if they are pending in the same Court.

(v) At the time of filing of petitions under Section 11 or Section 34 or any other provision of the Arbitration and Conciliation Act, 1996, specific disclosure ought to be made by parties as to the number of arbitration references, Arbitral Tribunals or court proceedings pending or adjudicated in respect of the same contract and if so, the stage of the said proceedings.

(vi) If there are multiple challenges pending in respect of awards arising out of the same contract, parties ought to bring the same to the notice of the Court adjudicating a particular challenge so that all the challenges can be adjudicated comprehensively at one go. This would ensure avoiding a situation as has arisen in the present case where Award Nos. 1 and 3 have attained finality and the challenge to Award No. 2 continued to remain pending.

35. Coming to the facts, a perusal of the dates would reveal that Award No. 1 was passed on 5th October, 2007 and the Contractor inter alia, challenged the rejection of Claim 2.3 under Section 34 of the Arbitration and Conciliation Act, 1996. Parallelly, the Contractor invoked arbitration in respect of some more claims in 2007. So, while the challenge to Award No. 1 was pending, including the rejection of Claim 2.3, the second arbitration was continuing. In 2009, the Contractor then sought permission of the Court to agitate Claim 2.3 before the second AT, which it was permitted to do, keeping open NHAI's objections. It didn't end there. Thereafter, a third arbitration, in respect of recovery of amounts collected as liquidated damages, along with other claims, was invoked by the Contractor on 23rd December, 2008. Award No. 2 was passed on 21st February, 2011 i.e., when the third arbitration was still continuing. The present OMP came to be filed in August, 2011. In order dated 20th September, 2011, it is noticed that the third arbitral proceeding is underway. The third Arbitral Tribunal concluded its proceedings and rendered its award on 20th February, 2012. The said award attained finality on 14th August, 2013. NHAI is also stated to have paid the awarded sum thereunder.

36. While Awards No. 1 and 3 have attained finality, the challenge in respect of Award No. 2 i.e., the present petition, continues to remain pending. Parties may not have brought to the notice of the Court deciding OMP No. 584/2012, arising out of Award No. 3, that the OMP relating to Award No. 2 is pending before the Court.

37. It is in this background that the Court has to consider the submissions made on behalf of the Contractor that the findings in Award No. 3 have to be read for deciding the present petition. The question that arises is whether it is permissible to read the findings of a subsequent award to decide objections against the previous award.

38. Claim No. 2.3 related to compensation for non-grant of escalation of rates i.e., revision of rates to cover increased cost of material and labour beyond the escalation provision provided in the agreement. This claim was one of the claims raised before the first AT which was, however, rejected by the first AT in the following terms:

"2.2.3.4 Arbitral Tribunal's observations and Conclusion.

2.2.4.1 The Claimant preferred this Claim No .2 under three sub-heads as follows:

Claim 2.1: Compensation for losses incurred on account of overhead and expected profit.
Claim 2.2: Compensation for reduced productivity of machinery and equipment deployed.
Claim 2.3: Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement.

Under sub-claims 2.1, 2.2 & 2.3, the Claimant demanded compensation of Rs. 3751.48 lacs, Rs. 1374.93 lacs and 1406.03 lacs respectively for the period from 15.01.2004 to 06.07.2006 (CA-XV dated 30.10.2006). The Claimant has finally not demanded a declaratory award for these sub-claims.

2.2.4.2 Out of the above three sub claims, the sub claim No. 2.3 does not find a mention in the list of claims included in the notice invoking Arbitration dated 27.01.2005 (C-87) followed by letter dated 21.02.2005 (C-89).

Although, this notice (C-87) is in continuation of the Claimant's notice dated 25.01.2005 to the General manager of the Respondents (C-86), the letter dated 27.01.2005 (C-87), being the later of two letters and addressed to the Chairman (Employer), finally prevails over the letter dated 25.01.2005 (C-86). The notice to commence arbitration dated 27.01.2005 in its third para graph clearly mentions as follows:

"In terms of clause 67.1, we give notice of our intention to commence arbitration in respect of the following issues/claims" (Emphases supplied).

Here the Claimants have listed 9 claims. Sub-Claims 2.3 referred to above is not included in this list. In the very first meeting of the AT held on 06.04.2005 it was made clear by the AT that the present arbitration is only for the claims contained in the Contractor's letters dated 27.01.2005 and 21.02.2005.

Hence the AT rules that sub-claim 2.3 is outside its terms reference."

39. Thus, the first AT was of the opinion that Claim 2.3 ought to have been part of the invocation/reference letter. The said claim, having not been raised in the invocation letter, was held to be outside the terms of reference. There is no doubt that in 2009 this Court permitted the Contractor to agitate the claim before the second AT, however, all objections of NHAI were kept open. The Second AT has, in the impugned award, come to the conclusion that escalation is not liable to be granted because of Clause 70.2, as also the fact that the first AT has taken care of all the escalations which were to be awarded to the Contractor. The reasoning of the Arbitral Tribunal is that insofar as delays, if any, by NHAI are concerned, the first AT has granted all the claims raised by the Contractor and no further claims are liable to be granted. The second AT has also analysed the aspects of delay and concluded that the four year delay by the Contractor after the site was available, was wholly unjustified.

40. The reasoning of the second AT is that Clause 70.2 provides for all possible changes in cost i.e., rise or fall in prices. Clauses 70.2 and 70.3 provide the formula for grant of escalation which has been granted to the Contractor. In view of the said clauses, the second AT holds that no further compensation is liable to be granted. The escalation clause in the contract has a clearly specified formula. If any rise or fall in costs is not covered by the contract, as per Clause 70.2 the unit rates and prices mentioned in the contract would be deemed to cover such contingency. A clear interpretation of this clause would be that if escalation is otherwise not provided under the contract, the only escalation permissible would be under Clause 70.2. The impugned award records that the Contractor did not provide any evidence to support this claim. Since NHAI has already paid as per the escalation clause in the contract, no further escalation is permissible.

41. In Award No. 1, on delay, the Tribunal concludes that delay is attributable to NHAI only to the extent that there was a delay by NHAI in handing over the site. The first AT observes that though the initial work of the Contractor was affected by NHAI's inability to fulfil its obligations under Clause 42.01, once the hindrances were removed, the Contractor was not able to accelerate the progress of the work. However, the 3rd AT, while dealing with the claim for recovery of liquidated damages, records that NHAI did not provide sufficient evidence to support the claim that delay was caused by the Contractor. These awards have to independently stand on their own legs. Any attempt to conflate Award no. 1 into Award no. 2 or Award no. 3 into Award no. 2 would lead to extremely unpredictable consequences. Ideally, since the core issue was of delay, one Tribunal ought to have dealt with all claims. However, that has not happened. It has been a 20-year long journey since the contract was executed in 2000 and the Court is still wrestling with multiplicity of proceedings, arising out of one contract. There needs to be an end to such multiplicity of litigations. The second Award on its own, is quite well reasoned and is also in terms of the clauses of the contract. In view of the same, it cannot be said that the findings in the impugned Award no. 2 are prone to challenge.

42. On behalf of the Contractor, various judgments have been cited to support the proposition that claims for damages due to delay and claims for escalation/ revision of rates are distinct. Both claims can be adjudicated upon and granted separately. Grant of damages does not defeat the claim for escalation. This proposition is not in doubt. However, in the present case, escalation/revision of rates as per the contract has already been granted and the Contractor has been

compensated for the delays both in Award No. 1 and Award No. 3. Claim No. 1 (Claim No. 2.3 before the first AT) is rightly rejected on two counts: (i) that the same was not included in the initial reference, though the dispute had already arisen, (ii) the delays after the clear availability of site was that of the Contractor and (iii) no escalation beyond what is permissible in Clause 70.2 is liable to be granted. Escalation as provided in the Contract has already been granted. This reasoning is not faulty and is not liable to be interfered with.

43. While hearing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, it would be incongruous to hold that a finding in a subsequent award would render the previous award illegal or contrary to law. The award would have to be tested as on the date when it was pronounced, on its own merits, and not on the basis of subsequent findings which may have been rendered by a later Arbitral Tribunal. In Vijay Karia & Ors. v. Prysmian Cavil E Systemic SRL & Ors. the Supreme Court rejected the argument that since the award under challenge is irreconcilable and inconsistent with another award, it deserved to be set aside. Thus, the findings of the second AT do not suffer from any patent illegality or perversity and no other grounds for interference under Section 34 of the Arbitration and Conciliation Act, 1996 are made out. Even if, for the sake of argument, one looks at the findings of the third AT, those relate to delays caused in the project and the right of NHAI to impose liquidated damages. Escalation or compensation for non-payment of increased rates, is not the subject matter of Award No. 3. Thus, none of the findings in Award No. 3 can be jettisoned or incorporated into the present petition to rule in favour of the Contractor qua Award No. 2 for awarding compensation/rate revision/escalation. The stand of the Contractor is thus not tenable and is liable to be rejected. The findings of the majority award are clear and succinct - the scope of interference is very limited. This Court does not find any merit in the present petition.

44. The issue of multiplicity in arbitral proceedings also needs to be effectively dealt with to ensure that a long-drawn arbitral journey, as in the present case, is avoided. Parties to arbitration are expected to adhere to a bona fide discipline of use of arbitral processes. There appears to be a clear need for streamlining the same. The Delhi High Court has issued several practice directions under the Act. One such direction requires that when petitions under Section 9 of the Arbitration and Conciliation Act, 1996, are filed, it is mandatory for the party to mention that no other petition on the same cause of action was filed. In an attempt to further avoid multiplicity of Tribunals and inconsistent/contradictory awards, as has arisen in the present case, the following directions are issued:

(i) In every petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, "Section 34 petition"), the parties approaching the Court ought to disclose whether there are any other proceedings pending or adjudicated in respect of the same contract or series of contracts and if so, what is the stage of the said proceedings and the forum where the said proceedings are pending or have been adjudicated.

(ii) At the time when a Section 34 petition is being heard, parties ought to disclose as to whether any other Section 34 petition in respect of the same contract is pending and if so, seek disposal of the said petitions together in order to avoid conflicting findings.

(iii) In petitions seeking appointment of an Arbitrator/Constitution of an Arbitral Tribunal, parties ought to disclose if any Tribunal already stands constituted for adjudication of the claims of either party arising out of the same contract or the same series of contracts. If such a Tribunal has already been constituted, an endeavour can be made by the arbitral institution or the High Court under Section 11, to refer the matter to the same Tribunal or a single Tribunal in order to avoid conflicting and irreconcilable findings.

(iv) Appointing authorities under contracts consisting of arbitration clauses ought to avoid appointment or constitution of separate Arbitrators/ Arbitral Tribunals for different claims/disputes arising from the same contract, or same series of contracts.

45. The present order be sent to the Learned Registrar General for being placed before Hon'ble the Chief Justice for considering if any modifications are required to be made in the Rules of the Delhi High Court framed under the Arbitration and Conciliation Act, 1996.

46. The present order be also sent to the Secretary, Ministry of Law & Justice, Government of India and the Chairman, National Highway Authority of India.

PRATHIBA M. SINGH JUDGE

JUNE 23, 2020

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Annexure – 6.1

Andhra High Court

Hindustan Shipyard Limited vs Essar Oil Limited and Others, on 29.09.2004

A.A.O. Nos. 255 and 624 of 2003

Author: T. M. Kumari
Bench: T. M. Kumari, G. K. Tamada

JUDGMENT

T. Meena Kumari, J.

1. As the parties in both the CMAs are one and the same and the issue involved in those CMAs are identical, they are being disposed of by this common order.

2. CMA No. 255 of 2003 has been directed against the decree and order dated 10-10-2002 in O.P. No. 989 of 2001 on the file of the Principal District Judge's Court, Visakhapatnam whereas CMA No. 24 of 2003 has been filed against the decree and order dated 1-11-2002 in O.P. No. 96 of 2002 on the file of the Principal District Judge's Court, Visakhapatnam.

3. The appellant herein is the petitioner in OPs and the respondents herein are the respondents in the OPs. The appellant in both the OPs is Hindustan Shipyard Limited rep. by its Chairman and Managing Director through Deputy Manager (Legal) whereas the first respondent in both the OPs is M/s. Essar Oil Limited and the second respondent is the Chairman of the Arbitrary Tribunal and respondents 3 and 4 are the arbitrators of the said Tribunal.

4. The brief facts that led to the filing of the above CMAs are as follows:

The Oil and Natural Gas Commission Limited has awarded a contract to the appellant herein for carrying out works of fabrication, skidding, load out, sea fastening, transportation, installation, book up, testing and pre-commissioning of PB PD and PE and RV 10 and RV 17 platforms at PANNA and RAVVA fields respectively. The appellant herein awarded the said contract to the first respondent herein by different agreements. According to the pricing formula between the parties, the appellant company has to get from the owners actual cost paid to the Contractor plus mark-up ranging from 7.5 to 10%. Later, it was agreed, at the instance of the first respondent, to make payments directly to the first respondent by the owners and a copy would be marked to the appellant-company. Later, the first respondent commenced the work of the assigned contract to it by the appellant and consequently the first respondent invoked the arbitration clause by its letter and appointed the third respondent as their arbitrator and the appellant appointed the fourth respondent as its arbitrator and both the arbitrators appointed the second respondent as its Chairman of the Arbitrary Tribunal as stipulated in the contract. As far as the said arrangement, there is no dispute raised by either party. Various substantial claims besides costs of the arbitration proceedings have been placed by the first respondent before the Arbitration Tribunal relating to both the projects. The majority view

of the Arbitrary Tribunal is that there is no privity of contract between ONGC and EOL and the appellant is contractually liable to pay the outstanding amounts as may be found due to the first respondent which remain unpaid by ONGC and there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law. On the other hand, the dissenting view is that there was privity of contract exists between the first respondent and the ONGC. The Arbitrary Tribunal passed the award in those matters after adjudication. Questioning the said awards, the appellant herein filed O.P. Nos. 989 of 2001 and 96 of 2002 before the Principal District Judge, Visakhapatnam on various grounds.

5. The Award passed in the case of RAVVA project has been challenged before the learned District Judge on the following grounds:

(i) The award, in question, is not a reasoned award;
(ii) The arbitrators have failed to decide the matter according to law;
(iii) Various claims were beyond the contract and the arbitrators ignored the express terms of the contract;
(iv) The arbitrators erred in holding that there is no privity of contract between the ONGC and the first respondent;
(v) The majority view of the arbitrators is manifestly contrary to law of the land and also terms of the contract;
(vi) That the arbitrators allowed the claims contrary to law, to the evidence and the material on record;
(vii) The arbitrators failed to see that some of the claims, especially, claim No. 4 is time barred;
(viii) That the arbitrators failed to conform to the agreed terms of the contract insofar as the claim No. 3 is concerned.
(ix) That the arbitrators failed to recognize the unsustainability of the claim of interest as all the claims are being questioned and challenged by the company and no interest is awardable until the amounts are quantified and on the same ground the award of future interest is erroneous.
(x) The appellant also sought declaration of rejection of the counter claim by the Arbitrary Tribunal as arbitrary and contrary to law.

6. Almost similar grounds have been raised questioning the award passed in the case of PANNA Project by the appellant herein before the learned District Judge.

7. The learned District Judge after hearing both sides confirmed the award in respect of the claims of the first respondent regarding RAVVA project and in so far as the counter claim of the appellant is concerned, the award was set aside and the matter was remanded to the arbitrators to adjudicate the counter claim. With regard to the award passed in respect of PANNA project, the same has been confirmed by the learned District Judge.

8. Questioning those awards, the petitioner in the OPs filed these CMAs.

9. Heard the learned Senior Counsel Sri Anantha Sabu appearing for the appellant and Sri B. Audinarayana Rao for the first respondent and perused the written arguments filed by the parties.

10. The main contention urged before this Court by the learned Senior Counsel Sri Anantha Babu for the appellant is that the appellant is only a certifying agency to certify the work done by the first respondent company. On such certification, the ONGC has to pay the cheques directly to the first respondent. The learned Senior Counsel has further argued that the mode of direct payment has been incorporated in Schedule-E of the agreement at the instance of the respondent company which is evident from its letter dated 30-1-1992. The learned Senior Counsel has also further argued that in spite of the stand taken by the appellant herein in the counter and also written arguments before the arbitrator that though the work was entrusted by the ONGC to the appellant and the appellant has called for the tenders for carrying out works in RAVVA and PANNA Fields which consist of fabrication, skidding, load out, sea fastening, transportation, installation, hookup, testing and pre-commissioning of platforms and the first respondent was awarded the contract pursuant to the tenders called for by the appellant and the first respondent on its own got the amendment to the terms of contract seeking direct payment from the ONGC and therefore the intention of the first respondent is that it wants to have direct contacts with the ONGC and the first respondent restricted the role of the appellant to that of certification of the bills and hence it has to be held that there is a privity of contract between the ONGC and the first respondent but not between the appellant and the first respondent.

11. The learned Senior counsel further argued that the letter of intent has been issued incorporating the modification of mode of payment at the instance of the first respondent to the effect that mode of payment should be direct by way of cheques from ONGC on the certification made by the appellant and to that effect Schedule- E has been introduced on 3-3-1992 and hence the appellant has no liability to the first respondent, if any amount is not paid by the ONGC.

12. The learned Senior Counsel also submitted that in spite of filing voluminous correspondence that took place between the three parties i.e., the appellant, the first respondent and the ONGC and in spite of taking the stand taken that privity of the contract exists by way of tripartite agreement, the majority of the arbitrators felt that there is no need to make ONGC as a party which finding is contrary to the material on record and the learned District Judge also did not properly appreciate the said fact. Further it is submitted that the arbitrators have not considered the voluminous documents placed by the appellant and they have chosen to pass the award without taking all those documents particularly without considering the amendment made with regard to the direct payment as per Schedule-E. Further, the arbitrators wrongly disallowed the counter claim made by the appellant without properly appreciating the material on record. Under the above circumstances, the appellant filed OPs before the learned District Judge under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking to set aside the awards passed by the Arbitral Award (sic. Tribunal) and to allow the counter claim of the appellant with interest.

13. The learned Senior Counsel further argued that the civil court has also negatived the contentions of the appellant on the ground that Section 5 of the Act has cut down the powers of the Court and no judicial authority shall intervene with the Award under certain circumstances provided in the Act.

The learned counsel submitted that the Supreme Court in catena of decisions has held that an Award can be set aside under Section 34 of the Act if the same is

against the principles of public policy and violates any of the provisions of the substantial law of the land i.e., Indian Contract Act, Transfer of Property Act etc. The learned Senior Counsel has further argued that the Schedule-E is introduced into the contract and number of meetings were held between the ONGC, the appellant and the respondent herein and in those meetings it has been concluded that the duty of the appellant is that it is only certifying agency, which is evident from Schedule-E and hence the award of the arbitral tribunal is illegal.

14. The learned Senior Counsel also submitted that as per Section 19(4) of the Arbitration Act, the arbitral tribunal has power to determine the admissibility, relevance and materiality and weight of any evidence. It is further submitted that if the Arbitral tribunal has taken into consideration the entire material and particularly the amendment made by way of Schedule-E, the arbitral tribunal should not have passed the award against the appellant company and equally the learned District Judge also failed to appreciate the said documents in proper perspective, it is also argued that had the arbitral tribunal had gone into the documents filed, the arbitral tribunal would have come to the conclusion that it is a tripartite agreement among the ONGC, the appellant and the respondent and it is a case where ONGC has to be made as a party to the proceedings with reference to the payment.

However, the arbitrary tribunal felt that there is no need to make the ONGC as a party which has been confirmed by the learned District Judge by making the award as a rule of the Court without taking all these factors into consideration. The learned counsel has argued that the contract is a creature of the tripartite discussions and in view of incorporating Schedule-E, the obligation of the appellant to pay the amounts to the first respondent did not remain in view of the fact that the first respondent itself has chosen to have direct mode of payment from the ONGC by way of cheques on the certification made by the appellant. In view of incorporating Schedule-E, the liability of payment has to be fastened only on the ONGC but not on the appellant.

15. The learned counsel has further argued that as per terms of the contract at clause 13.2.3, the appellant has to certify and approve the invoice for payment only. As per Section 41 of the Indian Contract Act, when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. In this case, he contends that the respondent company itself having got the Schedule-E introduced in the conditions of the Contract, now cannot enforce it against the appellant and it amounts to violation of Section 41 of the Indian Contract Act. Having accepted the mode of payment from the ONGC by the respondent, who is a third party to the arbitral proceedings, the contract itself cannot be enforced under law. Thus, this Court has got every power to set aside the award as confirmed by the learned District Judge under Section 34 of the Act since the said award is contrary to the provision of Section 41 of the Indian Contract Act in view of the fact that the respondent company itself has sought the mode of payment from the ONGC. The learned Senior Counsel also submits that the learned District Judge has misunderstood the scope of Section 5 of the Arbitration Act. The learned Senior Counsel also submits that there is no clause in the terms of the contract that the appellant has to pay the money to the first respondent in view of Exhibit-E and hence no liability can be fastened on the appellant since it is only a certification agency. Further, he submits that pursuant to the said terms, the ONGC has directly made advance payment of Rs. 5 crores

to the first respondent and hence the appellant has no liability to the amounts payable to the first respondent by the ONGC and if any amount is not paid to the first respondent, it has to proceed against the ONGC only but not against the appellant herein.

16. The learned Senior Counsel further submits that as per the judgment of the Apex Court in the case of Rickmers Verwaltung Gambh v. Indian Oil Corporation Limited, the correspondence that took place among the parties has to be taken into consideration while construing the intention of the parties to the contract. The learned Senior Counsel submits that the Arbitral Tribunal as well as the learned District Judge failed to take note of the correspondence that exchanged among the parties which amply indicate that the first respondent and the ONGC have entered into a contract. Had the entire correspondence been taken into consideration, the arbitral tribunal as well as the learned District Judge would have held that the agreement is a tripartite agreement among the appellant, the first respondent and the ONGC and hence it has to be held that the Arbitral Tribunal and the learned District Judge erred in holding that the appellant is liable for the amounts due to the first respondent.

17. The learned Senior Counsel also submitted that the Arbitral Tribunal and the learned District Judge failed to look into the entire material available on record particularly various letters exchanged between ONGC and the first respondent on 28-9-1992 (page 1 of volume III), 4-9-1992 (page 102 of Volume 111), 8-7-1993 (page 107 of Volume III), 29-3-2004 (page 2 volume 111) and 8-11-1994 (page 3 of volume III) and various other correspondence and it amounts to utter violation of the provisions of the substantial law of India i.e., the Indian Contract Act and the Evidence Act.

18. In reply to the above contentions, the learned counsel for the first respondent Sri B. Adinarayana Rao submits that there is no privity of contract between the ONGC and the first respondent and the contract is entered into between the appellant and the first respondent and it is only a bilateral contract and not tripartite contract. The learned counsel has also argued that clause 13.1 of the terms of the Contract deals with the payment. The learned counsel by placing reliance on clauses 13.1 and 13.2.1, 16.2 which deals with Arbitration and clause 28.0, which deals with termination, submits that the contract is in between the appellant and the first respondent only, with regard to introduction of Schedule-E in the terms of the contract, the amounts which were certified by the appellant and due by the appellant alone have to be paid to the first respondent and the appellant alone has to pay the amount and the agreement is between the appellant and the installation contractor i.e., the first respondent herein.

19. The learned counsel for the first respondent while supporting the award on the ground has further argued that the first respondent is a party to Schedule-E with regard to the receipt of payment from ONGC and he has also contended that a third party to a contract cannot sue or be sued and the exceptions to that general principle is the Trust and by way of family arrangement.

However, he has contended that the first respondent company has received some payments from the ONGC on the certification of the invoices by the appellant- HSL and hence the contract entered between the HSL and the first respondent company is enforceable under law as it is a bilateral agreement and is controlled

by clauses 13.1 and 13.2 of the terms of the contract and hence there is no violation of any of the provisions of substantial law i.e., the Indian Contract Act by the Arbitral Tribunal and therefore the award needs no interference.

20. The learned counsel has also argued that even though several meetings have been held among the appellant, the first respondent and the ONGC, those meetings could not result in any contractual obligations between the parties in the absence of ONGC being a party to the contract. The learned counsel has further argued that the ONGC cannot be made as a party merely because there is a correspondence and it is the appellant alone that is responsible for fastening the liability in view of the privity of contract between the two parties. The learned counsel also further argued that as per Section 11 (3) of the Act, each party to the agreement be required to be appointed as an arbitrator and the appellant company has never asked ONGC to have its own arbitrator and hence now it is not open to the appellant to contend that the liability should be fastened on the ONGC. The learned counsel has also further argued that in the absence of any privity of contract between the ONGC and the first respondent, it is the responsibility of the appellant for payment of the certified amount and the arbitral award needs no interference. The learned counsel also submits that Exhibit-E incorporated with regard to the mode of payment shall not have the overriding effect of the instructions to the bidders and hence as per the bid agreement, the appellant company alone is responsible but not ONGC.

21. Both the counsel have submitted voluminous records in 13 volumes before the Arbitral Tribunal. After hearing both the parties, this Court felt that the point with regard to the privity of contract has to be dealt with in extenso basing on the rival contentions urged before this Court so as to enable this Court to decide as to whether the award can be set aside under Section 34 of the Act in view of the peculiar circumstances of the case.

22. The material filed along with the record goes to show that the provisional cost for the works awarded to HSL i.e., the appellant, as per certificate dated 2-1-1990 issued by the ONGC, is Rs. 40 crores for RAVVA Project. The said provisional cost as stated in the said certificate for fabrication and installation of off shore platforms with associated facilities meant for oil production from RAVVA field in Godavari offshore is as follows: (page 4 of volume I).

"The provisional cost for the works awarded to HSL is Rs. 40 crores (Rupees forty crores only) which is fully financed by the ONGC."

23. The appellant company invited tenders by Tender Notice No. GT/OPF/ CONTR/0806/89 stating that the appellant company has been awarded with the contract for Design/Engineering, procurement, Fabrication, Assembly, Welding, Testing Installation and Commissioning of Well Head Platforms RV-5 and RV-1 by the ONGC and the appellant in turn intends to appoint an Installation Contractor for carrying the activities such as Skidding, Load out, Transportation, installation, Hookup and Pre-commissioning including Laying of Submarine Pipelines. (page 114 of volume No. 1). The respondent company is one of the tenderers. As per pricing and terms of payment by ONGC to the HSL, filed as one of the material papers at page 8 of volume 1, it has been stated as follows:

"Considering the cash flow restraints being experienced by HSL and the actual physical position that ONGC is being asked by HSL to either backup the LCs opened by HSL or to make the payment directly to HSL's suppliers/ contractors, it was proposed by ONGC that rather than backing up the LCs or making direct payment to suppliers/ contractors on request from HSL, the frequency of which is multiplying, it would expedite of ONGC makes direct payments to the supplies/contractors on the basis of authorization by HSL. In this respect, the following was agreed to between ONGC and HSL.

3. PAYMENT IN INDIAN RUPEES TO INDIAN CONTRACTORS/ SUPPLIERS:

(a) HSL would award the contract/supply order on the Indigenous supplier/ contractor following stores procedure as applicable in HSL and forward a copy of such supply order/contract to ONGC, BRBC.

(b) Such supply order/contract shall be certified by ONGC/EIL representative at Visakhapatnam certifying that equipment/services are for the ONGC project under execution by HSL.

(c) HSL on selective basis would incorporate in such supply order/ contract that payment would be made by ONGC on certification by HSL of the invoices of the work done. Therefore, the requirement of opening of LC for Indian Suppliers/ Contractors would not be incorporated.

(d) Invoices of the Suppliers/Contractors as received by HSL would be certified and authorized to ONGC to make the payment. On this basis. ONGC would make the payment to the concerned Indian Suppliers/Contractors and debit the HSL account in its books. ONGC would also inform HSL as and when the payment is made XXX".

24. After various correspondence between the appellant and the first respondent, a letter of intent has been placed by the appellant on the first respondent company on 24-1-1992. A reading of letter of intent goes to show that lot of correspondence has taken place between the parties and after several deliberations and meetings, the letter of intent has been issued. On 30-1-1992, the first respondent company has issued a telex message to the appellant company acknowledging the letter of intent dated 24-1-1992 and according their acceptance to the same subject to the following
clarifications:

"1. SUBJECT: XXXX

2. LIST OF CORRESPONDENCE: XXX

3. FOREIGN EXCHANGE RELEASE: XXX

4. MODE OF PAYMENT: In respect of mode of payment we wish to clarify that ail payments shall be made against invoices certified by HSL by Bank Cheques issued by Oil and Natural Gas Commission in favour of Essar. All such payment shall be made by the Oil and Natural Gas Commission, without effecting any additional deduction on any account whatsoever from the amount certified by HSL as due and payable to Essar by HSL.

5. SCHEDULE OF WORKS: XXXX

6. MOBILISATION NOTICE: XXX

7. PERFORMANCE GUARANTEE AND ADVANCE PAYMENT GUARANTEE: XXX

8. ADVANCE PAYMENT: XXX

9. INSURANCE:

10. OFFICIAL SCOPE OF WORK

11. SECOND PARA PAGE 4 OF LOI

12. CONTRACT: The preparation of contract is under way and will be submitted to HSL on or before 5th February, 1991 for signature by HSL."

25. In pursuance of the said letter of intent, an agreement has been entered into between the appellant and the first respondent on 3-3-1992 stipulating some terms with regard to mode of payment i.e., Exhibit-E, which reads as follows:

"All payments shall be made against invoices certified by the Company/Oil and Natural Gas Commission/Engineers India Limited and shall be effected through Bank Cheques issued by Oil and Natural Gas Commission in favour of the Installation contractor. All such payments shall be made by the Oil and Natural Gas Commission without effecting any deduction from the amount except for recovery of advance payment made by ONGC certified by the company as due and payable to the Installation Contractor by the company."

26. It is to be seen that while forwarding the tender documents to the first respondent company, it has been stated by the appellant in its letter dated 6-2-1990 that the appellant has been awarded contract by the ONGC and in turn it intends to appoint an Installation Contractor for carrying the activities in RAVVA and PANNA fields such as Skidding, Load out, Transportation, installation, Hookup and Pre-commissioning including Laying of Submarine Pipelines and the works are to be executed from post-monsoon 1990 to pre-monsoon 1991. Further, as per the agreement dated 3-3-1992 entered into between the appellant and the respondent, it has been stated that the documents annexed with the said agreement, shall be deemed to form and be read and construed as integrated and in case of any discrepancy, conflict or dispute they shall be referred in order of priority. In that regard Exhibit-E deals with method of payment which has been incorporated pursuant to the letter (sent through fax) of the first respondent company dated 30-1-1992 wherein a clarification has been sought that the method of payment should be by direct payment. The payment shall be made by the Oil and Natural Gas Commission without effecting any deduction to the first respondent. The same was marked as Exhibit-E. In that agreement, Ex. B deals with the instructions to Bidders, General Conditions of Contract and the Project Instructions.

27. While forwarding the tender applications by letter dated 6-2-1990, the appellant company has made it clear that they have been awarded the contract

work of design engineering etc. by ONGC, Madras and it in turn intends to appoint Installation Contractor. Clause 19 of the tender conditions deals with jurisdiction. Clause 8.2 of the Tender Conditions states that the tender document shall be accompanied by a certified true copy of the power of attorney duly executed in his favour by such other person or by all the partners stating that he has authority to bind such other person or the firm as the case may be, in all matters pertaining to the contract including the Arbitration clause.

Condition No. 19 deals with jurisdiction. It states that the enforcement of terms of tender as well as all the transactions entered into by the contractors with the appellant shall be deemed to have taken place within the jurisdiction of Visakhapatnam where the works of the appellant are situated and any cause of action arising in the due performance or breach of the contract by either of the parties hereto shall be deemed to have arisen within the jurisdiction of Visakhapatnam notwithstanding the residence or place of business of the contractors. Exhibit B is the instructions and conditions of the contract and project instructions.

28. As per instructions to the Bidders, clause 1.1 deals with Introduction, wherein it has been stated that the appellant company has been awarded a turnkey Contract by ONGC for complete design, engineering, procurement, fabrication, load out, tie-down, transportation, erection/installation, hook-up, testing, pre-commissioning, start-up and assistance during commissioning for the facilities described therein.

29. Clause 1.1-General Conditions of the Contract deals with definitions. In clause 1.1.1, 'owner' has been defined wherein it has been stated that 'owner' means Oil and Natural Gas Commission and its permitted assignees. As per clause 1.1.2, 'Company' means Hindustan Shipyard Limited and in clause 1.1.3 'Installation Contractor' has been defined as being the party to this contract so defined in the preamble to the substantive articles of Contract. In clause 8.6.3 of the General Conditions of the Contract, it has been stated that the Owner may accept at its discretion either for flowing oil or gas or for any other use any work which has been substantially completed to the satisfaction of the Owner representative at site by issuing a part certificate of completion and acceptance before issuing a final certificate of completion and acceptance to the Company. Clause 13 pertains to Contract Price Payment/ discharge certificate etc. Contract Price has been dealt with under clause 13.1. The company shall pay to the installation Contractor for satisfactory completion of all the works covered by the scope of work under the Contract Price. Payment Procedure has been mentioned under clause 13.2.

30. Clause 16.0 of the General Conditions of Contract deals with 'Laws/ Arbitration'. Under clause 16.1, it has been stated that all questions, disputes or differences arising under, out of or in connection with this contract shall be subject to the laws of India and to the exclusive jurisdiction of the courts in India. Clause 16.2 deals with arbitration.

31. Clause 24.0 which deals with Consequential Damages reads as follows:

"Neither the installation Contractor nor his sub-contractor shall be responsible for or liable to the Company or owner or any of their affiliates for consequential damages which shall include but not limited to loss of profits, loss of revenue, loss or escape of product (hydrocarbons) or facilities downtime, suffered by the Company or Owner or any of its affiliates, and the Company shall protect, defend, indemnify and hold harmless the Instillation Contractor and his Sub-Contractors from such claims even if such liability is based or claimed to be based upon:

(i) any breach by the Installation Contractor or his sub-contractor of his obligation under the contract OR

(ii) any negligent act or omission in whole or in part, of the Installation Contractor or his sub-contractor of any of his affiliates of them in connection with the performance of the works.

The Company or Owner shall in no event be responsible for or liable to the Installation Contractor or his sub-contractors for consequential damages suffered by the Installation Contractor or his sub-contractor including without limitations, business interruption or loss of profit, whether such liability is based or claimed to be used upon:

(i) any breach by the Company or Owner of its obligations under the contract, OR

(ii) any negligent act or omission on the part of the company or Owner or any of its employees, agents or appointed representatives in connection with the performance of the works.

32. It is pertinent to note that in a letter addressed by the first respondent on 31-1-1998, with regard to settlement of balance payments and other outstanding issues with regard to Ravva project, to the appellant it has been stated that the ONGC had to clear the outstanding payment to the first respondent a sum of Rs. 321.70 lakhs and in that statement it was also stated that ONGC will return LD BG to Essar a sum of Rs. 453 lakhs. At the end of the letter, the Vice President of the first respondent has expressed a hope that the Essar has taken a big step forward to close this issue and they were hopeful that HSL/ONGC Limited will also respond positively.

33. A lot of correspondence had taken place among the first respondent, the appellant and the ONGC. By letter dated 18-12-1997, the appellant company has intimated the first respondent company with regard to the settlement of outstanding issues in pursuant of the fax messages dated 28-11-1997 and 6-12-1997 that they have taken up the matter with ONGC and they have received fax message from ONGC on 15-12-1997 giving their competent authority's approval and they have also communicated a copy of the said fax message to the respondent company. The ONGC by its fax message dated 15-12-1997 informed as follows:

"Positive change order - Approved for Rs. 3,01,46,078/-
Negative change order - Approved for Rs. 90,00,000/-
Net payment approved - Rs. 2,11,46,078/-
Additional Mobilization claim - Not approved

Release of payment for mobilization of putrabelait - Not approved
Additional Insurance claim - Not approved
Contractual payment HSL - Approved for Rs. 66 lakhs
Contractual payment to Essar - Approved for Rs. 81 lakhs
Ad hoc payment of Rs. 125 lakhs towards F.E. Variation claim recovery approved."

34. The first respondent in its letter dated 6-12-1997 also made that ONGC/HSL have not given any indication of their outstanding/ firm payments which are due to it and also requested the appellant to note that the outstanding payments with the interest due on the said amount itself is a substantial amount which was withheld without any justification. In that letter, the first respondent requested the appellant to convene a tripartite meeting between the Essar, ONGCL and HSL in Madras. A lot of correspondence has taken place wherein the appellant company has made it clear to the first respondent that the ONGC has to take a decision for payment of due amounts to the first respondent herein. The first respondent also addressed number of letters to the appellant and also to the ONGC for early settlement. For example, in the letter dated 10-9-1995 it was requested to process the invoices. As the efforts of the first respondent company to get the amount as per the invoices became futile, it has invoked the arbitration clause by its letter dated 16-10-1998 to the appellant and three arbitrators have been appointed.

35. Before the Arbitral Tribunal, the stand of the appellant is that ONGC is the owner and the first respondent vide Exhibit-E, which was incorporated in the terms of the contract as per its letter, has claimed the amounts directly from the ONGC and it has also filed written arguments before the Arbitral Tribunal stating that ONGC is the owner of the work and Schedule-E has been incorporated at the instance of the first respondent and there is a privity of contract between the ONGC and the first respondent and its rote is restricted only for certification and that the said contract has become tripartite one among the ESSAR, HSL and ONGC and the first respondent has to pursue its remedies against the ONGC but not against the appellant herein. The appellant also brought to the notice of the arbitrators the letter dated 25-10-1991 in which the first respondent sought payment directly from the ONGC on certification by the appellant. Thus, it has to be held that the first respondent claimant itself wanted direct payment from the ONGC and the appellant also disputed the claims made by the first respondent company and they have also raised the other issues with regard to the limitation etc. The first respondent company also filed written arguments.

36. The appellant in his written arguments filed before the Arbitral Tribunal stated as follows:

"The first issue for consideration is whether there is privity of contract between the Claimant and ONGC. The claimants rely on Ex. E of Vol. III. The contract contains a method of payment. In the agreement dated 3-3-1992 condition III says that the company covenants to pay the amounts at the time and in the manner hereinafter described. In the contract, Ex. E of page 62 of Volume III says, all payments shall be made against the invoices certified by Company/ONGC/ EIL and shall be effected through Bank cheques issued by ONGC in favour of the claimant. It therefore shows that all such payment shall

be made by ONGC without effecting any deduction from the amounts certified by the company as due and payable to the installation contractor by the company."

Further, it is also submitted that:

"Minutes dt. 28-8-1995 at page 177 of Vol. VII also clearly shows that all the minutes were tripartite and the entire correspondence shows that either letters were directly written to ONGC or copies were marked to them. The respondent refers to the Minutes dt. 22/23-3-1995 page 165 to 172 of Vol. VII wherein, it is clearly mentioned that Essar would keep the performance guarantee alive. It was even agreed that they would give bank guarantee directly to ONGC."

37. From the above written arguments filed before the arbitrator, it is very clear that both the parties have filed voluminous documents before the arbitrators for their consideration, particularly correspondence between the parties i.e., appellant, the first respondent and the ONGC.

38. The arbitrators have passed the award and two arbitrators have upheld the claim of the respondents holding that there is no privity of contract and the concurrent view of the two of the arbitrators is that Exhibit-E, which deals with mode of payment, is only a medium through which HSL has to effect the payments of invoices certified even though the variation has been made with regard to the mode of payment i.e., ONGC instead of HSL and it was also held that the said variation has been made at the instance of the first respondent and even then also it does not exempt the HSL from the contractual liability in the event of non-payment by ONGC. It has also been held by the arbitrators that the ONGC issues the cheques only on certification of the appellant. The arbitral tribunal further held that there is no direct commitment from ONGC to the first respondent herein and they held that in the absence of any such commitment, they were not persuaded themselves to the contentions of the appellant herein that there is a privity of contract between the ONGC and the first respondent herein. The Arbitral Tribunal has further held that there is no privity of contract between the ONGC and EOL and the appellant company is liable to pay the amounts as may be found which remained unpaid by the ONGC. The Tribunal also held that there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them, nor any such suit lies under law.

39. However, the dissenting view of one of the arbitrators was that as there was amendment to the clause regarding 'payment procedure' in the General Conditions of contract vide Exhibit-E of the agreement between HSL and EOL at the request of EOL and in view of the fact that as per Exhibit-E, ONGC were to pay to the first respondent the invoiced amounts as certified by the appellant without any deduction but the facts of the case show that ONGC has raised many issues and deferred payments/ reduced payments and also not paid some invoices even though HSL certified the same and that the ONGC had been making payments by way of cheques drawn in favour of the first respondent in view of the understanding reached between the ONGC, EOL and the HSL and hence the dissenting view of the Arbitral Tribunal is that there is a privity of contract between the ONGC and the first respondent. It was also further observed that in view of the joint meetings held between the ONGC, EOL and the HSL, the agreement was a tripartite one but not bilateral agreement. The Arbitral Tribunal having gone into the counter claim made by the appellant has dismissed the same and the appellant

herein filed OPs before the learned District Judge to set aside the awards passed in respect of RAVVA and PANNA projects but the learned District Judge dismissed the OPs, however the counter claim made by the first respondent has been remanded back to the Arbitral.

40. As stated supra, arguments have been advanced by both the counsel in extenso. It has to be seen on the background of filing of voluminous records produced by both the parties before the Arbitral Tribunal and also before this Court whether the Arbitrators have got the duty to follow the procedure as laid down under Section 19(4) of the Act, which reads as follows:

"The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence".

41. The undisputed fact remains that the ONGC had convened number of meetings with both the appellant and the first respondent and also lot of correspondence has taken place between the parties. It is also an undisputed fact that Exhibit-E has been brought into existence at the instance of the first respondent, which has been incorporated in the agreement. The Exhibit-E deals with regard to the mode of payment by ONGC to the first respondent and the said Exhibit-E was incorporated by the first respondent company itself. As per the said Exhibit-E, the ONGC has to pay the amount by way of Bank cheques directly to the first respondent on certification made by the appellant.

42. The main contention urged by the learned Senior Counsel appearing for the appellant is that the Arbitral Tribunal was constituted on the basis of the terms of the contract and the approach of the lower court confirming the award of the Arbitral Tribunal is vitiated in view of the fact that voluminous documents filed by the parties have not been taken into consideration which go to show that it is tripartite agreement between the ONGC, HSL and the ESSAR and those documents have not been taken into consideration while deciding the issue. He placed reliance on the judgments of the Supreme Court in the case of Oil and Natural Gas Corporation Limited v. Saw Pipes Ltd. and in the case of Rickmers Verwaltung Gambh (1st supra). The learned Senior Counsel also submits that as per sub-section(4) of Section 19 of the Act, the District Court is functioning like any other Court and the court has to follow the principles of CPC and if the said principle is not followed, the award or the judgment will have no effect. In support of his contention he placed reliance in the case of Union of India v. Jain and Associates.

43. It is also contended that a duty is cast on the arbitrators to follow the rules of evidence and it has to look into the material filed before it but the Arbitral Tribunal as well as the learned District Judge have ignored the same and it is also a ground for setting aside the award. The tribunal also ignored the letters addressed by the ONGC for settling the claims which would amount to acknowledgment of the liability.

44. The Apex Court in the case of Rickmers Verwaltung Gmbh (1 st supra) held as follows:

"An agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties. It is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was

any meeting of mind between the parties, which could create a binding contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence.

The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."

45. In this case, as observed above Exhibit-E has been brought into the terms of contract with the knowledge of ONGC by the first respondent wherein the first respondent as well as ONGC has agreed that on certification by the HSL, the ONGC has to pay the amount directly to the first respondent by Bank Cheque. It is not the case of the first respondent that the appellant refused to certify the invoices but the case of the first respondent is that the ONGC did not pay the amounts even after certification. In view of the above observations of the Apex Court, it has to be held that, in view of introduction of Exhibit-E into the terms of the contract, the agreement in question is not bilateral one but it is tripartite agreement. However, it has to be observed that though both the parties have submitted voluminous documents including the correspondence that exchanged between the appellant, the first respondent and the ONGC, the same has not been taken into consideration. As noted above, Exhibit-E was incorporated in the conditions of the agreement with regard to the mode of payment by the ONGC to the first respondent by the first respondent itself. It shows that there is privity of contract between the ONGC and the first respondent. It is also to be noticed that as per the said Exhibit-E, the amount has to be paid by the ONGC to the first respondent on the certification of the appellant, it means that the ONGC has to pay the amount to the first respondent as and when the appellant has given certification and the ONGC has no option except to pay the amount which was certified by the appellant to the first respondent. As noted above, what has happened is that even after certification of the appellant, the ONGC did not release the amount to the first respondent and also withheld some amounts and also deferred to pay some claims. Thus, the ONGC did not act in terms of the agreement and the ONGC has adopted its own assessment to release the amount to the first respondent. This shows that the agreement is a tripartite one but not bilateral, one.

46. It is also to be kept in mind that the ONGC is a public sector undertaking and it cannot act as per its whims and fancies and it cannot directly pay the amount to anyone unless there is an agreement to that effect. In this case, the ONGC has paid some amounts to the first respondent on the certification of the appellant. This shows that the ONGC is a party to the terms of the contract which was entered between the appellant and the first respondent and for any dispute, the ONGC has to be made as a party in view of its conduct. Thus, it has to be held that non-impleadment of the ONGC as a party to the arbitration is bad and it

amounts that the arbitration proceedings has been concluded without making the ONGC as a party which is also a necessary party. It is well settled law that if any award is passed without joining a necessary party, the proceedings have no force at all.

47. The learned Senior Counsel has argued that as per Section 41 of the Indian Contract Act, when a promisee accepts performance of the promise from a third person, no contract could be enforced against the promissor. In this connection, it is relevant to extract Section 41 of the Indian Contract Act, which reads as follows:

"SECTION 41. EFFECT OF ACCEPTING PERFORMANCE FROM THIRD PERSON: When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promissor".

48. In this case, the first respondent has initiated for amendment of the conditions of the contract by introducing Exhibit-E wherein the first respondent sought payments directly from the ONGC and it has also accepted the amounts paid by the ONGC also and hence the first respondent cannot proceed against the appellant alone. But, the ONGC is not made as a party to the proceedings before the Arbitral Tribunal.

49. In the case of Kapurchand v. Himayatalikhan, the Apex Court while interpreting Sections 41 and 63, illus. (c) of the Contract Act held as follows:

"The defendant, the Prince of Berar, had executed in 1937, a promissory note in favour of the plaintiff for a sum of 13 lakhs and odd rupees due on account of purchase of jewellery from the plaintiff. After the Military occupation of Hyderabad, the Prince Debts Settlement Committee set up by the Military Governor decided that the plaintiff should be paid a sum of Rs. 20 lakhs in full satisfaction of his claim of Rs. 27 lakhs, under the note. The Government also made it clear that unless full satisfaction wads recorded payment would not be made. The plaintiff after some initial protests agreed to accept the sum of Rs. 20 lakhs in full satisfaction of his claim and duly discharged the promissory note by endorsement of full satisfaction and received the payment. He then brought a suit against the defendant for recovery of the balance of Rs. 7 lakhs.

(8). The legal position is clear enough. Section 63 of the Indian Contract Act reads:

"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

Illustration (c) to the section says:

"A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim."

It seems to us that this case is completely covered by Section 63 and illustration (c) thereof. The appellants having accepted payment in full satisfaction of their claim are not now entitled to sue the respondent for the balance. A reference

may also be made in this connection to Section 41 of the Contract Act under which when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promissory. There is some English authority to the effect that discharge of a contract by a third person is effectual only if authorized or ratified by the debtor.

In India, however, the words of Section 41 of the Contract Act leave no room for doubt, and when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor, namely, the respondent."

50. In this case, as held above, the first respondent has accepted the amounts from the ONGC directly and moreover the first respondent sought direct payment from the ONGC and to that effect a condition as per Exhibit-E has been incorporated in the conditions of contract and hence the first respondent cannot claim any amount from the appellant without making the ONGC as a party to the arbitral proceedings. Thus, non-making the ONGC as a party to the arbitral award and ignoring the said fact by the Arbitral Tribunal, in our opinion, would amount to violation of the provisions of the Contract Act and therefore it has to be held that the Arbitral Tribunal passed its award without taking note of the provisions of the Contract Act and thus violated the provisions of substantive law of India i.e., Indian Contract Act and the Indian Evidence Act and therefore on that ground also, the award has to be set aside.

51. Further, the Arbitral Tribunal and the learned District Judge did not properly consider the documents filed by both the parties. Section 19 of the Act which deals with determination of rules of procedure, which is extracted below for ready reference:

"19. DETERMINATION OF RULES OF PROCEDURE:

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

Section 19 of the Act deals with determination of procedure. A reading of the conditions of the contract, do not show that the parties have arrived at a procedure. However, sub-section (4) of Section 19 of the Act says that the Arbitral Tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. The undisputed fact remains that both the parties have filed voluminous documentary evidence before the arbitrator but as observed above, the documents, which show that the first respondent made correspondence

directly with the ONGC and the ONGC was responding to the demands/ requests of the first respondent have been ignored by the Arbitral Tribunal and the learned District Judge in the OPs. In the case of Sathyanarayana Bros. (P) Limited v. T.N, Water Supply and Drainage Board (2004) 5 SCC 319. wherein it was emphasized that the arbitrator while making his award cannot ignore very material and relevant documents relevant to determine the controversy so as to render a just and fair decision. As observed above, both the Arbitral Tribunal and the learned District Judge did not consider all the documents which amply indicate that the agreement in question is a tripartite one but not bilateral one and non-consideration of entire documents would amount to violation of principles of natural justice and also violation of the provisions the Evidence Act and thereby it would amount to violative of Public Policy of India.

52. In the case of State Bank of India v. Ram Das and Ors., (D.B.). it has been held, if the arbitrator failed to appreciate the entire material on record, as follows:

"38. Failure to indicate evidence on which the arbitrator has reached the conclusion would amount to an error apparent on the face of the award. It is true sufficiency of evidence upon which conclusions are based may not be a factor to be taken into consideration by the Court in the arbitration proceedings; but, the sufficiency of reasons is a factor to be taken into consideration in deciding as to whether the arbitrator has made any error of law in reaching this finding of fact.

39. It is true that the arbitrator-Umpire is not expected to recite at great length communications exchanged or submissions made by the parties. But the arbitrator/Umpire is duty bound to explain what is findings are and how the conclusions are reached."

53. The Calcutta High Court in the case of Chandrabhan v. Ganpatrai and Sons AIR 1944 Calcutta 127, it has been held that the Arbitral Tribunals must follow the procedure agreed by parties and if no such procedure has been adopted by the parties, it must follow its statutory procedure, if any, right or wrong, so all decisions as to the course to be adopted in general by a contractual tribunal must be read as subject to that course.

54. Further, the High Court of Bombay in the case of Aboobaker v. Congress Reception Committee AIR 1937 Bombay 410, has held that if material piece of evidence is tendered and rejected, it may amount to misconduct entitling party to set aside the award. In that context, it has been held as follows:

"Legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which cause miscarriage of justice. Misconduct is a question of fact in each case and has to be ascribed from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings, and the onus of proof lies on the party who alleges it. The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged by the party have been strictly proved.

If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to set aside the award. And a party is not precluded from impeaching the award on the ground of misconduct even if the arbitrator has been suggested by such party."

In this case, as held above, the following letters dated 28-9-1992, 4-9-1992, 8-7-1993, 29-3-1994, 8-11 -1994 and 3-12-1994 were exchanged between the first respondent and the ONGC by-passing the appellant and therefore it would go to show that the first respondent wanted to have direct links with ONGC and the said fact has been ignored by the Arbitral Tribunal and on the contrary it has held that there was no privity of contract between the ONGC and the first respondent, which goes to show that material piece of evidence though tendered has been rejected by the Arbitral Tribunal as well as the learned District Judge.

55. The High Court of Calcutta in the case of Bengal Jute Mill Co. v. Lalchand has held that though the Arbitral Tribunal is not bound by technical and strict rules of evidence, the arbitrary tribunal must not disregard the public policy. It has been held as follows:

"An arbitration proceeding is not governed by the Evidence Act. In an arbitration proceeding, however, the principles embodied in Sections 91 and 92 of the Evidence Act lay down the principles of natural justice, and the court in such a case of violation should come to the aid of the aggrieved party. In case the reference proceeds, and the Arbitrator gives effect to the principles embodied in Sections 91 and 92 and the decision is in favour of the party and then the point is agitated in court, then the court is bound to give effect to the principles of Sections 91 and 92 of the Evidence Act.

Hence, in either view the court should not encourage the party in these circumstances by staying the suit".

56. In the case of Bharat Coking Coal Limited v. M/s. Annapurna Construction 2003 (7) SCALE 20, it has been held that passing Award ignoring the material document would amount to misconduct in law. In the case of Sikkim Subba Associates v. State of Sikkim, it was held ignoring very material and relevant documents throwing light on the controversy to have a just and fair conclusion would vitiate the Award as it amounts to misconduct on the part of the Arbitrator. By following the above two decisions (10th and 11th supra), the Apex Court in the case of Sathyanarayana Brothers (P) Ltd. v. Tamil Nadu W.S. and D. Board 2004(1)Arb. L.R. 1 (SC), has re-iterated the above view that an Award, ignoring very material and relevant documents throwing light on the controversy to have a just and fair decision would vitiate the Award as it amounts to misconduct on the part of the Arbitrator.

57. In this case, no specific procedure has been fixed by the parties. When such procedure is not fixed, the Arbitral Tribunal has to follow the statutory procedure, it means it has to weigh the entire evidence on record properly and that it has to come to just conclusion within the parameters of the dispute. As observed above, the Tribunal has exceeded its jurisdiction by giving a finding that the first respondent cannot sue against the ONGC and such finding in our view is beyond the scope or purview of the reference to the Arbitral Tribunal and hence the award is liable to be set aside. In this case, it has to be held that there is no waiver of

the procedure by the parties. A plain reading of the agreement goes to show that there is no waiver of the procedure by the parties and in the absence of such agreement with regard to the procedure, the arbitrary tribunal is bound to follow the procedure as contained under Section 19(4) of the Act and they have the duty to determine the admissibility and weight of evidence of the documents filed by both the parties. But, however, they have not considered the material documents filed before them which is evident from a reading of the Award itself as nothing is mentioned about the contents or relevance of the documents even though number of documents have been filed before them.

58. As observed above, Exhibit-E has been incorporated at the request of the first respondent which deals with the mode of procedure for payment of the amount, wherein the first respondent company sought for direct payment from the ONGC on the certification of the appellant and more over the first respondent has entered into direct correspondence with the ONGC and tripartite meetings were held between ONGC, HSL and ESSAR on 2-5-1995 and 28-8-1995 and the minutes of those meetings clearly demonstrate the direct relationship between ONGC and the ESSAR. Further, the first respondent on 3-4-1995 faxed a letter to the ONGC stating that certified invoice worth Rs. 3.02 crores was pending with ONGC and requested the ONGC to release the amount of Rs. 1.70 crores from that after adjusting pending advance approximately to Rs. 1.32 crores. In that letter, it was stated that certified invoices amounting to Rs. 1.49 crores are under process with HSL and expected to reach ONGC during that week and requested the ONGC to release the total amount of Rs. 3.19 crores. This shows that the first respondent is in touch with the ONGC and it also by-passed the appellant, which goes to show that the first respondent acted with the ONGC as if it got the contract from the ONGC only but not from the appellant and hence the first respondent has to claim any amount due to it from the ONGC only but not against the appellant, particularly in view of the provision under Section 41 of the Indian Contract Act.

59. The learned counsel for the first respondent submits that clause 13.2.1 of the conditions of the agreement, which deals with the mode of payment, has become part of the contract and as per the said conditions, the HSL alone is responsible for the payment and as per the order of priority, the conditions incorporated would prevail over Exhibit-E and hence the HSL alone is responsible for payment and the learned Arbitral Tribunal rightly held that the appellant alone is responsible and therefore the Award needs no interference.

60. In this case, the undisputed fact remains that the ESSAR sought direct payment from the ONGC which has been incorporated as Exhibit-E with regard to mode of payment, which reads as follows:

"All payments shall be made against invoices certified by the Company/Oil and Natural Gas Commission/ Engineers India Limited and shall be effected through Bank Cheques issued by Oil and Natural Gas Commission in favour of the Installation contractor.

All such payment shall be made by the Oil and Natural Gas Commission without effecting any deduction from the amount except for recovery of advance payment made by ONGC certified by the company as due and payable to the Installation Contractor by the company."

61. From the above, it is clear that as per Exhibit-E, which has been incorporated at the request of the first respondent, it sought direct payment from the ONGC by way of bank cheques. It has also to be seen that as the letter of intent itself has been issued after incorporating Exhibit-E and the ONGC has paid some amounts directly to the first respondent, it goes without saying that after incorporation of Exhibit-E in the terms of the contract, the original conditions and instructions to the bidders even though they are formed as part of the contract, the same will not become virtuous and the mode of payment would be as per Exhibit E alone. As per Exhibit-E, an agreed condition with regard to mode of payment between the appellant and the first respondent is that the first respondent is entitled to have direct payment from ONGC for which the ONGC never opposed. It is also to be seen that some payments have been made directly to the first respondent by the ONGC, which goes to show that there is a privity of contract between the ONGC and the first respondent and therefore the contention of the first respondent's counsel that the conditions in clause 13.2.1 will prevail over Exhibit-E cannot be accepted.

62. As observed above, the contract in question is a tripartite one and there is privity of contract between the ONGC, HSL and ESSOR. But, it has to be noticed that the Arbitral Tribunal has observed that no privity of contract between the ONGC and the first respondent was established and HSL is contractually liable to pay the outstanding amounts as may be found due to EOL, which remain unpaid by ONGC. The Arbitrary Tribunal also hold that there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law.

63. Now, it has to be examined whether the said finding of the Arbitral Tribunal, which was confirmed by the learned District Judge is in conformity with the settled principles of law and whether it is within the purview of the Arbitral Tribunal and whether such a finding can be interfered with under Section 34 of the Act. Clause (iv) of sub-section (2) (a) and (2) (b) of the Section 34 of the Act is relevant to the issue involved in these CMAs, which is extracted below for ready reference:

"34. APPLICATION FOR SETTING ASIDE ARBITRAL AWARD:

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if,-

(a) the party making the application furnishes proof that-
(i) to (iii) xxxx

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or Xxxx

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

64. Thus, it has to be seen whether the findings of the Arbitral Tribunal are within the domain of reference or it has gone beyond the scope of reference. In this connection, it is necessary to note the dispute put before the Arbitrators in respect of Ravva project as follows:

"4. The dispute put before the arbitrators was in respect of (A) EOL's following claims, as per their Statement of Claim and annexures thereto:

(i) Claim No. 1 for a sum of Rs. 2,14,29,046.00 being the amount short-paid/ unpaid in respect of firm scope of work-Annexure 1-A.

(ii) Claim. No. 2 for a sum of Rs. 4,55,41,693.00 being the original amount of unpaid invoices for extra work, but this sum was subsequently revised to stand at Rs. 3,02,00,000 00 vide Annexure '2-A' of the Claim Statement.

(iii) Claim No. 3 for a sum of Rs. 2,72,30,698.00 being the balance amount due towards foreign exchange variation - vide Annexure-3-A.

(iv) Claim No. 4 for a sum of Rs. 7,09,00,000.00 being the amount of unpaid invoice for extra mobilization/de-mobilization.

(v) Claim No. 5 for Rs. 54,63,590/- in respect of Bank Guarantee Commission and Rs. 70,71,636.00 for loss of interest on Marring Money - vide Annexures - '5-A and '5-B'.

(vi) Claim No. 6 for Rs. 10,39,14,192.77 for Interest (including the component of Interest on Interest) on delayed payments and on unpaid amounts for the period up to 31-12-1998 - vide the 'Interest' columns in Annexures 1-A, 2-A, 3-A, 4-A, 5-A and 5-B and which were consolidated in Annexure '6-A' to the Claim Statement. In addition, Interest pendente lite, i.e., till date of the Award was also claimed.

(vii) Costs of the Arbitration proceedings were also claimed.

(B) HSL's counter-claim for Rs. 5,04,60,635/- towards liquidated damages together with interest @18% per annum thereon, as mentioned in their counter-statement."

65. But, the findings of the Arbitral Tribunal in respect of the above dispute are as follows:

"Now, based on our reasoning and analysis of facts as set out above, we hold:

(1) That no privity of contract between ONGC and EOL is established.

(2) That HSL is contractually liable to pay the outstanding amounts as may be found due to EOL, and which remain unpaid by ONGC.

(3) That there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them, nor can such a suit lie under law."

It is to be noted that in respect of PANNA field also (CMA No. 624 of 2003), the above findings have been assigned by the majority of the Arbitrators.

66. The findings of the Arbitral tribunal that there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them, nor can such a suit lie under law has to be examined with reference to the subject matter of the dispute in the absence of any such contention with regard to suing ONGC and whether such finding is beyond the scope of reference or not.

67. In the case of Oil and Natural Gas Corporation Limited v. Saw Pipes Limited (2nd supra), the Apex Court held as follows:

"Reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisos of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

xxxx The phrase 'Public Policy of India' in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/decision is likely to adversely affect the administration of justice."

68. It is well settled law that the Arbitrator has no jurisdiction to go beyond the terms of reference, which is limited to the agreement as he could decide the disputes only arising out of or in connection with the agreement and could not adjudicate upon and decide the matter which falls outside the agreement.

69. Further, in the case of Steel Authority of India Limited v. J. C. Budharaja, the Apex Court observed that the Arbitrator derives his authority from the contract and if he acts in manifest disregard of the contract, the Award given by him would be an arbitrary one.

70. The above view has been expressed by the Delhi High Court in the case of National Building Construction Corporation Limited v. Decor India Private Limited 2004 (2) Arb. L.R. 1 (Delhi), in the following words:

"I have perused the said Award passed by the learned Arbitrator granting interest. The learned Arbitrator has stated that he had ascertained that the prime

lending rates of SBI is 12% p.a. and basing on that enquiry made by him and information received consequent thereto, he had ordered for payment of interest at the rate of 18% compound interest with monthly rests. Apparently, the learned Arbitrator made enquires from a third source behind the back of the parties and relied upon certain material, which is not disclosed to the parties. On that short ground itself, the said Award is vitiated."

71. As noted above, in the reference put forth before the Arbitral Tribunal, it was not the issue before the Arbitral Tribunal as to whether a suit would lie under law against the ONGC and whether the first respondent could validly sue ONGC. But, the Arbitral Tribunal has held that there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law and this Court is of the view that such observation goes beyond the scope of reference.

72. The Apex Court in the case of Rajasthan State Mines and Minerals Ltd. v. Eastern Engg. Enterprises has held that in order to determine whether the arbitrator acted in excess of his jurisdiction it would be necessary to consider the agreement between the parties containing, the arbitration clause and it was further held as follows:

"44. (f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator, if there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction."

73. The Supreme Court in the case of Bharat Coking Coal Ltd. v. Annapurna Construction, it has been held that jurisdiction of the Arbitral Tribunal is confined to the four corners of the contract and he cannot ignore the provisions of the Contract, otherwise, he would be acting without jurisdiction.

74. It is a well settled law that if the award is in excess of jurisdiction of arbitrator, then it is liable to be set aside but if the award is within jurisdiction on the basis of construction of the contract which the arbitrator was required to do, then Court cannot set it aside merely because another view was possible.

The above view was endorsed by the Supreme Court in the case of Himachal Pradesh S.E.B. v. R.J. Shah and Co., which reads as follows:

"The case where there is want of jurisdiction has to be distinguished from the case where there is error in exercise of jurisdiction. The award is liable to be set aside if there is error of jurisdiction but not if the error is committed in exercise of jurisdiction. When the arbitrator is required to construe a contract the merely because another view may be possible the court would not be justified in

constructing the contract in a different manner and to set aside the award be observing that the arbitrator has exceeded the jurisdiction in making the award.

xxxx xxxx In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim on the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction, the court may have to look into some documents including the contracts as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings."

In the case of M/s. Sikkim Subba Associates v. State of Sikkim, it was held as follows:

"An arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider it to be fair and reasonable. Arbitrator is not entitled to ignore the law or misapply it and cannot also act arbitrarily, irrationally, capriciously or independent of the contract. If there are two equally possible or plausible views or interpretations, it is legitimate for the Arbitrator to accept one or the other of the available interpretations. It would be difficult for the Courts to either exhaustively define the word 'misconduct' or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of Law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of Arbitration to interfere, when on the face of the Award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational there no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record on the governing position of law."

The Supreme Court in the case of Harish Chandra Bajpai v. Triloki Singh, held as follows:

"Section 34 read conjointly with other provisions of the Act indicates that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it could not be set aside by the court. Holding otherwise would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, is would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

Such interpretation of Section 34(2){a){v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. The principle is - there cannot be any wrong without a remedy."

In the case of Dhannalai v. Kalawatibai, the Supreme Court has held that *"if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with under Section 34. However, such failure of procedure should be patent affecting the rights of the parties."*

75. Further, in the cases of Bengal Jute Mills v. Juraj AIR 1943 Cal. 13, and Mohinder v. Raminder AIR 1944 P.C. 83, it has been held that an arbitrator, derives his power from reference which tarnishes the source and prescribes the limit of his authority and he is bound to make an award in conformity with it both, in substance and in form and the award would become bad if the arbitrators go beyond the scope of reference and decide disputes not submitted to them.

76. As noted above, as per sub-section (2)(a)(iv) of Section 34 of the Act, an Arbitral award may be set aside by the Court only if the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Since this Court has held that the observation made by the arbitral Tribunal that there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them nor such a suit could lie under law is beyond the scope of the reference in view of Section 34(2){a)(iv) of the Act, the finding of the Arbitral Tribunal, which was confirmed by the learned District Judge, to that extent is set aside.

77. Further, it is to be seen that on behalf of the appellant it has been categorically urged by the appellant that there is a privity of contract between the parties i.e., ONGC, HSL and EOL and on the contrary and on behalf of the first respondent, it has been urged that there is no privity of contract between it and the ONGC. Even assuming that there is no privity of contract between ONGC and EOL, a duty is cast upon the arbitrators to come to a just and fair conclusion and it is not within the parameters of the arbitrators to come to the conclusion that a suit will not lie against the ONGC.

78. The finding that the Arbitral Tribunal, which was confirmed by the District Court, that there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them, nor can such a suit lie under law is contrary to the substantial provisions of law and against the terms of the contract and the scope of reference and hence such finding has to be held as patently illegal and hence it has to be interfered with under Section 34 of the Act.

79. In view of the findings arrived at it has to be held that the Arbitrary Tribunal acted beyond the scope of its jurisdiction and this Court feels that there is no need to go into the merits of the claims.

Further, the record which has been produced before the Arbitrators goes to show that the ONGC has acted as per Exhibit-E by making certain payments to the first respondent company. Further, that part of the evidence has not been looked into by the Arbitrator to arrive at a just and fair conclusion as to the existence of privity of contract between the parties as a result of which it has to be held that the Arbitral Tribunal has violated the provisions of substantive law of India i.e., Indian Contract Act and the Indian Evidence Act. Further, it shows that the ONGC by

acting upon Exhibit-E paid some amounts directly to the first respondent, and hence it cannot be said by the first respondent that there is no privity of contract between them and the ONGC.

80. The learned counsel for the first respondent relies on the following decisions in support of his contentions:

(i) U.P. Hotels v. U.P. State Electricity Board .
(ii) Coats Viyella India Limited v. India Cement Limited (2000) 9 SCC 376.
(iii) H.P. State Electricity Board v. R.J. Shah and Company.
(iv) Pure Helium India (P) Limited v. Oil and Natural Gas Commission (2003) 8 SCO 593.
(v) State of U.P. v. Allied Constructions .
(vi) P. V. Subba Naidu v. Government of A.P.
(vii) Babu Ram v. Dhan Singh.
(viii) Tamil Nadu Electricity Board v. M/s. Bridge Tunnel Construction.

But, as we have come to the conclusion that the Arbitral Tribunal has gone beyond the scope of reference and that the Award in question is passed without taking into consideration of the material available on record and as the same is contrary to the substantive law of India and that there is privity of contract between the ONGC, the appellant and the first respondent, we do not want to go into those decisions as they are not relevant to the facts of the present case.

81. As observed above, in view of the correspondence that has been made by the first respondent directly to the ONGC i.e., Fax dated 9-7-1996, 29-3-1994, 24-1-1995, 14-2-1995, 3-4-1995, 8-9-1995, 18-9-1995, 28-9-1992, 2-11-1995, 20-11-1995, 15-12-1995, 20-12-1995 and of the direct correspondence from ONGC to the first respondent i.e., Fax dated 8-11-1994, 14-12-1995 etc. (the above correspondence has been placed before this Court in Volume III of the material papers in C.M.A. No. 255 of 2002); and the minutes of the meetings dated 7/8-2-1992, 20-2-1992, 26-2-1992, 4-9-1992, 8-7-1993, 22/23-3-1995, 2/3-5-1993, 28-8-1995 and 23-4-1996, which were filed as material papers in Volume III in C.M.A. No. 255 of 2002; and also considering the fact that the ONGC has made payments directly to the first respondent and in view of the fact that the first respondent has sought amendment of the conditions of the terms of contract with regard to mode of direct payment from the ONGC and considering the fact that the role of the appellant is confined only to the extent of certification of the invoices and also considering the fact that the ONGC has withheld the payments to the first respondent even after certification made by the appellant, it has to be held that the agreement in question is a tripartite one i.e., privity of contract exists between the appellant company, ONGC and the first respondent company and not a bilateral one and hence this Court is of the view that the ONGC is a proper and necessary party to the dispute before the Arbitral Tribunal and as the ONGC is not made as a party by the first respondent before the Arbitral Tribunal, and as the award is passed without making a proper and necessary party as party to the dispute, the same has to be set aside as the award is violative of provisions of the substantive law of India i.e. the Indian Contract Act. The learned District Judge also failed to appreciate the said fact and hence the Arbitral Awards as well as the judgments in O.P.s with regard to the claims made by the first respondent have to be set aside and accordingly set aside. With regard to the counter claim made by the appellant, the learned District Judge remanded the

same to the Arbitral Tribunal for fresh disposal and the same is not subject matter before this Court in these C.M. As and hence no opinion is expressed on that aspect.

82. In the result, the C.M. is are allowed. No costs.

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Annexure – 6.2

Supreme Court of India

M. R. Engineers & Contractors Pvt. Ltd. v/s Som Datt Builders Ltd., on 07.07.2009

Author: R. V. Raveendran
Bench: R.V. Raveendran, J.M. Panchal

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4150 OF 2009
(Arising out of SLP [C] No.11117 of 2006)

M. R. Engineers & Contractors Pvt. Ltd. ... Appellant

Vs.

Som Datt Builders Ltd. ... Respondent

JUDGMENT

Leave granted.

1. Heard learned counsel for both parties. The matter relates to interpretation of sub-section (5) of section 7 of Arbitration and Conciliation Act, 1996 ('Act' for short) and the issue involved is whether an arbitration clause contained in a main contract, would stand incorporated by reference, in a sub-contract, where the sub-contract provided that it "shall be carried out on the terms and conditions as applicable to the main contract."

2. The Public Works Department, Government of Kerala, (in short `PW Department') entrusted the work of "Four Laning and Strengthening of Alwaye - Vyttila and Aroor - Cherthala and Strengthening of Vyttila to Aroor Section of NH 47 - N2 & N3 packages" which included the work of "Construction of Project Directorate Building for National Highway Four Laning Project at Edapally, Cochin" to the respondent. The said contract between PW Department and the respondent contained a provision for arbitration, as per clause 67.3 of the General Conditions of Contract. The relevant portion of the said clause is extracted below:

"Arbitration 67.3: Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2.

shall be referred to the adjudication of a Committee of three arbitrators. The Committee shall be composed of one arbitrator to be nominated by the Employer, one to be nominated by the Contractor and the third who will act as the Chairman of the Committee, but not as umpire, to be nominated by the Director - General (Road Development), Ministry of Surface Transport (Roads Wing); Government of India. If either of the parties abstain or fail to appoint his arbitrator, within sixty days after receipt of notice for the appointment of such arbitrator, then the

Director- General (Road Development), Ministry of Surface Transport, Government of India, himself shall appoint such arbitrator(s). A certified copy of the appointment made by the Director-General (Road Development), Ministry of Surface Transport, Govt. of India, shall be furnished to both parties."

3. The appellant is a sub-contractor of the respondent. Respondent entrusted a part of the work entrusted to it by the PW Department namely "construction of Project Directorate building" to the appellant under its work order dated 4.5.1994. The relevant portions of the work order are extracted below:

"With reference to your offer and subsequent discussions, we are pleased to accept your offer for the construction of the office building at the unit, firm and fixed price of Rs. 3150/- (Rupees Three Thousand One Hundred Fifty Only) per square metre.

The construction shall be carried out as per the tender specifications and drawings issued for construction by the client.

The square metre rate includes cost of all materials, labour, equivalent etc., required for the completion of building work but excludes the furniture required for the same.

No escalation shall be payable on the above contracted price. The work shall be carried out as per the drawings furnished by the Department. This sub- contract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter.

In case there are any change in the foundation design from the tender drawing, suitable variation claim shall be submitted to the client by us and the amount approved and paid shall be payable to you after deducting twenty percent amount."

The approximate cost of this order comes to Rs. 33,07,500/-

4. The appellant alleges that it informed the respondent that it executed certain extra items and excess quantities of agreed items on the instructions of the PW Department and requested the respondent to make a claim on the PW Department in that behalf; that the respondent accordingly made necessary claims in that behalf on the PW Department; that the said claims, as also several other claims of the respondent against the PW Department were referred to arbitration and the arbitrator made an award dated 18.8.1999. According to appellant, the Arbitrator awarded certain amounts in regard to its claims put through the respondent and in terms of the arrangement between the respondent and the appellant, the respondent is liable to pay to the appellant, eighty percent of the amounts awarded for such claims, that is Rs. 37,55,893/-, along with Rs. 1,55,807/- towards pre-reference interest upto 4.12.1996 and compensation at 18% per annum for non-payment of Rs. 37,55,893/- from 5.12.1996. The appellant alleged that a sum of Rs. 1,76,936/- was also due by the respondents towards unlawful deductions. The appellant therefore lodged a claim on the respondent by letter dated 5.7.2000, for payment of Rs. 65,11,341/-. As the claim was not settled, the appellant sent a letter dated 6.12.2000 seeking reference of the disputes by arbitration.

5. As the respondent failed to comply, the appellant filed an application under section 11 of the Act. According to the appellant, clause 67.3 of the General Conditions of Contract forming part of the contract between the PW Department and the respondent, providing for arbitration, was imported into the sub-contract between respondent and appellants. The appellant relies upon the term in the work order dated 4.5.1994 that the "sub-contract shall be carried out on the terms and conditions as applicable to main contract" to contend that the entire contract between the department and the respondent, including clause 67.3 relating to arbitration, became a part and parcel of the contract between the parties. The appellant also contended that having regard to section 7(5) of the Arbitration & Conciliation Act, 1996, the arbitration clause contained in the main contract between the PW Department and the respondent, constituted an arbitration agreement between the respondent and appellant on account of the incorporation thereof by reference in the contract between the appellant and respondent. The respondent denied the said claim and contention.

6. The designate of the Learned Chief Justice by order dated 31.1.2003 rejected the said application on the ground that the arbitration clause (in the contract between PW Department and the respondent) was not incorporated by reference in the contract between the respondent and appellant. The said order is challenged in this appeal by special leave. The question that arises for consideration is whether the provision for arbitration contained in the contract between principal employer and the contractor, was incorporated by reference in the sub-contract between the contractor and sub-contractor.

7. Section 7 of the Act defines `arbitration agreement'. Sub-sections (1) and (5) of section 7, relevant for our purpose, are extracted below:

"7. Arbitration agreement

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. "

Having regard to section 7(5) of the Act, even though the contract between the parties does not contain a provision for arbitration, an arbitration clause contained in an independent document will be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, if the reference is such as to make the arbitration clause in such document, a part of the contract. The wording of Sec. 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract.

The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract. If the legislative intent was to import an arbitration clause from another

document, merely on reference to such document in the contract, sub-section (5) would not contain the significant later part which reads "*and the reference is such as to make that arbitration clause part of the contract*", but would have stopped with the first part which reads "*The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing*." Section 7(5) therefore requires a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties. But the Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract, can be construed as a reference incorporating an arbitration clause contained in such document, into the contract. In the absence of such statutory guidelines, the normal rules of construction of contracts will have to be followed.

8. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract.

Therefore, when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive).

9. If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document, (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

10. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.

11. Sub-section (5) of Section 7 merely reiterates these well settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable.

12. The following passages from Russell on Arbitration throws considerable light on the position while dealing with Section 6(2) of (English) Arbitration Act, 1996 corresponding to Sec.7(5) of the Indian Act. (23rd Edition, see pages 52-55):

"Reference to another document. The terms of a contract may have to be ascertained by reference to more than one document. Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem encountered in many commercial transactions, particularly those involving shipping and construction. This issue has to be determined by applying the usual principles of construction and attempting to infer the parties' intentions by means of an objective assessment of the evidence. This may make questions of incorporation irrelevant, if for example it is clear that the contractual documents in question are entirely separate and no intention to incorporate the terms of one in the other can be established. However, the contractual document defining and imposing the performance obligations may be found to incorporate another document which contains an arbitration agreement. If there is a dispute about the performance obligations, that dispute may need to be decided according to the arbitration provisions of that other document. This very commonly occurs when the principal contractual document refers to standard form terms containing an arbitration agreement. However, the standard form wording may not be apt for the contract in which the parties seek to incorporate it, or the reference may be to another contract between parties at least one of whom is different. In these circumstances it may be possible to argue that the purported incorporation of the arbitration agreement is ineffective. The draftsmen of the Arbitration Act 1996 were asked to provide specific guidance on the issue, but they preferred to leave it to the court to decide whether there had been a valid incorporation by reference. "

[Para: 2.044] "Subject to drawing a distinction between incorporation of an arbitration agreement contained in a document setting out standard form terms and one contained in some other contract between different parties, judicial thinking seems to have favoured the approach of Sir John Megaw in Aughton, namely that general words of incorporation are not sufficient. Rather, particular reference to the arbitration clause needs to be made to comply with s. 6 of the Arbitration Act 1996, unless special circumstances exit."

[Para: 2.047] "Reference to standard form terms. If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. This is because the parties can be expected to be more familiar with those standard terms including the arbitration clause."

[Para: 2.048] After referring to the view of Sir John Megaw, in Aughton Ltd. v. M. F. Kent Services Ltd. [1991 (57) BLR 1] that specific words were necessary

to incorporate an arbitration clause and that the reference in a sub-contract to another contract's terms and conditions would not suffice to incorporate the arbitration clause into the sub-contract, followed in Barrett & Son (Brickwork) Ltd. v. Henry Boot Management Ltd. [1995 CILL 1026, Trygg Hansa Insurance Co. Ltd. v Equitas Ltd. [1998 (2) Lloyds' Rep.439) and Anonymous Greek Co of General Insurances (The "Ethniki") v. AIG Europe (UK) [2002 (2) All ER 566] and Sea Trade Maritime Corp. v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Athena") No.2

[2006] EWHC 2530, Russell concludes:

> *"The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary."*

A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract.

The exception to the requirement of special reference is where the referred document is not another contract, but a Standard form of terms and conditions of a Trade Associations or Regulatory institutions which publish or circulate such standard terms & conditions for the benefit of the members or others who want to adopt the same. The standard forms of terms and conditions of Trade Associations and Regulatory Institutions are crafted and chiselled by experience gained from trade practices and conventions, frequent areas of conflicts and differences, and dispute resolutions in the particular trade. They are also well known in trade circles and parties using such formats are usually well versed with the contents thereof including the arbitration clause therein. Therefore, even a general reference to such standard terms, without special reference to the arbitration clause therein, is sufficient to incorporate the arbitration clause into the contract.

13. The scope and intent of section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(i) The contract should contain a clear reference to the documents containing arbitration clause,

(ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(iii) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.

14. The Learned counsel for appellant relied on two decisions to contend that even a general reference to the main contract (between PW Department and the respondent) in the sub-contract was sufficient to incorporate the arbitration clause in the main contract, into the sub-contract, even if there was no special reference to the arbitration clause. We will refer to them briefly.

14.1 The first case referred is Atlas Export Industries v. Kotak & Co. [1999 (7) SCC 61]. In that case, the appellant had contracted to supply goods to a foreign buyer through the respondent. The contract entered among them provided that the terms and conditions of standard contract No. 15 of the Grain & Food Trade Association Ltd., London (for short GAFTA Contract) would apply. The contract also confirmed that both buyers and sellers were familiar with the text of GAFTA contract and agreed to be bound by its terms and conditions. Clause 27 of GAFTA contract provided for settlement of disputes by Arbitration in London in accordance with the Arbitration Rules of GAFTA. This Court upheld the decision of the High Court rejecting the appellant's objection that there was no agreement in writing between parties requiring the disputes being referred to arbitration in accordance with the arbitration rules of GAFTA, holding that the arbitration clause from GAFTA Contract 15, was incorporated by reference, into the contract.

14.2 The second case relied upon by the appellant is a decision rendered by a designate of the Learned Chief Justice of India in Groupe Chimique Tunisien SA

v. Southern Petrochemicals Industries Corpn. Ltd. [2006 (5) SCC 275]. In that case a purchase order placed by the respondent on the petitioner stated that "all other terms and conditions are as per FAI terms. ("FAI Terms" referred to the terms and conditions for sale and purchase of phosphoric acid of Fertilizer Association of India). Clause 15 of FAI terms provided for settlement of disputes by arbitration. Certain disputes having arisen, the petitioner appointed its arbitrator and called upon the respondent to appoint its arbitrator. When respondent failed to comply, the petitioner filed a petition under Section 11 of the Act for appointment of the second Arbitrator. In the counter to the petition under Sec. 11 of the Act, the respondent did not deny the fact that the purchase orders were placed with the petitioner nor denied the fact that the purchase orders were all placed subject to FAI terms and conditions, including clause 15 of FAI terms which provided for arbitration. This court held that the purchase orders placed by the respondents with the petitioner having been made subject to FAI terms which contained the arbitration clause, the arbitration clause contained in the FAI terms would constitute the arbitration agreement between the parties.

14.3 Both the decisions are not of any assistance to the appellant. Both relate to reference to standard terms & conditions of Trade Associations. In both cases the parties had agreed to be bound by the standard terms and conditions of the Trade Association thereby clearly showing an intention to subject themselves to the provision for arbitration contained in the standard terms of the Trade Association. The said two decisions therefore relate to cases referred to Para 13(iii) above, whereas the case on hand falls under para 13(ii) above.

15. The work order (sub-contract), relevant portions of which have been extracted in para 3 above, shows that the intention of the parties was not to incorporate the main contract (between the PW Department and respondent) in entirety into the sub contract. The use of the words "*This sub-contract shall be carried out on the terms and conditions as applicable to main contract*" in the work order would indicate an intention that only the terms and conditions in the main contract relating to execution of the work, were adopted as a part of the sub-contract between respondent and appellant, and not the parts of the main contract which did not relate to execution of the work, as for example the terms relating to payment of security deposit, mobilization advance, the itemised rates for work done, payment, penalties for breach etc., or the provision for dispute resolution by arbitration. An arbitration clause though an integral part of the contract, is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to `carrying out' of the contract. In the absence of a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, and as the wording of the sub-contract discloses only an intention to incorporate by reference the terms of the main contract relating to execution of the work as contrasted from dispute resolution, we are of the view that the arbitration clause in the main contract did not form part of the sub-contract between the parties. We are fortified in this view, by the decision in Alimenta SA. v. National Agricultural Co-op. Marketing Federation of India Ltd. [1987 (1) SCC 615]. The NAFED - the respondent therein entered into two contracts with Alimenta S.A. for the supply of certain goods referred to HPS. Clause 11 of the first contract stipulated that "other terms and conditions as per FOSFA- 20 contract terms". (FOSFA-20 being a standard form

of contract of the Federation of Oils, Seeds and Fats Association Ltd. containing an Arbitration clause). Clause 9 of the second contract provided that "*all other terms and conditions for supply not specifically shown and covered hereinabove shall be as per previous contract signed between us for earlier supplies of HPS*". The question before this court was whether the arbitration clause in FOSFA -20 was incorporated in the first contract by way of Clause 11 and in the second contract by virtue of Clause 9. The Court held that while the Arbitration clause was incorporated in the first contract, the same was not incorporated in the second contract. The following reasoning of the Court while dealing with the second contract is relevant for our purpose:

"There is a good deal of difference between Clause 9 of this contract and Clause 11 of the first contract. Clause 11 has been couched in general words, but Clause 9 refers to all other terms and conditions for supply. The High Court has taken the view that by Clause 9 the terms and conditions of the first contract which had bearing on the supply of HPS were incorporated into the second contract, and the term about arbitration not being incidental to supply of goods, could not be held to have been lifted as well from the first contract into the second one."

It is, however, contended on behalf of the appellant that the High Court was wrong in its view that a term about arbitration is not a term of supply of goods. We do not think that the contention is sound. It has been rightly pointed out by the High Court that the normal incidents of terms and conditions of supply are those which are connected with supply, such as, its mode and process, time factor, inspection and approval, if any, reliability for transit, incidental expenses etc. We are unable to accept the contention of the appellant that an arbitration clause is a term of supply.

There is no proposition of law that when a contract is entered into for supply of goods, the arbitration clause must form part of such a contract. The parties may choose some other method for the purpose of resolving any dispute that may arise between them. But in such a contract the incidents of supply generally form part of the terms and conditions of the contract. The first contract includes the terms and conditions of supply and as Clause 9 reference to these terms and conditions of supply, it is difficult to hold that the arbitration clause is also referred to and, as such, incorporated into the second contract. When the incorporation clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause. In the present case, Clause 9 specifically refers to the terms and conditions of supply of the first contract and the second contract and accordingly, only those terms and conditions are incorporated into the second contract and not the arbitration clause. The High Court has taken the correct view in respect of the second contract also".

16. Even assuming that the arbitration clause from the main contract had been incorporated into the sub-contract by reference, we are of the view that the appellant could not have claimed the benefit of the arbitration clause. This is in view of the principle that the document to which a general reference is made, contains an arbitration clause whose provisions are clearly inapt or inapplicable with reference to the contract between the parties, it would be assumed or inferred that there was no intention to incorporate the arbitration clause from the referred document. In this case the wording of the arbitration clause in the main contract

between the PW Department and contractor makes it clear that it cannot be applied to the sub-contract between the contractor and the sub-contractor.

The arbitration clause in the main contract states that the disputes which are to be referred to the committee of three arbitrators under clause 67(3) are disputes in regard to which the decision of the Engineer (`Engineer' refers to person appointed by State of Kerala to act as Engineer for the purpose of the contract between PW Department and the respondent) has not become final and binding pursuant to sub-clause 67.1 or disputes in regard to which amicable settlement has not been reached between the State of Kerala and the respondent within the period stated in sub-clause 67.2.

Obviously neither 67.1 nor 67.2 will apply as the question of `Engineer' issuing any decision in a dispute between the contractor and sub-contractor, or any negotiations being held with the Engineer in regard to the disputes between the contract and sub-contractor does not arise. The position would have been quite different if the arbitration clause had used the words "all disputes arising between the parties" or "all disputes arising under this contract". Secondly the arbitration clause contemplates a committee of three arbitrators, one each to be appointed by the State of Kerala and the respondent and the third (Chairman) to be nominated by the Director General, Road Development Ministry of Surface, Transport, Roads Wing, Govt. of India. There is no question of such nomination in the case of a dispute between the contractor and sub-contractor. It is thus seen that the entire arbitration agreement contained in the main contract between the employer and the contractor was tailor-made to meet the requirements of the contract between the employer and the contractor and is wholly inapt and inapplicable in the context of a dispute between the contractor and the sub-contractor. This makes it clear that the arbitration clause contained in the main contract would not apply to the disputes arising with reference to the sub-contract.

17. In view of our finding that there is no arbitration agreement between the parties, it is unnecessary to examine the contention of the respondent that no dispute existed between the parties in view of the full and final settlement receipt executed by the appellant.

18. We are therefore of the view that there is no error in the order of the High Court rejecting the application of the appellant on the ground that there is no arbitration agreement.

.....J.
(R V Raveendran)

.....J.
(J M Panchal)

New Delhi;
July 7, 2009.

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Annexure – 7.1

1. Extract from "Commentary on the Law of Arbitration", Fourth Edition, By: Malhotra (Page: 1092 – 1096)

Time Bar Clauses in Arbitration Agreements

Arbitration contracts, particularly construction contracts, insurance contracts, and the like, often contain a time-limit for the commencement of the arbitration, which is shorter than what is prescribed under the limitation act. If the request for arbitration is not made within the period specified in the contract, the claim would be deemed to have been waived and barred. As a consequence, the respondent shall stand discharged and released of all liabilities under the contract.

A specimen clause of this kind in a construction contract is set out hereunder by way of illustration:

> *"It is also the term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Govt. that the final bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Govt. shall be discharged and released of all liabilities under the contract in respect of these claims."*

Such clauses may be referred to as time-bar clause, since they seek to incorporate time limits within the arbitration clause, which stipulate in one form or another, that the claim for arbitration shall be barred unless a step is taken to commence arbitral proceedings. Commercial contracts often provide such clauses and are generally considered valid in common law jurisdictions.

Section 43(3) recognizes the validity of such arbitration agreements which incorporate a clause that a claim would be barred, unless some steps to commence arbitral proceedings are taken within the time fixed in the agreement between parties. Such arbitral agreements are covered by the Exceptions to Section 28 of the contract Act.

Arbitration agreements stand on a different footing from other agreements. The purpose of arbitration is to enable parties to constitute a private forum for dispute resolution, outside the court process, for timely and expeditious adjudication. The 1996 Act provides that the parties are free to choose the tribunal, the number of arbitrators, the procedure for appointing arbitrators, the procedure to challenge the appointment of an arbitrator, the procedure for conduct of proceedings, the place of arbitration, the date of commencement of proceedings, etc. Likewise, the parties are also free to provide the time limit within which some steps to commence arbitral proceedings are taken. These are matters of procedure pertaining to dispute resolution through arbitration, which stand on a different footing from that applicable to the usual court process.

Section 43(3) of the 1996 act recognizes that arbitration agreements may bar claims, unless the steps mentioned in the agreement to commence arbitral proceedings are initiated within the time limit fixed. Section 43(3) of the 1996 Act

makes such time-bar clauses enforceable. Such time-bar clauses would operate to extinguish the remedy of arbitration.

Notwithstanding that the time limit under the agreement has expired, the court is conferred with the discretion to extend the time limit for such period as it considers proper. The extension of time may be granted subject to such terms as the justice of the case may require.

There has been a divergence of views amongst the High courts with respect to the enforceability of time-bar clauses under Section 43(3) of the 1996 Act.

The issue of whether there can be a limitation of 90 days for making a demand for arbitration with respect to any claim, in view of the provisions of Section 28 of the Indian Contracts Act, 1872 was considered by the Delhi High court in *Pandit Construction company v Delhi development Authority [(2007) 3 Arb LR 205, 211-12: (2007) 143 DLT 270 (Del)]*. The court traced several precedents that drew a distinction between the agreements which in effect curtails the period of limitation, and an agreement which provides for forfeiture or waiver of the right itself, if the action is not initiated within the period stipulated by the agreement. Before amendment of the Contract Act in 1997, the first was held to be void as offending Section 28 of the Contract Act; but the later was held not to be violative of Section 28 of the contract Act. The curtailment of period of the period of limitation was held not to be permissible in view of Section 28 of the Contract Act, but extinction of the right itself, unless exercised within the specified time, is permissible and can be enforced.

Section 28 of the Contract Act was amended on 8 January 1997 and now reads as follows:

"28. Agreements in restraint of legal proceedings, void –

Every agreement -

(a) by which a party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharge any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.

Exception 1- Saving of contract to refer to arbitration dispute that may arise. – this section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them is respect or any class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of disputes so referred.

Exception 2- Saving of contract to refer questions that have already arisen. – Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has

already arisen, or affect any provision of any law in force for the time being as to reference to arbitration."

Exceptions 1 and 2 to Section 28 of the Indian Contract Act, 1872 do not bar arbitration agreements which contain a time bar clause or put a cap on the amount awarded.

The object of arbitration is to enable the parties to have their disputes resolved expeditiously through a private tribunal, outside the court process. In an arbitration agreement, parties are free to choose various procedural aspects of the dispute resolution mechanism, including laying down time limits for raisins a claim.

The time limit beyond which claims would be barred, is an acceptable aspect of the arbitration process, which is saved under Exception 1 to the Section 28 of the Contract Act read with Section 43(3) of the Arbitration and Conciliation Act, 1996. It is relevant to note that even after the amendment to Section 28, the exceptions to Section 28 which pertain to arbitration agreement, have not been amended or deleted.

The Supreme Court in a series of judgments has considered the validity of agreements prescribing a period within which a claim should be raised. A distinction was drawn between agreements which limit the time period for enforcement of right on the one hand, and agreements which altogether extinguish the right on the other hand. These judgements have, however, not adverted to arbitration agreements which are saved by the exceptions to Section 28 which place arbitration agreements on a different footing.

Undue hardship

Section 43(3) empowers the court to extend the period, for commencing arbitral proceedings within the time fixed by the agreement if it is of the opinion that in the circumstances of the case, undue hardship would be caused to the claimant.

Every hardship is not undue hardship. It simply means excessive. In the words of Lord Denning MR, "*It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault…. (This) was a matter for the judge's discretion."*

This provision provides that where such a clause causes undue hardship, the court has the discretion to extend the time on an application being made by the claimant.

In *Moscow V/O Exportkhleb v Helmville Ltd. "The Jocelyne",* an English Court framed the following guidelines for exercise of judicial discretion:

(1) the word "undue hardship" should not be construed narrowly;

(2) undue hardship means excessive hardship. Where the hardship is due to the fault of the claimant, it means hardship, the consequences of which, are out of proportion to such a fault;

(3) in deciding whether to extend time, the court should look at all relevant circumstances;

(4) in particular, the following matters should be considered-

(i) length of delay;

(ii) the amount at stake;

(iii) whether the delay was due to the fault of the claimant, or to circumstances outside his control;

(iv) if it was due to fault of the claimant, the degree of such fault;

(v) whether the claimant was misled by the other party;

(vi) whether the other party has been prejudiced by the delay and if so, the degree of such prejudice.

These guidelines were based on Section 27 of the English Arbitration Act, 1950. This provision has since been replaced by section 12 of the English Arbitration Act, 1996 which does not use the term "undue hardship". The formulation in English Arbitration Act, 1996 completely sweeps away the expression "undue hardship", and the line of authorities based upon it.

The Indian Arbitration Act uses the expression "undue hardship" which has been interpreted to mean something which is not merited by the conduct of the claimant or is very much disproportionate to it. The conduct of the party, *bona fides*, reasonableness of the claim, the amount at stake, the reasons for delay in taking the requisite steps to commence arbitration proceedings, the possibility of material prejudice being caused to the other side by extension of time limit, are some relevant, though not exhaustive criteria for determining the issue of undue hardship. As for the weight of which must be afforded to the various above-mentioned factors, no hard and fast rule can be laid down, which will depend upon the facts and circumstances of each case.

For extending the time limit, the principles laid down in the construction and application of Section 5 of Limitation Act, 1963 are to be followed. In other words, all relevant factors which occasioned delay should be taken into consideration.

A practice point to note is that the discretion to extend the time limit is not automatic. It would be granted by the court on an application made by a party to the agreement. The party must not only promptly apply for extension as soon as he comes to know of it, but must satisfy the court, that if the time is bot extended, he will suffer under hardship.

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Annexure – 7.2

Supreme Court of India

Wild Life Institute of India, Dehradun v/s Vijay Kumar Garg, on 02.03.1997

Civil Appeal No. 3314 of 1997
(Arising out of SLP (C) No. 1658 of 1997)

Bench: Justice M. Jagannadha Rao and Justice (Mrs.) Sujata V. Manohar

Judgment

1. Leave granted.

2. Under the order of this Court dated 7-2-1997, notice was issued to the respondent for final disposal of the special leave petition in view of the receipt dated 23-10-1993 given by the respondent to the appellants. Accordingly, we have heard both the sides.

3. The appellants had entered into a contract dated 8-8-1988 with the respondent for construction of their building at Dehradun on the terms and conditions set out in that contract. According to the appellants, several extensions were granted to the respondent for completion of the building. Ultimately, the contract was terminated by them on 28-7-1992. According to the appellants, they have paid a total amount of Rs. 2.63 lakhs (approximately) to the respondent under the said contract. The final payment has been made under a receipt dated 23-10-1993 which is signed by the Project Manager for and on behalf of the respondent. It states:

> *"Received a sum of Rs. 2, 19, 245 vide Cheque No. 9526281 dated 23-10-1993 from the Director, Wildlife Institute of India, Dehradun on behalf of Shri Vijay Kumar Garg, Sector 9-B, Chandigarh in full and final settlement of our final bill for the construction work and other dues as per our agreement entered between the Director, Wildlife Institute of India and Vijay Kumar Garg, Vide No. A/11-7/88-WII (II) dated 8-8-1988. No further claim of whatsoever on any ground will be taken up in any court of law or arbitration. Any claim arising on account of Labour Act or otherwise will be our responsibility."*

4. After the signing of this receipt, the respondent did not do anything for a period of almost one year. On 30-8-1994, the respondent addressed a letter to the appellants in which for the first time, he set out 18 claims against the appellants in respect of the same contract and demanded payment. He also asked for appointment of an arbitrator. Even in this letter, there is no reference to the receipt given by him on 23-10-1993. Nor is there any allegation that the amount was received under protest or that the respondent had been, in any manner, pressurized into giving that receipt. There is also another letter of 21-10-1994 from the respondent to the appellants in which he invoked the arbitration clause and stated that he would apply to the court for appointment of an arbitrator. In reply, the appellants by their letter dated 1-11-1994 pointed out that the receipt signed by the respondent on 23-10-1993 clearly stated that all the bills of the respondent had been settled in full and no further claim whatsoever would be

taken up in any court of law or arbitration. Even, at this stage, no reply was given by the respondent to this contention. The respondent, thereafter, filed a suit under Section 20 of the Arbitration Act in which the Additional Civil Judge has passed an order on 17-12-1996 directing the appointment of an arbitrator in terms of that order. An appeal from this order has been dismissed by the Division Bench of the High Court.

5. Looking to the facts in the present case and the circumstances which are apparent from the correspondence exchanged between the parties in connection with the signing of the receipt of 23-10-1993, it is clear that a final payment was accepted by the respondent in full satisfaction of all his claims under the contract and that there was no dispute outstanding. After the receipt of the said amount also, the respondent has not lodged any protest nor has he alleged any pressure being put upon him for signing the receipt.

6. It is also necessary to refer to the arbitration clause under the contract which clearly provides that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the appellants that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the appellants shall be discharged and released of all liabilities under the contract in respect of these claims. The liability, therefore, of the appellants ceases if no claim of the contractor is received within 90 days of receipt by the contractor of an intimation that the bill is ready for payment. This clause operates to discharge the liability of the appellants on expiry of 90 days as set out therein and is not merely a clause providing a period of limitation. In present case, the contractor has not made any claim within 90 days of even receipt of the amount under final bill. The dispute has been raised for the first time by the contractor 10 months after the receipt of amount under final bill.

7. In the premises, the High Court was not right in referring the alleged dispute to arbitration. The appeal is, therefore, allowed. The impugned order of High Court is set aside. No costs.

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Annexure – 7.3

In the High Court of Kerala at Ernakulam

K. Raghavan vs General Manager, Southern Railway and Others, on 29.05.2000

ARP No.: 5/1999

Applicants:

K. Raghvan S/o Govindan, Kaduvalli House, P. O. Eachur, Kannur District,
(Rep. By: Adv. Mr. Suresh Kumar Kodoth)

Opposite Parties:

1. The Union of India, represented by General Manager, Southern Railway, Park town, Chennai
2. The Divisional Manager (Works), Southern Railway, Palakkad Division
3. The Chief Engineer, Southern railway, Park Town, Chennai-3

(Rep. By: Senior Counsel Mr. M. C. Cherian)

This arbitration request having been finally heard on 22.03.2000, the Court on 29.05.2000 passed the following:

Author: K. Mohamed Shafi, J.

ORDER

1. The applicant has filled this arbitration request to appoint an arbitrator to adjudicate the disputes between the applicant and the respondent in respect of execution of the contract work as per the agreement No. J/265/87 dated 03.08.1987 entered into between the applicant and the 1st respondent.

2. According to the applicant, as per the agreement, he had undertaken the work of manning of unmanned level crossing at KM 795/9-8 between Payyannur-Cheruvathur Stations and also for construction of gate lodge and two Type-I quarters on the estimated cost of Rs. 1,28,658/- and to complete the work on or before 15.01.1988. According to him, as there was change of site and delay in handing over the site by the respondent, the work could not be completed within the stipulated time and extensions were granted upto 31.08.1989 to complete the entire work. But on 08.05.1989 the respondent issued a seven days' notice following by a termination notice dated 20.05.1989. He has contended that by that time more than 75% of the work was completed and Rs. 51,106/- was paid by the respondent to the applicant. He has further contended that as the delay was caused by the respondent and termination of the contract was illegal and unjust, he had to incur heavy loss and the respondent are liable to pay a total amount of Rs. 6,73,530/- to the applicant. As the respondents did not respond to the notice issued by the applicant on 17.12.1996, he sent a notice dated 30.09.1997 to refer the dispute to arbitration as provided under clause 63(3) of the contract. But the respondent sent reply dated 26.05.1998 rejecting the request without assigning any reason. Hence this arbitration request is filled by the applicant.

3. The respondents have contended that the above arbitration request is not maintainable either in law or on facts and the same is barred by limitation. According to them, out of the agreed contract amount of Rs. 1,28,658/-, Rs. 76,400/- is paid to the applicant by way of part-bill and he has failed to complete the work within the stipulated time due to his own reasons and not due to any delay or default on the part of the respondents. Even though time for completion of the work was extended upto 31.03.1989, the applicant failed to complete the work even within that period. Therefore, the agreement with him was terminated and arrangements were made to get the work executed by some other agency. The request for cancellation of the termination order made by the applicant was not accepted and final bill was drawn in respect of the work done by the applicant and intimated to him on 26.09.1989. Though he raised objections to the final bill, by Annexure-B1 letter dated 18.10.1989 and Annexure-B2 letter dated 18.11.1989, there was no correction to be made in the bill and the applicant is liable to pay the excess cost incurred by the respondent for arranging the balance work to be done by the applicant. Subsequently the applicant sent Annexure-B3 lawyer's notice dated 13.11.1990 under Section 80 of the C.P.C claiming Rs. 6 lakhs, to which a reply was sent. But now about seven years after everything was over, as far as the applicant's claim is concerned, no specific claim is preceded Annexure-II notice alleged to be issued under Section 80 of the Cr.P.C. as provided in clause 63 to Annexure-II agreement. As per clause 63 of the agreement, any demand for arbitration should be preceded by a final claim on disputed matters and if the Railway fails to make a decision within a reasonable time after the final claim, arbitration proceedings can be restored to. Therefore, Annexure-IV reply was sent to Annexure-II latter sent by the applicant, rejecting his demand for arbitration. Therefore, the applicant is not entitled to any relief in this case and the arbitration request is liable to be dismissed.

4. The execution of Annexure-III agreement between the applicant and the respondents and the termination of the contract by the respondents before the completion of the work, even after the extended period upto 31.03.1989, are not in dispute. While the applicant has contended that the contract was terminated by the respondents illegally and without ant default on the part of the applicant, the respondents have contended that they were forced to terminate the contract since the applicant has failed to execute the work even after several extension granted to him. Even though part payment is made for certain portion of the work done by the applicant, the final bill drawn by the respondents after the termination of the contract is not accepted by the applicant. Thereafter it would appear that the applicant did not take recourse to the arbitration proceedings as provided under clause 63 of Annexure-III agreement caused to send registered lawyer notice to the respondents under Section 80 of the C.P.C. presumably claiming damage for the illegal termination of the contract. Though Annexure-B3 notice under Section 80 of the C.P.C. is sent by the applicant on 13.11.1990 claiming Rs. 6 lakhs from the respondents, no suit is filed by the applicant against the respondents claiming the amount.

5. Clauses 63 and 64 Annexure-III agreement described in Annexure-B4 with settlement of disputes between the applicant and the respondent. Clause 64(1) stipulated that if the Railway fails to make a decision with regard to the claim made by the contractor within a reasonable time, after 90 days but within 180 days of his presenting the final claim on disputed matters, shall demand in writing that the dispute or differences be referred to arbitration. Therefore, preferring final

claim and failure of the Railway to take a decision within a reasonable time and then demand by the contractor after 90 days but within 180 days of his presenting the final claim, to refer the dispute for arbitration under Clause 63 and 64 of the agreement, Annexure-III. In this case the applicant has not contended anywhere that he has presented his final claim before the respondents and the respondents have failed to take a decision within the reasonable time and he has preferred written request to refer the dispute for arbitration after 90 days but within 180 days of preferring his final claim. On the other hand it would appear that the applicant was contemplating to approach the civil court to claim damage for illegal termination of the contract, consequent loss incurred by him etc. Therefore, it is patent that the applicant has preferred the above arbitration request without complying with the pre-conditions provided under clauses 63 and 64 of the arbitration agreement, Annexure-III, so as to invoke the arbitration clause incorporated in the agreement. Under the circumstances the above arbitration request made by the applicant is not sustainable.

6. In view of the above finding the question whether the claim is barred by limitation or is not considered by this court. In view of above findings this arbitration request is dismissed as not maintainable.

24th may, 2000

Sd/-
(K. A. Mohamed Shafi)
Judge

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Annexure – 7.4

Supreme Court of India

M/S P. Manohar Reddy & Bros vs Maharashtra Krishna Valley, on 18.12.2008

CIVIL APPEAL Nos. 7408-7409 of 2008
(Arising out of SLP (C) Nos. 4968-4969 of 2005)

M/S P. Manohar Reddy & Bros. ... Appellant

Versus

Maharashtra Krishna Valley Dev. Corp. & Ors. ... Respondents

Author: S Sinha

Bench: S. B. Sinha, Cyriac Joseph

JUDGMENT

1. Leave granted.

2. Respondent herein invited tenders for the work of excavation in canal K.M. No. 126, Kukadi Left Bank Canal, Shrigonda in the District of Ahmednagar at an estimated cost of Rs.23,26,424/- pursuant whereto appellant herein submitted its offer for a sum of Rs. 21,10,233/-. The said offer being the lowest was accepted.

3. The parties hereto thereafter entered into a contact on 9.2.1988; clauses 37, 54 and 55 whereof read as under:

"37. After completion of work and prior to that payment, the contractor shall furnish to the Executive Engineer, a release of claims against the Government arising out of the contract, other than claims specifically identified, evaluated and expected from the operation of the release by the contractor."

54. Settlement of Dispute (For works costing less than Rs. 50 lakhs)
If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any drawings, record or ruling of the Executive Engineer, KIP Dn. No. VII, Shrigonda on any matter in connection with or arising out of the contract or the carrying out of work to be outside the terms of contract and hence unacceptable he shall promptly ask the Executive Engineer, in writing, for written instructions or decision. Thereupon the Executive Engineer, shall give his written instructions or decision within a period of 30 days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Executive Engineer fails to give his decision in writing within a period of 30 days after being requested, or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision appeal to upward authority who

shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of thirty days from receipt of the decision shall indicate his intention to refer the dispute to Arbitration as per clause 55 failing which the said decision shall be final and conclusive.

55. Arbitration (For works costing less than Rs. 50 lakhs)
All the disputes or differences in respect of which the decision has not been final and conclusive as per clause 54 above shall be referred for arbitration to a sole arbitrator appointed as follows.

Within 30 days of receipt of notice from the contractor or his intention to refer the dispute to arbitration the Chief Engineer (SP Irrigation Department), Pune shall send to the contractor a list of three officers of the rank of Superintending Engineers or higher, who have not been connected with the work under this contract. The contractor shall within 15 days of receipt of this list select and communicate to the Chief Engineer, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. In case contractor fails to communicate this selection of name within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within 30 days as stipulated the contract shall send a similar list to the Chief Engineer within 15 days. The Chief Engineer shall then select one officer from the list and appoint him as the Sole Arbitrator within 15 days. If the Chief Engineers fails to do so, the contractor shall communicate to the Chief Engineer the name of one officer from the list who shall then be the sole Arbitrator.

The Arbitrator shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof. The Arbitration shall determine the amount of costs to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor shall not be withheld unless they are subject matter of the arbitration proceedings.

All awards shall be in writing and in case of award amounting to Rs. One lakh and above, such awards shall state the reasons for the amount awarded. Neither party is entitled to bring a claim to arbitrator if the arbitrator has not been appointed before the expiration of 30 days after defects liability period."

4. A work order was issued on the same day. The said contract was to be completed by 8.1.1989, i.e. within a period of about 11 months. Appellant failed to complete the work within the stipulated time. He applied for extension which was granted first upto 09.07.1989 and thereafter upto 30.09.1990. Within the said period the work was completed. The measurements of the work undertaken by the appellant were recorded on 26.11.1990. Final bill prepared and paid by the respondent was accepted by the appellant without any demur.

5. Inter alia, on the premise that appellant was asked to do extra items of work, it raised its claims by a letter dated 27.2.1991, which was rejected. Details

of the purported extra work done by appellant, however, were not mentioned in the said letter dated 27.2.1991. It submitted another claim giving details thereof by a letter dated 10.6.1991.

6. Appellant by a letter dated 26.9.1991 purporting to invoke clause 54 of the General Conditions of Contract, issued notice to the Executive Engineer of respondent, stating:

"Whereas a number of claims were referred to you from time to time and in respect of many of them you have failed to give the decision. And whereas the work under contract was kept in progress by us in good faith and with a belief that on completion of the work you will reconsider our total case and settle our accounts with all the claims.

And whereas the work has been duly completed by us, we are now in a petition (sic) of finally work out in full the sum of money due and payable to us by the department including all the claims.

Now therefore, we hereby call upon you and give you notice finally under clause 54 of the General conditions of contract with a request to settle our accounts and give your decisions in respect of our following claims and disputes within a period of thirty days from the date of receipt of this notice by reconsidering your earlier decision in respect of claim on which you had indicated your decision earlier."

He specified 16 claims thereunder.

7. Respondent rejected the said claim by its letter dated 5.10.1991 alleging that the stipulated period therefor expired in May, 1991. The Executive Engineer of the respondent by his letter dated 29.10.1991 opined that the matter cannot be considered for arbitration, stating:

"Please refer your letter under reference which was received by this office in the 1st week of October 1991. The claims raised were already denied by this Office vide letter No. 448 dtd. 29.4.91. As you have referred the matter under the provisions of clause 54 of the L.C.B. No. 18 for 87, 88, the decisions of this office are again sent herewith. It is further clarified that the matter is brought for arbitration process after expiry of 30 days from end of defect liability period. The work was completed in November-90 and the defect liability period of six months is over in May 1991, hence the matter cannot be considered for arbitration."

However, its earlier decision of rejecting the claim was repeated.

8. Treating the same to be an order rejecting his claim, appellant herein preferred an appeal thereagainst before the Superintending Engineer in terms of its letter dated 26.11.1991; pursuant whereto a meeting was held between the representatives of the parties; the minutes whereof read as under:

"Since the contractors have not submitted their claims under clause 54 of the General conditions of the contract along with documentary evidences within the stipulated period i.e. before the expiry of 30 days after defect liability period and as per clause 55 which states `Neither party is entitled to bring a claim to

arbitrator if the arbitrator has not been appointed before the expiration of 30 days after defect liability period.' Defect liability period of this contract expired on 31st May 1991 and the stipulated period of 30 days expired on 30th June 1991.

Hence the contractor's appeal for arbitration is hereby rejected"

9. A copy of the said minutes of the meeting was sent by the Superintending Engineer along with his letter dated 30.12.1991.

A notice, on the premise that disputes and differences arose between the parties within the meaning of clause 55 of the General Conditions of Contract, was served upon the Chief Engineer asking him to furnish the names of its three officers for appointment of sole arbitrator within 30 days from the receipt thereof. The said request was rejected by the Chief Engineer in terms of his letter dated 26.2.1992, stating:

"You have given notice under clause 54 on 26/11/91 to refer the dispute to arbitration. Thus the notice under clause 54 is given after the expiry of 30 days of defect liability period.

Thus you have not submitted the claims within the stipulated time and followed the procedure as per the clause 54 of general condition for settlement of dispute. This has already been informed to you by the Superintending Engineer Kukadi canal circle, Pune-6 under his letter no. KCC/PB-1/KM 126/Claims/4129 dt. 30/12/91.

Hence the question of appointing arbitrator by this office does not arise."

10. Appellant thereafter sent a list of arbitrators on 9.3.1992 followed by a notice through a lawyer. Indisputably, the said request for referring the disputes to an arbitrator was rejected by respondent.

11. Appellant filed an application under Section 8 of the Arbitration Act, 1940 (for short, "the Act") in the Court of Civil Judge (Senior Division), Ahmednagar at Ahmednagar for appointment of Arbitrator. By reason of a judgment and order dated 9.12.1997, the Civil Judge Senior Division, Ahmednagar opining that the said application having been filed within the period as specified in Article 137 of the Limitation Act, 1963 and the cause of action therefor having arisen on 29.10.1991 on which date the appellant's claim was rejected, appointed one Shri V.M. Bedse, a retired Chief Engineer as Arbitrator with regard to the additional and extra works allegedly carried out by appellant. The learned judge held:

"The petitioner along with Exh. 19 has produced various documents and correspondence ensued with the respondents. It is crystal clear from this correspondence that the petitioner had demanded release of claim on 27/2/91 under clause No. 37 of the contract agreement. This claim letter was received by the respondents and further query in respect of proof of claim was called for by the respondents by their letter dated 29/4/91. Accordingly, the proof was submitted by letter dated 10/6/91 and details of claim were given on 26/9/91. The petitioner also apprised about `settlement of dispute' as contemplated in clause No. 54 of the contract agreement. Therefore practically there is

compliance by the petitioner as contemplated under clause No. 54 of the contract agreement. The record also reveals that the respondents on 5/10/91 i.e. after lapse of three months replied the notice of petitioner dated 10/6/91 and first time it was agitated that the petitioner has not taken steps under clause No. 55 under defect liability and before expiration of 30 days. The clause No. 19(a) of the contract agreement is in respect of material and workmanship and it defines the defect liability in respect of workmanship and materials and so also the defect liability period is to be counted from the certified date of completion certificate. Under clause No. 26 of the contract agreement, it is the respondents who are required to issue such certificate to the petitioner. The notices were issued by the petitioner under clause Nos. 54 and 55 of the contract but it appears from the record that the respondents did not take any steps to choose their arbitrator. On the contrary, on 9/3/92 the list of three officers was demanded and out of them sole arbitrator was chosen but the respondents have not replied the same. In this manner, the petitioner and respondents could not concur for appointment of arbitrator and the petitioner had therefore no alternative but to resort to provisions of Section 8 of the Arbitration Act. The correspondence produced on record in support of claim under Section 8 of the Arbitration Act by the petitioner is sufficient to come to the conclusion that there was dispute between petitioner and the respondents in respect of additional work and no such steps have been taken by the respondents as provided under the Contract."

12. A Civil Revision Application No. 201 of 1998 was preferred thereagainst by the respondent before the High Court, which by reason of the impugned judgment and order dated 13.4.2004 has been allowed. A Review Petition filed by appellant thereagainst has been dismissed.

13. Mr. Sundaravaradan, learned Senior Counsel appearing on behalf of appellant raised the following contentions in support of the appeal.

i. The High Court committed a serious error of law in passing the impugned judgment insofar as it failed to take into consideration that limitation for raising a claim as envisaged under clause 54 is not applicable in the instant case.

ii. In view of the fact that the claim was rejected only on 26.2.1992 by the appellate authority, the period of 30 days should be counted therefrom.

iii. While exercising its jurisdiction under Section 8 of the Act, the court was concerned only with the question as to whether there was a triable issue.

iv. Once a triable issue is found to have been raised, which was required to be referred to the arbitration, the merit of the claim cannot be gone into.

14. Ms. Aprajita Singh, learned counsel appearing on behalf of the respondent, on the other hand, would urge:

i. Clause 54 of the General Conditions of the Contract must be invoked by the contractor during the tenure thereof and not after completion of the contract and acceptance of the final bill.

ii. The final bill having been accepted without any demur, the contract came to an end, wherewith the arbitration agreement which was a part thereof also perished.

iii. Appellant having not sought for extension of time in terms of sub-Section (4) of Section 37 of the Act and in any event no sufficient cause having been made out therefor, even no extension of time could be granted.

15. Indisputably, the parties are governed by the Act. `Arbitration Agreement' has been defined in Section 2(a) of the Act to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. An arbitration is a private dispute resolution mechanism agreed upon by the parties. The arbitration agreement is contained in a commercial document; it must be interpreted having regard to the language used in it. A bare perusal of clauses 37, 54 and 55 of the General Conditions of Contract clearly shows that the arbitration agreement entered into by and between the parties is not of wide amplitude. In a case where arbitration clause is of wide amplitude, the same may cover also the claims arising during the tenure of contract or thereafter, provided the arbitration clause subsists.

16. Clause 37 imposes an obligation upon the contractor to furnish to the Executive Engineer a release of claims against the Government arising out of the contract other than the claims specifically identified, evaluated and expected from the operation of the release by the Contractor only after completion of the work and prior to payment thereof. There is nothing on record to show that any claim in relation to extra or additional work had been raised by the contractor prior to 27.2.1991 although final measurement had been recorded on 26.11.1990 and the bill has been paid in full and final satisfaction on 4.12.1990. Clauses 54 and 55 of the arbitration agreement must be read together.

17. Indisputably, the contract has been entered into for works costing less than Rs. 50 lakhs and, thus, clause 54 would be attracted in the instant case. In terms of the said provision, the contractor has to raise a demand with the Executive Engineer if any work is demanded from him, which he considers to be outside the requirements of the contract. The word `consider' is of some significance, it means "to think over; to regard as or deem to be." (See Advanced Law Lexicon, 3rd Edition, 2005).

18. If a work has to be carried out outside the terms of the contract and is unacceptable, he is required to promptly approach the Executive Engineer in writing for obtaining his written instruction or decision in that behalf. The Executive Engineer is obligated to give his written instructions or decision within a period of 30 days of making such request. Once such instruction or decision is received, the contractor is required to comply therewith. Only in a case where the Executive Engineer fails and/or neglects to give a decision or issue instruction, the contractor may within a period of 30 days thereafter prefer an appeal to the appellate authority. The appellate authority is required to provide an opportunity of hearing to the contractor. It is only when the contractor is dissatisfied with the decision of the appellate authority, he may indicate his intention to refer the dispute to Arbitration in terms of clause 55 within a period of 30 days from the date of receipt of the said decision, failing which, the same would be final.

19. The arbitration clause, thus, could be invoked only in a case where the decision has not become final and conclusive as per clause 54.

20. A plain reading of the aforementioned provisions clearly shows that clause 54 does not envisage raising of a claim in respect of extra or additional work after the completion of contract.

21. The jurisdiction of the civil court under Section 8 of the Act or under Section 20 thereof can be invoked if the disputes and differences arising between the parties was the one to which the arbitration agreement applied.

22. The contractual clause provides for a limitation for the purpose of raising a claim having regard to the provisions of Section 28 of the Indian Contract Act. It is no doubt true that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a clause providing for limitation so as to enable a party to lodge his claim with the other side is not invalid. In The Vulcan Insurance Co. Ltd. vs. Maharaj Singh and anr. [AIR 1976 SC 287], the arbitration clause read as under:

"18. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an Arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single Arbitrator to the decision of two disinterested persons as Arbitrators.... ... . And 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 or Umpire of the amount of the loss or damage if disputed shall be first obtained.

19. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

Referring to the well-known decision of Scott vs. Avery [(1856) 25 LJ Ex 308 = 5 HLC 811] and noticing different views expressed by different courts, it was held:

"22. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in Scott v. Avery bars any action or suit if commenced for determination of a dispute covered by the arbitration clause. But if on the other hand a dispute cropped up at the very outset which cannot be referred to arbitration as being not covered by the clause, then the Scott v. Avery clause is rendered inoperative and cannot be pleaded as a bar to the maintainability of the legal action or suit for determination of the dispute which was outside the arbitration clause."

Whether such a clause comes within the purview of the arbitration clause, vis-a-vis Article 137 of the Limitation Act, it was held:

"...It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act and is valid; vide-The Baroda Spinning and Weaving Co. Ltd. v. The Satyr Narayan Marine and Fire Insurance Co. Ltd. [ILR 38 Bom 344 : AIR 1914 Bom 225 (2)]; Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd. [AIR 1949 Cal 390] and The Ruby General Insurance Co. Ltd. v. The Bharat Bank

Ltd. [AIR 1950 (East) Punj 352]. Clause 19 has not prescribed a period of 12 months for the filing of an application under Section 20 of the Act. There was no limitation prescribed for the filing of such an application under the Indian limitation Act, 1908 or the limitation Act, 1963. Article 181 of the former did not govern such an application. The period of three years prescribed in Article 137 of the Act of 1963 may be applicable to an application under Section 20."

Whether the difference which arose between the parties was the one to which the arbitration clause applied and whether the application under Section 20 of the Act could be dismissed, this Court opined:

"24. But in this case on a careful consideration of the matter we have come to the definite conclusion that the difference which arose between the parties on the company's repudiation of the claim made by respondent No. 1 was not one to which the arbitration clause applied and hence the arbitration agreement could not be filed and no arbitrator could be appointed under Section 20 of the Act. Respondent No. 1 was ill-advised to commence an action under Section 20 instead of instituting a suit within three months of the date of repudiation to establish the company's liability."
(See also A.B.C. Laminart Pvt. Ltd. vs. A. P. Agencies, Salem [AIR 1989 SC 1239)

23. It is not a case where an application under Section 8 could not be filed within a period of 3 years. It is a case where a determination was necessary as regards invocation of the disputes settlement processes. For resolution of the dispute, a claim must be made in terms of the provisions of the contract for the purpose of giving effect to the arbitration clause; the application thereof being limited in nature.

24. Mr. Sundaravaradan has taken us through a large number of decisions to contend that the purported `accord and satisfaction' on the part of the contractor might not itself be a sufficient ground to reject a prayer for making a reference under the Arbitration Act. Such a question came up for consideration before this Court in Damodar Valley Corporation vs. K.K. Kar [(1974) 1 SCC 141], wherein this Court noticing the decision of Heyman v. Darwins Ltd. [(1942) 1 All ER 337], stated the law thus:

"Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary."

It was furthermore held:

"Similarly the question whether there has been a settlement of all the claims arising in connection with the contract also postulates the existence of the contract. The principle laid down by Sarkar. J., in Kishorilal Gupta Bros's case [(1960) 1 S.C.R. 493] that accord and satisfaction does not put an end to the arbitration clause was not dissented to by the majority. On the other hand proposition (6) seems to lend weight to the views of Sarkar, J. In these circumstances, the question whether the termination was valid or not and whether damages are recoverable for such wrongful termination does not affect the arbitration clause, or the right of the respondent to invoke it for appointment of an arbitrator."
{See also S.C. Konda Reddy v. Union of India & anr. [AIR 1982 KARNATAKA 50)}

25. We are, however, in this case faced with a different situation. The contention of respondent is not that there has been a breach of contract and the contract still subsists. Its contention is that in terms of the contract the claim for extra work or additional work should have been raised during the tenure of the contract itself and not after it came to an end and payment received in full and final satisfaction.

26. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). The Indian law - The Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in Article 16 (1)(b), which reads as under:-

"16. Competence of arbitral tribunal to rule on its jurisdictional - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
-
(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

Modern laws on arbitration confirm the concept. The United States Supreme Court in the recent judgment in Buckeye Check Cashing, Inc. v. Cardegna [546 US 460] acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." The Court, referring to its earlier judgments in Prima Paint Corp. v. Flood & Conklin Mfg. Co., [388 U. S. 395] and Southland Corp. v. Keating [465 U. S. 1], inter alia, held:

"Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."

But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply.

M/s Bharat Heavy Electricals Limited, Ranipur vs. M/s Amar Nath Bhan Prakash [(1982) 1 SCC 625], whereupon reliance has been placed by Mr. Sundaravaradan is not applicable as it was held therein that the question whether there was discharge of the contract by accord and satisfaction or not, is itself arbitrable.

The said question need not detain us having been considered by this Court in *Bharat Coking Coal Ltd. vs. Annapurna Construction* [(2003) 8 SCC 154] holding:

> *"14. The question is as to whether the claim of the contractor is de hors the rules or not was a matter which fell for consideration before the arbitrator. He was bound to consider the same. The jurisdiction of the arbitrator in such a matter must be held to be confined to the four-corners of the contract. He could not have ignored an important clause in the agreement; although it may be open to the arbitrator to arrive at a finding on the materials on records that the claimant's claim for additional work was otherwise justified."*

27. *In Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors* [(2004) 2 SCC 663], this Court held:

> *"18. Normally, an accord and satisfaction by itself would not affect the arbitration clause but if the dispute is that the contract itself does not subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that the contract survives, recourse to the arbitration clause may be taken. [See Union of India v. Kishorilal Gupta [AIR 1959 SC 1362] and Naihati Jute Mills Ltd. v. Khyaliram Jagannath [AIR 1968 SC 522]."*

It was furthermore opined;

> *"28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.*
>
> *29. We may, however, hasten to add that such a case has to be made out and proved before the Arbitrator for obtaining an award.*
>
> *30. At this stage, the Court, however, will only be concerned with the question whether trial issues have been raised which are required to be determined by the Arbitrators."*

28. We, however, as noticed hereinbefore, are concerned with a different fact situation. As arbitration clause could not be invoked having regard to the limited application of clauses 37, 54 and 55 of the General Conditions of the Contract, we are of the opinion that the trial court was not correct in directing appointment of an arbitrator.

29. We may notice that in Wild Life Institute of India, Dehradun vs. Vijay Kumar Garg [(1997) 10 SCC 528], a Division Bench of this Court held as under:

"It is also necessary to refer to the arbitration clause under the contract which clearly provides that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the appellants that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the appellants shall be discharged and released of all liabilities under the contract in respect of these claims. The liability, therefore, of the appellants cease if no claim of the contractor is received within 90 days of receipt by the contractor of an intimation that the bill is ready for payment. This clause operates to discharge the liability of the appellants on expiry of 90 days as set out therein and is not merely a clause providing a period of limitation. In the present case, the contractor has not made any claim within 90 days of even receipt of the amount under the final bill. The dispute has been raised for the first time by the contractor 10 months after the receipt of the amount under the final bill."

30. The High Court has relied upon a decision of this Court in M/s K. Ramaiah and Company Vs. Chairman & Managing Director, National Thermal Power Corpn. [1994 Supp. (3) SCC 126]. We need not deal therewith in details as the effect thereof has been considered by us in Bharat Coking Coal Ltd. vs. Annapurna Construction (supra).

31. It is also not a case where sub-section (4) of Section 37 of the Act could be invoked. Appellant did not invoke Section 37(4) of the Act. No reason has been assigned as to why the said discretion of the court should be invoked particularly when the claim has been raised only after completion of the work.

32. For the reasons aforementioned, we, albeit for different reasons, affirm the judgment of the High Court. The appeals are, accordingly, dismissed. In the facts and circumstances of the case there shall be no order as to costs.

We may clarify that nothing stated herein shall affect the merit of the appellant's claim to invoke the jurisdiction before any other forum for enforcing the same.

.....J.
[S.B. Sinha]

.....J.
[Cyriac Joseph]

New Delhi;
December 18, 2008

****

Annexure – 8.1

Calcutta High Court

Abu Hamid Zahir Ala V/s Golam Sarwar, on 18.08.1916

Equivalent citations: 40 Ind Cas 422

Bench: A Mookerjee, Cuming

JUDGMENT

1. We are invited in this appeal to consider the propriety of an order of dismissal of an application under paragraph 17 of the Second Schedule to the Civil Procedure Code, 1908, for the enforcement of a private award. The relevant portion of the agreement of reference was in these terms:

> *"Considering it desirable to decide the matters in dispute by arbitrators and so appointing the above-mentioned gentlemen as arbitrators, we execute this deed of reference and agree that the award, which all the arbitrators unanimously or the majority of the arbitrators will make, will be accepted as a decree of a superior Court and will have force and be valid at all places. In case of difference of opinion among the arbitrators, the majority of them will make and be competent to make their award unanimously. To that no objection by any of us will be entertained nor shall we be competent to make any."*

2. Under this instrument, five gentlemen were appointed arbitrators, three of whom alone signed the award. The application with which we are now concerned was made for the enforcement of this award. The defendant objected that there was no valid award in law because two of the arbitrators had not attended all the sittings and one at least did not take part in the final deliberations. The plaintiff contended that inasmuch as three arbitrators who had made the award had attended all the meetings, and as a majority of the arbitrators was competent to make a valid award, the award was legal and enforceable. The Subordinate Judge has overruled these contentions on the ground that all the arbitrators should be present at all the meetings and particularly at the last when the final act of arbitration is done, though as a result of this united deliberation there may be an award by a majority only of them. In our opinion, the view taken by the Subordinate Judge is correct.

3. It is now firmly settled, as ruled in Nand Ram v. Fakir Chand [7 A. 523: A.W.N. (1885) 139 : 4 Ind. Dec. (N.S.) 539] that when a case has been referred to arbitration, the presence of all the arbitrators at all the meetings and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. There the case had been referred by the Court to the arbitration of three persons and the parties had agreed to be bound as to the matters in dispute by the decision of the majority. One of the arbitrators subsequently refused to act and withdrew from the arbitration. Oldfield and Mahmood, JJ., held that the award of the majority was not binding. A similar view was taken in Sreenath Ghose v. Raj Chunder Paul [8 W.R. 171]. Our attention, however, has been drawn to the earlier decision in Kazee Syud Naser Ali v. Musammat Tinoo Dossia [6 W.R. 95] as an authority for the contrary position. We are of opinion that this case is clearly distinguishable, and is an authority only for

the proposition that an award of arbitrators cannot be set aside on the ground that it is erroneous for that only two out of three arbitrators signed the award when the parties agreed to abide by the decision of the majority. There is nothing to indicate that the arbitrator who did not sign the award had not taken part in the deliberations. The principle which underlies the view we take is best stated in the words of Russell, which have now became classical, quoted as they were with approval in In re Beck and Jackson [(1857) 1 C.B. (N.S.) 695 : 140 E.R. 286 : 107 R.R. 861] and Khelut Chunder Ghose v. Tarachurn Koondoo [6 W.R. 269 at p. 272]. '*The arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges, so that by conference they shall mutually assist each other in arriving at a just decision*." The same point of view had been emphasised in Dalling v. Matchett [(1740) Wiles 215 : 125 E.R. 1138] where the Court of Common Pleas observed as follows:

> *"It has often been said that if that one had been present, that is, the arbitrator who did not attend, he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always received this answer that everyone has a right to argue and debate as, well as to give his vote and; it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion."*

4. The matter was put substantially in the same way in Pering and Keymer, In the matter of [(1835) 3 Ad. & E. 245 : 111 E.R. 406 : 42 R.R. 376]. Lord Denman observed "*Any two, under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after discussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him."* Coleridge, J., added: *"The parties have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted."* This view accords with that adopted in Peterson v. Ayre [(1854) 14 C.B. 665 : 2 C.L.R. 722 : 23 L.J.C.P. 129 : 2 W.R. 373 : 139 E.R. 273 : 23 L.T. (O.S.) 67 : 98 R.R. 805]; White v. Sharp[(1844) 1 Car & K. 348 : 12 M. & W. 712 : 1 D. & L. 1039 : 13 L.J. Ex. 215 : 8 Jur. 344 : 152 E.R. 1385]; Templeman In re [(1842) 9 D.P.C. 952 : 6 Jur. 324]; Burton v. Knight [(1705) 1 Eq. Ca. Abr. 50 : 21 E.R. 866]; Morgan v. Bolt[(1863) 7 L.T. 671 : 11 W.R. 265] and Doberor v. Morgan [(1903) 34 Can. Sup. Ct. 125].

5. We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving, at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. The inference follows that in the present case there is no valid award.

6. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold mohurs.

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Annexure – 8.2

High Court of Himachal Pradesh

M/s Inderjit Singh Avtar Singh vs State of H.P. and Another, on 10.11.2003

Arbitration Appeal No. 14 of 2003

Judgement

V. K. Gutpa, C.J.

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (1996 Act for short) has been filed by M/s. Inderjit Singh Avtar Singh against the judgment dated 16.9.2003 passed by the learned Single Judge of this Court in OMP (M) No. 94 of 2001 whereby, after setting aside arbitral award forming the subject matter of the aforesaid OMP, the learned Single Judge issued directions that the Arbitral Tribunal shall consider afresh the subject matter of the arbitration proceedings and after deliberating upon the same pass the final arbitral award in accordance with law.

2. Work relating to the construction of a bridge over Ali Khud near village Kothi in the district of Bilaspur, was awarded to the Appellant by the Respondents sometime in September, 1989 and the same had to be completed within a period of three years. However, disputes arose between the parties and these were referred for arbitration. The arbitral award ultimately was passed which was challenged before the learned single Judge in the aforesaid OMP in terms of Section 34 of 1996 Act, and as noticed above, the learned Single Judge while allowing the application under Section 34 (supra) set aside the award and issued directions as noticed.

3. Clause 16 of the agreement between the parties related to the reference to and adjudication by arbitration and as per this arbitration agreement, the arbitration was to be conducted by two arbitrators, one to be appointed by each party and in case of difference of opinion between the two arbitrators, the matter was to be referred to an Umpire. Even though, the agreement between the parties was executed sometime in the year 1989 and apparently the arbitration agreement provided for reference of disputes to two arbitrators, one to be appointed by each party, since admittedly the arbitral proceedings had not commenced before the coming into force of the 1996 Act, in terms of Section 85 of 1996 Act, because of the repealing of the Arbitration Act, 1940, the provisions of 1996 Act alone were applicable to the arbitration proceedings arising out of the agreement in question, governing the parties in this petition. We are saying so because, even though the agreement between the parties had been executed at a point of time when Arbitration Act, 1940 was applicable, and presumably because of the applicability of the provisions of 1940 Act at that time, the arbitration agreement had provided for the arbitration being done by two arbitrators, one to be nominated by each party and also the appointment of an Umpire in the case of differences between the two arbitrators, when the disputes actually arose between the parties necessitating the reference of such disputes to Arbitration, 1996 Act had in the meantime come into force. As already observed,

by virtue of Section 85 of 1996 Act, Arbitration Act, 1940 had stood repealed on the coming into force of 1996 Act and consequently, at that point of time, the provisions of 1996 Act alone were applicable to these arbitration proceedings. Admittedly, by application of Section 21 of 1996 Act also because the arbitral proceedings had not commenced at the relevant time, provisions as contained in 1996 Act were applicable, and not those contained in 1940 Act.

4. Once, therefore, it is clearly understood and hence established, beyond any doubt whatsoever, that with respect to the arbitration proceedings in hand the provisions of 1996 Act were applicable (and not 1940 Act), because of the mandatory statutory requirement as contained in Section 10 of 1996 Act, in a multi-member Arbitral Tribunal, the number of arbitrators could not be even; this number had to be odd. Reading Section 10(1) with Section 11(3) of 1996 Act together, therefore the two nominee arbitrators of the parties rightly appointed the third as the Presiding Arbitrator, and thus the Arbitral Tribunal consisted of three members, two of them being the nominees of the parties, and the third as the Presiding Member.

5. It appears because of some misconception on the part of the functionaries of the State Government, resultantly also some misunderstanding based on this misconception having crept in their minds. The functionaries of the State Government by misconstruing and misapplying the true scope of the applicability of 1996 Act, wrongly thought and felt that since the arbitration agreement (which admittedly and been executed at a point of time of 1989, when 1996 Act was not applicable and 1940 Act was applicable) had provided for appointment of only two arbitrators, appointment of the third arbitrator was untenable and, therefore, the State nominated arbitrator at the crucial stage of arbitration proceedings did not participate in the proceedings, giving rise to this avoidable controversy. In the judgment under challenge before us, in this appeal, the learned Single Judge has rightly rejected this untenable plea of the State and has rightly held that Arbitral Tribunal comprising of three members was rightly constituted and was intra vires of the contract agreement and also was in conformity with Section 11(3) of 1996 Act. The learned Single Judge, accordingly rightly refused to set aside the award on the ground of the Arbitral Tribunal not having properly been constituted.

6. We are in full agreement with the aforesaid approach of the learned single Judge and hold that even though the arbitration agreement as originally executed had provided for appointment of two arbitrators, this provision was to be read at the relevant time in conformity with Section 10(1) and Section 11(3) of 1996 Act because, on application of Section 21 of 1996 Act since arbitral proceedings had not commenced, provisions of 1996 Act alone were applicable and, therefore any Arbitral Tribunal comprising of even number of arbitrators would have been a nullity in the eyes of law. Similarly, the provisions regarding the appointment of an Umpire and his role being relevant only in the eventuality of the two arbitrators dissenting was no more an applicable proposition of law after coming into force of 1996 Act since this was a stipulation contained in 1940 Act alone which had stood repealed as already noticed above by virtue of Section 85 of 1996 Act.

7. The arbitral Award, however, has been set aside by the learned Single Judge on the ground that in the decision making process, one of the arbitrators, namely, the nominee of the State Government did not participate. Even though as rightly argued by Mr. Suneet Goel, learned Counsel appearing for the Appellant, that

Section 29 of the 1996 Act clearly provides that the decision of the arbitral Tribunal shall be made by a majority of all its members and even though out of the three members of the arbitral Tribunal, two members are parties to the decision in the present case, what we found is that the/non-participation of the third member of the arbitral Tribunal was owing to a bona fide misunderstanding on his part that perhaps the Arbitral Tribunal should have comprised of only two members, or that the proceedings should have started de novo. It was because of such bona fide misunderstanding on his part that the third arbitrator did not participate in the decision making process. That being the case, therefore, in the peculiar facts and circumstances of this case, the majority rule as envisaged in Section 29 of the Act cannot be pressed into aid for sustaining the award. In our considered opinion, the learned Single Judge has adopted a very rational, right and correct approach and has charted a right course of action by remitting the matter to the arbitral Tribunal to consider the matter afresh, in a joint meeting of all the three Members and pass the arbitral award. Any other course of action could have been detrimental and prejudicial to the interests of justice.

8. We therefore, while upholding the judgment of the learned Single Judge and dismissing the appeal in limine, direct that (if not already done) the meeting of the Arbitral Tribunal comprising of all the three members of the Tribunal shall be held in the shortest possible time and in any case within four weeks from the date of communication of this order and in the light of the observations made hereinabove, the Arbitral Tribunal shall decide the matter afresh on its merits, in accordance with law and pass the Arbitral award in the shortest possible time.

9. We have been informed at the Bar that the State nominee arbitrator, namely Superintending Engineer (Arbitration) is not available anymore because of the abolition of this post. That being the case, we direct Respondent No. 1 to nominate the State nominee arbitrator within two weeks from today. He shall fill up the vacancy caused owing to the abolition of the post of Superintending Engineer (Arbitration) and be the third member of the arbitral Tribunal.

10. Appeal dismissed. No order as to costs.

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Annexure – 8.3

Karnataka High Court

Rudramuni Devaru vs Shrimad Maharaj Niranjan, on 11.03.2005

Miscellaneous First Appeal No. 3742 of 2000

Bench: S Nayak, S Majage

Author: S Nayak J.

JUDGMENT

1. The appellant herein is the applicant in Miscellaneous Application No. 66 of 1999. This appeal preferred under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') is directed against the judgment and order dated 5th September, 2000, passed in Miscellaneous Application No. 66 of 1999 on the file of the Court of the First Additional District Judge, Dharwad. The Court below by the order under appeal has dismissed Miscellaneous Application No. 66 of 1999 filed by the appellant herein under Section 34 of the Act.

2. The facts of the case in brief are as follows:

There is a well known Veerashaiva Math called Moorusaavira Math at Hubli having large number of devotees in the Veerashaiva Community not only in the State of Karnataka but also from outside. Moorusaavira Math is registered as a public trust under the provisions of the Bombay Public Trust Act, 1950 (for short, 'the BPT Act'). The first respondent was the Mathadipathi and sole trustee of the Math as noted in the P.T. Register at the relevant point of time. As noted in the P.T. Register, the succession to the office of the Mathadipathi is by way of appointment of a successor by the existing Mathadipathi in accordance with the opinion of Lingayath Devotees of Hubli and Dharwad. The appellant was appointed as successor by the first respondent with the unanimous consent of Lingayath Devotees of Hubli and Dharwad on 17.10.1991 and a document to that effect was registered on 30th October, 1991. When the matter stood thus, the first respondent sought to cancel the appointment of the appellant as successor by executing a cancellation deed dated 19.10.1995. It appears that that led to differences and disputes between the first respondent and the appellant. However, those differences and disputes between them were settled by intervention of the devotees and well meaning people of Hubli and Dharwad who adore the office of the Mathadipathi in high esteem and reverence. Under the said settlement, the first respondent decided to forgive and forget the past and the appellant was again appointed as successor as per the wish of the devotees thereby, in effect, cancelling the cancellation deed dated 19.10.1995 and affirming the appointment of the appellant as successor as per registered deed dated 30th October, 1991. In that regard, the first respondent executed a deed dated 16.10.1998 and the same was duly registered. When the matter stood thus, the first respondent quite curiously and within a short time executed another cancellation deed dated 02.11.1998 cancelling the appointment of the appellant as the Mathadipathi without consulting and obtaining the consent of the Lingayath Devotees of Hubli-Dharwad and without informing the appellant. However, it is the case of the

appellant that he was installed as Mathadipathi after performing necessary ceremonies, poojas, etc. on 7th and 8th November, 1998 in pursuance of the deed executed by the first respondent on 16.10.1998. The cancellation of the appointment of the appellant as Mathadipathi by the first respondent by executing cancellation deed dated 02.11.1998, it is claimed, created chaos and tense feeling amongst the devotees of the Math and in the smooth administration of the Math. When the matter stood thus, due to the intervention of the devotees, leaders of the Veerashaiva Community and other prominent citizens of Hubli and Dharwad, the appellant and the first respondent ultimately agreed to refer the dispute between them to the arbitral tribunal consisting of five arbitrators. In terms of the arbitration agreement, out of five arbitrators, the first respondent was to nominate two arbitrators, the appellant was to nominate two arbitrators and the Chief Minister of Karnataka was to nominate one arbitrator and all the arbitrators were required to be Mathadipathies of different Maths. In terms of the arbitration agreement, the appellant nominated third and fifth respondents as his nominees whereas the first respondent nominated fourth and sixth respondents as his nominees. The Chief Minister of Karnataka nominated second respondent as his nominee. The second respondent, the records disclose, assumed the role of the presiding arbitrator of the arbitral tribunal.

3. The arbitral tribunal held its first sitting on 25th, 26th and 27th December, 1998. It is claimed by the arbitral tribunal that the arbitrators on 25th December, 1998 decided on the procedure to be followed in the enquiry and they have decided to examine the appellant and the first respondent separately in order to know the reasons which led to the untoward incident in the precinct of the Math and accordingly it examined them separately and recorded their statements. On 26th and 27th December, 1998, number of citizens and eminent persons of Hubli and Dharwad were heard orally and written representations were also received from them. The next sitting of the arbitral tribunal was held on 17th, 18th and 19th February, 1999. The third respondent due to his ill-health was not in a position to attend the sitting on those three days. Therefore, he requested the arbitral tribunal to fix some other dates for hearing. Nevertheless, sittings were held on 17th, 18th and 19th February, 1999. The fifth respondent protested to the sittings held in the absence of the third respondent. However, the fifth respondent participated in the sittings held on 17th and 18th February, 1999. But, the fifth respondent, since notwithstanding his opposition, the arbitral tribunal conducted the sittings on 17th and 18th, as a protest, tendered his resignation on 19.02.1999 and he did not participate in the sitting held on 19.02.1999. The arbitral tribunal held the next sitting on 22nd and 23rd of March, 1999. The appellant made a request to the arbitrators who attended the sitting on 22nd March, 1999 to give him time in order to facilitate him to nominate another arbitrator in place of fifth respondent who had tendered resignation, but, his request was not granted and the proceedings were continued. In the meanwhile, since the request of the third respondent to the arbitral tribunal to fix some other dates was not acceded and the arbitral tribunal proceeded to conduct sittings even in his absence, the third respondent sent a letter dated 25.03.1999 tendering his resignation. On the same day, the appellant by fax sent a message to the arbitral tribunal followed by a telegram on 26.03.1999 requesting the arbitral tribunal to give him opportunity to appoint another arbitrator in place of third respondent and requesting the arbitral tribunal not to proceed with the enquiry before the arbitral tribunal is properly reconstituted in terms of the arbitral agreement.

4. The arbitral tribunal having conducted enquiry passed the award on 27.03.1999 at Bangalore. The award is signed only by the second, fourth and sixth respondents. The third and fifth respondents have not signed the award. In the award, the installation of the appellant as the Mathadipathi vide registered deed executed by the first respondent dated 15.05.1998 and his assumption of the office of the Mathadipathi on 7th/8th November, 1998 in pursuance of the deed executed by the first respondent dated 16.10.1998 are held to be invalid. It is also held that the appellant is not entitled to continue as the Mathadipathi of the Math. The arbitral tribunal has further held that the action of the first respondent in cancelling the appointment of the appellant as the Mathadipathi vide deed dated 02.11.1998 is valid. While holding so, the arbitral tribunal directed the first respondent to demit the office of the Mathadipathi and that he should appoint a successor to him. In pursuance of the above award, on 29.03.1999, the 8th respondent was installed as Mathadipathi. It is claimed that the first respondent demitted the office of Mathadipathi on 28.03.1999.

5. The appellant herein being aggrieved by the above award of the arbitral tribunal dated 27.03.1999 made an application under Section 34 of the Act before the Court below for setting aside the impugned arbitral award on various grounds such as the award is a nullity in the eye of law because when the award was pronounced on 27th March, 1999, the arbitral tribunal was not properly constituted; no opportunity of being heard was given to the appellant; the enquiry was not conducted in the presence of the appellant and that behind his back and statements of persons concerned and unconcerned were recorded and those statements are not made available to him and he was not given any opportunity to cross-examine those persons/witnesses who deposed against him; the three arbitrators could not have proceeded to conduct and complete the enquiry and pass the impugned award after the third and fifth respondents tendered their resignations without giving any opportunity to the petitioner to nominate arbitrators in place of the third and fifth respondents despite his request and that there is a total miscarriage of justice.

6. The Court below without finding merit in the above contentions, by the order impugned in this appeal, dismissed the application. Hence this appeal by the aggrieved applicant.

7. We have heard Shri Jayakumar S. Patil, learned senior counsel for the appellant, Shri K. Ramadas, learned senior counsel and Shri F.V. Patil, learned counsel for eighth respondent, Shri M. P. Eshwarappa, learned senior counsel for sixth respondent, Shri G. R. Gurumath, learned counsel for the first respondent and Shri Ashok B. Hinchigeri, learned counsel for the second respondent. Although third, fourth, fifth and seventh respondents are served with notice, they remain unrepresented.

8. Shri Jayakumar S. Patil would contend that the impugned award having been passed by only three arbitrators out of five arbitrators who constituted the arbitral tribunal, cannot be regarded as an award within the meaning of that term under the Act. In other words, according to Shri Jayakumar S. Patil, the award is a nullity in the eye of law because the award is made only by three arbitrators out of five and the third and fifth respondents did not participate in the decision making. It is contended that since the third and fifth respondents tendered resignations well before the date of the impugned award, the arbitral tribunal

ought to have given opportunity to the appellant to nominate new arbitrators in place of third and fifth respondents because the third and fifth respondents were the nominees of the appellant. It is the contention of Shri Jayakumar S. Patil that the award of the arbitral tribunal in order to be valid should have been made and signed by all the arbitrators who constituted the arbitral tribunal. It is also the contention of Shri Jayakumar S. Patil that it is the requirement of law that all the arbitrators who constituted the arbitral tribunal should not only subscribe their signatures to their award but should also participate at every hearing/ sitting of the arbitral tribunal. Since the proceedings of the arbitral tribunal resulting in the impugned award disclosed many apparent illegalities and irregularities on its face, the impugned award is liable to be set aside. It was next contended by Shri Jayakumar S. Patil that there is utter violation of principles of natural justice and proper hearing. It was contended that the arbitrators collected all the materials, examined the persons and devotees in the absence of the appellant and without disclosing the same to the appellant at any stage, made use of the same as the basis for passing the impugned award and this procedure adopted by the arbitral tribunal is in utter violation of principles of natural justice, fair-play in procedure. It is the contention of Shri Jayakumar S. Patil that the method adopted by the arbitrators in conducting the enquiry is opposed to all cannons of fair hearing. It was also contended that the appellant was neither apprised of the materials adverse to him nor was he given any opportunity to contest the correctness of those adverse materials by permitting him to cross-examine the witnesses. It is contended by Shri Jayakumar S. Patil that the finding recorded by the three arbitrators are based on surmises and conjectures and not on any legally permissible materials/evidence. While attacking the correctness of the impugned judgment and award of the Court below, Shri Jayakumar S. Patil would highlight that though the Court below has rightly come to the conclusion that the materials collected in the course of the enquiry were not disclosed to the appellant and that he was not given opportunity to cross-examine the persons who gave evidence against him, nevertheless did not interfere with the impugned award on the specious ground that the similar treatment was meted out to the first respondent also. That reason could hardly be a proper answer to the serious flaws found in the proceedings. Shri Jayakumar S. Patil would conclude by contending that the impugned award passed by the three arbitrators could not be sustained in law and since the permissible grounds are made out to set aside the award in terms of Section 34 of the Act, this Court should allow the appeal, set aside the judgment and order of the Court below and set at naught the arbitral award dated 27.03.1999 passed by the three arbitrators.

9. Shri K. Ramadas, learned senior counsel appearing for respondent 8, at the outset, would contend that this case could not be regarded as a commercial arbitration nor an adversarial litigation. According to him, there is no lis between the appellant, 1st respondent and the 8th respondent in as much as the point referred to the arbitral tribunal was restricted to find out a Mathadipathi to Moorusaavira Math acceptable to all or at least to the majority of the devotees. It was contended that since this case is not an adversarial litigation, there is no necessity for the arbitral tribunal to confront the appellant with the adverse materials and information collected by it in the course of the enquiry. Alternatively, it is contended by Shri K. Ramadas that none of the issues framed by the arbitral tribunal does deal with the conduct of the appellant and looking from that angle also, there was no necessity to confront the appellant with the adverse materials and information collected against him in the course of the enquiry. It was also

contended by Shri K. Ramadas that respondents 3 and 5 having offered their opinion to the other arbitrators in the course of enquiry and since their opinion was not accepted by other arbitrators, they sought to resign and, therefore, their subsequent resignation would not invalidate the impugned arbitral award. Lastly, Shri K. Ramadas would highlight the limited interference by the Courts that too only on certain grounds specified under Sub-section (2) of Section 34 of the Act and maintain that no ground is made out under Section 34 of the Act to set aside the arbitral award.

10. We have also heard Shri G. R. Gurumath for the 1st respondent. Shri G.R. Gurumath while adopting the arguments of Shri K. Ramadas would contend that the conduct of the appellant is totally blameworthy, immoral, irreligious and he is unfit to be a successor Mathadipathi of Moorusaavira Math and, therefore, no objection could be taken to the action of the 1st respondent in cancelling the appointment of the appellant as successor Mathadipathi. He would highlight on the voluminous materials laid before the arbitral tribunal by well-meaning and important citizens of Hubli-Dharwad, the other Mathadipathies of important Maths in the State as well as the devotees of the Moorusaavira Math and, according to him, they would convincingly show that the appellant strayed away from the 'dharmic' and religious path and such a person could never be a proper person to succeed the Moorusaavira Math which enjoys great spiritual esteem of not only the people of Karnataka, but also devotees from outside the State of Karnataka. Shri Gurumath, therefore, would strongly appeal to us not to interfere with the arbitral award made by the arbitral tribunal and to dismiss the appeal.

11. Shri M. P. Eshwarappa, learned senior counsel appears for 6th respondent. We have heard Shri M.P. Eshwarappa also.

12. Shri Jayakumar S. Patil, learned counsel for the appellant, took strong exception to the conduct of the 6th respondent in contesting the appeal like an adversarial litigant in supporting the impugned arbitral award and in opposing the appeal tooth and nail. Shri Jayakumar S. Patil would submit that the 6th respondent being one of the arbitrators of the arbitral tribunal is not expected to take sides and he should have been aloof in this litigation leaving it to the aggrieved parties to work out their legal remedies. Nevertheless, Shri M.P. Eshwarappa wished that we should hear him to arrive at a proper decision. Accordingly, we heard him.

13. Shri M.P. Eshwarappa would highlight the limited scope of interference available to the Courts under the Arbitration and Conciliation Act, 1996 and maintain that none of the grounds specified in Sub-section (2) of Section 34 of the Act is made out. Shri Eshwarappa would seek to differentiate between the contractual justice and principles of natural justice. Shri Eshwarappa would contend that since arbitration agreement does not provide for any specific procedure to be followed in the conduct of the enquiry, it was open for the arbitral tribunal to follow any procedure to collect information and materials in order to resolve the dispute referred to it and, therefore, no exception could be taken to the action of the arbitral tribunal in not disclosing and/or confronting the information and materials collected by it in the course of the enquiry to the appellant. Be that as it may, Shri Eshwarappa would contend that there is no discrimination in treatment of the appellant and the 1st respondent by the arbitral tribunal in as much as the adverse materials and information collected against the

1st respondent are also not disclosed and confronted to the 1st respondent and, therefore, there is no failure of justice. Shri Eshwarappa would contend that the dispute referred to the arbitral tribunal in the present case could not be regarded as an adversarial litigation.

14. We heard the arguments of the learned counsels for the parties on an earlier occasions, i.e. on 10.07.2003, 15.07.2003, 16.07.2003 and 04.08.2003. During the course of hearing on 10.07.2003 it was brought to our notice that the 1st respondent died sometime in the month of May 2003. Having heard the learned counsels for the parties on the aforementioned dates, we, however, deferred the decision making in order to facilitate an amicable settlement of the dispute between the appellant and the 8th respondent with a direction that if the dispute is settled, the parties should report the same to the Court. At that time, we as well as the learned counsels appearing for all the parties felt strongly that only an amicable settlement of the dispute by the appellant and 8th respondent could bring peace to the Math and solace to the devotees of the Math. That was the reason why we did not immediately proceed to the decision making. However, having realised that one of us (S. B. Majage, J.) would be laying down the office in the third week of March 2005, we directed the listing of the appeal for further hearing on 28.01.2005. On that date, we were told by the learned counsels for the parties that settlement is not possible and the appellant and respondent 8 are at loggerheads. In the circumstances, the appeal was listed on 11.02.2005 and 18.02.2005 for further hearing. In the meanwhile, the appellant filed IA No. 1 of 2005 praying the Court to rehear the appeal. Accordingly, on 04.03.2005 we reheard the learned counsels for the parties on merit.

15. Having heard the learned counsels for the parties quite extensively, not only on 10.07.2003, 15.07.2003, 16.07.2003 and 04.08.2003, but also on 11.02.2005, 18.02.2005 and 04.03.2005, the only question that arises for decision is: whether any of the grounds stated in Sub-section (2) of Section 34 of the Act is made out to set aside the impugned arbitral award ?

16. Having deeply thought over the issues brought before the Court, keeping in mind the institutional interest of Math which has lakhs and lakhs of devotees within the State of Karnataka and outside the State, the sanctity attached to the principles of natural justice, the principle of fairness in procedure as well as the specific grounds stated in Sub-section (2) of Section 34 of the Act and having closely gone through the proceedings of the arbitral tribunal, we are of the considered opinion that undeniably the appellant has made out at least two grounds, viz (i) the ground stated in Clause (a)(iii) of Sub-section (2); and (ii) the ground stated in Clause (a)(v) of Sub-section (2) which would enable the Court to set aside the arbitral award.

17. Chapter VII of the Act which deals with recourse against arbitral award contains only one section viz Section 34. Sub-section (1) of Section 34 lays down that recourse against an arbitral award may be only by an application for setting aside the same. Sub-section (2) of Section 34 contains the grounds on which an arbitral award may be set aside by the Court. Sub-sections (1) and (2) of Section 34 read as follows:

"34. Application for setting aside arbitral award--

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation--Without prejudice to the generality of Sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

As already pointed out supra, the appellant has made out ground specified in Clause (a)(iii) of Sub-section (2) and the ground specified in Clause (a)(v) of Sub-section (2) of Section 34 of the Act.

18. Section 14 specifies the grounds for terminating the mandate of an arbitrator and methods of doing so. The three methods for terminating the mandate are: (i) withdrawal of the arbitrator from his office; (ii) agreement of the parties; and (iii) decision by the Court. The mandate of an arbitrator shall

terminate if: (i) the arbitrator becomes de jure or de facto unable to perform the functions; or (ii) the arbitrator for some other reasons fails to act without undue delay; or (iii) the arbitrator withdraws from his office; or (iv) the parties agree to the termination of his authority as an arbitrator. Section 15 deals with termination of mandate and substitution of arbitrator. Though Sub-section (1) of Section 15 purports to state additional grounds for termination of authority of an arbitrator, the grounds mentioned therein are covered by the grounds set-up in Clause (b) of Sub-section (1) of Section 14 of the Act. On the authority of an arbitrator being terminated, a substitute arbitrator in place of the arbitrator whose authority is terminated has to be appointed and such appointment as per Sub-section (2) shall be made by following the same procedure as followed while appointing the arbitrator. Sub-section (2) of Section 15 provides for filling of the vacancies. The mandate of an arbitrator stands terminated if it becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. The mandate of an arbitrator stands terminated if he withdraws from his office or the parties agree to termination of his mandate. An arbitrator may withdraw from his office when challenge is made to his appointment. He may also withdraw from his office when he becomes de jure or de facto unable to perform his functions or fails to act without undue delay. In addition thereto, an arbitrator may withdraw from his office for any reason and, in that case too, the mandate shall terminate. In other words, the appointment of a new arbitrator shall be as per the provisions of Section 11 of the Act.

19. Admittedly, in this case the 5th respondent sent his resignation letter on 18.03.1999 to the arbitral tribunal followed by another letter of resignation on 22.03.1999. Similarly, on 25.03.1999, the 3rd respondent sent his resignation letter and it was admittedly received by the arbitral tribunal the same day. Since it is the right of an arbitrator to withdraw from his office both in terms of Section 14(1)(b) and Section 15(1)(a), it could not be said that the resignation letters sent by respondents 3 and 5 are of no consequence. Simply because the resignation letters of respondents 3 and 5 are not accepted by the arbitral tribunal, it could not be said that even after receipt of the resignation letters by the arbitral tribunal, they continued to be the members of the arbitral tribunal. We need not dilate this aspect further. Suffice it to state that both respondent 3 and respondent 5 are not parties to the arbitral award pronounced on 27.03.1999. Further of the nine sittings conducted by the arbitral tribunals on 25.12.1998, 26.12.1998, 27.12.1998, 17.02.1999, 18.02.1999, 19.02.1999, 22.03.1999, 23.03.1999 and 27.03.1999, the 3rd respondent did not participate in the proceedings held on 17.02.1999, 18.02.1999, 19.02.1999 and 27.03.1999, whereas respondent 5 did not participate in the proceedings held on 19.02.1999, 22.03.1999, 23.03.1999 and 27.03.1999. Further, though it was claimed by the arbitral tribunal that respondent 5 participated in the proceedings held on 17.02.1999, the order-sheet of the proceedings of that day produced before the Court does not bear his signature. As a consequence of the resignation tendered by respondents 3 and 5, vacancies arose in the offices held by them and, therefore, those vacancies ought to have been filled by new arbitrators as per the provisions of Section 11 of the Act. There is also no controversy between the parties that when respondents 3 and 5 tendered resignation to the offices held by them in the arbitral tribunal, since they are the nominees of the appellant, the appellant sought time to nominate new arbitrators in place of respondents 3 and 5, but, the arbitral tribunal without acceding to his request, proceeded to pass the impugned arbitral award on the ground that respondents 3 and 5 have given their opinion in the course of

the proceedings and, therefore, there is no need to appoint new arbitrators in their places. Therefore, it is quite clear that without there being a properly constituted arbitral tribunal, the only three arbitrators viz respondents 2, 4 and 6 conducted the enquiry/ proceedings on 19.02.1999, 22.03.1999 and 23.03.1999 and ultimately pronounced the arbitral award on 27.03.1999. Even before 19.02.1999 when the arbitral tribunal conducted the enquiry, on 17.02.1999 and 18.02.1999, the 3rd respondent was not present.

20. It needs to be noticed in this case that the arbitral tribunal was a multimember body and, therefore, what was of importance and need was the joint deliberation from amongst all the members of the arbitral tribunal. There is a sound rationale behind the insistence that in a multimember body all the members should participate on all the material dates of enquiry. That insistence helps the members of the arbitral tribunal to influence/pursue each other, to appreciate each other's view point and ultimately to arrive at a consensus and unanimous opinion, if that is possible or to accept the opinion of the majority with respect and perfect understanding. The arbitral tribunal in this case is deprived of the essence of deliberations from amongst all the members of the arbitral tribunal. In taking this view, we are also fortified by the judgment of the Bombay High Court in the case of *Faze Three Exports Limited v. Pankaj Trading Company and Ors*. [2004(2) RAJ 573 (Bom.)], arising out of the Arbitration and Conciliation Act, 1996. In para 15 of the said judgment, it is stated thus:

> *"15. As arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witness and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceeding brought to bear on the minds of his fellow Judges, so that by conference they shall mutually assist each other in arriving at a just decision. In the present case, it is not disputed that there were only two arbitral meetings after the remand, i.e. on 12th August, 2002 and 14th August, 2002. The first meeting was merely adjourned and no procedure took place thereunder. Therefore, the only effective meeting was held on 14th August, 2002 and for the entire period of that meeting, one arbitrator was absent. In such circumstances, the award made by the arbitral tribunal cannot be sustained and has to be set aside."*

In that case, in the arbitral meeting held on 14th August, 2002 one Mr. Sunderlal Bagadi who was one of the three arbitrators was not present, but, the remaining two arbitrators opined that his presence was not necessary and they would inform him as to what transpired at the meeting. Therefore, a contention was raised that the arbitral award passed in that case was vitiated due to absence of one of the arbitrators. While upholding the said contention, the Bombay High Court made the above observations in paragraph 15. Therefore, in our considered opinion, the impugned arbitral award is vitiated not only because on the relevant and material dates there was no properly constituted arbitral tribunal but also on account of the fact that all the five arbitrators were not present in the proceedings held on the nine dates already referred to above. Moreover, the arbitral award is signed by only three arbitrators.

21. This takes us to the other contention of the appellant that the arbitral award is vitiated on account of utter violation of principles of natural justice and lack of

fairness in the procedure adopted by the arbitral tribunal. It is needless to state that if the party making an application under Section 34 of the Act to set aside an arbitral award was not given proper notice of appointment of arbitrator or of the arbitral proceedings or was otherwise unable to remain present in the arbitral proceedings before the arbitral tribunal an arbitral award may be set aside by the Court. The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have the opportunity to be present throughout the hearing; (iv) each party must have the reasonable opportunity to present statements, documents, evidence and arguments in support of his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date for hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagement of himself elsewhere, etc. However, it is true that a party has no absolute right to insist of his convenience being consulted in every respect. The matter is very much within the discretion of the arbitral tribunal and the Court may intervene only in the cases of, positive abuse. Since each party has a right to remain present throughout the hearing, the arbitral tribunal is not to exclude either party even from a portion of hearing without the consent of such party. The arbitral tribunal is expected to give opportunity to both the parties to present their respective cases and evidence in support thereof before it. Each of the parties is required to be apprised with statements, documents and evidence adduced by his opponent which are adverse to his case. Each party is also entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under Section 24 of the Act. Section 18 of the Act mandates that the arbitral tribunal shall treat the parties to the arbitral reference with equality and that each party to the arbitral reference shall be given a full opportunity to present his case. Sections 23 and 24 of the Act deal with filing of statement of claim and statement of defence and hearings and written proceedings. It is of utmost importance to take note of the provisions of Sub-section (3) of Section 24 of the Act in order to appreciate the contention of the appellant in this case. Sub-section (3) of Section 24 mandates that all statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party. The object behind the above prescription, to our mind, appears to be that the arbitral tribunal before making use of any such statements, documents and information against a party, that party should be apprised of these statements, documents and information in consonance with the principles of natural justice.

22. In the backdrop of the principles governing proper and fair hearing, the principles of natural justice, let us proceed to consider the contention of the appellant. The specific grievance of the appellant which is not seriously disputed by the contesting respondents is that in his absence the arbitral tribunal received large number of representations, petitions and memoranda from the various sections of the people. It is also contended that the appellant and the 1st respondent were examined by the arbitral tribunal separately and their statements are recorded, but copies of those documents are not given to each other. None of those documents, materials, information including the statement of the 1st respondent are made available to the appellant. Further, the appellant was not given opportunity to cross-examine any of those who gave documents, materials and information prejudicial to the case of the appellant. We find that all those allegations made by the appellant are correct and not seriously disputed by the respondents.

23. We have carefully perused the proceedings sheet of the arbitral tribunal as well as the arbitral award. On 25.12.1998, the arbitral tribunal separately examined the appellant and the 1st respondent. On 26.12.1998 and 27.12.1998, the arbitral tribunal received representations/petitions from the citizens of Hubli-Dharwad and also orally heard them. On 18.02.1999, the arbitral tribunal received the written representations and oral representations of the two groups of people who came to give evidence in support of the appellant and the 1st respondent separately. On 19.02.1999 also, the arbitral tribunal heard and received representations from the two rival groups of people who came to support the case of the appellant and the 1st respondent separately. In the impugned arbitral award, the arbitral tribunal has made extensive references to the materials collected by it, the persons examined by it, etc. and, therefore, there is no need for us to dilate on them. The arbitral tribunal admittedly has received thousands of representations from the groups of people supporting the appellant and the 1st respondent. The arbitral tribunal has also referred to an incident alleged to have happened in the course of the enquiry. On page 30 of the impugned award, the arbitral tribunal has observed thus:

24. Admittedly, these materials collected by the arbitral tribunal quite often in the absence of the appellant and the 1st respondent or in the absence of either of them were not disclosed either to the appellant or to the 1st respondent. It is also admitted case that arbitral tribunal did not give any opportunity to cross-examine the witnesses of either side. Perhaps realising the above serious flaw in the conduct of the enquiry by the arbitral tribunal, the stock and specious argument placed before us by the learned counsels appearing for the respondents 1, 6 and 8 is that this case cannot be regarded as an adversarial litigation. This contention is not acceptable to us. The subject-matter of arbitral reference relates to the office of Mathadipathi of the Math. There was a serious dispute between the appellant, the 1st respondent and the 8th respondent as to who should be a successor Mathadipathi of Math. Therefore, if the arbitral tribunal were to declare that the appointment of the appellant as Mathadipathi vide registered deed dated 15.05.1998 is invalid and the cancellation of the appointment of the appellant as successor Mathadipathi vide cancellation deed executed by the 1st respondent on 02.11.1998 is valid, the law undeniably requires that the affected appellant should have been apprised of the adverse materials collected by the arbitral tribunal or adduced by the 1st respondent. We hold that the litigation which was subject-matter of arbitral reference is undeniably an adversarial litigation in as much as it

relates to the office of the Mathadipathi of the Moorusaavira Math and there was a contest between the appellant and the 1st respondent with regard to that office. The above contention was specifically raised and argued before the Court below also, but the Court below brushed aside that contention without examining the legality of the contention by observing that there is no discrimination in the treatment meted out to the appellant and the 1st respondent by the arbitral tribunal in as much as even the 1st respondent was not supplied with documents, information collected by it which are against his interest and that the 1st respondent was also not permitted to cross-examine the persons who deposed against him. The above reasoning of the Court below is apparently unsound, illegal and cannot be accepted as valid. One illegality cannot be cured by another illegality. The opinion of the Court below thus lacks both logic and reason.

25. It was contended by the learned counsel for the 1st respondent that the arbitration agreement does not provide that the arbitral tribunal shall conduct enquiry in conformity with principles of natural justice and, therefore, the procedure adopted by the arbitral tribunal with regard to which complaint is made by the appellant cannot be faulted. This contention requires to be noticed only to be rejected. Affected should be apprised is the Constitutional creed flowing from Article 14 postulates. Of course, in certain circumstances, law may permit denial of right of hearing, but, in order to deny that it should have a legal basis. Simply because the arbitral agreement provides that the arbitral tribunal can evolve its own procedure to be followed in the conduct of the enquiry, from that provision, it cannot be said that the arbitral agreement dispenses with the applicability of principles of natural justice and fairness in procedure. It is well settled that though a statute or an instrument does not specifically include principles of natural justice, the Court is bound to read into such statute or instrument the principles of natural justice. Therefore, the defence raised by the learned counsel appearing on behalf of respondents 1, 6 and 8 are unsound and is not acceptable to us. We hold that the appellant has also made out a ground specified in Clause (a)(iii) of Sub-section (2) of Section 34 of the Act.

26. Now, this takes us to the question whether we should give a quietus to this dispute or remand the proceedings to the arbitral tribunal to conduct enquiry and pass appropriate award in accordance with law. We are inclined to follow the second alternative. Moorusaavira Math is a well known, historical and well respected premier Math in the northern Karnataka having lakhs and lakhs of devotees not only within the State of Karnataka but also outside the State. Such an institution should have a right person as Mathadipathi and such person should imbibe in himself all qualities, temporal and spiritual, expected of a Mathadipathi. However, it is not safe to make use of untested materials and information to deny that office to the appellant. The truth or otherwise of the allegations made against him would be known only when the arbitral tribunal adopts a fair procedure in consonance with the principles of natural justice in the conduct of the enquiry.

27. In Writ Appeal Nos. 3833 and 3834 of 2000 filed by the appellant herein, arising out of the proceedings initiated by the Charity Commissioner, this Court was told that the 3rd respondent therein (8th respondent herein) had already assumed the office of Mathadipathi. The Division Bench having noticed that fact passed the final order thus:

"The 3rd respondent will function as Swamiji. The District Court, Dharwad is directed to dispose of Misc. A. No. 66 of 1999 as expeditiously as possible, within a period of three months and both the parties are directed to co-operate for the disposal of the case. Pending disposal of the proceedings before the District Court, no further proceedings will be taken by the Charity Commissioner or first respondent-Assistant Charity Commissioner or any other authority. The assumption of the charge by 3rd respondent is subject to the decision of the District Court."

The 8th respondent who is a party to the above order of the Division Bench is bound by the above direction.

28. Although Shri K. Ramadas and Shri M. P. Eshwarappa have cited number of judgments to highlight about the limited scope of judicial intervention by the Courts under the Act and about non-applicability of principles of natural justice on the assumption that the arbitral reference in this case, cannot be regarded as an adversarial litigation, since we agree with the first aspect and disagree with the second aspect, we do not find it necessary to consider those judgments in as much as those judgments have no bearing on the decision making in this appeal.

29. In the result and for the foregoing reasons, we allow M.F.A. No. 3742 of 2000, set aside the judgment and order dated 5th September, 2000 in M.A. No. 66 of 1999 on the file of the First Additional District Judge, Dharwad, sitting at Hubli, and the award of the arbitral tribunal dated 27.03.1999 and remand the proceedings to the arbitral tribunal for de novo disposal of the arbitral reference made to it in accordance with law.

30. After the remand, in the first instance, the arbitral tribunal is directed to know from the 3rd and 5th respondents whether they are willing to be members of the arbitral tribunal. In the event of their refusal to be members of the arbitral tribunal, the arbitral tribunal shall grant fifteen days time to the appellant to nominate arbitrator/arbitrators in place of respondent 3 and/or respondent 5, as the case may be. Having regard to the importance of the issue covered by the arbitral reference, we request the arbitral tribunal to dispose of the arbitral reference as expeditiously as possible and under any circumstance within the period of six months from today. The office is directed to send a copy of this order forthwith to the arbitral tribunal. In the facts and circumstances of the case, the parties shall bear their respective costs.

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Annexure – 9.1

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 20th July, 2018
O.M.P. (T) (COMM.) 39/2018 & IA No. 6559/2018 & 9228/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner
Through: Mr.Sudhir Nandrajog, Sr. Adv.
with Mr.Santosh Kumar &
Mr.Manan Gill, Advs.

Versus

GAMMON ENGINEERS AND CONTRACTOR PVT. LTD. ..... Respondent
Through: Ms.Awantika Manohar &
Ms. Khushboo Kumari, Advs.

CORAM: HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

Judgement

1. This petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking termination of the mandate of the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 07.02.2006, for work of widening and strengthening to 4 lane of the existing single/ intermediate lane carriageway of NH-57 section from km 230.00 to km 190.00 (Forbesganj-Simrahi Section) in the State of Bihar on East West Corridor under NHDP Phase-II (Contract Package C-II/BR-3) awarded by the petitioner to the respondent.

2. The above said Agreement contains an Arbitration Agreement in form of Clause 5 thereof which is reproduced herein below:

"5. The parties are desirous that the remuneration and other expenses payable to the Arbitrators as per arbitration clause for referring the dispute between the parties arising out of the said Contract to the Arbitral Tribunal for resolution in accordance with the procedure laid down there in, shall be as follows:

i. That the maximum limit for fee payable to each Arbitrator per day shall be Rs. 5000/- subject to a maximum of Rs. 1.5 lakh per case.

ii. That each Arbitrator shall be paid a reading fees of Rs. 6000/- per case.

iii. That each Arbitrator shall be paid Rs. 5000/- by way of secretarial assistant per case.

iv. That each Arbitrator shall be paid Rs. 6000/- per case towards incidental charges like telephone, FAX, postage etc.

v. That other expenses based on actual against presentation of bills, shall also be reimbursed to each Arbitrator subject to the following ceiling (applicable for the days of hearing only).

(a) Travelling expenses – Economy class (By Air), First Class AC (By train) and AC car (By road).

(b) Lodging and boarding – Rs. 8000/- per day in Metro cities (Delhi, Mumbai, Chennai & Kolkata), Rs. 5000/- per day in other cities OR Rs. 2000/- per day if any Arbitrator makes his own arrangement.

(c) Local travel – Rs. 700/- per day.

vi. Charges for publishing the Award – Maximum of Rs. 10,000/-

vii. That in exceptional cases, such as cases involving major legal implication/wider ramification/higher financial stakes etc. a special fees structure could be fixed in consultation with the Contractor/Supervision consultant and with the specific approval of the chairman, NHAI before appointment of the Arbitrator."

3. A reading of the above Clause would show that the parties have not only agreed to have their disputes settled through arbitration but also prescribed the fees that shall be payable to the Arbitral Tribunal.

4. The petitioner thereafter, issued a Circular dated 01.06.2017 whereby it, *inter-alia,* amended the fee structure payable to the Arbitrators in form of Annexure-3 thereof. The said Annexure is reproduced herein below:

"Annexure-3

Schedule of Expenses and Fee payable to the Arbitrators

Sr. No.	*Particulars of fees and expenses*	*Amount payable per Arbitrator per Case where total sum of all claims or counter-claims in the case before AT is up to Rs. 100 Crore.*	*Amount payable per Arbitrator per Case where total sum of all claims or counter-claims in the case before AT is above Rs. 100 Crore and up to Rs. 500 Crore*	*Amount payable per Arbitrator per Case where total sum of all claims or counter-claims in the case before AT is above Rs. 500 Crore*
1.	*Fee*	*(i) Rs. 25,000/- per day.*	*(i) Rs. 40,000/- per day.*	*(i) Rs. 50,000/- per day.*
		(ii) 25% extra on fee at (i) above in case of fast-track procedure as per Section-29(B) of A&C Act; or 10% extra on fee at (i) above if award is published within 6 months from date of	*(ii) 10% extra on fee at (i) above if award is published within 6 months from date of entering the reference by AT;*	*(ii) 10% extra on fee at (i) above if award is published within 6 months from date of entering the reference by AT;*

		entering the reference by AT;		
		Alternatively, the Arbitrator may opt for a lump-sum fee of Rs. 5.00 lakh per case including counter-claims.	*Alternatively, the Arbitrator may opt for a lump-sum fee of Rs. 8.00 lakh per case including counter-claims.*	*Alternatively, the Arbitrator may opt for a lump-sum fee of Rs. 10.00 lakh per case including counter-claims.*
2.	*Reading Charges – One Time*	*Rs. 25,000/- per arbitrator per case including counter claims*	*Rs. 40,000/- per Arbitrator per case including counter claims.*	*Rs. 50,000 per Arbitrator per case including counter claims*
3.	*One-time charges for Secretarial Assistance and Incidental Charges (telephone, fax, postage etc.)*	*Rs. 25, 000/- per arbitrator per case*	*Rs. 25, 000/- one-time per arbitrator per case*	*Rs. 25,000/- one-time per arbitrator per case*
4.	*One-time Charges for publishing/ declaration of the Award*	*Rs. 40,000/- per arbitrator*	*Rs. 50,000/- per arbitrator*	*Rs. 60,000/- per arbitrator*
5.	*Other Expenses (as per actual against bills subject to ceiling given below)*			
(i)	*Travelling Expenses*	*Economy Class (by air), First Class AC (by train) and AC Car (by road)*		
(ii)	*Lodging and Boarding*	*Rs. 15,000/- per day (Metro Cities); or* *Rs. 8,000/- per day (in other cities); or* *Rs. 5,000/- per day, if any Arbitrator makes own arrangement*		
6.	*Local Travel*	*Rs. 2,000/- per day*		
7.	*Extra Charges for days other than meeting days (maximum for 2x1/2 days)*	*Rs. 5,000/- per ½ day for outstation Arbitrator*		
Note: *1. Lodging, boarding and travelling expenses shall be allowed only for the arbitrator who is residing 100 kms., away from the venue of the meeting.* *2. Delhi, Mumbai, Chennai, Kolkata, Bengaluru and Hyderabad shall be considered as Metro Cities.*				

Additional Notes:

i) In case of arbitrations under SAROD Rules of Arbitration, SAROD may consider to revise its order dated 08.01.2016 as per the above schedule. Thereafter only, the above schedule shall be applicable subject to modifications made by SAROD, if any.

ii) The above schedule of fees and expenses shall be applicable to all meetings of ATs being held on or after the date of issue of this Circular where the fee structure of NHAI has been followed by the Arbitral Tribunals on its own or in pursuance of the provision in original agreement or Supplementary Agreement between the parties.
iii) In case of future bidding/ contracts, the fee structure as may be determined by the NHAI from time to time, may be included as part of the Bidding/ Contract Documents and the acceptance of the above fee structure by the Contractors/ Concessionaries/ Consultants may be kept as a pre-condition for signing the contract."

5. Disputes having arisen between the parties, the petitioner vide its letter dated 14.07.2017 appointed its nominee Arbitrator, *inter-alia*, stipulating the following condition:

"3. The Terms & Conditions and Fee applicable may be considered as per the Policy Circular of NHAI dated 01.06.2017 (copy enclosed). The time period of the arbitration shall be as prescribed by the Arbitration & Conciliation Act, 1996 as amended by the Amendment Act, 2015 (3 of 2016)."

6. The respondent also nominated its Arbitrator and the two Arbitrators thereafter appointed a Presiding Arbitrator.

7. In the arbitral proceedings held on 23.08.2017, the Arbitral Tribunal *inter alia* directed the following with respect to the fees payable to the Arbitral Tribunal:

"1.12.1 Fees:

(a) The Claimant informed that there is no agreement between the parties regarding the fees of the AT

(b) The Respondent requested that fees of the AT may be fixed in terms of the instructions issued by NHAI vide their circular dated 01.06.2017

(c) The Tribunal considered the matter and decided that the fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015."

8. As the fees fixed by the Arbitral Tribunal was more than the one prescribed in the Circular issued by the petitioner, the petitioner filed an application seeking review of the above-mentioned order and fixation of the fees of the Arbitral Tribunal. The said application was, however, dismissed by the Arbitral Tribunal vide its order dated 30.01.2018 observing as under:

"3.8 The Respondent had filed an application for review of fees fixed by the AT and to modify the same in terms of the NHAI circular dated 01.06.2017.

It was brought out that the Claimant had inadvertently informed the AT as per para 1.12.1(a) that there was no agreement between the parties regarding the fees of the AT. In fact, the agreement provides for a fixed rate of fee of the AT as agreed by the parties.

Oral submissions on this matter were made by both the parties. The AT deliberated on the matter and has decided that in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties. This is as per judgment dated 11.09.2017 of the Hon'ble High Court in the matter of NHAI vs Gayatri Jhansi Roadways. The AT reiterated that the fees fixed in the 1st hearing shall be followed. Accordingly, fees shall be regulated as per provisions of 'the fourth schedule' of the amended Arbitration and Conciliation Act, 2015."

9. Being aggrieved of the above-mentioned order, the petitioner has filed the present application invoking Section 14 of the Act which is reproduced herein below:

"14. Failure or impossibility to act — (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

10. The learned senior counsel for the petitioner submits that as the Arbitral Tribunal has failed to abide by the conditions fixed by the parties in the Arbitration Agreement or by the petitioner in its Circular, it should be considered as *de jure* and *de facto* unwilling to perform its functions, thereby leading to the termination of its mandate. In this regard he places reliance on the Judgments of this Court in *National Highways Authority of India vs. Mr. K. K. Sarin and Ors.* [MANU/DE/ 0798/2009]; and *Taxus Infrastructure and Power Projects Pvt. Ltd. vs. Schneider Electric India Pvt. Ltd.* [MANU/DE/2681/2016] and of the Madras High Court in *Madras fertilizers Limited vs. SICGIL India Limited and Hon'ble Mr. Justice V. Ratnam (Retd.)* [MANU/TN/7900/2007] as also of the Supreme Court in *Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust and Ors.* [(2012) 1 SCC 455] and *Union of India vs. Singh Builders Syndicate* [(2009) 4 SCC 523].

11. On the other hand, the learned counsel for the respondent submits that as the Arbitral Tribunal has fixed its fees in accordance with the Fourth Schedule of the Act, the same cannot be termed as unreasonable. She further submits that in terms of Section 31A read with Section 31(8) of the Act, the Arbitral Tribunal is empowered to fix its own fee and, in this regard, has placed reliance on the Judgment of this Court in *National Highways Authority of India vs. Gayatri Jhansi Roadways Limited* [2017 SCC OnLine Del 10285].

12. I have considered the submissions made by the counsels for the parties. At the outset it is to be noted that arbitration is an Alternative Dispute Resolution mechanism adopted by the parties with informed consent. Section 7 of the Act mandates that an Arbitration Agreement between the parties must be in writing and therefore, cannot be a unilateral act of either party. The parties may for various reasons, including that of expeditious adjudication of their disputes, agree for an Alternative Dispute Resolution mechanism in form of arbitration and at the same time they may also in the same Agreement, provide the expenses that they are willing to bear for the same. In arbitration, party autonomy is therefore, the most vital ingredient.

13. The Arbitrators are appointed with the consent of the parties, failing which they are appointed by the Court in exercise of its power under Section 11 of the Act. Section 11 of the Act also mandates that while appointing an Arbitrator the Court shall take into account the qualifications required for the Arbitrator by the Agreement of the parties.

14. Whether the Arbitrators are appointed by the parties or by the Court, the parties or the Court may also stipulate various conditions for such appointment including fixation of fees. It is for the Arbitrators to then accept or reject such appointment, however, they cannot impose unilateral conditions on the parties while accepting such appointment. In *Sanjeev Kumar Jain* (Supra), the Supreme Court had held that the word "appoint" is wide enough to stipulate the terms of such appointment including the fees payable to the Arbitrators. In relation to Section 11 of the Act, the Supreme Court held as under:

> *"39. Arbitrators can be appointed by the parties directly without the intervention of the court, or by an institution specified in the arbitration agreement. Where there is no consensus in regard to the appointment of arbitrator(s), or if the specified institution fails to perform its functions, the party who seeks arbitration can file an application under Section 11 of the Act for appointment of arbitrators. Section 11 speaks of the Chief Justice or his designate "appointing" an arbitrator. The word "appoint" means not only nominating or designating the person who will act as an arbitrator, but is wide enough to include stipulating the terms on which he is appointed. For example, when we refer to an employer issuing a letter of appointment, it not only refers to the actual act of appointment, but includes the stipulation of the terms subject to which such appointment is made. The word "appoint" in Section 11 of the Act, therefore, refers not only to the actual designation or nomination as an arbitrator, but includes specifying the terms and conditions, which the Chief Justice or his designate may lay down on the facts and circumstances of the case. Whenever the Chief Justice or his designate appoint arbitrator(s), it will be open to him to stipulate the fees payable to the arbitrator(s), after hearing the parties and if necessary, after ascertaining the fee structure from the prospective arbitrator(s). This will avoid the embarrassment of parties having to negotiate with the arbitrators, the fee payable to them, after their appointment." (emphasis supplied)*

15. In *Ariba India Private Ltd. vs. ISPAT Industries Ltd.* [MANU/DE/3103/2011], this Court had observed that:

> *"132. …..The institution of arbitration, just like the courts, are created with the litigant, i.e. consumer of justice being the central figure. It is to provide judicial*

service to the litigating public, so as to preserve law and order in the society, that the courts have been established and all other alternate dispute resolution modes, including arbitration, have been evolved. Just like the courts have not been created for the benefit of the Judges and the support staff, similarly, the arbitrations are not conducted to advance the cause of the learned arbitrators."

16. In *Union of India vs. Singh Builders Syndicate* [(2009) 4 SCC 523], the Supreme Court had expressed its dismay at the fees being charged by the Arbitral Tribunal and observed as under:

"22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee.

24. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such arbitrator. It is unfortunate that delays, high costs, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high costs are two areas where the arbitrators by self-regulation can bring about marked improvement."

17. To answer the above concern expressed by the Supreme Court, the Law Commission of India in its Report No. 246 recommended amendments to be made to the Arbitration and Conciliation Act, 1996. The relevant paragraphs of the Report in relation to the Fees of Arbitrators are reproduced herein under:

"Fees of Arbitrators

10. One of the main complaints against arbitration in India, especially ad hoc arbitration, is the high costs associated with the same – including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is really to become a cost-effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise the fee structure for arbitrations. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in Union of India v. Singh Builders Syndicate [(2009) 4 SCC 523], where it was observed:

"The cost of arbitration can be high if the arbitral tribunal consists of retired Judges… There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute

or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee."

11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic.

12. The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators; similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, therefore, expressly restricted its recommendations in the context of purely domestic, ad hoc, arbitrations."

18. Based on the above recommendation, the legislature, while making amendments to the Act by way of Arbitration and Conciliation (Amendment) Act, 2015, has introduced Schedule-IV to the Act. Section 11(14) of the Act further provides for framing of rules for the purpose of determination of the fees of the Arbitral Tribunal and the manner of its payment to the Arbitral Tribunal, after taking into consideration the rates specified in the Fourth Schedule.

19. The Fourth Schedule to the Act, however, is not mandatory, but provides for a reasonable fee structure that may be adopted by the High Court in form of Rules, while appointing an Arbitrator under Section 11 of the Act and may also be used by the parties and the arbitrators for arriving at a consensus on the fees payable to the Arbitral Tribunal.

20. What is to be noted and remembered is that the terms of appointment of the arbitrator are governed by the agreement between the parties and the arbitrator on the fee payable to the Arbitral Tribunal. Where there is no express agreement about fees and expenses, the right to remuneration would be on the basis of an implied term to pay reasonable remuneration to the Arbitral Tribunal for its services. However, where an offer/request for appointment as arbitrator is made stipulating the terms of such appointment, including fee, the arbitrator cannot accept such appointment, while rejecting the other terms.

21. In *Mr. K. K. Sarin and Ors. (Supra),* this Court had considered the issue whether the Arbitral Tribunal is bound by the agreement between the parties regarding the fees payable to the Arbitral Tribunal and held as under:

"22. Therefore, even though I agree with the senior counsel for the petitioner that the arbitrators are bound by the agreement between the parties as to the payment of fee and if the said fee is not acceptable to them, are free not to accept the office as an arbitrator and/or to recuse themselves and cannot demand fee in supersession of the said agreement but in the facts of the present case I find the petitioner to have agreed to the fee schedule. The agreement between the petitioner and the respondent as to the fee schedule could always be novated and in this case is found to have been novated. Even otherwise there is no justification whatsoever for the petitioner to have agreed to pay and paid fee higher than agreed and/or as per its circular in arbitration-I and to make a grievance with respect thereto at the fag end of the proceedings in arbitration-II. The ASG had handed over a compilation of judgments on waiver but in view of above, it is not felt necessary to cite the same. The first challenge of the petitioner thus fails."

22. In *Madras Fertilizers Limited* (Supra), the High Court of Madras had held that a party cannot be forced to pay fees higher than what they are capable of paying to the Arbitrator. It was held as under:

"22. The words used in Section 14(1)(a) is that the mandate of an Arbitrator shall terminate if he has become de jure unable to perform his functions. (emphasis supplied). It is true that the second respondent is ready to go ahead with the proceedings, but somehow, the proceedings got bogged down in the light of the controversy with regard to fixation of fees by the second respondent. The word 'Perform his functions used in Section 14(1)(a) will simply performing his functions effectively without any bias and with full confidence of both the parties. Performing this function does not simply going through the motion without instilling confidence in the minds of the parties.

23. Now, if the mandate is not terminated and the second respondent is permitted to continue with Arbitration proceedings, it will amount to forcing a higher fee on the petitioner which they are not capable of paying. Further, after these controversies, disputes, exchange of correspondences, etc. with regard to fixation of fee, if the second respondent continues the Arbitration proceedings, the petitioner may not be in a proper frame of mind to proceed with the arbitration before the second respondent. They will definitely have some doubt as to the conduct of the Arbitrator and this doubt would certainly lead to loss of confidence. Therefore, such an unpleasant situation is to be avoided in the best interest of the parties including the Arbitrator.

25. A perusal of the fees fixed by the Hon'ble Chief Judge would reveal that the maximum fees fixed by him for arbitration proceedings is Rs. 1 lakh. It is true that the second respondent is not named in the Panel of Arbitrators constituted by the Hon'ble Chief Justice. It is equally true that the second respondent fixed his fees at Rs. 15 lakhs on 03.08.2005 prior to the first Circular dated 20.03.2006. But a comparison of the fees fixed by the Hon'ble Chief Justice and the second respondent Arbitrator would definitely make it very clear that the fees fixed by the second respondent is on the higher side, justifying the

petitioner which is a Public Sector undertaking facing financial problems, requesting the second respondent for reduction of fees. However, the second respondent is not ready to accede to the request as he is of the opinion that as the Counsel for the petitioner has already consented to for the fixation of fees, the petitioner should pay the same as fixed by him. In this context, the learned Senior Counsel for the petitioner has rightly submitted that the acceptance of the fees by the Counsel is not the criterion, but it is the ability and capacity of the petitioner to pay the same. I am also of the considered view that even if the Counsel gives her consent, it is not binding on the petitioner, as it is the petitioner who is the right person to decide about its financial capability and ability. Besides this, the petitioner wrote letters to the second respondent informing about its financial conditions and requesting him to reduce his fees.

26. Because of this long drawn controversy with regard to fixation of fees by the second respondent, the arbitration proceedings could not make a headway. Therefore, taking into considerations the totality of the facts and circumstances, I am of the considered view that the second respondent has become de jure unable to perform his function effectively warranting his mandate to be terminated as per Section 14(1)(a) of the Act 1996."

23. Reliance of the counsel for the respondent on Section 31A read with Section 31(8) of the Act cannot be accepted as Section 31(8) of the Act forms part of the "terms and conditions of the Arbitral Award". In the Award the Arbitral Tribunal can fix the "costs" that are payable by one party to another in the arbitration proceedings. Section 31A of the Act provides for various aspects of such "costs" that the Arbitral Tribunal has to bear in mind while passing its Award. It is true that one such criterion is of the fees of the Arbitrator, however, as noted above, this is only one of the aspects to be considered while determining the costs payable by one party to another in terms of the Arbitration Award.

24. The Law Commission of India in its Report No. 246 had given the following reasons for recommending introduction of Section 31A to the Act:

"70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration – which include arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).

71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations.

72. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation

in Court by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision furthers the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v Union of India [AIR 2005 SC 3353], and it is hoped and expected that judges and arbitrators would take advantage of this robust provision, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration."

25. A reading of the above would clearly show that the "costs" under Section 31(8) and 31A of the Act are the costs which are awarded by the Arbitral Tribunal as part of its award in favour of one party to the proceedings and against the other.

26. The deletion of words "unless otherwise agreed by the parties" in Section 31A only signifies that the parties, by an agreement, cannot contract out of payment of 'costs' and denude the Arbitral Tribunal to award 'costs' of arbitration in favour of the successful party. The Judgment of this Court in *Gayatri Jhansi Roadways Limited* (Supra) relied upon by the counsel for the respondent does not take note of the above decisions or the report of the Law Commission. The said judgment is, therefore, *per incuriam*. I am informed that the said decision is pending challenge before the Supreme Court by way of a Special Leave Petition. In any case, the said Judgment was passed on an appeal under Section 37 of the Act and did not consider the contours of Section 14 of the Act.

27. In my view, the Arbitral Tribunal is bound by the Arbitration Agreement between the parties, which is the source of its power. The Arbitral Tribunal cannot accept the appointment in part and rewrite the Arbitration Agreement between the parties.

28. In view of the above, the mandate of the Arbitral Tribunal shall stand terminated. The parties may appoint a substitute Arbitrator in terms of the Arbitration Agreement between them within a period of 15 (Fifteen) days from today. The Arbitral Tribunal so constituted shall proceed from the stage where the proceedings stood before the existing Arbitral Tribunal.

29. The petition is allowed in the above terms and with no order as to cost.

…….J.
NAVIN CHAWLA

JULY 20, 2018

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Annexure – 9.2

IN THE SUPREME COURT OF INDIA

National Highway Authority of India vs Gayatri Jhansi Raodways Limited, on 10.07.2019

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5383 OF 2019
(Arising out of SLP (C)No. 3211 of 2018)

National Highways Authority of India ..... Appellant(s)
Versus
Gayatri Jhansi Raodways Limited ..... Respondent(s)

With

CIVIL APPEAL NO. 5384 OF 2019
(Arising out of SLP (C) No. 22099 of 2018)

Gammon Engineers and Contractors Pvt. Ltd. ..... Appellant(s)
Versus
National Highways Authority of India .....Respondent(s)

JUDGMENT

R. F. NARIMAN, J.

1. Leave granted.

2. The brief facts of the present appeal are as follows:

It is sufficient to state, for the purpose of this case, that insofar as the Civil Appeal No. 5383 of 2019 etc. dispute resolution is concerned, the arbitration clause referred the parties to the arbitration of three learned arbitrators - one to be appointed by each party and the third arbitrator to be appointed by the two arbitrators so appointed. The aforesaid contract contained paragraph 5 which reads as follows:

"5. The parties are desirous that the remuneration and other expenses payable to the Arbitrators as per arbitration clause for referring the dispute between the parties arising out of the said Contract to the Arbitral Tribunal for resolution in accordance with the procedure laid down therein, shall be as follows:

I. That the maximum limit for fee payable to each Arbitrator per day shall be Rs. 5000/- subject to a maximum of Rs. 1.5 lakh per case.

II. That each Arbitrator shall be paid a reading fees of Rs. 6000/- per case.

III. That each Arbitrator shall be paid Rs. 5000/- by way of secretarial assistant per case.

IV. That each Arbitrator shall be paid Rs. 6000/- per case towards incidental charges like telephone, FAX, postage etc.

V. That other expenses based on actual against presentation of bills, shall also be reimbursed to each Arbitrator subject to the following ceiling (applicable for the days of hearing only)

(a) Travelling expenses Economy class (By Air), First class AC (By train) and AC car (By road).

(b) Lodging and boarding Rs.8000/- per day in Metro cities (Delhi, Mumbai, Chennai & Kolkata), Rs.5000/- per day in other cities OR Rs.2000/- per day if any Arbitrator makes his own arrangement.

(c) Local travel Rs.700/- per day VI Charges for publishing the Award Maximum of Rs.10,000/-

VII. That in exceptional cases, such as cases involving major legal implication/wider ramification/higher financial stakes etc. a special fees structure could be fixed in consultation with the Contractor/Supervision consultant and with the specific approval of the Chairman, NHAI before appointment of the Arbitrator.

Mr. P. S. Narasimha, learned senior counsel appearing on behalf of the respondent, has informed us that the fee schedule that was so fixed, was fixed under a policy decision dated 31.05.2004 of the National Highways Authority of India (hereinafter referred to as NHAI of brevity), a perusal of which would show that, this is, in fact, so.

3. As disputes arose between the parties, arbitration was invoked by the appellant long after the contract was entered into, i.e., on 23.05.2017. The respondent wrote a letter dated 14.07.2017 appointing Shri Sudesh Dhiman as its nominee arbitrator in which it reminded the arbitrator that the fee applicable is to be considered as per the policy circular of the NHAI dated 01.06.2017. This circular substituted amount payable to the arbitrator as per the circular of 2004, whereby the arbitrators would now get for any claim under Rs. 100 crores, Rs. 25,000 per day together with enhanced other charges or a lumpsum fee of Rs. 5 lakhs per case which includes counter claims, in place of the original fee structure.

4. The matter then came up before the Arbitral Tribunal, which was by then constituted, in which the Tribunal passed an order dated 23.08.2017, in which it stated as follows:

"1.12.1 Fees:

(a) The Claimant informed that there is no agreement between the parties regarding the fees of the AT.

(b) The Respondent requested that fees of the AT may be fixed in terms of the instructions issued by NHAI vide their circular dated 01.06.2017.

(c) The Tribunal considered the matter and decided that the fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

The respondent, against this order, moved an application dated 13.10.2017 before the Tribunal in which it sought to remind the Tribunal that the arbitral fees has been fixed by the agreement and that, therefore, they may be fixed in terms of the policy of 2017 and not as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996. The matter came up before the Tribunal yet again on 30.01.2018. The Tribunal then passed the following order:

3.8 The respondent had filed an application for review of fees fixed by the AT and to modify the same in terms of the NHAI circular dated 01.06.2017.

It was brought out that the Claimant had inadvertently informed the AT as per para 1.12.1(a) that there was no agreement between the parties regarding the fees of the AT. In fact, the agreement provides for a fixed rate of fee of the AT as agreed by the parties.

5. Oral submissions on this matter were made by both the parties. The AT deliberated on the matter and has decided that in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties. This is as per judgment dated 11.09.2017 of the Hon'ble High Court in the matter of NHAI vs Gayatri Jhansi Roadways. The AT reiterated that the fees fixed in the 1st hearing shall be followed. Accordingly, fees shall be regulated as per provisions of the fourth schedule of the amended Arbitration and Conciliation Act, 1996. Faced with this order, the respondent moved an application on 08.05.2018 under Section 14 of the Arbitration and Conciliation Act, 1996, to terminate the mandate of the arbitrators, inasmuch as, according to the respondent, the arbitrators had willfully disregarded the agreement between the parties and were, therefore, de jure unable to act any further in the proceedings.

6. Meanwhile, the Arbitral Tribunal passed yet another order dated 19.07.2018 in which the Tribunal stated it had no objection to payment of any fees as would be decided in the pending proceedings by the High Court of Delhi.

7. The learned Single Judge, by the impugned judgment, set out clause 5 of the agreement between the parties and then stated that the Fourth Schedule of the Arbitration Act not being mandatory, whatever terms are laid down as to arbitrator's fees in the agreement, must needs be followed. In so doing, he disagreed with the another learned Single Judge Bench judgment dated 11.09.2017 in National Highways Authority of India v. Gayatri Jhansi Roadways Limited in which, the learned Single Judge had held that Section 31(8) and Section 31A of the Arbitration Act would govern matters such as this and since the expression unless otherwise agreed by the parties had been omitted from Section 31A by the Amendment Act of 2015, arbitrators fees would have to be fixed in accordance with the Fourth Schedule of the Arbitration Act dehors the agreement between the parties.

8. The impugned judgment violently disagreed with this view holding the said judgment as per incuriam stating that:

"25. A reading of the above would clearly show that the costs under Section 31(8) and 31A of the Act are the costs which are awarded by the Arbitral Tribunal as part of its award in favour of one party to the proceedings and against the other.

26. The deletion of words "unless otherwise agreed by the parties" in Section 31A only signifies that the parties, by an agreement, cannot contract out of payment of costs and denude the Arbitral Tribunal to award costs of arbitration in favour of the successful party. The Judgment of this Court in Gayatri Jhansi Roadways Limited (Supra) relied upon by the counsel for the respondent does not take note of the above decisions or the report of the Law Commission. The said judgment is, therefore, per incuriam. I am informed that the said decision is pending challenge before the Supreme Court by way of a Special Leave Petition. In any case, the said Judgment was passed on an appeal under Section 37 of the Act and did not consider the contours of Section 14 of the Act."

9. We have heard learned counsel for the both the sides. In our view, Shri Narasimha, learned senior counsel, is right in stating that in the facts of this case, the fee schedule was, in fact, fixed by the parties. This fee schedule, being based on an earlier circular of 2004, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that have arisen under the agreement. We, therefore, hold that the fee schedule that is contained in the Circular dated 01.06.2017, substituting the earlier fee schedule, will now operate and the arbitrators will be entitled to charge their fees in accordance with this schedule and not in accordance with the Fourth Schedule to the Arbitration Act.

10. We may, however, indicate that the application that was filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not lie for the simple reason that an arbitrator does not become de jure unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that, in point of fact, the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in Gayatri Jhansi Roadways Limited case which clearly mandated that the Fourth Schedule and not the agreement would govern. The arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions. The learned Single Judge, in allowing the Section 14 application, therefore, was in error and we set aside the judgment of the learned Single Judge on this count.

11. However, the learned Single Judges conclusion that the change in language of section 31(8) read with Section 31A which deals only with the costs generally and not with arbitrators' fees is correct in law. It is true that the arbitrators fees may be a component of costs to be paid but it is a far cry thereafter to state that section 31(8) and 31A would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct. We may also state that the declaration of law by the learned Single Judge in Gayatri Jhansi Roadways Limited is not a correct view of the law.

12. With these observations, this appeal is allowed, the impugned judgment is set aside and the arbitrators are directed to proceed with the arbitration as expeditiously as possible.

13. We extend the time, with the consent of the parties, to a period of one year from today in which the arbitrators must deliver the Arbitral Award in the present case. Regard being had to the judgment just pronounced in Civil Appeal No. 5383 of 2019 etc. the aforementioned Civil Appeal No. 5384 of 2019, we set aside the impugned judgment dated 11.09.2017 in the present case. However, the setting aside of this judgment will not, in any way, come in the way of the final Award between the parties which has been upheld finally by this Court.

14. The appeal stands disposed of accordingly.

……., J.
[R. F. NARIMAN] .

…….J.
[SURYA KANT]

New Delhi;
July 10, 2019.

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Annexure – 9.3

In the High Court of Delhi at New Delhi

Rail Vikas Nigam Limited vs Simplex Infrastructure Limited, on 10.07.2020

O.M.P.(T)(COMM) 28/2020

RAIL VIKAS NIGAM LTD. ..... Petitioner
Through: Mr. Udit Seth, Adv.

Versus

SIMPLEX INFRASTRUCTURES LTD ..... Respondent
Through: Ms. Aanchal Mullick, & Mr. Pranjit Bhattacharya, Advs.

CORAM: HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

Judgement

1. The present petition preferred under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeks termination of the mandate of the 3-member Arbitral Tribunal constituted to adjudicate the disputes between the parties, on the ground that the Tribunal has willfully disregarded the ceiling provided in Schedule-IV of the Act while fixing its fee.

2. The petitioner Rail Vikas Nigam Limited is a public sector undertaking engaged in the business of railway construction projects for the Indian Railways. On 27.09.2010, the petitioner issued an Invitation to Bid for construction of Viaduct and related works for 4.748 km length in Joka-BBD Bag Corridor of Kolkata Metro Railway Line, excluding the station areas from Ch. 1250 to Ch.4128.00 between Joka to Behala Chowrasta including Depot Approach at Joka. In response thereto, the respondent submitted its bid which was accepted by the petitioner by way of the letter dated 28.12.2010. Shortly thereafter, on 28.01.2011, the parties executed a formal contract to carry out the work, however the date of commencement was taken as the date on which the Letter of Acceptance was issued, i.e., 28.12.2010.

3. Initially, as per the terms of the contract, the project was earmarked for completion on 27.06.2013, but for various reasons the original schedule could not be adhered to and the project completion date kept being extended. Finally, on 20.11.2017, the respondent completed the construction work as outlined in the Scope of Work in the contract dated 28.01.2011. However, since the respondent claimed that the petitioner's failure to discharge its obligations under the contract in a timely manner delayed the contract from a 30-month long to an 84-month long project, it sought cost escalation from the petitioner. Since repeated claims in this regard went unanswered, the respondent invoked arbitration under Clause 17.3 of the General Conditions of Contract (GCC) but the petitioner failed to appoint its nominee arbitrator. Resultantly, the respondent approached this Court by way of Arb. Pet. 519/2018 which was allowed on 11.12.2018. This Court appointed Hon'ble Mr. Justice Swatanter Kumar (Retd.) as the nominee arbitrator

on behalf of the petitioner herein with a specific direction that the fee of the learned arbitrator would be fixed as per Schedule-IV appended to the Act.

4. In its first sitting which took place on 15.01.2019, the learned Tribunal recorded that its fee would be assessed as per Schedule IV to the Act. The parties completed all pleadings thereafter and made part payment towards fees. On 09.01.2020, in its 8th sitting, the Tribunal extended the time for rendering an award by six months with the consent of the parties, and after observing that only two installments of Rs. 5 lakh each had been paid towards arbitrators' fee, directed the parties to pay the outstanding dues which, in terms of Schedule-IV to the Act, was observed as Rs. 49,87,500/-. Consequently, the parties were granted four weeks' time to pay the fee.

5. Aggrieved by the fixation of fee, the petitioner preferred an application before the learned Tribunal on 27.02.2020 averring that the fee fixed exceeds the statutory ceiling limit of Rs. 30,00,000/- prescribed in Schedule-IV of the Act and is, therefore, contrary to the statutory provisions set out in the Act. The Tribunal examined the objections raised by the petitioner and rejected them by way of its order dated 03.03.2020, the relevant extract whereof reads as under:

"8. On a reading of the plain language of Schedule-IV reproduced hereinabove, it becomes clear that the same provides for payment of fix fee with certain percentage if the claim exceeds Rs. 5,00,000/- or more. If the claim is more than Rs. 20,00,00,000 then in addition to the fixed fee of Rs. 19,87,500/- the parties are liable to pay 0.5% of the claim amount over and above Rs. 20,00,00,000/- with a ceiling of Rs. 30,00,000. The word 'plus' appearing in Column 3 of Schedule-IV is disjunctive and divides the table into two parts creating a liability for payment of fee for first Rs. 20,00,00,000 and then for the amount over and above Rs. 20,00,00,000. In terms of Entry-5 of Schedule-IV, which relates to the claims above Rs. 10,00,00,000 and up to Rs.20,00,00,000 the fee payable is Rs. 12,37,500 plus 0.75% per cent of the claim amount over and above Rs. 10,00,00,000/- Similarly, in terms of Entry-6, the fee payable for disputed amount which is more than Rs. 20,00,00,000 is a fixed amount of Rs. 19,87,500 for Rs. 20,00,00,000 and 0.5% of the claim amount over and above Rs. 20,00,00,000 crores. For the second parcel of the fees a ceiling of Rs. 30,00,00,000 has been imposed. Once the fixed sum is provided then the concept of ceiling would not operate to that sum. The ceiling is obviously applicable to the fee payable on the balance of the claim. Such an interpretation would be in consonance with the principle of plain construction as well as harmonious construction else the concept of fixed sum would stand negated by the concept of ceiling.

9. If the legislature intended that the parties shall pay fix fee irrespective of the quantum of claim and/or counter claim then it would have straightaway indicated that the maximum fees payable would be Rs. 30,00,000. That would have meant that irrespective of the quantum in dispute, the fees payable would not exceed Rs. 30,00,000. However, in its wisdom, the legislature has specified Rs. 19,87,500 + 0.5% of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000, which means that the ceiling of Rs. 30,00,000 is applicable qua claim over and above Rs. 20,00,00,000.

10. It would be rather incongruous that irrespective of the quantum in dispute, which in many cases would run into hundreds of crores or even more, the ceiling of Rs. 30,00,000 would apply to the fees payable to the arbitrator(s).

11. Another fact that needs to be inculcated to further substantiate the above point of view is the concept of proportionally and pro rata distribution. The said principle means an increase in liability proportionate to the claim raised by the party. Of course, this facet is applied with due regard to reasonableness and limitations. For instance, if the claims are for Rs. 20,00,01,000 the Arbitral Tribunal would get Rs. 19,87,505/- and if the claim runs into thousands of crores, the fee would be Rs. 30,00,000 even inclusive of Rs. 19,87,500 which does not stand to reason, proportionally and is not in the intent of the language of the table under the schedule.

12. The limitation of Rs. 30 lakhs is obviously intended to be placed on the additional sum and not inclusive of the fixed fee for twenty crores as per the table under the schedule.

13. In the light of the above discussion, the application filed on behalf of the respondent for revision of direction contained in the minutes of the meeting held on 09.01.2020 for payment of Rs. 10,00,000 by each party apart from the expenses of Rs. 50,000 is rejected."

6. Almost four months after the learned Tribunal had rejected the petitioner's application for reduction of fees, during which period the learned Tribunal fixed the matter for arguments on 13.07.2020, the present petition under Section 14 came to be filed seeking termination of the mandate of the 3-member Arbitral Tribunal.

7. In support of the petition, Mr. Udit Seth learned counsel for the petitioner submits that in view of the order passed by this Court on 11.12.2018 specifically directing the fee of the learned Tribunal to be governed by Schedule-IV to the Act, the Tribunal was entitled to fix its fee solely according to the statutorily prescribed ceiling. He submits that while Schedule-IV prescribes the model format for fixation of fee, entry No. 6 thereof deals with arbitrations where the sums in dispute exceed Rs. 20 crores. He thus contends that considering the respondent's claim which is being arbitrated by the Tribunal is for approximately an amount of Rs. 102 crores, the fixation of fee was required to be done in accordance with entry no. 6 of Schedule IV; this provision permits fixation of fee at Rs. 19,87,500/- and 0.5% of the claim amount over and above Rs. 20 crores, which cumulative amount is further subject to a ceiling of Rs. 30 lakh. He, therefore, submits that notwithstanding this fact, the learned Tribunal has erroneously concluded that in all claims qualifying under Entry No.6, the maximum fee chargeable per arbitrator is Rs. 49,87,500, i.e., Rs. 19,87,500/- of base fee added to *an additional amount* of 0.5% of the claim amount over and above 20 crores and that the ceiling of Rs. 30 lakh is only applicable to the second half of the Model Fee clause under Entry No. 6 of Schedule IV.

8. Mr. Seth further submits that not only does the English version of Schedule IV show that the ceiling of Rs. 30 lakh is inclusive of the base fee of Rs. 19,87,500/- but even the Hindi version of the notification, bearing a comma before the figure of Rs. 30,00,000/-, makes it clear that the ceiling limit of Rs.

30,00,000/- is applicable on the cumulative sum charged as arbitrator's fee under Entry No. 6. Mere absence of a comma in the English version cannot imply that the ceiling of Rs. 30 lakh is exclusively applicable to the second half of the Model Fee clause under Entry no.6, as has been held by the learned Tribunal. By relying on the decisions of the Supreme Court in *R.S. Nayak Vs. A.R. Antulay [(1984) 2 SCC 183]* and *Mithilesh Kumari Vs. Prem Behari Khare [(1989) 2 SCC 95]*, he submits that even if there is any ambiguity in the statutory provision, the same ought to be resolved by referring to an external aid of interpretation, i.e. the 246th Law Commission Report, to gauge the true legislative intent behind the provision. After all, the 246th Law Commission Report, which lamented the practice of arbitrators charging exorbitant fee thereby making arbitration disproportionately expensive, recommended incorporation of a fee schedule which ultimately resulted in Schedule-IV getting appended to the Act. He submits that with this in mind, the ceiling was envisaged as an effective way to curb costs associated with arbitration by limiting the fee chargeable by an arbitrator since Rs. 30,00,000/- is now the maximum amount of fee which can be charged under Entry No. 6 of Schedule-IV, irrespective of the extent to which the claim exceeds Rs. 20 crores.

9. Mr. Seth submits that in fact, the 246th Law Commission Report specifically recommended the schedule to be drafted on the basis of the fee schedule set out by the Delhi International Arbitration Center Administrative Costs and Arbitrators Fees Rules (DIAC Rules) which was ultimately adopted verbatim in the Act. This makes the DIAC Fee Schedule the primary source of law as far as Schedule-IV is concerned. He submits that while the Hindi version of the notification has adopted the DIAC Rules in spirit and includes the comma, the English version omits to do so and appears to be an inadvertent mistake. By relying on the decisions in *Indore Development Authority Vs. Manoharlal [2020 SCCOnline SC 316]* and *Jamshed N. Guzdar Vs. State of Maharashtra [(2005) 2 SCC 591]*, he submits that due attention ought to be given to grammar/punctuation employed in a statute to cull out the correct interpretation when multiple interpretations thereof are possible and that, in this case as well, the comma has a crucial role to play in the interpretation of Entry No. 6. He further submits that the comma disjoins the phrase 'with a ceiling of Rs. 30,00,000/- 'from the preceding phrase 'Rs. 19,87,500/- plus 0.5% of the claim amount over and above Rs. 20 crore' thereby capping the maximum limit of chargeable fee under Schedule IV as Rs. 30 lakh. He submits that the petitioner, who has been a part of several arbitration proceedings in the past which required fixation of fee under Schedule-IV of the Act, has watched most Tribunals follow this interpretation and adhere to the ceiling limit of Rs. 30,00,000/- on the entire fee chargeable under Entry No. 6 of Schedule-IV. However, in the event the comma is not taken into account while interpreting the Schedule, one more plausible interpretation of the statute arises and the ceiling limit of Rs. 30,00,000/- can then be read to apply only to the second portion of Entry No.6, i.e., the amount which is equivalent to 0.5% of the claim amount which is over and above Rs. 20 crores. He submits that such an interpretation is a blind adherence to the literal rule of interpretation and if it were to be effected, the maximum fee which can be charged by an arbitrator under the Schedule rises exponentially from Rs. 30,00,000/- to Rs. 49,87,500/- (19,87,500 + 30,00,000], which is contrary to the intent of the provision. By relying on *Abhiram Singh Vs. C.D. Commachen [(2017) 2 SCC 629]*, he submits that when a statute is enacted for the benefit of the people and the literal interpretation of a provision therein does not further such an object, it is important to carry out a purposive interpretation of the same. He, therefore, submits that the comma

furthers the object of the statute and should be read to exist in the English version of the notification, just as it exists in the Hindi notification and the DIAC Rules.

10. Mr. Seth finally submits that evidently, the manner in which the learned Tribunal interpreted Schedule-IV and dealt with the petitioner's objections regarding fee fixation on 03.03.2020 is contrary to the legislative intent of the provision. He submits that when Entry No. 6 of Schedule-IV of the Act clearly prescribes that the highest amount which could be charged as fee by an Arbitrator is Rs. 30,00,000/-, the purpose of this provision cannot be defeated by the minor, inadvertent omission of a comma. By relying on the decisions in *National Highways Authority of India Vs. Gayatri Jhansi Roadways Limited [2019 SCCOnline SC 906]*, *Doshion Pvt. Ltd. Vs. Hindustan Zinc Limited [2019 SCCOnline Raj 6]* and *Madras Fertilisers Ltd. Vs. SICGIL India Limited [2007 SCCOnline Mad 748]* he submits that any instance of charging excessive fee, in violation of the fee schedule which is statutorily prescribed, is a valid ground for termination of the arbitrator's mandate under Section 14 of the Act. In these circumstances, he prays that the present petition be allowed and the mandate of the learned Tribunal be terminated effectively.

11. Per contra, learned counsel for the respondent submits that the petitioner's challenge to the interpretation of Schedule-IV as carried out by the learned Tribunal is baseless and completely arbitrary and arises out of a deliberate misinterpretation of Schedule-V appended to the Act. She submits that when the plain text of the Schedule is clear and pronounced and explicitly stipulates that the ceiling of Rs. 30,00,000/- is applicable on the latter half of the Model Fee Clause corresponding to Entry No. 6, i.e., 0.5% of the sums in dispute over and above Rs. 20 crores, there is no occasion to refer to external aids such as the 246th Law Commission Report and the DIAC Rules to understand the Schedule. She further submits that phrasing employed in statutes in Hindi and English language are always different owing to the difference in script, but contrary to the petitioner's submissions, the addition of a comma in the Hindi notification does not change the meaning of Entry No. 6 in Schedule-IV at all. It is clear and evident that the ceiling of Rs. 30,00,000/- is in addition to the amount of Rs. 19,87,500 prescribed in Entry No.6 as the base fee chargeable. She submits that if the legislature wanted to impose a ceiling of Rs. 30,00,000/- as the maximum amount which could be charged as arbitrator's fee under the Act, it would have stated the same explicitly in Entry No. 6.

12. She further submits that although the petitioner has alleged that the mandate of the learned Tribunal is liable to be terminated on account of the fact that it has now become de jure/de facto unable to perform its functions, the petitioner has miserably failed to establish this argument. Ultimately, the learned Tribunal fixed its fee as per Schedule-IV of the Act and in doing so, complied with the order passed by this Court on 11.12.2018. When the petitioner was aggrieved by the same, the learned Tribunal even examined its objections comprehensively before passing the impugned order dated 03.03.2020. She submits that merely because the petitioner is choosing to misinterpret Entry No.6 of Schedule-IV by referring to the minute addition of a comma in the Hindi version of the notification, instead of reading the plain text of the provision in English itself, does not conclude any inability on the part of the learned Tribunal to effectively discharge its mandate.

13. She further submits that in any event, this petition under Section 14 is merely an attempt on the petitioner's part to defeat the rights of the respondent which is evident from the fact that this application has been moved rather belatedly, i.e., after a lapse of 4 months from the date of the order dated 03.03.2020. Even during this period of 4 months, the petitioner has been continuously moving applications before the learned Tribunal seeking various reliefs, while simultaneously building the narrative that the learned Tribunal has become de-jure/de-facto unable to effectively perform its functions. In fact, before the learned Tribunal, the petitioner had even undertaken to pay the Tribunal's fee as per the order dated 09.01.2020, which it then proceeded to challenge before the Tribunal and now before this Court. She submits that the petitioner's conduct has been wrought with contradictions and the reliefs it seeks under the present petition, if granted, would cause great harm to the respondent by way of delaying the adjudication of the disputes between the parties. She, therefore, prays that the present petition be dismissed with costs.

14. I have heard learned counsel for the parties and perused the record with their assistance.

15. To begin with, it may be noted that the parties are ad idem that while embarking on the task of fixing fee, the learned Tribunal was to be guided by Schedule-IV appended to the Act, specifically Entry No. 6 therein on account of the quantum of sums in dispute in arbitration. It is also undisputed that a cap has been placed on the quantum of fee which can be fixed by an arbitrator under Schedule-IV of the Act. The short question raised in this petition is regarding the interpretation of Entry No. 6 of Schedule-IV: is the ceiling limit of Rs. 30,00,000/- inclusive of the base fee of Rs. 19,87,500/- or is it only applicable as a cap on the latter portion of the Model Fee prescribed, i.e., 0.5% of the claim amount over and above Rs. 20 crores.

16. Since this dispute hinges on the interpretation of Schedule-IV appended to the Act, reference may be made to the said Schedule in entirety to ascertain the implication of Entry No.6:

The Fourth Schedule S. No.	***Sum in Dispute***	***Model fee***
1.	*Upto Rs.5,00,000*	*Rs.45,000*
2.	*Above Rs.5,00,000 and upto Rs.20,00,000*	*Rs.45,000 plus 3.5 per cent of the claim amount over and above Rs.5,00,000*
3.	*Above Rs.20,00,000 and upto Rs.1,00,00,000/-*	*Rs.97,500 plus 3 per cent of the claim amount over and above Rs.20,00,000*
4.	*Above Rs.1,00,00,000 and upto Rs.10,00,00,000/-*	*Rs.3,37,500 plus 1 per cent of the claim amount over and above Rs.1,00,00,000*
5.	*Above Rs.10,00,00,000 and upto Rs.20,00,00,000/-*	*Rs.12,37,500 plus 0.75 per cent of the claim amount over and above Rs.10,00,00,000*

6.	*Above Rs.20,00,00,000/-*	*Rs.19,87,500 plus 0.5 per cent of the claim amount over and above Rs.20,00,00,000 with a ceiling of Rs.30,00,000*

17. On a perusal of this Schedule, it becomes evident that every entry under Sums in Dispute bear upper and lower limits, barring Entry No. 6 which is the last entry and does not bear an upper limit, and every entry against Sums in Dispute has a corresponding model fee prescribed. Even the Model Fee column bears two kinds of figures, the base fee component and the variable fee component. It is apparent that the base fee is a fixed fee prescribed against the lower limit of the sums in dispute, whereas the variable fee component is prescribed in relation to the upper limit of the sums in dispute. The variable fee component, being additional in nature and calculated on a percentage basis, is dependent on the sums in dispute by virtue of the fact that the percentages decrease as the sums in dispute increase from Entry nos.1 to 6. Evidently, the word 'plus' employed in the preceding rows containing Entry Nos. 1 to 5 disjoint the two components of the Model Fee, which implies that the same is true for Entry No. 6.

18. In fact, the plain text of Entry No. 6 reveals that for all arbitrations involving sums in dispute exceeding Rs. 20,00,00,000/-, there is a base fee prescribed of Rs. 19,87,500/-. However, a certain amount of fee, i.e., the variable fee component, follows the word 'plus' and can be further charged by the arbitrator by way of a formula provided to calculate this amount, i.e., 0.5% of the sums in dispute which is over and above Rs. 20,00,000/-. The disputed phrase 'ceiling of Rs. 30,00,000/-', as per the petitioner, includes the base fee of Rs.19,87,500/-, and, as per the Tribunal, is only applicable to the variable fee component. In the light of the discussion in the preceding paragraph that the word 'plus' is the disjunctive between the base fee and variable fee component, it is evident that the ceiling of Rs. 30,00,000/- has been imposed on the variable fee component.

19. The petitioner has sought to contend, by relying on the Hindi version of Entry No.6, that the crucial point of disjunction in this piece of legislation was the comma which is absent from the English version. It would, therefore, be apposite to refer to the Hindi version of Entry no.6 which reads as under:

English Notification	**Hindi Notification**
Rs. 19,87,500/- plus 0.75 percent of the claim amount over and above – Rs. 20,00,00,000/- with a ceiling of Rs. 30,00,000/-	19,87,500/- रुपए + 20,00,00,000 रुपए से अधिक की दावा रकम का 0.5 प्रतिशत, 30,00,000 रुपए की अधिकतम सीमा सहित।

20. Even a glance at this extract fails to show how it furthers the case of the petitioner considering even the Hindi version stipulates that the ceiling of Rs.30 lakh is applicable only on the amount payable in addition to the base amount of Rs. 19,87,500/-. In my considered opinion, the absence of a comma in the English version does not materially alter the legislative intent of placing the ceiling of total chargeable fee per arbitrator under Entry no. 6 at Rs. 49,87,500/-. I have also considered the decisions in *Jamshed N. Guzdar (supra)* and *Indore Development Authority (supra)* which the petitioner has relied upon to contend that grammar has an important role in ascertaining the true interpretation of a statute, and that the comma in the Hindi version of the notification ought to be taken into account

while interpreting Entry No. 6 of Schedule-IV. Be that as it may, since the plain text of both the notifications in Hindi and English reiterate the same rule that the ceiling limit of Rs. 30,00,000/- is only applicable on the second parcel of the Model Fee prescribed, the English version of Schedule IV clearly shows that the point of disjunction is earmarked by the word 'plus' and that the whole body of the Schedule itself is self-explanatory, the presence of a comma in the Hindi notification does not make any difference. On this aspect, I find merit in the respondent's contention that if the legislature had truly intended to place an overall ceiling limit on any fee chargeable under Entry No.6, it would have explicitly done so using words to this effect.

21. The petitioner has also contended that in order to correctly interpret the legislative intent behind incorporating Schedule-IV, reference may be made to the 246th Law Commission Report and the DIAC Rules as external aids of interpretation. The relevant extract of the 246th Law Commission Report reads as under:

"10. One of the main complaints against arbitration in India, especially ad hoc arbitration is the high costs associated with the same-including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is really to become a cost-effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalize the fee structure for arbitrators. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in Union Of India v. Singh Builders Syndicate (2009) 4 SCC 523, where it was observed.

The cost of arbitration can be high if the arbitral Tribunal consists of retired judge. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired judges are arbitrators. The large number of sittings and charging of very high fees per sitting with several add ons, without any calling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if ti is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee"

11. In order to provide a workable solution to this problem, the commission has recommended a model schedule of fees and has empowered the High Court to frame appropriates rules for fixation of fees for arbitrators and for which purpose it may take the said modal schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The schedule of fees would require regular updating and must be reviewed every 3-4 years to ensure that they continue to stay realistic."

22. Since the 246th Law Commission Report provided reasons for incorporation of the Schedule and the DIAC Rules lent the format on which the Schedule was ultimately modelled, there is merit in the petitioner's contention that these two documents are useful external aids of interpretation. In fact, the reliance on the decisions in *R. S. Nayak (supra)* and *Mithilesh Kumari (supra*) has been placed to contend that a Law Commission Report can be referred to as an external aid of interpretation when there is ambiguity present in the statutory text, to understand the legislative intent behind the ambiguous provision. The petitioner is also correct in contending that the amount of fee fixed by the arbitrator ought to be regulated in order to reduce the costs associated with arbitration in the country and encourage alternate disputes resolution mechanisms, a mischief which the Law Commission sought to address in its 246th Report. There is absolutely no dispute with this proposition or the admissibility of external aids of evidence, which can be resorted to when the plain text of the statute is insufficient to gauge the meaning behind the text. However, in the present case, the plain text of Schedule IV is sufficient to shed light on the meaning and implication of Entry no. 6 insofar as it expressly provides the ceiling of Rs.30,00,000/- on the latter portion of the Model Fee, i.e., 0.5% of the claim amount over and above Rs. 20 crores. I am supported in my view by the decision in *Ben Hiraben Manilal (supra)*, which has been relied upon by the petitioner. In Ben Hiraben, although the Supreme Court observed that when confronted with an issue of statutory interpretation, the Court ought to read the statute in a manner which furthers the legislative intent conveyed through the express language of the provisions, it also clarified that when the language is plain and explicit, no problem of construction arises.

23. Even otherwise, considering the fact that arbitrations can involve enormous sums in dispute, often running into hundreds and thousands of crores, the cap of Rs. 49,87,500/- in Entry no.6 as the maximum fee which can be charged per arbitrator under Schedule IV is reasonable and in furtherance of the recommendations made in the 246th Law Commission Report. In a similar vein, even the DIAC Rules show that the ceiling limit is applicable on the variable component of the Model Fee prescribed under Entry No.6 in Schedule IV. The prevalent practice in some arbitration proceedings conducted under the aegis of DIAC, of capping the overall fee chargeable under Entry No.6 at Rs.30,00,000/- does not change the text, spirit or effect of the Schedule and it is always open for a Tribunal to charge fee which is lower than that set out in Schedule IV. Keeping in view that the language of Schedule IV is quite clear and consonant with the very purpose of its enactment and that Entry No. 6 is not in conflict with the recommendations of the Law Commission Report or the DIAC Rules, I have no hesitation in holding that the ceiling limit of Rs. 30,00,000/- is not inclusive of the base fee of Rs. 19,87,500/-, but has rightly been interpreted by the learned Tribunal as a cap on the additional fee chargeable, i.e., 0.5% of the claim amount which is over and above Rs.20 crores.

24. In these circumstances, when the interpretation of the learned Tribunal is in consonance with Schedule-IV of the Act, I find that the petitioner has been unable to make out a case for termination of the mandate of the learned Tribunal under Section 14. Before, I conclude, I deem it necessary to observe that, in view of my finding that the learned Tribunal has fixed the fees strictly in accordance with Schedule IV of the Act, the decisions in *Madras Fertilisers (supra)*, *Doshion (supra)*, *Gayatri Jhansi Roadways (supra)* reiterating the settled principle of law

that non-adherence to Schedule-IV while fixing fee for arbitration can be a valid ground for termination, are wholly inapplicable to the facts of the present case.

25. The petition, being meritless, is dismissed with no order as to costs.

……J
REKHA PALLI,

JULY 10, 2020

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Annexure – 10.1

Supreme Court of India

Associated Engineering Co. vs Government of Andhra Pradesh, on 15.07.1991

CIVIL APPELLATE JURISDICTION
Civil Appeal Nos. 338-339 of 1991

ASSOCIATED ENGINEERING CO. … PETITIONER:

Vs.

GOVERNMENT OF ANDHRA PRADESH AND ANR. … RESPONDENT:

AUTHOR: THOMMEN, T.K. (J)
BENCH: THOMMEN, T.K. (J) and SAHAI, R.M. (J)

HEADNOTE: Some disputes arose between the Respondent State and the Contractor in respect of the Cement concrete lining under an agreement in connection with the construction of Nagarjunasagar Dam. Arbitrator Umpire was appointed and the parties filed their pleading and documents before him. There were 15 claims apart from the general claim for cost and interest. The award made by the Umpire was filed before the Civil Court. The Civil Court made the award a rule of Court and passed a decree in terms of the award together with interest at 12% per annum from the date of the decree. On appeal, the High Court set aside the decree in respect of three claims on the ground that the claims were not supported by the agreement between the parties and that the arbitrator had gone beyond the contract in awarding the claims, and confirmed the decree in respect of three other claims.

Aggrieved by the High Court's Judgment, both the Contractor and the State Government preferred appeals by special leave. On behalf of the Contractor it was contended that since the Umpire made a non-speaking award and did not incorporate any document as part of the award except his reference to the contract, law did not permit interference by the Court with the award, and that the High Court exceeded its jurisdiction in interfering with a non-speaking award. On behalf of the State Government it was contended that notwithstanding the brevity of his reasoning, the arbitrator had given a speaking award, but with errors of law and fact apparent on the face of it; and that he acted contrary to the contract, thereby exceeding his jurisdiction.

Dismissing the appeal of the Contractor and partly allowing the appeal of the State Government, this Court, HELD:

1. The arbitrator cannot act arbitrarily, irrationally capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. [938A-B]

2. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award. [938C-E] *Mustill & Boyd's Commercial Arbitration, Second Edition, p. 64; Halsbury's Laws of England, Volume II, 4th Edn., para 622, referred to.*

3. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An Umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by doing so, his award would be liable to be set aside. [938E-F] Attorney General for Manitoba v. Kelly & Others, [([1922) 1 AC 268] referred to.

4.1 Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself. [939A-B] Bunge & Co. v. Dewar & Webb, [(1921)] 8 LI. L.Rep. 436(K.B.)], referred to.

4.2. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. [939C-F] M/s. Alopi Parshad & Sons Ltd. v. The Union of India [1960) 2 SCR 793]; Union of India v. Kishori Lal [AIR 1959 SC 1362]; Renusagar Power Co. Ltd. v. General Electric Company [(1984) 4 SCC 679]; Jivarajbhai v. Chintamanrao [AIR 1965 SC 214]; Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] and Thawardas v. Union of India [AIR 1955 SC 468] relied on. Bunge & Co. v. Dewar & Webb, [(1921) 8 LI. L. Rep. 436 (K.B.)]; Christopher Brown Ltd. v. Genossenschaft Oesterreichischer, [(1954) 1 QB 8]; Rex v. Fulham [(1951) 2 K.B. 1]; Falkingham v. Victorian Railways Commission [(1900) A.C. 452]; Rex v. All Saints, Southampton, [(1828) 7 B. & C. 785]; Laing, Son & Co. Ltd. v. Eastcheap Dried Fruit Co. [(1961) 1 LI. L. Rep. 142, 145 (Q.B.)]; Dalmia

Dairy Industries Ltd. v. National Bank of Pakistan [(1978) 2 LI. L. Rep. 223 (C.A.)]; Heyman v. Darwins Ltd. [(1942) A.C. 356]; Omanhene v. Chief Obeng [AIR 1934 P.C. 185]; F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Limited, [(1933) AC 592 (HL)] and M. Golodetz v. Schrier & Anr. [(1947) 80 LI. L.Rep. 647] referred to.

5. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. The umpire acted unreasonable, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ultra fines compromissi. [940A-D] M.L. Sethi v. R.P. Kapur [AIR 1972 SC 2379]; the managing Director, J. and K. Handicrafts v. M/s. Good Luck Carpets [AIR 1990 SC 864] and State of Andhra Pradesh & Anr. v. R.V. Rayanim [AIR 1990 SC 626] relied on. Anisminic Ltd. v. Foreign Compensation Commission [(1969) 2 AC 147]; Pearlman v. Keepers and Governors of Harrow School, [(1979) 1 Q.B. 56] and Lee v. Showmen's Guild of Great Britain [(1952) 2 Q.B. 329] referred to. Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641 and Halsbury's Laws of England, 4th Edn., Vol. 2, para 622, referred to.

6.1 In the instant case, the contract did not postulate-in fact it prohibited-payment of any escalation under Claim No. III for napa slabs or Claim No. VI for extra lead of water or Claim No. IC for flattening of canal slopes or Claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction. As such, the High Court was right in holding that the arbitrator acted outside the contract in awarding the abovesaid claims. However, the High Court went wrong in confirming the decree in respect of Claim No. II relating to escalation in labour charges since a specific formula had been prescribed under Item 35, and the function of the umpire was to make an award in accordance with the formula; he had no jurisdiction to alter the same. [937C-D; 936F] Jivarajbhai Ujamshi Sheth & Ors. v. Chintaman rao Balaji & Ors. [AIR 1965 SC 214] relied on.

6.2 Claim No. IV relating to `Refund of Excess hire charges of machinery and payment towards losses suffered as a result of poor performance of department machinery and also direction for the future' was rightly allowed by the arbitrator and his decision was rightly upheld by the High Court. The Government was, in terms of the contract, bound to compensate the contractor for the excess higher charges paid as a result of the poor performance of the machinery supplied by the Government. [937E-F]

6.3 As regards Claim No. VII(4) relating to `Sand Conveyance' the arbitrator was right in stating that the diesel oil requirement should be taken as 0.35 lit for item No. 5 of statement (A) at page 59 of Agreement as indicated in the original tender and not as O.035 and price adjustment made accordingly. The High Court rightly upheld this claim. [937G-H; 938A]

JUDGMENT

From the Judgment and Order dated 28.12.85 of the Hyderabad High Court in OMA No. 456 of 1984 and CRP No. 2743 of 1984.

WITH Civil Appeal Nos. 2692-930F 1991.

K. R. Choudhary for the Appellant.

K. Madhava Reddy, G. Prabhakar, T.V.S.N. Chari (N.P.) for the Respondents.

The Judgment of the Court was delivered by THOMMEN. J.

Leave granted in S.L.P. (C) Nos. 7071-72 of 1986.

2. These appeals are brought against the common judgment of the Andhra Pradesh High Court in O.M.A. No. 456 of 1984 and C.R.P. No. 2743 of 1984. The High Court set aside in part the common judgment of the Ist Additional Chief Judge, Civil Court at Hyderabad, in Original Suit No. 174 of 1983 and O.P. No. 49 of 1983 whereby he made the award of the umpire (hereinafter referred to as the `umpire' or `arbitrator') a rule of court and passed a decree in terms of the award together with interest on the principal amount awarded at the rate of 12 per cent per annum from the date of the decree. The High Court set aside the decree in respect of Claim Nos. III, VI and IX and affirmed the decree for the other claims. The main appeal Nos. 338 & 339 of 1991 arising from S.L.P. (C) Nos. 1573 & 1574 of 1986 are by the Associated Engineering Co. (hereinafter referred to as `the Contractor'). It challenges the judgment of the High Court setting aside the decree of the Civil Court in respect of Claim Nos. III, VI and IX. The other appeals arising from S.L.P. (C) Nos. 7071 & 7072 of 1986 are by the Government of Andhra Pradesh and they are against the judgment of the High Court confirming the decree of the Civil Court in respect of Claim Nos. II, IV and VII(4). The High Court set aside Claim Nos. III, VI and IX on the ground that those claims were not supported by the agreement between parties and that the arbitrator travelled outside the contract in awarding those claims. While that portion of the judgment of the High Court is supported by the Government, the Contractor submits that the High Court exceeded its jurisdiction in interfering with non-speaking award. The Government challenges the judgment of the High Court in so far as it affirmed the findings of the Civil Court in respect of Claim Nos. II, IV and VII(4) on the ground that the arbitrator awarded those claims totally unsupported by the contract.

3. Mr. A.B. Dewan, appearing for the Contractor, submits that the umpire made a non-speaking award. He did not incorporate any document as a part of the award, notwithstanding his reference to the contract. In the circumstances, counsel submits, the law does not permit interference by the Court with such an award.

4. Mr. K. Madhava Reddy, appearing for the Government, on the other hand, submits that the umpire made a speaking award with reference to the claims and he gave reasons for awarding those claims. It is true, counsel says, that the umpire made only brief reference to the provisions of the contract and his reasons for making the award. But notwithstanding the brevity of his reasoning, he has spoken sufficiently clearly as a result of which errors of law and fact have become apparent on the face of the award disclosing that the umpire acted contrary to, and unsupported by, contract, thereby exceeding his jurisdiction. He says that the umpire has referred to the contract not merely for the purpose of reciting or narrating his authority to hear the matter and resolve the dispute, but for incorporating it as a part of the award. In doing so, he exceeded the contract, not merely by misinterpreting it, but by travelling totally outside it, and by making an award without regard to and independent of the contract. A number of decisions have been cited on either side in support of the respective contentions.

5. The award was made in respect of disputes which arose between the Government and the Contractor for the cement concrete lining under Agreement dated 20.1.1981 (as supplemented subsequently) in connection with the construction of Nagarjunasagar Dam. The parties filed their pleadings and documents before the arbitrator/umpire. There were 15 claims apart from the general claim for cost and interest. As stated earlier, we are concerned only with Claim Nos. III, VI and IX which are claims awarded by the umpire and decreed by the Civil Court, but set aside by the High Court, and with Claim Nos. II, IV and VII(4) which were awarded by the umpire and decreed by the Civil Court as well as by the High Court. The first set of claims respectively, are: 'Escalation on Napa Slabs'; 'Payment of Extra Lead for water' and `Extra Expenditure incurred due to flattening of canal slopes and consequent reduction in top width of banks used as roadway'. The other set of claims relate respectively to `Labour Escalation'; `Refund of excess Hire Charges of Machinery' and `Sand conveyance'.

6. The umpire after reciting the background of the dispute which led to his entering upon reference on 16.12.82 to decide the dispute and the relevant agreement between the parties deals with the claims seriatim. As regards Claim No. III, he says: *"I hereby declare and award and direct the respondent to compensate the claimants towards escalation in the cost of napa slabs calculated at Rs. 4.25 (Rupees four and paise twenty-five) per Sq. Met. of napa slab lining, under item 11 of schedule A of the agreement for the entire work and make payments accordingly".*

The main criticism levelled by the Government against this award is that there was no provision in the contract for escalation of the cost or price of napa-slabs. The escalation provision in the contract related to labour, diesel oil, tyres and tubes, as provided in Item 35 thereof. There was no escalation provision in the contract as far as napa-slabs were concerned. The price for these slabs had been determined in the contract at Rs. 4.25 Per Sq. Met. and there was no provision for increase or decrease of that price. Both the parties to the contract were bound by that price and the arbitrator, therefore, had no jurisdiction to award any escalation in the price of napa-slabs. In the absence of any provision in the contract, the arbitrator had no jurisdiction to make an award for escalation. This contention of the Government was accepted by the High Court.

Mr. Dewan, appearing for the Contractor, is not in a position to refer to any provision of the contract allowing escalation for napa-slabs. All that he is in a position to refer to is Item 35 of the contract which refers to price adjustment for increase or decrease in the cost. That item, as stated earlier, refers to various matters such as, diesel oil, labour, etc., but not to napa-slabs. On the other hand, at the end of that item, it is specifically stated `no claims for price adjustment other than those provided herein, shall be entertained'. Furthermore, it is specifically provided in the contract `the contractor shall have to make his own arrangements to obtain the napa-slabs as per standard specifications. The Department does not accept any responsibility either in handing over the quarries or procuring the napa-slabs or any other facilities. The contractor will not be entitled for any extra rate due to change in selection of quarries as above'. There is thus a specific prohibition against price adjustment or award for escalated cost in respect of any matter falling outside Item 35. Mr. Dewan, however, submits that being a non-speaking award, the Court cannot examine the reasons.

Mr. Madhava Reddy, appearing for the Government, submits that the award is not silent on the point. It speaks eloquently, though briefly. It is not merely in the recital or narrative portion of the award that the agreement is referred to, but in making the award under Claim No. III the agreement is specifically incorporated by directing payment for escalation on napa-slabs under Item 11 of Schedule-A of the Agreement at the rate of Rs. 4.25. The agreement is thus bodily incorporated into the award thereby disclosing an error apparent on its face and the total lack of the arbitrator's jurisdiction by reason of his going totally outside and opposed to the contract. This, counsel says, is revealed not by a construction of the contractual provisions, but by merely looking at the matters covered by the contract.

7. Claim No. VI-Payment of Extra Lead for water.

This is what the arbitrator says: *"I hereby declare and award and direct the Respondent to pay extra towards additional lead for water i.e. 3 KM. over the specified lead of 2 KMs in the agreement for items 4, 5, 6, 10 and 11 of Schedule A".*

As regards this claim, Mr. Dewan reiterates his contention that the award is silent as to the reasons and, therefore, the Court should not interfere. Mr. Madhava Reddy on the other hand submits that the award speaks as to the reasons for allowing the claim for extra amount towards additional lead for water i.e. for 3 KMs over and above the specified lead of 2 KMs. But counsel says, the agreement provides for no payment at all for any lead and much less for any additional lead. He refers to the specific provision of the agreement regarding water. He says that the Contractor had to make its own arrangements for supply of water at work site for all purposes including quarry. There is no provision in the contract for making any payment to the Contractor for the water brought by it to the site. In the absence of any such provision, counsel says, it is preposterous that the arbitrator should have awarded extra amount for additional lead for water. The contract specifically stated that it was the responsibility of the Contractor to make its on arrangements for the supply of water. The Government gave no assurance to the Contractor regarding the availability of water or the prices payable therefor. The umpire, therefore, had no jurisdiction to allow Claim No. VI. The High Court accepting the contention of the State reversed the Civil Court's decree as regards

that claim and held *" ..... In view of unequivocal agreement that the contractor should make his own arrangements for supply of water for the purpose of curing, the award of compensation is outside the purview of the agreement and is vitiated".*

8. Claim No. IX-Extra expenditure incurred due to flattening of canal slopes and consequent reduction in top width of banks used as roadway.

Referring to this claim, this is what the award says: *"I hereby declare and award and direct the respondent to pay the claimant for 50% of the work done on the napa slab lining on the left side slope of Canal at the extra rate of Rs. 4.00 per Sq. Met of lining work".*

Rejecting the contentions of the Contractor and accepting those of the Government, the High Court held that the contract did not provide for any payment whatever for the maintenance of canal slopes and consequent deduction in top width of banks used as roadway. The High Court found that it was the responsibility of the Contractor to repair the banks and the contract contained no provision for payment of any amount towards the decrease in the width or otherwise. The High Court says *`....the acceptance of claim on this score is beyond the purview of the agreement and as such vitiated'.*

While counsel for the Contractor repeats his contentions regarding the award being silent as to reasons, Mr. Madhava Reddy submits that the contract provides for no payment whatever under Claim No. IX. On the other hand, it specifically states-

"8(A) SITE FACILITIES

Haul roads from batching plant site to the work site in the first instance will be formed by the Department as per site surveys per each batching plant site. These haul roads are fair weather roads only with hard passages at stream crossings. Formation of haul roads within the batching plant area, maintenance of all haul roads including those formed by the Department shall be the responsibility of the contractors. Existing roads and roads under the control of N.S. Project can be made use of by the Contractor. Any other haul roads required by the Contractor and not specified in plan shall be carried out by the Contractor at his cost.

8.(A) 1. WIDENING OF BANKS: The canal banks will be widened to 5 meters and 3 meters width respectively by the Department for right and left banks to facilitate transport of materials. The contractor however has to maintain the haul roads".

In the absence of any provision to pay for extra expenditure and in the light of the specific provision placing the sole responsibility for the maintenance of the haul roads on the Contractor, the arbitrator had no jurisdiction to award 50% at extra rate of Rs. 4 per Sq. Meter. The contract contains no provision for payment of any amount outside what is strictly specified under the clause. In the circumstances, Mr. Madhava Reddy says, the High Court was perfectly justified in coming to the conclusion, which it did, as regards the arbitrator acting outside his jurisdiction.

9. We shall now deal with the other set of claims, namely, Claim Nos. II, IV and VII(4) which had been awarded and decreed by both the courts below. The arbitrator deals with Claim No. II as follows:

"The claim is admitted. I hereby declare and award and direct the Respondents that due to the statutory revision of Minimum rates of wages payable to various categories of workers, the claimant is to be paid compensation as per the following formula:

$$P1\ \frac{(WSI-WSO)}{WSO}0.10+\ \frac{(WSSI-WSSO)}{WSSO}0.10-\ \frac{(WUSI-WUSO)}{WUSO}0.8\ Vs\ X\ R\ X100$$

Where:
Vs- Compensation payable due to statutory increase in Min. Wages of labour notified by the Government of A.P. after 22.10.1980 under the Min. Wages Act., 1948.
P-1. Percentage Labour component of each item of Work as per Appendix 9 at page 139 of Agreement.
R- Value of work done under each item of work during the period under review.
WSO- 11.15 (Daily Minimum wage in force on the date of Tender for skilled labour).
WSSO- 8.50 (Daily Minimum wage in force on the date of Tender for semiskilled labour).
WUSO- 5.65 (Daily Minimum wage in force on the date of Tender for unskilled labour).
WSI- Revised daily Min. wage as fixed by Govt. A.P. for skilled labour applicable for the period under review.
WSSI- Revised daily Min. wage as fixed by Govt. of A.P. for semiskilled labour applicable for the period under review.
WUSI- Revised daily Min. wage as fixed by Govt. of A.P. for semiskilled labour applicable for the period under review.
WUSI- Revised daily Min. Wages as fixed by Government of A.P. for unskilled labour applicable for the period under review.

The above compensation is payable to the claimant for the work done after 23.12.80, the date of publication of G.O. No. 835 dated 18.12.80, till the completion of the work".

It is not seriously disputed that the observation "The claim is admitted" is only a reference to the arbitrator's decision to allow the claim and not as a concession or admission on the part of the Government. In fact, from the pleadings it is quite clear that the Government had opposed every claim and there was no concession on its part.

Claim No. II had been, as seen above, elaborately dealt with by the arbitrator. On account of the statutory revision of minimum rates of wages payable to various categories of workers, the arbitrator made the award in respect of labour escalation. Escalation under this item is in fact, as stated above, provided for under the contract, but in terms thereof. The grievance of the Government is not because the umpire awarded escalation for labour, but because he allowed escalation otherwise than as provided under the contract. The contract under Item

35 provides- `*Increase or decrease in the cost due to labour shall be calculated quarterly in accordance with the following formula:*

$$V1 = 0.75 \times \frac{P1}{100} \times \frac{R \times (I-i)}{10}$$

V1 = increase or decrease in the cost of work during the quarter under consideration due to changes in rates for labour.
R = the value of the work done in Rupees during the quarter under consideration
I = the average consumer price index for industrial workers (wholesale prices) for the quarter in which tenders were opened (as published in Nalgonda District by the Director of Bureau of Economics and Statistics, Andhra Pradesh).
P1 = Percentage of labour components (specified in schedule in appendix-9 of the item).
i = the average consumer price index for industrial workers (wholesale prices) for the quarter under consideration.

Price adjustment clause shall be applicable only for the work that is carried out within the stipulated time or extensions thereof as are not attributable to the contractor. No claims for price adjustment other than those provided herein, shall be entertained".

The contention of the Government is that the two formulae are totally different from each other as a result of which the arbitrator awarded very much more than what is warranted under the agreed formula.

Mr. Madhava Reddy submits that it is true that the contractor was bound to pay minimum wages according to the relevant statutory provisions. In fact, the contract contains a provision making it necessary for the Contractor to conform to all laws, regulations, bye-laws, ordinances, regulations, etc.

But the fact that the Contractor necessarily had to pay enhanced rates of wages did not entitle it to claim any amount from the Government in excess of what had been strictly provided under the contract. A specific formula had been prescribed under Item 35, as seen above, and the function of the umpire was to make an award in accordance with that formula. He had no jurisdiction to alter the formula, which he has done, as seen from the award. It is not disputed on behalf of the Contractor that the formula followed by the arbitrator, as seen from the award under Claim No. II, is different from the formula prescribed under the contract. But Mr. K.R. Chowdhury, one of the counsel appearing for the Contractor, points out that the contract provided for payment of all wages according to the current rates and, therefore, the arbitrator was well within his jurisdiction to make an award by adopting a formula in keeping with the enhanced rates of wages, and the High Court, he contends, rightly decreed the amounts under that claim in terms of the award.

10. We shall deal with Claim Nos. IV and VII(4) separately. But as regards Claim Nos. III, VI and IX, we are of the view that the High Court was right in stating that the arbitrator acted outside the contract in awarding those claims. For the very same reason we are of the view that the High Court was wrong in coming to the conclusion, which it did, regarding Claim No. II. We say so because there is no justification whatsoever for the arbitrator to act outside the contract. These

four claims are not payable under the contract. The contract does not postulate- in fact it prohibits payment of any escalation under Claim No. III for napa-slabs or Claim No. VI for extra lead of water or Claim No. IX for flattening of canal slopes or Claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. The conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction: See Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors. [AIR 1965 SC 214]. We are in complete agreement with Mr. Madhava Reddy's submissions on the point.

11. As regards Claim Nos. IV and VII(4), we see no merit in Mr. Madhava Reddy's contentions. Claim No. IV relates to `Refund of excess hire charges of machinery and payment towards losses suffered as a result of poor performance of department machinery and also direction for the future'. This claim, was rightly allowed by the arbitrator and his decision was rightly upheld by High Court. The Government was, in terms of the contract, bound to compensate the Contractor for the excess higher charges paid as a result of the poor performance of the machinery supplied by the Government.

Claim No. VII(4) is as regards `Sand Conveyance'. The arbitrator says- *"The diesel oil requirement shall be taken as 0.35 lit for item No. 5 of statement (A) at page 59 of Agreement as indicated in the original tender and not as 0.035 and price adjustment made accordingly".* The arbitrator was, in our view, right in so stating and the High Court, in our view, rightly upheld this claim.

12. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract; his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

13. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. It he exceeded his jurisdiction by so doing, his award would be liable to be set aside. As stated by

Lord Parmoor: *".....It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which on the true construction of the submission was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties .....", Attorney-General for Manitoba v. Kelly & Others, [(1922) 1 AC 268, 276]*.

14. Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself. Bunge & Co. v. Dewar & Webb, [(1921) 8 L1. L.Rep. 436(K.B.)]. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders Outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can he established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. See M/s. Alopi Parshad & Sons. Ltd. v. The Union of India, [(1960) 2 SCR 793]; Bunge & Co. v. Dewar & Webb., [(1921) 8 L1. L. Rep. 436 (K.B.)]; Christopher Brown Ld. v. Genossenschaft Oesterreichischer, [(1954) 1 QB 8]; Rex v. Fulham, [(1951) 2 K.B. 1]; Falkingham v. Victorian Railways Commission, [(1900) A.C. 452]; Rex v. All Saints, Southampton [(1828) 7 B. & C. 785]; Laing. Son & Ltd. v. Eastcheap Dried Fruit Co. [(1961) 1 L1.L. Rep. 142, 145 (Q.B.)]; Dalmia Dairy Industries Ltd. v. National Bank of Pakistan, [(1978) 2 L1. L. Rep. 223 (C.A.)]; Heyman v. Darwing Ld. [(1942) A.C. 356], Union of India v. kishorilal [AIR 1959 SC 1362]; Renusager Power Co. Ltd. v. General Electric Company [(1984) 4 SCC 679]; Jivarajbhai v. Chintamanrao [AIR 1965 SC 214]; Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689, 692]; Thawardas v. Union of India [AIR 1955 SC 468]; Omanhene v. Chief Obeng [AIR 1934 P.C. 185, 188]; F.R. Absalom. Ltd. v. Great Western London Garden Village Society. Limited [(1933) AC 592 (HL)] and M. Golodetz v. Schrier & Anr. [(1947) 80 L1. L. Rep. 647].

15. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. See the principles state in Anisminic Ltd. v. Foreign Compensation Commission [(1969) 2 AC 147]; Pearlman v. Keepers and Governors of Harrow School [(1979) 1 Q.B. 56]; Lee v. Showmen's

Guild of Great Britain [(1952) 2 Q.B. 329]; M.L. Sethi v. R.P. Kapur [AIR 1972 SC 2379]; The Managing Director. J. and K. Handicrafts v. M/s. Good Luck Carpets [AIR 1990 SC 864] and State of Andhra Pradesh & Anr. v. R.V. Rayanim [AIR 1990 SC 626]. See also Mustill & Boyd's Commercial Arbitration, Second Edition; Halsbury's Laws of England, Fourth Edition, Vol. 2.

16. The umpire, in our view, acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ultra fines compromissi.

17. In the circumstances, we affirm the judgment of the High Court under appeals except in respect of Claim No. II. Accordingly, the appeals of the contractor are dismissed; and, the appeals of the Government are allowed in respect of claim No. II. We do not, however make any order as to costs.

Appeals dismissed.

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Annexure – 10.2

Supreme Court of India

The New India Civil Erectors (P) Ltd. vs Oil & Natural Gas Corporation, on 17.02.1997

Civil Appeal No. 808 of 1997

The New India Civil Erectors (P) Ltd. …… Petitioner

Versus

Oil & Natural Gas Corporation …… Respondent

Author: B. P. Jeevan Reddy
Bench: B. P. Jeevan Reddy, Sujata A. V. Manohar

JUDGMENT

Leave granted.

2. Heard Shri F. S. Nariman, learned counsel for the appellant and the learned Attorney General for the respondent-corporation.

3. A contract was entered into between the appellant and the Oil & Natural Gas Corporation (O.N.G.C), whereunder the appellant undertook the construct 304 pre-fabricated housing units at Panvel, Phase-I. The appellant commenced the construction but did not complete it even within the extended period. The respondent thereupon terminated the contract and got the said work done through another agency. Disputes arose between parties in the above connection, each party raising claims against the other, which were referred for decision to two arbitrators (joint Arbitrators). By their award dated 18th June, 1991, the arbitrators decided that while the O.N.G.C. shall pay to the appellant a sum of Rs. 1,09,04,789/-, the appellant shall pay to the O.N.G.C. a sum of Rs. 41,22,178/-. In the other words the appellant was held entitled to a net amount of Rs. 67,82,620/- with the interest at the rate of 18 per cent per annum from the date of award till the date of payment or till the date of decree whichever was earlier. While the appellant applied for making the said award a Rule of the Court, the respondent- Corporation filed objections seeking to have the award set aside. The learned Single Judge overruled the objections of the respondent-corporation and made the award a Rule of the Court. Corporation appealed against the same, which has been partly allowed by the Division Bench.

4. The appellant had claimed various amounts under as many as 19 heads, while the respondent-corporation claimed certain amounts under three heads. The arbitrators rejected the appellant`s claim under heads 3, 5, 7, 8, 10, 11, 12 and 18. They awarded various amounts under the other heads, the total of which came to Rs. 1,09,04,789/-. So far as the respondent`s claims are concerned, the arbitrators rejected claim No.2 but accepted claim No. 1 (partly) and awarded various amounts totaling Rs. 41,22,178/-.

5. In the appeal before the Division Bench the respondent-corporation confined its attack only to claims 1, 4, 6, 9 and 13. The Division Bench rejected the respondent's contentions with respect to claims 1 and 13 but upheld the same

with respect to claims 4, 6 and 9. Only the appellant has come to this Court challenging the Judgment of the Division Bench. We shall deal with these three claims in their proper order.

6. Claim No. 4: Appellant's claim No. 4 arises on account of the shortage of cement in the bags supplied by the respondent. The appellant's case was that the corporation had undertaken to supply cement to it in bags, each bag containing 50 kg. of cement, but as a matter of fact, the cement actually found in the bags was less. The appellant complained of the same to the officers of the corporation from time to time and a record of the shortages has indeed been kept by the parties. On this count, the appellant claimed a sum of Rs. 3,96,984.50, against which the arbitrators awarded an amount of Rs. 3,70,221.50. The defence of the corporation was that according to the stipulation contained in Schedule-A to the Tender notice, the corporation was not to be held responsible for any variation in the weight of the cement in the bags supplied by them. The relevant stipulation read as follow:

"*Ordinary port-land construction cement M.T. 830/- Ex commission's Godown, Greater Bombay.*

NOTE: 20 (Twenty bags) bags of cement shall mean one metric tonne for the purpose of recovery irrespective of variation in standard weight of cement filled in bags."

7. The appellant's case, however, was that though the Schedule to the Tender notice did contain the above stipulation, the appellant had, in its letter dated 5th March, 1984, which was in the nature of a counter-offer, clearly stipulated that "ordinary Portland cement", Rs 8.30 per metric tonne [each 50 kg. bag]" will be supplied by the corporation "at site", The appellant had stipulated in the said letter that the terms set out by it therein "shall take precedence over tender conditions". It is pointed out by Shri Nariman that the said letter forms part of the contract between the parties and that indeed it is this letter which contains the arbitration clause whereunder the disputes between the parties adjudicated by the arbitrators. It is further submitted by the learned counsel that in their acceptance letter dated 10th January, 1985, the respondent-corporation merely stated that the cement will be supplied only at Bombay and not at the site, but did not say anything with respect to the stipulation in the appellant`s letter dated 5th March 1984 (counter-offer) that each bag of cement supplied to it shall contain 50.kg of cement.

8. The Division Bench has not referred to the letter dated 5th March, 1984 nor the acceptance letter dated 10th January, 1985, but has rejected the appellant's claim only and exclusively with reference to the stipulation in the schedule to the Tender notice. Mr. F. S. Nariman submits that the Division Bench was in error in holding that the arbitrators exceeded their authority in awarding the said amount. According to him, the arbitrators merely construed the relevant stipulation as contained in the schedule to the Tender notice read with the appellant`s letter dated 5th March, 1984 (counter offer) and the corporation's acceptance letter dated 10th January, 1985 – which they were entitled to do. It is submitted that since the award is a non-speaking award [though it has awarded separate amounts under each head of claim] no interference is permissible on the ground that the arbitrators have misconstrued the terms of the agreement. On the other

hand, the learned Attorney General submitted that the modified or qualified in any manner by the appellant's letter dated 10th January, 1985, and, therefore, the Division Bench was right in rejecting this claim as prohibited by the agreement between the parties. We are of the opinion that it appears to be border-line case. It is possible to take either view. It must be remembered that in this case there is no formal contract and the terms of the agreement have to be inferred from the Tender notice and the correspondence between the parties. Since the attempt of the Court should always be to support the award within the letter of law, we are inclined to uphold the award on this count [Claim No. 4]. Accordingly, we reverse the judgment of the Division Bench to the above extent. The amount awarded by the arbitrators under this claim is affirmed.

9. Claim No. 6: The claim of the appellant under this head is in a sum of Rs. 53,11,735.60, against which the Arbitrators have awarded an amount of Rs. 49,91,327/-. The dispute between the parties is with respect to the method/mode of measuring the constructed area. The case of the respondent is that according to the tender conditions, as well as clause (10) of the aforesaid letter dated 5th March, 1984 (written by the appellant to the corporation), the area covered by balconies is liable to be excluded from the measurements. We may refer to clause (10) of the appellant's own letter dated 5th March, 1984 which reads as follows:

> *"Mode of measurement|- We have based our price on the total build-up area of one floor [four flats] including stair-case and common corridor but excluding balconies only. Hence work should be measured on the build-up area, excluding balcony areas."*

10. The tender condition is to the same effect. The above stipulation clearly says that total build up area of a floor shall include stair case and common corridor but shall exclude balconies. It expressly provides that "*work should be measured on the build-up area excluding balcony area*". It is undisputed that in the plan of the flats attached to the Tender notice, balconies were provided. Shri Nariman contended that the said plans were modified later and that the flats as finally constructed, did not have any balconies and, hence, no question of excluding the balconies area can arise. Shri Nariman could not, however, bring to our notice any agreed or sanctioned plan modifying the plan attached to the Tender notice. The appellant could not have constructed flats except in accordance with the plans attached to the Tender notice, unless of course there was a later mutually agreed modified plan – and there is none in this case. We cannot, therefore, entertain the contention at this stage that there are no balconies at all in the flats constructed and that, therefore, the aforesaid stipulation has no relevance. We must proceed on the assumption that the plans attached to the Tender notice are the agreed plans and that construction has been made according to them and that in the light of the agreed stipulation referred to above, the areas covered by balconies should be excluded. In this view of the matter we agree with the Division Bench that the arbitrators over-stepped their authority by including in area of the balconies in the measurement of the build-up area. It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the build-up area, the balcony area should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any awarded any amount

to the appellant on the account. We, therefore, affirm the decision of the Division Bench on this score [Claim No. 6]

11. Claim No. 9: The appellant claimed an amount of Rs. 32,21,099.89. Under this head, against which the arbitrators have awarded a sum of Rs. 16,31,425/-. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-corporation with reference to and on the basis of the stipulation in the corporations' acceptance letters dated 10th January, 1985 which stated clearly that "*the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work*". The Division Bench held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned single Judge was not right in holding that the said prohibition is confirmed to the original contract period and does not operate thereafter. Merely, because the time was made the essence of the contract and the work was completed within 15 months, it does not follow that the aforesaid stipulation was confirmed to the original contract period this is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the stipulation/condition contained in the agreement between the parties. We therefore, affirm the decision of the Division Bench on this Count as well [claim No. 9].

12. So far as the position of the law on the subject is concerned, there is hardly any dispute between the parties. It is sufficient to refer to the well considered decision of this Court in Sudarshan Trading Company V. Government of Kerala [A.I.R.(1989) S.C. 890], within it has been held:

> *".... if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the court can find that he exceeded his jurisdiction on proof of such excess..... Therefore it appears to us that there are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award".*

13. For the above reasons, the appeal is allowed in part, i.e., to the extent of claim No. 4 (in a sum of Rs. 3,70,221.50). In other respects, the appeal is dismissed. There shall be no order as to costs.

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Annexure – 10.3

Supreme Court of India

Steel Authority of India Limited vs. J. C. Budharaja, on 01.09.1999

Civil Appeal No. 507 of 1992

Steel Authority of India Limited …… Petitioner

Vs.

J. C. Budharaja, Government and Mining Contractor …… Respondent

Author: M. B. Shah, J.
Bench: D. P. Wadhwa, M. B. Shah

JUDGMENT

This appeal is filed against the judgment and order dated 11th September, 1991 passed by the Patna High Court, Ranchi Bench, in Miscellaneous Appeal No. 621 of 1987 under Section 39(1)(vi) of the Arbitration Act, 1940 (hereinafter referred to as the Act). The High Court dismissed the appeal filed by the appellant and confirmed the order dated 2nd April, 1990 passed by the Subordinate Judge, Ist Court, Chas, in Arbitration Suit No. 28 of 1988 by which award is made rule of Court with 8% per annum interest from the date of the decree.

2. It is undisputed that the National Mineral Development Corporation, predecessor of the Steel Authority of India Limited on 1.8.1977 executed a contract with the respondent for construction of tailing-cum-storage reservoir at Kundi for Megha Taburu Iron Ore Project. As per the terms of the contract, the work was to be completed within a period of two years. During this period, Public Sector Iron and Steel Companies (Re-structuring and Miscellaneous Provisions) Act, 1978 was passed and Steel Authority of India Limited became the employer in place of National Mineral Development Corporation. Further, the contractor, N. C. Budharaja also died and was succeeded by the present respondent.

3. After two years of contract period, on 29th August, 1979, respondent raised the claim of about 18 lakhs as damages for delay in handing over work sites and allied reasons. On 20th December, 1980, a supplementary agreement was executed between the appellant and the respondent for the same work at an increased rate. The relevant part of the said agreement is as under:

> *The Supplementary agreement made this twentieth day of December, 1980 between Steel Authority of India Limited having its registered office at Hindustan Times House, 18/20, Kasturba Gandhi Marg, New Delhi 110 001 and having one of fits units at Bokaro Steel Plant at Bokaro Steel City (hereinafter referred to as the (Employer) which expression shall include its successors and assigns) of the one part and M/s N. C. Budhraja Govt. and Mining Contractor, at Jharpada, P.O. Budheswari Colony, Bhubaneswar (hereinafter referred to as the Contractor) which expression shall include its successors and assigns of the other part.*
>
> *WHEREAS the contractor entered into an agreement dated 1st August 1977 with M/s National Mineral Development Corporation Limited in regard to the work of*

Constructions of Tailing-cum-Storage Reservoir at Meghahatuburu Iron Ore Project relating to their Meghahatuburu Iron Ore Project.

AND WHEREAS the said unit of the National Mineral Development Corporation Limited after the coming into force of the Public Sector Iron and Steel Companies (Restructuring and Miscellaneous Provisions) Act, 1978 was transferred to Steel Authority of India Limited and declared as a captive unit for the Bokaro Steel Plant of Steel Authority of India Limited.

AND WHEREAS pursuant to the provisions of Section 23 of the Restructuring Act aforesaid, the agreement entered into by and between M/s National Mineral Development Corporation Ltd. In respect of Meghahatuburu unit of M/s National Mineral Development Authority Ltd. became fully enforceable and effective against or in favour of Steel Authority of India of India Limited.

AND WHEREAS the Contractor is yet to execute a considerable portion of the work more particularly described in the schedule to this agreement.

AND WHEREAS the contractor has agreed to complete the said balance work as on 12.3.80 the estimated quantity of which is set out in document specified at 2(d) on the terms and conditions hereinafter enumerated".

4. Further clauses 3 and 4 of the said agreement read as under:

3. In consideration of the payments to be made by the employer to the Contractor as hereinafter mentioned the contractor hereby covenants with the employer to construct, complete and maintain the works in conformity with the provisions of contract in all respect.

4. The employer hereby covenants to pay to the contractor in consideration of the construction completion and maintenance of the works the contract price at the time and in the manner prescribed by the contract.

5. Despite the aforesaid fact that the supplementary agreement was executed for the same work at an increased rate, it is stated that the appellant wrote letter dated 3.9.1983 repudiating claim of 18 lakhs on account of damages for any loss sustained by the contractor as claimed by him by his letter dated 29th August, 1979.

6. Thereafter, dispute arose, in the year 1985 for the work with regard to second agreement dated 20th December, 1980 and the matter was referred to arbitration. In that Reference, respondent raised certain claims relating to the work done under the first agreement. On 2nd December, 1985, the appellant raised an objection that the claim could not be decided by the Arbitrators as the same was pertaining to previous agreement. Thereafter respondent gave notice dated 2nd December, 1985 to the appellant to appoint sole arbitrator as provided for under the first agreement. On 10th December, 1985, the appellant appointed sole arbitrator with reservation regarding the tenability, maintainability and validity of the Reference as also on further grounds that the claim was barred by the period of limitation and that it pertained to excepted matters of general conditions of the contract.

7. On 11th July, 1986, the arbitrators gave an award pertaining to the dispute under the agreement dated 20.12.1980. Against the claim of Item No.1 of Rs. 17 lakhs and odd pertaining to first agreement, the arbitrators awarded Nil; this award has been made rule of the Court by the High Court of Delhi.

8. Meanwhile, the appellant challenged the jurisdiction of the sole arbitrator by filing Miscellaneous Case No. 22 of 1987. Finally, the High Court dismissed the Revision Application on 22nd August, 1988. Thereafter on 18th November, 1988, the sole arbitrator made an award granting damages to the tune of Rs. 11,26,296/- as principal sum (unliquidated damages) and a further sum of Rs. 12,06,000/- as interest on the above principal amount from 29th August, 1979 till the date of the Reference, i.e. 15th December, 1985. The arbitrator also awarded future interest at the rate of 17 per cent from the date of the award to the date of payment or the date or decree whichever is earlier. By order dated 2nd April, 1990, the learned Sub-Judge made the award rule of the court with a modification for the payment of interest from the date of the decree at the rate of 8 per cent on the principal amount or unpaid part till the date of actual payment. The appeal filed before the High Court against the said judgment and decree was also dismissed. Hence this appeal.

9. At the time of hearing, the learned counsel for the appellant submitted that the award passed by the arbitrator is (a) without jurisdiction, (b) The claim made by the respondent was on the face of it barred by the period of limitation, and (c) Award of interest is wholly unjustified and illegal. The learned counsel for the respondent supported the order passed by the High Court. He submitted that (1) The award is non-speaking. Hence, courts below rightly refused to interfere with. (2) The question, whether claim made by the contractor was within period of limitation or not, was required to be decided by the arbitrator, and (3) There is no prohibition for awarding interest from the date of the claim till the date of reference and thereafter.

10. For deciding the controversy, it would be necessary to refer to the material part of the award dated 18th November, 1988 which is as under:

"The claimant has put forth a claim amounting to Rs. 18,10,014.48 plus interest on the same amount at 30% per annum from 29.8.79 till date of payment.

The amount of interest at the above rate on the claim amount from 29.8.79 till 18.11.88, i.e. date of AWARD worked out to Rs. 33,39,351.00 (Rupees Thirty three lakhs thirty nine thousand three hundred fifty one only).

Thus the total amount of claims including interest up to the date of AWARD works out to Rs.51,49,365.48 (Rupees fifty one lakhs forty nine thousand three hundred sixty five and paise forty eight only).

On perusal of all documents filed by both parties and relied upon by the parties and keeping in view oral and written submissions and chain of arguments of both parties relating to factual and legal. I am convinced that the claimant sustained losses on account of the following reasons:

(a) The work site is located in the wild-life sanctuary of Saranda Reserve forest. The project authorities issued work order without completing the departmental

formalities in obtaining permission of the Forest Department for executing the work inside wild-life sanctuary.

(b) The project authorities could not obtain permission of Forest Department to take men and machinery to the work site as and when necessary for executing the work.

(c) The project authorities could not obtain permission of Forest Department in time for making hutments at work site and could not hand over the site in time.

(d) The project authority could not remove forest growths from the working area before issue or work order.

(e) The project authorities could not obtain permission of Forest Department for transporting the required machinery and materials for blasting operation and executing drilling and blasting work inside the wild-life sanctuary till March 1979.

(f) Delay in payment of legitimate dues of the claimant for more than nine years".

11. After recording the aforesaid reasons, the arbitrator held that in consideration of the documents, submissions and arguments of both the parties, contractor was entitled to be paid by the Steel Authority of India Limited a sum of Rs. 11,26,296/- as principal amount and a sum of Rs. 12,06,000/- as interest from 29th August, 1979 till 15th August, 1985, in all Rs. 23,32,296/-. The Arbitrator also awarded future interest at the rate of 17% on the principal sum of Rs. 11,26,296 from the date of award till the date of payment or the date of decree whichever is earlier.

12. Learned counsel for the appellant submitted that the award is a speaking one and the Arbitrator has awarded the damages for the reasons that department failed to obtain various permissions from the forest department. The reasons which are specifically mentioned in the award for granting damages clearly reveal that the arbitrator has passed a speaking award. He pointed out the terms of the contract and submitted that it is apparent that arbitrator has awarded the amount for the items for which there is prohibition in the contract and thereby he has travelled beyond his jurisdiction. For this purpose, learned counsel for the appellant referred to conditions which are referred to by the learned Single Judge and the trial court. They are as under:

"Clause 25: No claim if work is abandoned or postponed-
The successful tenderer shall have no claim whatsoever against the Corporation if the work or any part thereof covered by these tender documents if postponed to any later date or abandoned in the overall interest of the Corporation or for any other reason. The Corporations decision in the matter shall be final and binding on the contractor."

"Clause 32: Site for execution of work:

Site for execution of work will be available as soon as the work is awarded. In case it is not possible for the Corporation to make the entire site available on the award of work the contractor will have to arrange his working programme accordingly. No claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable."

"Clause 39: (Force majeure):
No failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the contractor, one against the order, if such failure omission arises from an act of God, which shall include natural calamities such as fire, flood, earthquake, hurricane or any pestilence, or from civil strike, compliance with any statute or regulation of Government, lockouts and strikes, or from any political or other reasons beyond the control or either the Corporation or the Contractor, including war whether declared or not, Civil war or state of insurrection."

"Clause 5 (iv): General Conditions of Contract (Time for Completion of work covered by the Contract:
Failure or delay by the Corporation to hand over to the contractor possession of the lands necessary for the execution of the work, or to give the necessary drawings instructions or any other delay by the Corporation which due to any other cause whatsoever shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damage or compensation therefore, provided that the Corporation may extend the time for completion of the work by such period as it may consider necessary and proper."

13. Before the learned Sub-Judge and the High Court, it was submitted that in view of the aforesaid conditions which are laid down in the contract which prohibited award of damages or compensation, it was not open to the arbitrator to award damages for the alleged losses sustained on account of not obtaining or delay in obtaining various permissions required to be taken under the law or rules from the Forest Department.

14. Re: Lack of Jurisdiction of the Arbitrator: From the Award quoted above, it is apparent that damages are granted by the arbitrator for delay in obtaining permission from the Forest Department:

(a) for executing the work inside the wildlife sanctuary;
(b) to take man and machinery to the worksite in the forest;
(c) for making hutments at the work site and failure to hand over site in time;
(d) failure to remove Forests growths from working area before issue of work order; and
(e) for transporting the required machinery and materials for blasting operation and executing the drilling and blasting work inside the wild-life sanctuary till March, 1979.

15. Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the contractor is required to arrange his working programme accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the contractor, one against the other, if such failure or omission arises from

compliance with any statute or regulation of Government or other reasons beyond the control of either the Corporation or the Contractor. Obtaining permission from Forest Department to carry out the work in wild life sanctuary depends on statutory regulations. Clause (vi) of General condition of the contract also provides that failure or delay by the Corporation to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation which due to any other cause whatsoever would not entitle the contractor to damage or compensation thereof; in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs. 11 lakhs and more for the alleged lapses or delay in handing over work site is, on the face of it, against the terms of the contract.

16. Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. In Continental Construction Co. Ltd. vs. State of Madhya Pradesh [(1988) 3 SCC 82], this Court considered the clauses of the contract which stipulated that contractor had to complete the work in spite of rise in the prices of materials and also rise in labour charges at the rates stipulated in the contract. Despite this, the arbitrator partly allowed contractor's claim. That was set aside by the court and the appeal filed against that was dismissed by this Court by holding that it was not open to the contractor to claim extra costs towards rise in prices of material and labour and that arbitrator misconducted himself in not deciding the specific objection regarding the legality of extra claim.

17. If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the court provided his error appears on the face of the award.

18. It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his

jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. Arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. Dealing with similar question this Court in New India Civil Erectors (P) Ltd. Vs. Oil and Natural Gas Corporation [(1997) 11 SCC 75] held thus: "*It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account*."

19. However, the learned Counsel for the Respondent submitted that the award being non-speaking one, the learned Sub-Judge and the High Court have rightly refused to go behind the award or interfere with. In our view, this submission is without any substance. It is apparent that the Arbitrator has awarded Rs. 11,26,296/- for the losses sustained for the reasons stated therein which we have incorporated in the previous paragraph. These reasons only pertained to non-obtaining or delay in obtaining permission from the Forest Department as the work site was located in the wild-life sanctuary of Saranda reserve forest. The Arbitrator in his award in terms mentioned "*I am convinced that the claimant sustained losses on account of following reasons and thereafter reasons are recorded*". Therefore, it cannot be said that the award is a non-speaking one.

20. Further even if such reasons are not recorded, the claim itself for such prohibited items was not entertainable by the Arbitrator. In the agreement between the parties, there is specific bar to raising of such claims. Hence the decision of the arbitrator is without jurisdiction. This aspect is also dealt with by this Court in H.P. State Electricity Board Vs. R.J. Shah and Company [1999(4) SCC 214]. In paragraph 26, the Court held as under:

> *In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the Arbitrator in respect thereof would clearly be in excess of jurisdiction.*

21. The Court further held that in order to find out whether the Arbitrator has acted in excess of the jurisdiction, the Court may have to look into some documents including the contract as well as the reference of the dispute made to the Arbitrator limited for the purpose of seeing whether the Arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.

22. Further dealing with the similar condition in the contract, such as no claim for price escalation other than those provided therein shall be entertained and the

Contractor will not be entitled for any extra rate due to change in selection of quarries, this Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and Another [(1991) 4 SCC 93], observed that four claims mentioned therein were not payable under the contract, in fact, it prohibited such payment and for this purpose. The Court held this conclusion is reached not by construction of the contract but by merely looking at the contract. The Court further observed that the Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract; his sole function is to arbitrate in terms of the contract. The Court further held thus:

23. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyds Commercial Arbitration, 2nd Ed., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsburys Laws of England, Volume II, 4th Ed., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

24. In view of the aforesaid settled law, the award passed by the arbitrator is against the conditions agreed by the contracting parties and is in conscious disregard of stipulations of the contract from which the arbitrator derives his authority. His appointment as a sole arbitrator itself was conditional one and he was informed that the same was with reservation regarding the tenability, maintainability and validity of the Reference as also on further grounds that the claim was barred by the period of limitation and that it pertained to excepted matters of general conditions of the contract. Despite this he has ignored the stipulations and conditions between parties. Hence, the said award is, on the face of it, illegal.

25. Re: LIMITATION: Our next question is of limitation. The period of limitation is required to be considered on the basis of the arbitration clause between the parties which is as under:

"All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution meaning operation or effect thereof or to the rights or liabilities of parties or arising out of or in relation thereto, whether during or after completion of the contract, or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them and to the M.D./Chairman of the Corporation (who will be the appointing Authority) be referred for adjudication to be sole Arbitrator to be appointed as hereafter provided.

The Appointing Authority will send within thirty days of the receipt of notice a penal of three names of persons not directly connected with the work of the contractor who will select any one of the persons named to be appointed as a sole Arbitrator within thirty days of receipt of the names. If the Contractor fails to select the name from the panel and communicate within 30 days, the appointing authority shall appoint one out of the panel sole as Arbitrator.

If the Appointing Authority fails to send to the contractor the panel of three names, as aforesaid, within the period specified, the Contractor shall send to the Appointing Authority a panel of three names of persons who shall all be unconnected with the organisation by which the work is executed. The Appointing Authority shall on receipt of the names as aforesaid select any one of the persons named and appoint him as the Sole Arbitrator, if the appointing authority fails to select the person and appoint him as the Sole Arbitrator within 30 days of receipt of the panel and inform the contractor accordingly, the Contractor shall be entitled to invoke the provisions of the Indian Arbitration Act, 1940 and any statutory modification thereof."

26. In view of the aforesaid arbitration clause, even though the claim made by the contractor was time barred, the dispute was required to be referred to the arbitrator. However, the reference was subject to the contention that it was barred by the period of limitation. In that context, the learned counsel for the appellant submitted that it is settled law that application under Section 20 or notice for appointment of arbitrator is to be filed within three years from the date when cause of action arises as provided in Article 137 of the Limitation Act, 1963. The application filed by the contractor in December 1985 was, on the face of it, time barred because the cause of action to recover the amount arose, according to the contractor, in August 1979 when he demanded the alleged damages for loss suffered by him because of the delay in handing over the worksites. He further submitted that, in the present case, in year 1980 for the same work, the Contractor has executed a supplementary agreement for the completion of the work within the stipulated time and at a higher rate. This would also show that Contractor waived his alleged right of asking for appointment of Arbitrator as provided in arbitration clause. He referred to the arbitration clause and pointed out that within 30 days of the receipt of the notice, arbitrator is required to be appointed by the Managing Director. If arbitrator is not appointed then Contractor has option to send the penal of three names from which arbitrator is required to be appointed. He contended that after the supplementary agreement, there was no question of adjudicating the so-called demand made by the contractor in the year 1979. In any case, he submitted that the Contractor ought to have approached the Court under Section 20 or ought to have demanded arbitration within three years from the date of the notice demanding the amount for loss suffered by him. As against this, learned Counsel for the respondent submitted that the cause of action to refer the matter to the arbitrator arose only in 1983 when respondent denied contractors claim.

27. For deciding this controversy, we would first refer to the decision of this Court in the State of Orissa & Ors. Vs. Damodar Das [1996(2) SCC 216] wherein this Court held that Section 3 of the Limitation Act, 1963, enjoins the Court to consider the question of limitation whether it is pleaded or not. The Court in paragraph 5 held as under:

"*Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require than an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued"*.

28. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

29. The Court also referred to the earlier decision in Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta [1993(4) SCC 338], where the Court observed as under:

"The Period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned".

30. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

31. Applying the aforesaid ratio in the present case, right to refer the dispute to the arbitrator arose in 1979 when Contractor gave a notice demanding the amount and there was no response from the appellant and the amount was not paid. The cause of action for recovery of the said amount arose from the date of the notice. Contractor cannot wait indefinitely and is required to take action within the period of limitation. In the present case, there was supplementary agreement between the parties. Supplementary agreement nowhere provides that so-called right of the contractor to recover damages was in any manner saved. On the contrary, it specifically mentions that contractor was yet to execute a considerable portion of the work more particularly described in the schedule to the agreement. And that the contractor has agreed to complete the said balance work on the terms and conditions enumerated in the agreement. Now, in this set of circumstances, contractor cannot wait and approach the authority or the court for referring the dispute to the arbitrator beyond the period of limitation. Section 37 of the Arbitration Act specifically provides that provisions of the Indian Limitation Act shall apply to the arbitrations as they apply to proceedings in the Court.

32. Learned counsel for the respondent relied upon the decision of this Court in Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority [(1988) 2 SCC 338] for contending that cause of action for referring the claim arises only when the appellant disputed the right of the respondent to recover the damages claimed by him. In the said case, the Court has observed that on completion of the work, the right to get payment would clearly arise, but wherein the final bills have not been prepared and when the assertion of the claim was made on 28th February, 1983 and there was non-payment, the cause of action arose from that date. In that case, application under Section 20 was filed in January 1986. The Court also observed that: *"It is true that the party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action"*. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R. S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.

33. In the present case, as stated above, on 29th August, 1979, the contractor wrote letter making certain claims. Thereafter, the supplementary agreement was executed on 20th December, 1980. In that agreement it is nowhere stated that contractors alleged right of getting damages or losses suffered by him was kept alive. On the contrary, he has agreed to complete the work within the time stipulated in the second agreement by charging some higher rate. Contractor has not sought any reference within three years from the date when cause of action arose, i.e., from 29th August, 1979. Only in 1985 when dispute arose with regard to the second agreement, respondent gave notice on 2nd December, 1985 to appoint sole arbitrator. The sole arbitrator was appointed with a specific reservation regarding the tenability, maintainability and validity of reference as also on the ground that claim was barred by the period of limitation and it pertained to excepted matters in terms of general conditions of the contract. From these facts, it is apparent that claim before the arbitrator in November December 1985 was apparently barred by period of limitation. Letter dated 3rd September, 1983 written by the appellant repudiating the respondents claim on account of damages or losses sustained by him would not give fresh cause of action. On that date cause of action for recovering the said amount was barred by the period of three years prescribed under Article 137 of the Limitation Act, 1963. Under Section 3 of the Limitation Act, it was the duty of the arbitrator to reject the claim as it was on the face of it, barred by the period of limitation.

34. In the present case, in view of the aforesaid findings, it is not necessary to discuss the contention with regard to the award of interest prior to coming into force of the Interest Act, 1978 or that no interest could be awarded on the unliquidated damages. It is also not necessary to discuss whether arbitration agreement provided in first agreement executed in 1977 would survive after execution of the second agreement in December, 1980.

35. In the result, the appeal is allowed with costs. The impugned order passed by the Patna High Court, Ranchi Bench in Miscellaneous Appeal No. 621 of 1987 and the order dated 2nd April, 1990 passed by the Subordinate Judge, Ist Court, Chas in Arbitration Suit No. 28 of 1988 are quashed and set aside.

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Annexure – 10.4

Supreme Court of India

Oil & Natural Gas Corporation Ltd. Vs Saw Pipes Ltd., on 17.04.2003

Civil Appeal No. 7419 of 2001

Oil & Natural Gas Corporation Ltd. …… Petitioner

Versus

SAW Pipes Ltd. …… Respondent

Author: M. B. Shah

Bench: M. B. SHAH & ARUN KUMAR.

JUDGMENT

1. Before dealing with the issues involved in this appeal, we would first decide the main point in controversy, namely - the ambit and scope of Court's jurisdiction in case where award passed by the Arbitral Tribunal is challenged under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") as the decision in this appeal would depend upon the said finding. In other words - whether the Court would have jurisdiction under Section 34 of the Act to set aside an award passed by the Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract ?

2. Learned senior counsel Mr. Ashok Desai appearing for the appellant submitted that in case where there is clear violation of Sections 28 to 31 of the Act or the terms of the Contract between the parties, the said award can be and is required to be set aside by the Court while exercising jurisdiction under Section 34 of the Act.

3. Mr. Dushyant Dave, learned senior counsel appearing on behalf of respondent-company submitted to the contrary and contended that the Court's jurisdiction under Section 34 is limited and the award could be set aside mainly on the ground that the same is in conflict with the 'Public Policy of India'. According to his submission, the phrase 'Public Policy of India' cannot be interpreted to mean that in case of violation of some provisions of law, the Court can set aside the award.

4. For deciding this controversy, we would refer to the relevant part of Section 34 which reads as under:

"34. Application for setting aside arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

5. For our purpose, it is not necessary to refer to the scope of self-explanatory Clauses (i) to (iv) of sub-section (2)(a) of Section 34 of the Act and it does not require elaborate discussion. However, clause (v) of sub-section 2(a) and clause (ii) of sub-section 2(b) require consideration. For proper adjudication of the question of jurisdiction, we shall first consider what meaning could be assigned to the term 'Arbitral Procedure'.

'ARBITRAL PROCEDURE'
The ingredients of clause (v) are as under:

1) The Court may set aside the award:

(i) (a) if the composition of the arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

9b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

6. However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

7. In the aforesaid sub-clause (v), the emphasis is on the agreement and the provisions of Part-I of the Act from which parties cannot derogate. It means that the composition of arbitral tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in the Part-I of the Act i.e. Sections 2 to 43. At the same time, agreement for composition of arbitral tribunal or arbitral procedure should not be in conflict with the provisions of the Act from which parties cannot derogate. Chapter- V of Part-I of the Act provides for conduct of arbitral proceedings. Section 18 mandates that parties to the arbitral proceedings shall be treated with equality and each party shall be given full opportunity to present his case. Section 19 specifically provides that arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Failing any agreement between the parties subject to other provisions of Part-I, the arbitral tribunal is to conduct the proceedings in the manner it considers appropriate. This power includes the power to determine the admissibility, relevance, the materiality and weight of any evidence. Sections 20, 21 and 22 deal with place of arbitration, commencement of arbitral proceedings and language respectively. Thereafter, Sections 23, 24 and 25 deal with statements of claim and defence, hearings and written proceedings and procedure to be followed in case of default of a party.

8. At this stage, we would refer to Section 24 which is as under:

"24. Hearings and written proceedings:

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials;

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."

9. Thereafter, Chapter VI deals with making of arbitral award and termination of proceedings. Relevant Sections which require consideration are Sections 28 and 31. Sections 28 and 31 read as under:

"28. Rules applicable to substance of dispute

(1) Where the place of arbitration is situate in India-

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of law rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

31. Form and contents of arbitral award-

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless-

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties,-

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify,-

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation: For the purpose of clause (a), "costs" means reasonable costs relating to-

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award."

10. The aforesaid provisions prescribe the procedure to be followed by the arbitral tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the arbitral tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the tribunal to decide the dispute is prescribed. In these sections there is no distinction between the jurisdiction/power and the procedure. In Harish Chandra Bajpai v. Triloki Singh [1957 SCR 370], while dealing with Sections 90 and 92 of the Representation of the People Act, 1951 (as it stood), this Court observed thus:

"It is then argued that S. 92 confers powers on the Tribunal in respect of certain matters, while S. 90(2) applies the CPC in respect of matters relating to procedure that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under section 92 and not under S. 90(2). We do not see any antithesis between 'procedure' in S. 90(2) and 'powers' under S. 92. When the respondent applied to the Tribunal for amendment, he took a procedural step, and that he was clearly entitled to do under S. 90(2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of a petition is competent, but the passing of any order thereon is not? We are of opinion that there is no substance in the contention either."

11. Hence, the jurisdiction or the power of the arbitral tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the arbitral tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

12. The question, therefore, which requires consideration is - whether the award could be set aside, if the arbitral tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties? Under sub-section (1)(a) of Section 28 there is a mandate to the arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be - whether such award could be set aside? Similarly, under sub-section (3), arbitral tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If arbitral tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it

would be contrary to basic concept of justice. If the arbitral tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

13. The aforesaid interpretation of the clause (v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. Principle is - there cannot be any wrong without a remedy. In M.V. Elisabeth and others v. Harwan Investment & Trading Pvt. Ltd. [1993 Supp. (2) SCC 433] this Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. Similarly, in Dhanna Lal v. Kalawatibai and others [(2002) 6 SCC 16] this Court observed that wrong must not be left unredeemed and right not left unenforced.

14. Result is - if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.

15. WHAT MEANING COULD BE ASSIGNED TO THE PHRASE 'PUBLIC POLICY OF INDIA'?

The next clause which requires interpretation is clause (ii) of sub-section 2(b) of Section 34 which inter alia provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India'. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions.

16. For this purpose, we would refer to few decisions referred to by the learned counsel for the parties. While dealing with the concept of 'public policy, this Court in Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly and another [(1986) 3 SCC 156] has observed thus:

> *"92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head*

of public policy, the courts have not shirked from extending it to the new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought- "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well- established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd. [(1902) AC 484, 500]: "Public Policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish [(1824) 2 Bing 229, 252] described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Assn. Ltd. [(1971) Ch. 591, 606]; "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A. Schroeder Music Public Co. Ltd. v. Macaulay [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In Kedar Nath Motani v. Prahlad Rai [(1960) 1 SCR 861], reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants'

benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

17. Further, in Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp. (1) SCC 644], this Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which inter alia provided that a foreign award may not be enforced under the said Act, if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to the Public Policy. After elaborate discussion, the Court arrived at the conclusion that Public Policy comprehended in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the 'Public Policy of India' and does not cover the public policy of any other country. For giving meaning to the term 'Public Policy', the Court observed thus:

"66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary

to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

The Court finally held that:

"76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act."

18. This Court in Murlidhar Agarwal and another v. State of U.P. and others [1974 (2) SCC 472] while dealing with the concept of 'public policy' observed thus:

"31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

32. ... The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hide-bound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decision on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. .... The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere."

19. Mr. Desai submitted that the narrow meaning given to the term 'public policy' in Renusagar's case is in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality. It was not a case where validity of the Award is challenged before a forum prescribed under the Act. He submitted that the scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign award are not identical. A foreign award by definition is subject to double exequatur. This is recognized inter alia by Section 48 (1) and there is no parallel provision to this clause in Section 34. For this, he referred to Lord Mustill & Stewart C. Boyd QC's "Commercial Arbitration" 2001 wherein [at page 90] it is stated as under:

"Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the convention assumes that they will trust, the supervising

authorities of the chosen venue. It follows that if, and to the extent that the award has been struck down in the local court it should be a matter of theory and practice be treated when enforcement is sought as if to the extent it did not exist."

20. He further submitted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in the domestic arbitration the only recourse is to Section 34.

21. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that arbitrator shall decide ex aequo et bono [according to what is just and good] only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'.

22. The learned senior counsel Mr. Dave submitted that the Parliament has not made much change while adopting Article 34 of UNCITRAL Model Law by not providing error of law as a ground of challenge to the arbitral award under Section 34 of the Act. For this purpose, he referred to Sections 68, 69 and 70 of the Arbitration Act, 1996 applicable in England and submitted that if the legislature

wanted to give a wider jurisdiction to the Court, it would have done so by adopting similar provisions.

23. Section 68 of the law applicable in England provides that the award can be challenged on the ground of serious irregularities mentioned therein. Section 68 reads thus:

"68. Challenging the award: serious irregularity

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
A party may lose the right to object (see Section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirement as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-

(a) remit the award to the tribunal, in whole or in part, for reconsideration;

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The Court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the Court is required for any appeal from a decision of the court under this section."

24. Similarly, Section 69 provides that appeal on point of law would be maintainable and the procedure thereof is also provided. Section 70 provides supplementary provisions.

25. It is true that Legislature has not incorporated exhaustive grounds for challenging the award passed by the arbitral tribunal or the ground on which appeal against the order of the Court would be maintainable.

26. On this aspect, eminent Jurist & Senior Advocate Late Mr. Nani Palkhivala while giving his opinion to 'Law of Arbitration and Conciliation' by Justice Dr. B. P. Saraf and Justice S. M. Jhunjhunuwala, noted thus:

"I am extremely impressed by your analytical approach in dealing with the complex subject of arbitration which is emerging rapidly as an alternate mechanism for resolution of commercial disputes. The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct errors of law in the award.

I welcome your view on the need for giving the doctrine of "public policy" its full amplitude. I particularly endorse your comment that Courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice.

If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India."

26. From this discussion it would be clear that the phrase 'public policy of India' is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the arbitral tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the arbitral tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for the Parliament to provide for limited or wider jurisdiction to the Court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term 'public policy of India' as contended by learned senior counsel Mr. Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) By LRs and others [(1991) 3 SCC 67], this Court observed thus:

"17. .. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor as it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society."

27. Learned senior counsel Mr. Dave submitted that the purpose of giving limited jurisdiction to the Court is obvious and is to see that the disputes are resolved at the earliest by giving finality to the award passed by the forum chosen by the parties. As against this, learned senior counsel Mr. Desai submitted that in the present system even the arbitral proceedings are delayed on one or the other ground including the ground that the arbitrator is not free and the matters are not disposed of for months together. He submitted that the legislature has not provided any time limit for passing of the award and this indicates that the contention raised by the learned counsel for the respondent has no bearing in interpreting Section 34.

28. It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass award within reasonable time as fixed by the Court. It is also true that on occasions, arbitration proceedings are delayed for one or other reason, but it is for the parties to take appropriate action of selecting proper arbitrator(s) who could dispose of the matter within reasonable time fixed by them. It is for them to indicate the time limit for disposal of the arbitral proceedings. It is for them to decide whether they should continue with the arbitrator(s) who cannot dispose of the matter within reasonable time. However, non-providing of time limit for deciding the dispute by the arbitrators could have no bearing on interpretation of Section 34. Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the Court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

29. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be held that the award could be set

aside if it is patently illegal. Result would be - award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

30. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

31. NOW ON FACTS: The brief facts of the case are as under:

Appellant - ONGC which is a Public Sector Undertaking, has challenged the arbitral award dated 2nd May, 1999 by filing Arbitration Petition No. 917/1999 before the High Court of Bombay. Learned Single Judge dismissed the same. Appeal No. 256/2000 preferred before the Division Bench of the High Court was also dismissed. Hence, the present appeal.

It is stated that in response to a tender, respondent-Company which is engaged in the business of supplying equipment for Offshore Oil exploration and maintenance by its letter dated 27th December, 1995 on agreed terms and conditions, offered to supply to the appellants 26" diameter and 30" diameter casing pipes. The appellant by letter of intent dated 3rd June, 1996 followed by a detailed order accepted the offer of the respondent-Company. As per terms and conditions, the goods were required to be supplied on or before 14th November, 1996.

It was the contention of the respondent that as per clause (18) of the agreement, the raw materials were required to be procured from the reputed and proven manufacturers/suppliers approved by the respondent as listed therein. By letter dated 8th August, 1996, respondent placed an order for supply of steel plates, that is, the raw material required for manufacturing the pipes with Liva Laminati, Piani S.P.A., Italian suppliers stipulating that material must be shipped latest by the end of September 1996 as timely delivery was of the essence of the order. It is also their case that all over Europe including Italy there was a general strike of the steel mill workers during September/October 1996. Therefore, respondent by its letter dated 28th October, 1996 conveyed to the appellant that Italian suppliers had faced labour problems and was unable to deliver the material as per agreed schedule. Respondent, therefore, requested for an extension of 45 days time for execution of the order in view of the reasons beyond its control. By letter dated 4th December, 1996, the time for delivery of the pipes was extended with a specific statement inter alia that the amount equivalent to liquidated damages for delay in supply of pipes would be recovered from the respondent. It is the contention of the respondent that the appellant made payment of the goods supplied after wrongfully deducting an amount of US $ 3,04,970.20 and Rs.15,75,559/- as liquidated damages. That deduction was disputed by the

respondent and, therefore, dispute was referred to the arbitral tribunal. The arbitral tribunal arrived at the conclusion that strikes affecting the supply of raw material to the claimant are not within the definition of 'Force Majeure' in the contract between the parties, and hence, on that ground, it cannot be said that the amount of liquidated damages was wrongfully withheld by the appellant. With regard to other contention on the basis of customs duty also, the arbitral tribunal arrived at the conclusion that it would not justify the delay in the supply of goods. Thereafter, the arbitral tribunal considered various decisions of this Court regarding recovery of liquidated damages and arrived at the conclusion that it was for the appellant to establish that they had suffered any loss because of the breach committed by the respondent in not supplying the goods within the prescribed time limit. The arbitral tribunal thereafter appreciated the evidence and arrived at the conclusion that in view of the statement volunteered by Mr. Arumoy Das, it was clear that shortage of casing pipes was only one of the other reasons which led to the change in the deployment plan and that it has failed to establish its case that it has suffered any loss in terms of money because of delay in supply of goods under the contract. Hence, the arbitral tribunal held that appellant has wrongfully withheld the agreed amount of US $ 3,04,970.20 and Rs.15,75,559/- on account of customs duty, sales tax, freight charges deducted by way of liquidated damages. The arbitral tribunal further held that the respondent was entitled to recover the said amount with interest at the rate of 12 per cent p.a. from 1st April 1997 till the date of the filing of statement of claim and thereafter having regard to the commercial nature of the transaction at the rate of 18 per cent per annum pendente lite till payment is made.

32. For challenging the said award, learned senior counsel Mr. Desai submitted that:

(1) the award is vitiated on the ground that there was delay on the part of respondent in supplying agreed goods/ pipes and for the delay, appellant was entitled to recover agreed liquidated damages i.e. a sum equivalent to 1% of the contract price for whole unit per week of such delay or part thereof. Thereby, the award was contrary to Section 28(3) which provides that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract;

(2) the award passed by the arbitrator is on the face of it illegal and erroneous as it arrived at the conclusion that the appellant was required to prove the loss suffered by it before recovering the liquidated damages. He submitted that the arbitral tribunal misinterpreted the law on the subject;

(3) in any set of circumstances, the award passed by the arbitrator granting interest on the liquidated damages deducted by the appellant is, on the face of it, unjustified, unreasonable and against the specific terms of the contract, namely clause 34.4 of the agreement, which provides that on 'disputed claim', no interest would be payable.

33. As against this, learned senior counsel Mr. Dave submitted that it is settled law that for the breach of contract provisions of Section 74 of the Contract Act would be applicable and compensation / damages could be awarded only if the loss is suffered because of the breach of contract. He submitted that this principle is laid down by the Privy Council as early as in 1929 in Bhai Panna Singh and

others v. Bhai Arjun Singh and others [AIR 1929 PC 179], wherein the Privy Council observed thus:

"The effect of S. 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simplicitor the sum of Rs.10,000/- whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered."

34. He submitted that this Court has also held that the plaintiff claiming liquidated damages has to prove the loss suffered by him. In support of this contention, he referred to and relied upon various decisions. In any case, it is his contention that even if there is any error in arriving at the said conclusion, the award cannot be interfered with under Section 34 of the Act.

35. At this stage, we would refer to the relevant terms of the contract upon which learned counsel for the appellant has based his submissions, which are as under:

"11. Failure and Termination Clause/Liquidated Damages: Time and date of delivery shall be essence of the contract. If the contractor fails to deliver the stores, or any instalment thereof within the period fixed for such delivery in the schedule or at any time repudiates the contract before the expiry of such period, the purchaser may, without prejudice to any other right or remedy, available to him to recover damages for breach of the contract:

(a) Recovery from the contractor as agreed liquidated damages are not by way of penalty, a sum equivalent to 1% (one percent) of the contract price of the whole unit per week for such delay or part thereof (this is an agreed, genuine pre- estimate of damages duly agreed by the parties) which the contractor has failed to deliver within the period fixed for delivery in the schedule, where delivery thereof is accepted after expiry of the aforesaid period. It may be noted that such recovery of liquidated damages may be upto 10% of the contract price of whole unit of stores which the contractor has failed to deliver within the period fixed for delivery, or

(e) It may further be noted that clause (a) provides for recovery of liquidated damages on the cost of contract price of delayed supplies (whole unit) at the rate of 1% of the contract price of the whole unit per week for such delay or part thereof upto a ceiling of 10% of the contract price of delayed supplies (whole unit). Liquidated damages for delay in supplies thus accrued will be recovered by the paying authorities of the purchaser specified in the supply order, from the bill for payment of the cost of material submitted by the contractor or his foreign principals in accordance with the terms of supply order or otherwise.

(f) Notwithstanding anything stated above, equipment and materials will be deemed to have been delivered only when all its components, parts are also delivered. If certain components are not delivered in time the equipment and material will be considered as delayed until such time all the missing parts are also delivered.

12. Levy of liquidated damages (LD) due to delay in supplies.

LD will be imposed on the total value of the order unless 75% of the value ordered is supplied within the stipulate delivery period. Where 75% of the value ordered has been supplied within stipulated delivery period. LD will be imposed on the order value of delayed supply(ies). However, where in judgment of ONGC, the supply of partial quantity does not fulfill the operating need, LD will be imposed on full value of the supply order.

34.4 Delay in Release of Payment:

In case where payment is to be made on satisfactory receipt of materials at destination or where payment is to be made after satisfactory commissioning of the equipment as per terms of the supply order. ONGC shall make payment within 60 days of receipt of invoice / claim complete in all respects. Any delay in payment on undisputed claim / amount beyond 60 days of the receipt of invoice / claim will attract interest @ 1% per month. No interest will be paid on disputed claims. For interest on delayed payments to small scale and Ancillary Industrial Undertakings, the provisions of the "Interest of delayed payments to small scale and Ancillary Industrial Undertakings Act, 1993 will govern."

36. Mr. Desai referred to the decision rendered by this Court in Delta International Ltd. v. Shyam Sundar Ganeriwalla and another [(1999) 4 SCC 545] and submitted that for the purpose of construction of contracts, the intention of the parties is to be gathered from the words they have used and there is no intention independent of that meaning.

37. It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. {Re: Modi & Co. v. Union of India [(1968) 2 SCR 565]. Further, in construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. {Re: Provash Chandra Dalui and another v. Biswanath Banerjee and another [1989 Supp (1) SCC 487]}.

38. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods.

39. Further, in arbitration proceedings, the arbitral tribunal is required to decide the dispute in accordance with the terms of the contract. The agreement between the parties specifically provides that without prejudice to any other right or remedy if the contractor fails to deliver the stores within the stipulated time, appellant will be entitled to recover from the contractor, as agreed, liquidated damages equivalent to 1% of the contract price of the whole unit per week for such delay.

Such recovery of liquidated damage could be at the most up to 10% of the contract price of whole unit of stores. Not only this, it was also agreed that:

(a) liquidated damages for delay in supplies will be recovered by paying authority from the bill for payment of cost of material submitted by the contractor;

(b) liquidated damages were not by way of penalty and it was agreed to be genuine, pre-estimate of damages duly agreed by the parties;

(c) This pre-estimate of liquidated damages is not assailed by the respondent as unreasonable assessment of damages by the parties.

40. Further, at the time when respondent sought extension of time for supply of goods, time was extended by letter dated 4.12.1996 with a specific demand that the clause for liquidated damages would be invoked and appellant would recover the same for such delay. Despite this specific letter written by the appellant, respondent had supplied the goods which would indicate that even at that stage, respondent was agreeable to pay liquidated damages.

41. On this issue, learned counsel for the parties referred to the interpretation given to Sections 73 and 74 of the Indian Contract Act in Sir Chunilal V. Mehta & Sons Ltd. v. The Century Spinning and Manufacturing Co. Ltd. [1962 Supp. (3) SCR 549], Fateh Chand v. Balkishan Das [(1964) 1 SCR 515 at 526], Maula Bux v. Union of India [(1969) 2 SCC 554] Union of India v. Rampur Distillery and Chemical Co. Ltd. [(1973) 1 SCC 649] and Union of India v. Raman Iron Foundry [(1974) 2 SCC 231].

Relevant part of Sections 73 and 74 of Contract Act are as under:-

"73. Compensation for loss or damage caused by breach of contract: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

74. Compensation for breach of contract where penalty stipulated for- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation- A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

42. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

43. Now, we would refer to various decisions on the subject. In Fateh Chand's case (supra), the plaintiff made a claim to forfeit a sum of Rs. 25000/- received by him from the defendant. The sum of Rs. 25000/- consisted of two items - Rs. 1000/- received as earnest money and Rs. 24000/- agreed to be paid by the defendant as out of sale price against the delivery of possession of the property. With regard to earnest money, the Court held that the plaintiff was entitled to forfeit the same. With regard to claim of remaining sum of Rs. 24000/-, the Court referred to Section 74 of Indian Contract Act and observed that Section 74 deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty. The Court observed thus:

"The measure of damages in the case of breach of a stipulation by way of penalty is by S. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

The Court further observed as under:

".... Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by S. 74. In all cases, therefore,

where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

44. From the aforesaid decision, it is clear that the Court was not dealing with a case where contract named a sum to be paid in case of breach but with a case where the contract contained stipulation by way of penalty.

45. The aforesaid case and other cases were referred to by three Judge Bench in Maula Bux's case (supra) wherein the Court held thus:

"... It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre- estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

46. In Rampur Distillery and Chemical Co. Ltd.'s (supra) also, two Judge Bench of this Court referred to Maula Bux's case and observed thus:

" ... It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within Section 70 of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, "where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

47. In Raman Iron Foundry's case (supra), this Court considered clause 18 of the Contract between the parties and arrived at the conclusion that it applied only where the purchaser has a claim for a sum presently due and payable by the contractor. Thereafter, the Court observed thus:

"11. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for

liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre- estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages."

48. Firstly, it is to be stated that in the aforesaid case Court has not referred to earlier decision rendered by the five Judge Bench in Fateh Chand's case or the decision rendered by the three Judge Bench in Maula Bux's case. Further, in M/s H .M. Kamaluddin Ansari and Co. v. Union of India and others [(1983) 4 SCC 417], three Judge Bench of this Court has over-ruled the decision in Raman Iron Foundry's case (supra) and the Court while interpreting similar term of the contract observed that it gives wider power to Union of India to recover the amount claimed by appropriating any sum then due or which at any time may become due to the contractors under other contracts and the Court observed that clause 18 of the Standard Contract confers ample powers on the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

49. In the light of the aforesaid decisions, in our view, there is much force in the contention raised by the learned counsel for the appellant. However, the learned senior counsel Mr. Dave submitted that even if the award passed by the arbitral tribunal is erroneous, it is settled law that when two views are possible with regard to interpretation of statutory provisions and or facts, the Court would refuse to interfere with such award.

50. It is true that if the arbitral tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) If there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the Court could interfere; (b) It is also settled law that in a case of reasoned award, the Court can set aside the same if

it is, on the face of it, erroneous on the proposition of law or its application; (c) If a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit of its being set aside, unless the Court is satisfied that the arbitrator had proceeded illegally.

51. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the arbitral tribunal was not with regard to interpretation of question of law. It was only a general reference with regard to claim of respondent. Hence, if the award is erroneous on the basis of record with regard to proposition of law or its application, the Court will have jurisdiction to interfere with the same.

52. Dealing with the similar question, this Court in M/s Alopi Parshad & Sons Ltd. v. The Union of India [(1960) 2 SCR 793] observed that the extent of jurisdiction of the Court to set aside the award on the ground of an error in making the award is well defined and held thus:

> *"The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous-Champsey Bhara and Company v. Jivaraj Balloo Spinning and Weaving Company Limited [L.R. 50 IA 324]. If however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside-In the matter of an arbitration between King and Duveen and others [LR (1913) 2 KBD 32] and Government of Kelantan v. Duff Development Company Limited [LR 1923 AC 395]."*

53. Thereafter, the Court held that if there was a general reference and not a specific reference on any question of law then the award can be set aside if it demonstrated to be erroneous on the face of it. The Court, in that case, considering Section 56 of the Indian Contract Act held that the Indian Contract Act does not enable a party to a contract to ignore the express provisions thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity and that the arbitrators were not justified in ignoring the expressed terms of the contract prescribing the remuneration payable to the agents. The aforesaid law has been followed continuously. {Re. Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and another [(1999) 9 SCC 283], Sikkim Subba Associates v. State of Sikkim [(2001) 5 SCC 629] and G.M., Northern Railway and another v. Sarvesh Chopra [(2002) 4 SCC 45]}.

54. There is also elaborate discussion on this aspect in Union of India v. A.L. Rallia Ram [(1964) 3 SCR 164] wherein the Court succinctly observed as under:

> ".. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. An error in law on the face of the award means :

"you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a 'reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound" Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd. [(1932) L.R. 50 I.A. 324] But this rule does not apply where questions of law are specifically referred to the arbitrator for his decision; the award of the arbitrator on those questions is binding upon the parties, for by referring specific questions the parties desire to have a decision from the arbitrator on those questions rather than from the Court, and the Court will not unless it is satisfied that the arbitrator had proceeded illegally interfere with the decision."

55. The Court thereafter referred to the decision rendered in Seth Thawardas Pherumal v. The Union of India [(1955) 2 SCR 48] wherein Bose, J. delivering the judgment of the Court had observed:

"Therefore, when a question of law is the point at issue, unless both sides specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about point of law in the course of the proceedings is not enough."

55. The learned Judge also observed at p. 59 after referring to F.R. Absalom Ltd. v. Great Western (London) Garden Village Society [1933] AC 592, 616:

"Simply because the matter was referred to incidentally in the pleadings and arguments in support of, or against, the general issue about liability for damages, that is not enough to clothe the arbitrator with exclusive jurisdiction on a point of law."

56. The Court also referred to the test indicated by Lord Russell of Killowen in F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd., and observed that the said case adequately brings out a distinction between a specific reference on a question of law, and a question of law arising for determination by the arbitrator in the decision of the dispute. The Court quoted the following observations with approval:

" .. it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. x x x x The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

57. Further, in Maharashtra State Electricity Board v. Sterilite Industries (India) and Another[(2001) 8 SCC 482], the Court observed as under:

"9. The position in law has been noticed by this Court in Union of India v. A.L. Rallia Ram [AIR 1963 SC 1685] and Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. [(1967) 1 SCR 105] to the effect that the arbitrator's award both on facts and law is final that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award, the following observations in Champsey Bhara & Co. v. Jivraj Balloo Spg and Wvg. Co. Ltd, [(1922-23) 50 IA 324] a decision of the Privy Council, are relevant (IA p. 331)

> *"An error in law on the face of the award means, in Their Lordship's view, that you can find in the award on a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."*

10. In Arosan Enterprises Ltd. v. Union of India [1999 (9) SCC 449], this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator."

58. Next question is - whether the legal proposition which is the basis of the award for arriving at the conclusion that ONGC was not entitled to recover the stipulated liquidated damages as it has failed to establish that it has suffered any loss is erroneous on the face of it? The arbitral tribunal after considering the decisions rendered by this Court in the cases of Fateh Chand, Maula Bux and Rampur Distillery (supra) arrived at the conclusion that "in view of these three decisions of the Supreme Court, it is clear that it was for the respondents to establish that they had suffered any loss because of the breach committed by the claimant in the supply of goods under the contract between the parties after 14th November, 1996. In the words we have emphasized in Maula Bux decision, it is clear that if loss in terms of money can be determined, the party claiming the compensation 'must prove' the loss suffered by him".

59. Thereafter the arbitral tribunal referred to the evidence and the following statement made by the witness Das: "The re-deployment plan was made keeping in mind several constraints including shortage of casing pipes."

60. Further, the arbitral tribunal came to the conclusion that under these circumstances, the shortage of casing pipes of 26" diameter and 30" diameter pipes was not the only reason which led to redeployment of rig Trident II to Platform B 121. The arbitral tribunal also appreciated the other evidence and held that the attempt on the part of the ONGC to show that production of gas on Platform B 121 was delayed because of the late supply of goods by the claimant failed. Thereafter, the arbitral tribunal considered the contention raised by the

learned counsel for the ONGC that the amount of 10% which had been deducted by way of liquidated damages for the late supply of goods under the contract was not by way of penalty. In response thereto, it was pointed out that it was not the case of learned counsel Mr. Setalwad on behalf of the claimants that "these stipulations in the contract for deduction of liquidated damages was by way of penalty". Further, the arbitral tribunal observed that in view of the decisions rendered in Fateh Chand and Maula Bux cases, "all that we are required to consider is whether the respondents have established their case of actual loss in money terms because of the delay in the supply of the Casing Pipes under the contract between the parties". Finally, the arbitral tribunal held that as the appellant has failed to prove the loss suffered because of delay in supply of goods as set out in the contract between the parties, it is required to refund the amount deducted by way of liquidated damages from the specified amount payable to the respondent.

61. It is apparent from the aforesaid reasoning recorded by the arbitral tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand's case (supra) wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre- estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is - whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

62. In Maula Bux's case (supra), plaintiff - Maula Bux entered into a contract with the Government of India to supply potatoes at the Military Head Quarters, U.P. Area and deposited an amount of Rs. 10000/- as security for due performance of the contract. He entered into another contract with the Government of India to

supply at the same place poultry eggs and fish for one year and deposited an amount of Rs. 8500/- for due performance of the contract. Plaintiff having made persistent default in making regular and full supplies of the commodities agreed to be supplied, the Government rescinded the contracts and forfeited the amounts deposited by the plaintiff, because under the terms of the agreement, the amounts deposited by the plaintiff as security for the due performance of the contracts were to stand forfeited in case plaintiff neglected to perform his part of the contract. In context of these facts, Court held that it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made. Hence, claim for damages was not granted.

63. In Maula Bux's case (supra), the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach.

64. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society / State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the

goods, respondent was informed that it would be required to pay stipulated damages.

65. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

66. For the reasons stated above, the impugned award directing the appellant to refund the amount deducted for the breach as per contractual terms requires to be set aside and is hereby set aside.

67. WHETHER THE CLAIM OF REFUND OF THE AMOUNT DEDUCTED BY THE APPELLANT FROM THE BILLS IS DISPUTED OR UNDISPUTED CLAIM?

As the award directing the appellant to refund the amount deducted is set aside, question of granting interest on the same would not arise. Still however, to demonstrate that the award passed by the arbitral tribunal is, on the face of it, erroneous with regard to grant of interest, we deal with the same.

68. Arbitral Tribunal arrived at the conclusion that the appellant wrongfully withheld/deducted the aggregate amount of US $ 3,04,970.20 on account of delay in supply of goods and amount of Rs. 15,75,559/- on account of excise duty, sales tax, freight charges deducted as and by way of liquidated damages from the amount payable by the respondent and thereafter arrived at the conclusion that the said amount was deducted from undisputed invoice amount, therefore, the said claim of the respondent cannot be held to be 'disputed claim'.

69. It is apparent that the claim of the contractor to recover the said amount was disputed mainly because it was agreed term between the parties that in case of delay in supply of goods appellant was entitled to recover damages at the rate as specified in the agreement. It was also agreed that the said liquidated damages were to be recovered by paying authorities from the bills for payment of the cost

of material submitted by the contractor. If this agreed amount is deducted and thereafter contractor claims it back on the ground that the appellant was not entitled to deduct the same as it has failed to prove loss suffered by it, the said claim undoubtedly would be a 'disputed claim'. The arbitrators were required to decide by considering the facts and the law applicable, whether the deduction was justified or not? That itself would indicate that the claim of the contractor was 'disputed claim' and not 'undisputed'. The reason recorded by the arbitrators that as the goods were received and bills are not disputed, therefore, the claim for recovering the amount of bills cannot be held to be 'disputed claim' is, on the face of it, unjust, unreasonable, unsustainable and patently illegal as well as against the expressed terms of the contract. As quoted above, clause 34.4 in terms provides that no interest would be payable on 'disputed claim'. It also provides that in which set of circumstances, interest amount would be paid in case of delay in payment of undisputed claim. In such case, the interest rate is also specified at 1% per month on such undisputed claim amount. Despite this clause, the arbitral tribunal came to the conclusion that it was undisputed claim and held that in law, appellant was not entitled to withhold these two payments from the invoice raised by the respondent and hence directed that the appellant was liable to pay interest on wrongful deductions at the rate of 12% p.a. from 1.4.1997 till the date of filing of the statement of claim and thereafter having regard to the commercial nature of the transaction at the rate of 18% p.a. pendente lite till payment.

70. It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the arbitral tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act.

71. CONCLUSIONS: In the result, it is held that:

A. (1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

2) The Court may set aside the award:

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:-

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

B. (1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

For the reasons stated above, the impugned award directing the appellant to refund US $ 3,04,970.20 and Rs.15,75,559/- with interest which were deducted for the breach of contract as per the agreement requires to be set aside and is hereby set aside. The appeal is allowed accordingly. There shall be no order as to costs.

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Annexure – 10.5

Supreme Court of India

Food Corporation of India vs M/S. Chandu Construction & Others, on 10.04.2007

Case No.: Appeal (Civil) 1874 of 2007
[Arising out of S.L.P. (Civil) No. 3335 of 2006]

Food Corporation of India ..... Petitioner

vs

M/s. Chandu Construction & Anr ..... Respondent

Author: D. K. Jain

Bench: Tarun Chatterjee & D. K. Jain

JUDGMENT

Leave granted.

2. Challenge in this appeal, by the Food Corporation of India (for short "FCI"), is to the final judgment and order dated 14th October, 2005 passed by the Division Bench of the High Court of Judicature at Bombay, affirming the judgment of the learned Single Judge in Arbitration Petition No.334 of 2004. By the impugned order, the award of an amount of Rs. 8,23,101/- by the sole arbitrator against claim No.9 has been upheld.

3. A brief factual background giving rise to the appeal is as follows:

The FCI undertook construction of godowns at Panvel, District Raigad and issued notice inviting tenders for construction of 50000 MT capacity conventional godowns in 10 units along with ancillary work and services. Pursuant thereto, the respondents (hereinafter referred to as the claimants) submitted tender, which was accepted by the FCI. A formal contract was executed between the FCI and the claimants on 19th September, 1984. As per the terms of the contract, the work was to be completed within 10 months from 30th day of issue of the orders and the time was deemed to be of the essence of the contract.

4. As the claimants could not complete the work within the stipulated time, which was once extended, the FCI issued a show cause notice to them seeking to terminate the contract. Ultimately the contract was terminated vide order dated 15th November, 1987. The claimants invoked the arbitration agreement and requested the FCI to appoint an arbitrator. Since there was no response from the FCI, the claimants filed a suit in the High Court for appointment of an arbitrator. An arbitrator was appointed, who gave his award on 27th August, 1998. As payment in terms of the award was not made, the claimants again moved the High Court. The FCI, in turn, filed a petition in the High Court for setting aside of the award. With the consent of parties, the award was set aside and the matter was remitted to the Arbitrator for fresh adjudication.

5. In fresh proceedings before the Arbitrator, the stand of the claimants, qua Claim No.9 was that the rate quoted by them for filling the plinth under floors including watering, ramming, consolidation and dressing in terms of item No. 1.7 of the Schedule of rates was only for labour and did not cover "providing or supplying" sand for the said purpose and yet they were required to supply sand for filling. As such the claimants were entitled to be paid extra for supply of sand. Accordingly, they made a claim of Rs. 8,23,101/- for providing and supplying 5487.34 cubic meters of sand.

6. The claim was resisted by the FCI on the ground that the scope of work, specifications and the item rates was governed by the terms of the contract and as per clause (2) of the agreement dated 19th September, 1984, the claimants were to be paid the "respective amount for the work actually done by him at the 'Schedule of rates' as contained in the appended Schedule and such other sums as may become payable to the contractor under the provisions of this contract". The contract clearly stipulated that the work was to be carried out as per specifications contained in Volume I and II of C.P.W.D. manual, para 2.9.4 whereof provided that the "Rate" includes the cost of materials and labour. Therefore, the claimants were not entitled to any extra amount for supply of sand. The arbitrator gave his award on 31st December, 2003 accepting the said claim. For reference, the relevant portion of the award is extracted below: "According to defence under the provision of 1967 CPWD specification Vol.I & II, the nature of the item includes sand also and not merely the labour charges, similarly the rate of sand filling is for consolidated thickness or loose thickness or voids to any extent and this claim is denied into to. Now here the dispute between the two parties is over the words supplying and providing and in respect of this item the particular words are missing whereas as observed earlier they were being found in respect of certain other items. According to the Claimants since these words were missing in respect of this item of work, they took it that the material i.e. sand would be supplied and, therefore, they quoted only the labour rate. The tender of M/s Gupta and Co. as pointed out to me, shows that in respect of this item of work, these words providing and supplying were used. It is submitted that there can't be two different phraseologies in respect of the same item and as observed earlier, nothing prevented the FCI from using those words and not giving rise of any confusion. Comparative statement showing contents and details of schedule items based on tender working with PWD Bombay which clearly provides for rates for quantity of work for schedule items. The Claimants here are trying to establish that their quotations were based without including the cost of materials supplied. If we see the figures in respect of the items, we find substantial force in the say of Claimants that the rate quoted by them is so low that it could not be in respect of price inclusive of cost of sand. If we see the wording of specification with Contractor M/s. Gupta & Co., we find additional words supplying and providing have been added under similar items of the schedule. Why these words were missing in case of Claimants is difficult to follow. The Respondents content that 1967 CPWD's specification in Vol. I & II covers the specifications not only for labour charges but also for providing and supplying of the materials required. It is very difficult to understand this defence, for if we look at the figures quoted in the tenders it would make it absolutely clear that the inclusion of cost of sand could not have to be in the mind of the Contractor Claimants. The figures are very low and I may be permitted to say that these figures do not cover the cost of sand. There is force in the say of the Claimant that he did not vouch that he himself was to supply sand. Of course, I must say that there is no very satisfactory evidence about the

quantity of sand used, its price and amount paid by the claimant to his suppliers but when the work was done the FCI was bound to take upon it to make the payment though it may appear to be somewhat arbitrary. I allow this claim of Rs. 8,23,101/- (Rupees Eight lacs twenty three thousand and one hundred and one only)."

7. Being aggrieved, the FCI filed objections against the award under Section 30 of the Indian Arbitration Act, 1940 praying for setting aside of the award on claim no.9, but without any success. The learned Single Judge affirmed the view taken by the Arbitrator that the rate quoted by the claimant did not include the cost of the material. The FCI carried the matter in appeal before the Division Bench. Before the Division Bench, the FCI also attempted to raise the issue of award of interest by the Arbitrator, which was not permitted on the ground that the issue was neither taken up before the Arbitrator nor was raised before the learned Single Judge. As noted above, the Division Bench has dismissed the appeal. Hence, the present appeal.

8. Learned counsel for the petitioner has submitted that the claim for supply of sand against Claim No. 9 was patently opposed to the terms of the contract between the parties. It is urged that the relevant clause of the contract is clear, unambiguous and admits of no such interpretation as has been given by the arbitrator. It is, thus, pleaded that the arbitrator has misconducted himself in awarding additional amount of Rs. 8,23,101/- in favour of the claimants, which part of the award deserves to be set aside.

9. On the other hand, learned counsel for the claimants submitted that it was within the domain of the arbitrator to construe the terms of contract in the light of the evidence placed on record by the claimants, particularly the terms of similar contracts entered into by the FCI with the other contractors. It is asserted that the view taken by the arbitrator being plausible the High Court was justified in declining to interfere with the award.

10. While considering objections under Section 30 of the Arbitration Act, 1940 (for short 'the Act"), the jurisdiction of the Court to set aside an award is limited. One of the grounds, stipulated in the Section, on which the Court can interfere with the award is when the arbitrator has 'misconducted' himself or the proceedings. The word "misconduct" has neither been defined in the Act nor is it possible for the Court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word "misconduct" in Section 30 (a) of the Act does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result. (Union of India Vs. Jain Associates and Anr.

11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals

with matters not allotted to him, he commits a jurisdictional error (see: Associated Engineering Co. Vs. Government of Andhra Pradesh and Anr. and Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises & Anr.

12. In this context, a reference can usefully be made to the observations of this Court in M/s. Alopi Parshad and Sons, Ltd. Vs. Union of India, wherein it was observed that the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a Court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, this Court had observed that where there is an express term, the Court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13. In Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, it was emphasised that not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

14. In Bharat Coking Coal Ltd. Vs. Annapurna Construction while inter alia, observing that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus: "*There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record*."

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action [Also see: Associated Engineering Co. Vs. Government of Andhra Pradesh & Anr. (supra)].

16. Thus, the issue, which arises for determination, is whether in awarding Claim No. 9, the arbitrator has disregarded the agreement between the parties and in the process exceeded his jurisdiction and has, thus, committed legal misconduct?

17. For deciding the controversy, it would be necessary to refer to the relevant clauses of the contract, which read thus:

"1. GENERAL SPECIFICATIONS:

1.1 The civil sanitary, water supply and road works shall be carried out as per Central Public Works Department specification of works at Delhi 1967 Volume I & II with correction slips upto date. In the case of civil, sanitary, water supply and road works and electrical works should there be any difference between the Central Public Works Department specifications mentioned above and the specifications of schedule of quantities, the latter i.e. the specification of schedule of quantities, shall prevail. For items of work not covered in the C.P.W.D. specifications or where the C.P.W.D. specifications are silent on any particular point, the relevant specifications or code of practice of the Indian Standard Institution shall be followed.

1.2 Should any clarification be needed regarding the specifications for any work the written instructions from the Engineer-in-Charge shall be obtained."

18. Paragraph 2.9.4 of the C.P.W.D. specifications insofar as it is relevant for the present appeal, reads as follows:

"Rate: It includes the cost of materials and labour involved in all the operations described above'."

19. From the above extracted terms of the agreement between the FCI and the claimants, it is manifest that the contract was to be executed in accordance with the C.P.W.D. specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. It is to be borne in mind that filling up of the plinth with sand under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19th September, 1989, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. Claimants' claim had to be adjudicated by the specific terms of their agreement with the FCI and no other.

20. Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has out-stepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of

claim No.9, on the face of it, is beyond his jurisdiction; is illegal and needs being set aside.

21. Consequently, the appeal is allowed and the impugned judgment of the High Court, to the extent it pertains to claim No. 9 is set aside. However, on the facts and circumstances of the case, there shall be no order as to costs.

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Annexure – 10.6

IN THE SUPREME COURT OF INDIA

Oil & Natural Gas Corporation vs. M/s Wig Brothers Builders & Engineering Pvt. Ltd., on 08.10.2010

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No. 8817 of 2010
(Arising out of SLP(C) No. 12188/2009)

Oil & Natural Gas Corporation ……. Appellant

Versus

M/s Wig Brothers Builders & Engineering Pvt. Ltd. ……. Respondents

J U D G M E N T

R. V. RAVEENDRAN, J.

Leave granted.

2. The appellant (also referred to as `ONGC') entrusted a construction work to the respondent under a contract dated 11.10.1983. Clause 25 of the contract provided for settlement of disputes by arbitration. Certain disputes arose between the parties in regard to the said contract and they were referred to a sole arbitrator on 31.12.1986. The claimant made several claims aggregating to Rs. 82,89,000/-. ONGC made counter claims aggregating to Rs. 1,24,87,000/-. The arbitrator awarded Rs. 9,50,000/- under the first claim, Rs. 7,80,132/- under the second claim, Rs. 4,77,129/- under fifth claim and several smaller amounts under claims 3, 4, 6 to 13, 15, and 17, in all aggregating to Rs. 25,26,270/-. The arbitrator also awarded 12% pendente lite interest and 6% from the date of the award/decree. The counter claims were rejected.

3. The ONGC challenged the said award by filing a petition under sections 30 and 33 of the Arbitration Act, 1940 (`Act' for short). The civil court (Additional District Judge, Dehradun) dismissed the said petition filed by ONGC and made the award a rule of the court. ONGC filed an appeal before the Uttarakhand High Court. By impugned judgment dated 14.6.2007, the High Court upheld the judgment of the civil court making the award the rule of the court, subject only to one change, by reducing the rate of pendente lite interest from 12% to 6% per annum. The said judgment is challenged by ONGC in this appeal by special leave.

4. It is now well settled that a court, while considering a challenge to an award under sections 30 and 33 of Arbitration Act, 1940, does not examine the award, as an appellate court. It will not re-appreciate the material on record. An award is not open to challenge on the ground that the arbitrator had reached a wrong conclusion or had failed to appreciate some facts. But if there is an error apparent on the face of the award or if there is misconduct on the part of the arbitrator or legal misconduct in conducting the proceedings or in making the award, the court will interfere with the award. Keeping the said principles in view, we will consider the challenge.

5. The award has been made with reference to several claims. The appellant has not been able to make any valid ground to attack except with reference to Claim No. 1. In fact, the learned counsel for appellant rightly concentrated upon the award on Claim No. 1, which relates to the claim for compensation for loss on account of prolongation of the completion period on account of the ONGC's failure to perform its contractual obligations. The arbitrator has held that the delay in completion was due to the fault of both the contractor and ONGC and that both are equally liable for the delay of 19 months. The arbitrator held that as both were equally liable, the contractor was entitled to compensation at the rate of Rs. 1 lakh for a period of 9 months (that is half of the period of delay of 19 months) in all Rs. 9,50,000/-. The arbitrator has observed that there is no provision in the contract by which the contractor can be estopped from raising a dispute in regard to the said claim. But clause 5A of the contract pertains to extension of time for completion of work and specifically bars any claim for damages. The said clause is extracted below:

"In the event of delay by the Engineer-in-Charge to hand over to the contractor possession of land/lands necessary for the execution of the work or to give the necessary notice to the contractor to commence work or to provide the necessary drawing or instructions or to do any act or thing which has the effect of delaying the execution of the work, then notwithstanding anything contained in the contract or alter the character thereof or entitle the contractor to any damages or compensation thereof but in all such cases the Engineer-in-Charge may grant such extension or extensions of the completion date as may be deemed fair and reasonable by the Engineer-in Charge and such decision shall be final and binding."

6. In view of the above, in the event of the work being delayed for whatsoever reason, that is even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs. 9.5 lakhs. This aspect is covered by several decisions of this Court. We may refer to some of them.

In Associated Engineering Co. v. Government of A.P. [1991 (4) SCC 93], this Court observed:

> *"24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. ..."*

In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises [1999 (9) SCC 283] this Court held:

> *"The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This*

deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action.

It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose, agreement is required to be considered. ....

He cannot award an amount which is ruled out or prohibited by the terms of the agreement."

In Ramnath International Construction (P) Ltd. v. Union of India [2007 (2) SCC 453], a similar issue was considered. This Court held that clause 11(C) of the General Conditions of Contract (similar to clause 5A under consideration in this case) was a clear bar to any claim for compensation for delays, in respect of which extensions had been sought and obtained. This Court further held that such a clause amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of claims for delay and not to claim any compensation; and that in view of such a bar contained in the contract in regard to award of damages on account of delay, if an arbitrator awards compensation, he would be exceeding his jurisdiction.

7. In view of the above, the award of the arbitrator in violation of the bar contained in the contract has to be held as one beyond his jurisdiction requiring interference. Consequently, this appeal is allowed in part, as follows:

(a) The judgment of the High Court and that of the civil court making the award the rule of the court is partly set aside in so far as it relates to the award of Rs. 9.5 lakhs under Claim No. 1 and the award of interest thereon.

(b) The judgment of the civil court as affirmed by the High Court in regard to other items of the award is not disturbed.

.....J.
(R. V. Raveendran)

.....J.
H L Gokhale)

New Delhi; October 8, 2010

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Annexure - 10.7

IN THE SUPREME COURT OF INDIA

South East Asia Marine Engineering and Constructions Ltd. vs. Oil India Limited, on 11.05.2020

CIVIL APPELLATE JURISDICTION
Civil Appeal No. 673 OF 2012

South East Asia Marine Engineering and Constructions Ltd. ... Appellant
Versus
Oil India Limited … Respondent

With
Civil Appeal No. 900 of 2012

Oil India Limited ... Appellant
Versus
South East Asia Marine Engineering and Constructions Ltd. … Respondent

JUDGMENT

N. V. RAMANA, J.

Civil Appeal No. 673 of 2012

1. The present appeal arises out of impugned judgment and order dated 13.12.2007 in Arbitration Appeal No. 11 of 2006 passed by the Gauhati High Court, wherein the High Court allowed the appeal preferred by the Respondent under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the "*Arbitration Act*"), and set aside the arbitral award dated 19.12.2003.

2. Brief facts necessary for the disposal of this case are as follows: appellant was awarded the work order dated 20.07.1995 pursuant to a tender floated by the Respondent in 1994. The contract agreement was for the purpose of well drilling and other auxiliary operations in Assam, and the same was effectuated from 05.06.1996. Although, the contract was initially only for a period of two years, the same was extended for two successive periods of one year each by mutual agreement, and finally the contract expired on 04.10.2000.

3. During the subsistence of the contract, the prices of High Speed Diesel ("HSD"), one of the essential materials for carrying out the drilling operations, increased. Appellant raised a claim that increase in the price of HSD, an essential component for carrying out the contract triggered the "change in law" clause under the contract (*i.e.*, Clause 23) and the Respondent became liable to reimburse them for the same. When the Respondent kept on rejecting the claim, the Appellant eventually invoked the arbitration clause *vide* letter dated 01.03.1999. The dispute was referred to an Arbitral Tribunal comprising of three arbitrators.

4. On 19.12.2003, the Arbitral Tribunal issued the award in A.P. No. 8 of 1999. The majority opinion allowed the claim of the Appellant and awarded a sum of Rs. 98,89,564.33 with interest @10% per annum from the date of the award till the

recovery of award money. The amount was subsequently revised to Rs. 1,32,32,126.36 on 11.03.2005. The Arbitral Tribunal held that while an increase in HSD price through a circular issued under the authority of State or Union is not a "law" in the literal sense, but has the "force of law" and thus falls within the ambit of Clause 23. On the other hand, the minority held that the executive orders do not come within the ambit of Clause 23 of the Contract.

5. Aggrieved by the award, the Respondent challenged the same under Section 34 of the Arbitration Act before the District Judge. On 04.07.2006, the learned District Judge, upheld the award and held that the findings of the tribunal were not without basis or against the public policy of India or patently illegal and did not warrant judicial interference.

6. The Respondent challenged the order of the District Judge by filing an appeal under Section 37 of the Arbitration Act, before the High Court. By the impugned judgment, the High Court, allowed the appeal and set aside the award passed by the Arbitral Tribunal.

7. The High Court held that the interpretation of the terms of the contract by the Arbitral Tribunal is erroneous and is against the public policy of India. On the scope of judicial review under Section 37 of the Arbitration Act, the High Court held that the Court had the power to set aside the award as it was passed overlooking the terms and conditions of the contract. Aggrieved by the same, the appellant has filed this present appeal by the way of special leave petition against the impugned judgment.

8. Learned Counsel for the Appellant assailing the impugned order contends that:

a. The High Court has imparted its own personal view as to the intent for inclusion of Clause 23 and has sat in appeal over the award of the Arbitral Tribunal. The construction of Clause 23, he submitted, is a matter of interpretation and has been correctly interpreted by the Arbitral Tribunal based on the authorities cited before it.

b. If two views are possible on a question of law, the High Court cannot substitute one view and deference should be given to the plausible view of the Arbitral Tribunal. Learned counsel has relied upon a judgment of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [*(2006) 11 SCC 181*] to support his contention.

c. The question of law decided by the Arbitral Tribunal is beyond judicial review and thus the High Court could not have interfered with a reasoned award which was neither against public policy of India nor patently illegal.

9. In response, the learned counsel for the Respondent, supporting the findings of the High Court, submits that:

a. the award passed by the Arbitral Tribunal is contrary to the terms of the contract and essentially rewrites the contract. The Arbitral Tribunal has to adjudicate the dispute within the four corners of the contract and thus awarding additional reimbursement not contemplated under Clause 23 is perverse and patently illegal.

b. Overlooking the terms and conditions of a contract is violative of Section 28 of the Arbitration Act and thus the tribunal has exceeded its jurisdiction.

c. This is not a case where the Arbitral Tribunal accepted one interpretation of the terms of the contract where two interpretations were possible. Findings of the Tribunal are perverse and unreasonable as the Tribunal did not consider the contract as a whole and failed to follow the cardinal principle of interpretation of contract.

d. The Arbitral Tribunal has rewritten the contract in the guise of interpretation and such interpretation being in conflict with the terms of the contract, is in conflict with the public policy of India.

10. We have heard the learned counsels for the parties and perused the materials on record.

11. In order to answer the questions raised in this appeal we first need to delve into the ambit and scope of the court's jurisdiction under Section 34 of the Arbitration Act. Section 34 of the Arbitration Act provides as under:

34. Application for setting aside arbitral award;

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with subsection (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if –

(a) the party making the application furnishes proof that -

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was

in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation— Without prejudice to the generality of Sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under subsection (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

12. It is a settled position that a Court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the Courts. Recently, this Court in Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd. [*2019 SCC Online SC 1656*] laid down the scope of such interference. This Court observed as follows:

"26. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."(emphasis supplied)

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in *Dyna Technologies* (supra) observed as under**:**

> *27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act." (emphasis supplied)*

14. However, the question in the present case is whether the interpretation provided to the contract in the award of the Tribunal was reasonable and fair, so that the same passes the muster under Section 34 of the Arbitration Act?

15. In the present case, respondent has argued that the view taken by the Arbitral Tribunal was not even a possible interpretation, therefore the award being unreasonable and unfair suffers from perversity. Hence, the respondent has pleaded that the award ought to be set aside. In this context, we may state that usually the Court is not required to examine the merits of the interpretation provided in the award by the arbitrator, if it comes to a conclusion that such an interpretation was reasonably possible.

16. We begin by looking at the clause, i.e. Clause 23 which is extracted below:

> *"SUBSEQUENTLY ENACTED LAWS:*
> *Subsequent to the date of price of Bid Opening if there is a change in or enactment of any law or interpretation of existing law, which results in additional cost/reduction in cost to Contractor on account of the operation under the Contract, the Company/Contractor shall reimburse/pay Contractor/Company for such additional/reduced cost actually incurred."*

17. The Arbitral Tribunal held that this clause must be liberally construed and any circular of the Government of India would amount to a change in law. The Arbitral Tribunal observed:

> *"According to Rule of Construction of any document harmonious approach should be made reading or taking the document as a whole and exclusion should not be readily inferred unless it is clearly stated in the particular clause of the document. This is according to Rule of Interpretation. A consistent interpretation should be given with a view to smooth working of the system, which the document purports to regulate. The word, which makes it inconsistent or unworkable, should be avoided. This is known as beneficial construction and a construction should be made which suppress the mischief and advance the remedies. So, the increase in the operational cost due to enhanced price of the diesel is one of the subject matters of the contract as enshrined in Cl. 23. It may be said that Cl. 23 may be termed as ''Habendum Clause". In the deed of the contract containing various granting clauses and the habendum signifying the intention of, the grantor. That Cl. 23 requires liberal interpretation for interpreting the expression 'law' or change in law etc. will also be evident from the facts that the respondents Oil India Ltd. through its witness Mr. Pasrija has clearly stated that the change in*

diesel price or any other oil price was never done and by way of any statutory enactment either by Parliament or by State Legislature So, it is clear that at the time when the Cl. 23 was incorporated in the agreement the Oil India Ltd. was very much aware that change in oil price was never made by any Statutory Legislation but only by virtue of Government Order, Resolution, Instruction, as the case may be, on accepting that a condition of the appropriate committee namely O.P.C. it is also clear to apply when there is change in oil price, here HSD, by the Government and its statutory authority as enacted in the above without resorting any statutory enactment. Therefore that the interpretation of expression 'law' or change in law etc. requires this extended meaning to include the statutory law, or any order, instruction and resolution issued by the Central Government in its Ministry of Petroleum and Natural Gas."

The majority award utilizes 'liberal interpretation rule' to construe the contract, so that the price escalation of HSD could be brought under the Clause 23 of the contract. Further the Arbitral Tribunal identifies the aforesaid clause to be a 'Habendum Clause', wherein the rights granted to the appellant are required to be construed broadly.

18. On the other hand, the High Court in the impugned order, interpreted the same clause as follows:

"27… I am of the firm view that clause 23 was inserted in the agreement to meet such uncertain and unforeseen eventualities and certainly not for revising a fixed rate of contract. I also find that both parties had agreed to keep "force majeure" clause in the agreement. Under this doctrine of commercial law, a contract agreement can be rescinded for acts of God, etc. Under clause 44.3 of the agreement, 'force majeure" has been clearly defined, which includes acts and regulations of the Government to rescind a contract. In this way, clause 23 is very close and akin to the "force majeure clause". Besides this, I may also declare that clause 23 is pari materia to the "doctrine of frustration and supervening impossibility". In other words, under clause 23 rights and obligations of both the parties have been saved due to any change in the existing law or enactment of a new law or on the ground of new interpretation of the existing law. In my opinion, clause 23 must have been made a part of the agreement keeping in mind section 56 of the Indian Contract Act, 1872 sans any other intention."

19. The High Court, in its reasoning, suggests that Clause 23 is akin to a force majeure clause. We need to understand the utility and implications of a *force majeure* clause. Under Indian contract law, the consequences of a *force majeure* event are provided for under Section 56 of the Contract Act, which states that on the occurrence of an event which renders the performance impossible, the contract becomes void thereafter. Section 56 of the Contract Act stands as follows:

"56. Agreement to do impossible act— An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful— A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

20. When the parties have not provided for what would take place when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act applies. When the act contracted for becomes impossible, then under Section 56, the parties are exempted from further performance and the contract becomes void. As held by this Court in *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44:

> *"15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."* (emphasis supplied)

However, there is no doubt that the parties may instead choose the consequences that would flow on the happening of an uncertain future event, under Section 32 of the Contract Act.

21. On the other hand, the common law at one point interpreted the consequence of such frustration to fall on the party who sustained loss before the frustrating event. The best example of such an interpretation can be seen in the line of cases which came to be known as 'coronation cases'. In *Chandler v. Webster*, [1904] 1 KB 493, Mr. Chandler rented space from Mr. Webster for viewing the coronation procession of King Edward VII to be held on 26th June 1902. Mr. Chandler had paid part consideration for the same. However, due to the King falling ill, the coronation was postponed. As Mr. Webster insisted on payment of his consideration, the case was brought to the Court. The Court of Appeals rejected the claims of both Mr. Chandler as well as Mr. Webster. The essence of the ruling was that once frustration of contract happens, there cannot be any enforcement and the loss falls on the person who sustained it before the *force majeure* took place.

22. This formulation was overruled by the House of Lords in the historic decision of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1942] UKHL 4, wherein the harsh consequences of frustration as per the old doctrine was moderated by the introduction of the law of restitution. Interestingly, Lord Shaw in *Cantiare San Rocco SA (Shipbuilding Company) v. Clyde Shipbuilding and Engineering Co. Ltd.*, [1924] AC 226, had observed that English law of leaving the loss to where it fell unless the contract provided otherwise was, he said, appropriate only 'among tricksters, gamblers and thieves'. The UK Parliament took notice of the aforesaid judgment and legislated Law Reform (Frustrated Contracts) Act, 1943.

23. In India, the Contract Act had already recognized the harsh consequences of such frustration to some extent and had provided for a limited mechanism to ameliorate the same under Section 65 of the Contract Act. Section 65 provides as under:

65. Obligation of person who has received advantage under void agreement, or contract that becomes void When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

The aforesaid clause provides the basis of restitution for 'failure of basis'. We are cognizant that the aforesaid provision addresses limited circumstances wherein an agreement is *void ab initio* or the contract becomes subsequently void.

24. Coming back to the case, the contract has explicitly recognized *force majeure* events in Clause 44.3 in the following manner:

"For purpose of this clause "Force Majeure" means an act of God, war, revolt, riots, strikes, bandh, fire, flood, sabotage, failure or destruction of roads, systems and acts and regulations of the Government of India and other clauses (but not due to employment problem of the contractor) beyond the reasonable control of the parties."

Further, under Clause 22.23, the parties had agreed for a payment of *force majeure* rate to tide over any *force majeure* event, which is temporary in nature.

25. Having regards to the law discussed herein, we do not subscribe to either the reasons provided by the Arbitral Tribunal or the High Court. Although, the Arbitral Tribunal correctly held that a contract needs to be interpreted taking into consideration all the clauses of the contract, it failed to apply the same standard while interpreting Clause 23 of the Contract.

26. We also do not completely subscribe to the reasoning of the High Court holding that Clause 23 was inserted in furtherance of the doctrine of frustration. Rather, under Indian contract law, the effect of the doctrine of frustration is that it discharges all the parties from future obligations. In order to mitigate the harsh consequences of frustration and to uphold the sanctity of the contract, the parties with their commercial wisdom, chose to mitigate the risk under Clause 23 of the contract.

27. Our attention was drawn to *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited*, (2010) 11 SCC 296, where this Court interpreted an indemnity clause and found that an additional tax burden could be recovered under such clause. Based on an appreciation of the evidence, the Court ruled that additional tax burden could be recovered under the clause as such an interpretation was a plausible view that a reasonable person could take and accordingly sustained the award. However, we are of the opinion that the aforesaid case and ratio may not be applicable herein as the evidence on record does not suggest that the parties had agreed to a broad interpretation to the clause in question.

28. In this context, the interpretation of Clause 23 of the Contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.

29. The contract was entered into between the parties in furtherance of a tender issued by the Respondent herein. After considering the tender bids, the Appellant issued a Letter of Intent. In furtherance of the Letter of Intent, the contract (Contract No. CCO/FC/0040/95) was for drilling oil wells and auxiliary operations. It is important to note that the contract price was payable to the 'contractor' for full and proper performance of its contractual obligations. Further, Clauses 14.7 and 14.11 of the Contract states that the rates, terms and conditions were to be in force until the completion or abandonment of the last well being drilled.

30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.

31. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same.

32. The other contractual terms also suggest that the interpretation of the clause, as suggested by the Arbitral Tribunal, is perverse. For instance, Item 1 of List-II (Consumables) of Exhibit-C (Consolidated Statement of Equipment and Services Furnished by Contractor or Operator for the Onshore Rig Operation), indicates that fuel would be supplied by the contactor, at his expense. The existence of such a clause shows that the interpretation of the contract by the Arbitral Tribunal is not a possible interpretation of the contract.

33. For the aforesaid reasons, we are not inclined to interfere with the impugned judgment and order of the High Court setting aside the award. The appeal is accordingly dismissed. There shall be no order as to costs.

CIVIL APPEAL NO. 900 OF 2012

34. In view of the judgment pronounced in C.A. No. 673 of 2012, the aforesaid matter is disposed of in the aforesaid terms.

.....J.
(N.V. RAMANA)
.....J.
(MOHAN M. SHANTANAGOUDAR)
.....J.
(AJAY RASTOGI)

NEW DELHI;
MAY 11, 2020.

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Annexure – 11.1

Delhi High Court

Union of India vs Pradeep Vinod Construction Co., on 30.11.2005

IA 9619/2005 (OMP 437/2005)

JUDGMENT: Sanjay Kishan Kaul, J.

1. The petition has been filed u/s 34(2)(a) of the Arbitration and Conciliation Act, 1996 seeking to impugn the award dated 16.08.2005 of the arbitral tribunal. The award has been rendered by a tribunal of three arbitrators including the nominee of the petitioner and the award is unanimous.

2. Learned counsel for the petitioner has rightly confined his submissions to the aspects arising from the plea that the award in certain matters is contrary to the terms of the contract. This plea arises from the judgment of the apex court in ONGC v. Saw pipes Ltd; where it was held that the words 'public policy of India' have to be given wider meaning and where an award is patently illegal, the award is likely to be interfered with. Further if an award is patently contrary to the terms of the contract, the court is entitled to interfere with the award. At this stage, it may be clarified that while scrutinizing this aspect, it is not as if the award is required to be interfered with merely because there is another possible view to be taken on the finding arrived by the arbitrator. The award must be perverse in its reasoning while considering whether a particular aspect is or is not incorporated in the contract. So long as the view taken by the arbitrator is a plausible view, though perhaps not the only correct view, the award ought not to be interfered with by the court.

3. Learned counsel for the petitioner submits that the claim no. 1 awarded for extra lead involved in earthwork arising from a ban imposed by the government after issuance of acceptance letter is contrary to the terms of the contract. In this behalf learned counsel has referred to Clause 4.1 of the Special data and specifications of Contract Agreement:

> *"The rates for earthwork in filling in low lying area/platform has been invited. The rate quoted will be deemed to be inclusive of all classes of soil, taxes royalty, loading, unloading, handling, re-handling of earth all leads, lifts, ascents, descents, crossing of nallahs, streams, tracks etc. leveling and dressing complete in all respects to the required profile with the earth to be brought by the contractor from outside railway land at his own cost."*

4. Learned counsel submits that while quoting the rates for earthwork, the rate quoted were to be deemed to be inclusive of all classes of soils, etc. and thus the amount could not have been awarded. A perusal of the reasoning of the award in respect of this claim shows that the claim has been partly allowed on account of the fact that the material placed on record before the arbitrators establishes that the government authorities banned mining of work around sites of work even for government work and the respondent had no option but to bring the earth from adjoining sites involving extra lead which was not earlier envisaged by the respondent. What weighed with the arbitrators is the fact that a government ban had resulted in a situation where the terms of the contract could not be

implemented as per the terms originally envisaged. Since a government ban was a supervening circumstance, the amount has been awarded, and thus, the reasoning of the arbitrator cannot be said to be fallacious or contrary to the terms of the contract as to call for interference by the court.

5. Learned counsel for the petitioner further submitted that in respect of the award of claim no. 2 on account of wastage of labour for not allowing the labour to work for normal eight hours per day, the same is again prohibited by clause 7.2 of the contract read with clause 22.5 which are as under:

"Clause 7.2: The tenderer/s are advised to visit the site of work, and investigate actual conditions regarding nature and conditions of soil, difficulties involved due to inadequacy of stacking space for built up area around the site, availability of materials, water and labour, probable tiles for labour camps, stores, godowns etc. They should also satisfy themselves as to the source of supply and adequacy of their respective purpose of different materials referred to in the specifications if indicated in the drawings. The extent of lead and lift involved in the execution of work should also be examined before formulating the rates for complete items of works described in the schedule.

Clause 22.5: No claim for idle labour and/for idle machinery etc. on any account will be entertained. Similarly, no claim shall be entertained for business loss or any such loss."

6. Learned counsel submits that the respondent was required to visit the site of the work and investigate the actual conditions at site to take into consideration any inadequacies which may be there while making the tender and no claim for idle labour and idle machinery was to be entertained on that account.

7. The arbitrators while considering this claim have allowed it only to the extent of about 25% of the amount claimed on account of the finding arrived at that the petitioner failed to provide the requisite blocks, cautions to the respondent in time and there was no fault on account of respondent in this aspect. Thus, the amount has been awarded not in violation of the terms of the contract but on account of breach caused by the petitioner which has resulted in certain consequences. It is not open for the petitioner to contend that even if it breaches terms of the contract, no amount can be awarded to the respondent.

8. The next contention raised by learned counsel for the petitioner is in respect of claim no. 8 which is on account of expenses incurred for employment of caution men. The claim of the respondent was for Rs 2,56,000/- against which an amount of Rs 1,00,000/- has been awarded. In this behalf, learned counsel relies upon clause 3.3 of the contract, which is as under:

"Clause 3.3: The work is to be executed in the vicinities of running track and the contractor will ensure safety of the tracks and his own men, material and equipment at his own cost. No claim on this account will be entertained. All safety precautions will be entire responsibility of the contractor."

9. Learned counsel for the petitioner thus submits that safety of the tracks, men and material was to be at the cost of respondent and no claim was to be entertained in this behalf. The arbitrators have however found that a part of the

amount is liable to be allowed on account of additional expenditure. It has to be kept in mind that an arbitral tribunal is chosen by the parties as a final adjudicator of the disputes. It is not the object in such proceedings to challenge the award for the court to sit as a court of appeal over the decision of the arbitrators. The arbitrators are technical people and have considered the ramifications at site as also the various obligations and counter obligations of the parties. If it is found that there are certain obligations not fulfilled by the petitioner which has resulted in certain consequences for the respondent, the award in that behalf cannot be said to be fallacious.

10. The last aspect urged by learned counsel for the petitioner is that no interest ought to have been award in view of there being a specific stipulation to the contrary contained in clause 16(c). The said clause is as under:

> *"No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposited in terms of sub clause (1) of the clause will be repayable with interest accrued thereto."*

11. Learned counsel submits that there is an absolute bar on grant of interest and in this behalf has referred to a judgment of the Division Bench of the Gauhati High Court in Arbitration Appeal No 4/2001 (DB) titled Union of India v. Major V Ninhawan (Retd) & Anr where the same clause has been considered. The Division Bench came to the conclusion that there appeared to be a complete bar for grant of interest under the said clause on amounts payable in respect of refund of earnest money, security deposit or amounts payable to the contractor under the contract. Learned counsel submits that the amounts awarded are the amounts payable to the contractor under the contract.

12. In my considered view, what is envisaged by the said expression 'amounts payable to the contractor under the contract' would mean the amounts which have to be paid in normal course to the contracting party. This expression has to be also read with two other stipulations in respect of earnest money and security deposit. The object is that the earnest money and security deposit are liable to be detained till the completion of the contract. Not only amounts are payable to the contractor at various stages of the contract but there will be differences between the dates when such bills are raised and amounts are paid. It is in respect of these payments on behalf of the petitioner that no interest is payable. It cannot be said that if the petitioner unreasonably detains any amount, no interest would be payable. Similarly, if it is found that there are claims arising on account of eventualities like additional work, breach by the petitioner of the terms of the contract, then the arbitrators cannot be said to be devoid of any authority to compensate the suffering party by grant of interest.

13. In view of the aforesaid position, despite the strenuous and erudite effort of the learned counsel for the petitioner, I am unable to persuade myself to agree with the submissions made by learned counsel for the petitioner.

14. Dismissed.

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Annexure – 11.2

Supreme Court of India

M/S M. B. Patel & Co. vs Oil & Natural Gas Commission, on 08.05.2008

CIVIL APPEAL No. 7340 OF 2002

M/S. M. B. PATEL & CO. ... APPELLANT

VERSUS

OIL & NATURAL GAS COMMISSION ... RESPONDENT

Bench: H. K. Sema, Markandey Katju

ORDER

1. This appeal is filed against the judgment and order dated 11.07.2000 of the High Court of Gujarat at Ahmedabad in First Appeal No. 418 of 1986 whereby the High Court set aside the award dated 03.05.1985 passed by the Arbitrator. The High Court set aside the aforesaid award on the following reasonings:

(a) that an arbitrator or umpire has misconducted himself in the proceedings;

(b) that there appears to be an error on the face of the record inasmuch as the Umpire has overlooked clauses 14 & 18 of the Arbitration Agreement;

(c) that the Umpire has travelled beyond the scope of the contract between the parties on certain items and claims and

(d) that he has rendered lump sum award making it totally unintelligible.

On the aforesaid premises the award was set aside.

2. In the present case the contractor claimed Rs. 30,425/- for abandonment of contract. This was the first claim. The second claim was for Rs. 30,213/- for illegal deductions made by ONGC. The third claim was for Rs. 2,00,000/- for not supplying the material in time by the ONGC. The fourth claim was loss occasioned by the contractor for keeping his establishment alive and on this head the claim was for Rs. 3,50,000/-. The fifth claim was loss of profit at the rate of 20 percent amounting Rs. 1,80,000/-. Last claim was interest at the rate of 18% p.a. As already pointed out that the Arbitrator awarded Rs. 5,98,438/- as lump sum, we agree with the reasoning of the High Court that the award is unintelligible.

3. Clause 14 of the Arbitration Agreement reads as under:

"DELAY IN CONSTRUCTION (COMMISSION'S DEFAULTS): The Commission will make every reasonable affect to furnish the materials under the contract and the right of user including the permits required to be furnished by the Commission under the contract in due time so as not to delay the construction related work of reconditioning. In case of any hold up to site work of the CONTRACTOR on account of non-availability of any one of these terms, no compensation by way of claims is admissible but only corresponding extension of time limit would be granted."

Under the aforesaid clause no claim for compensation is admissible even that foul of the Commission.

4. Clause 18 of the Arbitration Agreement reads:

"INTEREST ON AMOUNTS: No interest will be payable on the security deposit or any other amount payable to the CONTRACTOR under the contract."

The Arbitrator has awarded the interest at the rate of 12% on the amount with effect from 09.02.1984 to 03.05.1985 (pendente lite). He has also awarded interest from the date at the rate of 12% on the amount as shown in 1 & 3 above till the date of decree or actual date of payment, whichever is earlier.

5. In view of the aforesaid premises, the Arbitrator has not at all considered clause 14 of the Arbitration Agreement. The interest has been awarded in violation of clause 18 of the Agreement. Apart from others, these two legal aspects have not been considered by the Arbitrator. We are, therefore, in full agreement with the reasoning given by the High Court. The Arbitrator may now proceed with the arbitration but in the light of the judgment of the High Court. We direct the Arbitrator to consider the matter afresh in the light of the reasoning of the High Court.

4. Subject to the aforesaid, the appeal is dismissed.

(H. K. SEMA) .....J.

(MARKANDEY KATJU) .....J.

NEW DELHI, MAY 08, 2008.

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ANNEXURE – 11.3

Supreme Court of India

M/S Sree Kamatchi Amman Constructions vs Divisional Railway Manager/Works/Palghat & Others, on 20.08.2010

CIVIL APPEAL NOS. 6815-6816 OF 2010
[Arising out of SLP [C] Nos.13291-13292 of 2008]

Sree Kamatchi Amman Constructions ... Appellant

Vs.

The Divisional Railway Manager (Works), Palghat & Ors. ... Respondents

Author: R. V. Raveendran

Bench: R. V. Raveendran, H. L. Gokhale

JUDGMENT

Leave granted.

2. The first respondent entrusted certain construction work to the appellant under a contract in the year 1995. Alleging breach by the first respondent (for short `Railways') the appellant invoked the arbitration Clause and the disputes were referred to an arbitral tribunal of which respondents 2 to 4 are the members. The arbitral tribunal made a non-speaking award dated 14.05.1999 in favour of the appellant. The High Court by order dated 09.01.2001 set aside the said award and remitted the matter to the arbitral tribunal with a direction to make a reasoned award after fresh consideration. The arbitral tribunal accordingly passed an award dated 05.12.2001 awarding certain amounts with a direction that the award amount should be paid to the appellant by 04.01.2002 and if it failed to do so, the appellant will be entitled to simple interest at 10% per annum on the amounts awarded from 05.12.2002 till date of payment. That is, the arbitral tribunal awarded only future interest and refused to award the interest for pre-reference period and interest pendente lite. It may be mentioned that the award rejected two of the claims of the appellants and rejected all the claims of the Railways.

3. Feeling aggrieved by the award, the Railways filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 (`Act' for short). Aggrieved by the rejection of its claims 1 and 2 and the failure to award interest for the pre-reference period and pendente lite, the appellant also filed a petition under section 34 of the Act. A learned Single Judge of the High Court rejected both the challenges to the award. Insofar as interest is concerned the learned Single Judge held that having regard to the bar contained in Clause 16(2) of the General Conditions of Contract, the contractor was not entitled to it. Again, both Railways and the appellant filed appeals against the order of the learned Single Judge. The Division Bench of the Madras High Court by the impugned judgment dated 18.07.2007 dismissed the appeal by the appellant- contractor. It allowed the Railways appeal and set aside the award made on claim No. 3 (damages for idle labour) and claim No. 5 (damages for overstay). As a result, what remained was award of Rs. 38,92,455/- under claim No. 4 (erroneous billing with reference to unit of measurement/unit rate of payment for the work covered under the optional item No. 19 of Schedule of Work) and award of Rs. 94,100 (refund of security

deposit) under claim 6 with interest at 10% per annum from 05.01.2002 till date of payment. The appellant has challenged the said common judgment in these appeals. This court on 07.07.2008 granted leave only in regard to the non-award of interest pendente lite and for pre-reference period. This court refused to interfere with the decision of the division bench, setting aside the award insofar as claim Nos. 3 and 5.

4. The appellant urged the following contentions:

(i) Clause 16(2) of the General conditions of contract did not prohibit or prevent arbitrator to direct payment of interest and, therefore, the award insofar as it denied interest for pre-reference period and pendente lite by relying upon Clause 16(2) was liable to be interfered with.
(ii) As the arbitrators had recorded a clear finding that the delay in completion of the work was occasioned due to reasons attributable to Railways and not on account of the appellants, the appellant cannot be denied interest for pre-reference period and pendente lite.

On the other hand Railways contended that the contract contained a specific bar against award of interest on any amount payable to the contractor under the contract or upon the earnest money or security deposit and therefore the arbitral tribunal was barred from awarding interest for the said periods under section 31(7)(a) of the Act. It was further submitted that if the contract between the parties barred payment of interest, arbitral tribunal cannot award interest for the period between the date on which the cause of action arose and the date on which the award was made and therefore the arbitral tribunal had rightly not awarded the interest for the same period.

On the aforesaid contentions the following questions arise for consideration: (i) whether the contract between the parties contains an express bar regarding award of interest? and (ii) If so whether the arbitral tribunal was justified in refusing interest for the period between the date of cause of action to date of award?

Re : Point (i)
5. Clause 16(2) of the General Conditions of contract governing the contract between the parties bars payment of interest and the same is extracted below:

"16(2): No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the Contract, but Government Securities deposit in terms of sub-Clause (1) of this Clause will be repayable (with) interest accrued thereon". (emphasis supplied)

The two claims on which amounts are awarded are with reference to claim No. 4 relating to erroneous billing and claim No. 6 relating to security deposit. Clause 16(2) in terms specifically bars payment of interest on security deposit. Insofar as claim No. 4 is concerned, the question is whether the amount awarded is an "amount payable to the contractor under the contract". Learned counsel for the appellant made a faint attempt to contend that the award relating to claim No. 4 was not in regard to an amount payable to the contractor under the contract. This contention has absolutely no merit as the award itself categorically recorded a finding that under item No. 19 "*the actual quantity executed by the claimant at*

the orders of the respondent very much becomes a part and parcel of the original agreement quantity". What was awarded for the "*rate per metre of rails to be led to SLY Yard and stacked vide Agreement Schedule Item No. 19*" at the rate of Rs. 225 per metre. Thus claim No. 4 related to a work executed by the contractor as a part and parcel of the work contemplated under the agreement. Payment directed by the arbitral tribunal for such work was also in accordance with the Agreement Schedule Item No. 19. Therefore, it is evident that the amount awarded in regard to claim No. 4 was an amount payable to the contractor under the contract. Consequently, no interest could be paid thereon having regard to the bar under Clause 16(2) of the General conditions of contract.

Re: Point (ii)

6. This court had occasion to consider the jurisdiction and authority of the arbitrator to award interest under the Arbitration Act, 1940 and under the new Act in Sayeed Ahmed & Co. vs State of U.P. [2009 (12) SCC 26]. Relying upon the earlier decisions of this court in Irrigation Department, Government of Orissa vs G. C. Roy [1992 (1) SCC 508], Executive Engineer/Dhenkanal Minor Irrigation Division vs N C Budharaj [2001 (2) SCC 721] and Bhagawati Oxygen Ltd. vs Hindustan Copper Ltd. [2005 (6) SCC 462] and State of Rajasthan vs Ferro Concrete Construction (P) Ltd. [2009 (12) SCC 1], this court held that the arbitrator had the jurisdiction and authority to award interest for three distinct periods namely, the pre-reference period (which referred to the period between date of cause of action to date of reference), pendente lite (which referred to the period between date of reference to date of award) and future period (which referred to the period between the date of award to date of payment) if there was no express bar in the contract regarding award of interest. This court then noticed the change under the new Act as follows:

"13. The Legislature while enacting the Arbitration and Conciliation Act, 1996, incorporated a specific provision in regard to award of interest by Arbitrators. Sub-section (7) of Section 31 of the Act deals with the Arbitrator's power to award interest. Clause (a) relates to the period between the date on which the cause of action arose and the date on which the award is made. Clause (b) relates to the period from the date of award to date of payment. The said Sub-section (7) is extracted below:

"31.7(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared in so far as award of interest by arbitrator. The said section recognises only two periods and makes the following provisions:

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the arbitral tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless otherwise agreed by the parties.
(b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act 1996."

We may also refer to the decision of this court in Union of India vs Saraswat Trading Agency [2009 (16) SCC 504] this court reiterated that if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. In view of the specific bar under Clause 16(2), we are of the view that the arbitral tribunal was justified in refusing interest from the date of cause of action to date of awards.

7. We may at this juncture refer to the contention of the appellant that even if the appellant was not entitled to interest for the pre-reference period, that is date of cause of action to date of reference, the appellant will be entitled to interest pendente lite, that is for the period from the date of reference to date of award, having regard to the decisions of this court in Board of Trustees for the Port of Calcutta vs Engineers-De-Space-Age [1996 (1) SCC 516] and Madnani Construction Corporation Pvt. Ltd. vs Union of India [2010 (1) SCC 549].

8. In Engineers-De-Space-Age (supra) this court held:

"4. We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the arbitrator post reference. The short question, therefore, is whether in view of Sub-Clause (g) of Clause 13 of the contract extracted earlier the arbitrator was prohibited from granting interest under the contract. Now the term in Sub-Clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words `no claim for interest will be entertained by the Commissioner' clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the terms of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed

payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the Clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite.

In Madnani (supra) the arbitrator had awarded interest pendente lite, that is from the date of appointment of arbitrator to date of award. The High Court had interfered with the same on the ground that there was a specific prohibition in the contract regarding awarding of interest. This court following the decision in Engineers-De-Space-Age reversed the said rejection and held as follows:

> *"39. In the instant case also the relevant Clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the High Court was not right in interfering with the arbitrator's award on the matter of interest on the basis of the aforesaid Clauses. We, therefore, on a strict construction of those Clauses and relying on the ratio in Engineers find that the said Clauses do not impose any bar on the arbitrator in granting interest."*

9. At the outset it should be noticed that Engineers-De-Space-Age and Madnani arose under the old Arbitration Act, 1940 which did not contain a provision similar to section 31(7) of the new Act. This court, in Sayeed Ahmed held that the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed (supra) held that the decision in Engineers-De-Space-Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed:

"23. The observation in Engineers-De-Space-Age (supra) that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting Arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.

24. The learned Counsel for appellant next contended on the basis of the above observations in Engineers-De-Space-Age, that even if Clause G-1.09 is held to bar interest in the pre-reference period, it should be held not to apply to the pendente lite period that is from 14.3.1997 to 31.7.2001. He contended that the

award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered by the High Court. In view of the Constitution Bench decisions in G. C. Roy and N. C. Budhiraja (supra) rendered before and after the decision in Engineers-De Space-Age, it is doubtful whether the observation in Engineers-De-Space Age in a case arising under Arbitration Act, 1940 that Arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by Arbitrator."

The same reasoning applies to the decision in Madnani also as that also relates to a case of under the old Act and did not independently consider the issue but merely relied upon the decision in Engineers-De-Space-Age.

10. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore, where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

11. We are of the view that the decisions in Engineers-De-Space-Age and Madnani are inapplicable for yet another reason. In Engineers-De-Space-Age and Madnani the arbitrator had awarded interest for the pendente lite period. This court upheld the award of such interest under the old Act on the ground that the arbitrator had the discretion to decide whether interest should be awarded or not during the pendente lite period and he was not bound by the contractual terms insofar as the interest for the pendente lite period. But in this case the arbitral tribunal has refused to award interest for the pendente lite period. Where the arbitral tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the arbitrator could not be interfered with. On this ground also the decisions in Engineers-De-Space-Age and Madnani are inapplicable. Be that as it may.

12. For the aforesaid reasons, we find no merit in these appeals and they are dismissed. Parties to bear their respective costs.

(R V Raveendran) .....J.

(H L Gokhale) .....J.

New Delhi; August 20, 2010.

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Annexure – 11.4

Delhi High Court

Union of India vs M/S Conbes India Pvt. Ltd., on 24.02.2012

FAO (OS) 494 OF 2010

UNION OF INDIA . . . PETITIONERS
Through: Mr. A.S. Chandhiok, ASG with Mr. H. R. Tiwari and Mr. J. K. Singh, Advocates

VERSUS

M/S CONBES INDIA PVT LTD . . .RESPONDENT
Through: Mr. Vivekanand, Advocate.

Author: A. K. Sikri

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, HON'BLE MR. JUSTICE RAJIV SHAKDHER, HON'BLE MR. JUSTICE A. K. SIKRI, ACTING CHIEF JUSTICE: (ORAL)

1. This intra court appeal is preferred by the Union of India challenging the orders dated 05.04.2010 passed by the learned Single Judge in CS(OS) 122/2009 preferred by the appellant which was a petition under Section 14 & 17 of the Arbitration Act, 1940 filed by the respondent herein for making the award passed by the Arbitrator as a rule of the Court. On receipt of notice of the said petition, the appellant had filed objections under Section 30 & 33 of the Arbitration Act, (hereinafter referred to as "the Act, 1940"). Specific objection was laid to the award in respect of Claims No. 1, 2, 5, 6 and 8 etc. Objection qua Claims No. 1, 2, 5 and 6 were rejected and qua claim no. 8, objections were sustained thereby reducing the amount awarded under this claim to Rs. 1,75,000/-. Insofar as this part of the order of the learned Single Judge is concerned, there is no dispute. In this behalf, though the order of the learned Single Judge sustaining the claims is challenged, the same was not pressed at the time of arguments and only controversy which is raised before us pertains to the award of pendente lite interest by the learned Arbitrator.

2. The submission of the appellants was that the Arbitrators could not have awarded any interest on the awarded amount in view of Section 16(2) of the General Conditions of Contract (GCC). However, this contention did not find favour with the learned Single Judge who has, by means of impugned order, held that notwithstanding the aforesaid contractual provision, the Arbitrator had the jurisdiction to award the interest. While taking this view various judgments cited by the learned Counsel for the parties on either side have been taken note of and considered, to which we shall be referring to at an appropriate stage.

3. When the matter came up for argument before the Division Bench, the Division Bench took note of the judgments cited on either side and prima facie found that there appears to be some conflict and, therefore, the vexed question

needed consideration by a Larger Bench. Vide orders dated 05.12.2011, the matter was referred to the Larger Bench. Since this order takes note of the controversy involved, we reproduce that order in verbatim:

"The vexed question whether the clause prohibiting the grant of interest contained in the contract between the parties could also preclude the Arbitrator from granting pendent lite interest has arisen in this appeal. There have been various positions on this aspect.

Suffice it to say that a number of judgments of the learned Single Judge of this Court have taken a view that the award of pendent lite interest by the Arbitrator is not barred under the Indian Arbitration Act, 1940. In this behalf we may refer to the judgment in FAO No. 289/2003 Union of India Vs. R.C. Singhal and Ors. decided on 21.03.2006. The subsequent judgment by one of us (Sanjay Kishan Kaul, J.) in Thermospares India Vs. BHEL and Ors. 130 (2006) DLT 382 followed this view. We are informed that a similar view has been taken in OMP No. 403/2002 Union of India Vs. TRG Industries Pvt. Ltd. decided on 28.07.2006 and OMP No. 44/2010 Union of India Vs. M/s Chenab Construction Joint Venture decided on 05.03.2010.

The clause in question in the present case is identical to the one in Union of India Vs. R.C. Singhal and Ors. case (supra) and Mandnani Construction Corporation (P) Ltd. Vs. Union of India and Ors. 2009 (4) Arbitration Law Reporter 457 (SC).

Thus, this view is favourable to the respondent as adopted by the learned Single Judge in the impugned order.

The matter does not rests at this since, in Madnani Construction Corporation (P) Ltd. Vs. Union of India and Ors. case (supra), the Supreme Court has taken the same view. However, learned counsel for the appellant has referred to a judgment in Sayeed Ahmed & Co. Vs. State of U.P. and Ors. 2009 (3) Arbitration Law Reporter 29 (SC), which is an earlier judgment and according to him takes a contrary view. Learned counsel has also referred similarly to the Union of India Vs. Saraswat Trading Agency and Ors. (2009) 16 SCC 504. In FAO (OS) No. 239/2000, M/s Housing and Urban Development Corporation Vs. M/s Shapoorji Pallonji & Co. Ltd. decided on 02.11.2011 various judgments were not brought to our notice and in respect of a different clause, we took a view relying on the judgment in Secretary, Irrigation Department, Govt. of Orissa and Ors. Vs. G.C. Roy (1992) 1 SCC 508.

We are thus of the view that this issue needs to be examined by a larger bench of this court to bring about a settled legal position.

The papers be placed before Hon'ble the Acting Chief Justice for constitution of a Larger Bench."

This is how the matter comes up before this Full Bench.

4. We have heard Mr. A. S. Chandhiok, learned ASG for the appellant and Mr. Vivekanand, learned counsel who appeared for the respondent.

5. The reference order spells out the conflicting approach of this Court and takes note of relevant judgments of the Supreme Court which have to be kept in mind while straightening the controversy. In the first blush, though it may appear that the view taken by the Supreme Court in Engineers-De-Space-Age 9 (1996) 1 SCC 516 and Madnani(supra) is contrary to the ratio of Sayeed Ahmed (supra), a close scrutiny of these judgments which all interpreted the Constitution Bench judgments in Secretary, Irrigation Department, Government of Orissa Vs. G. C. Roy (supra) and Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa Vs N. C. Budharaj 2001 (2) SCC 721, would make it clear that the issue stands squarely decided by a Constitution Bench judgment in G. C. Roy (supra). In fact, it is not even necessary for us to indulge in detailed discussion on this aspect as our task is made easier by a recent judgment of the Supreme Court in the case of Union of India Vs Krafters Engineering and Leasing Private Ltd. (2011) 7 SCC 279 wherein the Supreme Court has undertaken the identical exercise which we are supposed to undertake. The Court extensively quoted from G. C. Roy (supra) which was also a case under the Arbitration Act, 1940 and dealt with the question of pendente lite interest. We would like to extract some portion from the said Constitution Bench judgment hereunder:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Code of Civil Procedure and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes

a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view." (emphasis added)

6. Thereafter, the Court reproduced the following discussion from N. C. Budharaj (supra):

"26. For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jena case taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs."

7. Further exercise undertaken by the Court relates to the discussion of the subsequent judgments particularly Engineering De-Space-Age and Sayeed Ahmed (supra) and summed up the position in the following manner:

"15. Considering the specific prohibition in the agreement as discussed and interpreted by the Constitution Bench, we are in respectful agreement with the view expressed in Sayeed Ahmed and Company (supra) and we cannot possibly agree with the observation in Board of Trustees for the Port of Calcutta (supra) in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite ignoring the express bar in the contract.

17. At the end of the argument, learned Counsel for the Respondent heavily relied on the recent decision of this Court in Madnani Construction Corporation Private Limited (supra) which arose under the Arbitration Act, 1940. There also, Clause 30 of SCC and Clause 52 of GCC prohibits payment of interest. Though the Bench relied on all the earlier decisions and considered the very same clause as to which we are now discussing, upheld the order awarding interest by the arbitrator de hors to specific bar in the agreement.

21. In the light of the above principle and in view of the specific prohibition of contract contained in Clause 1.15, the arbitrator ceases to have the power to grant interest. We also clarify that the Arbitration Act, 1940 does not contain any specific provision relating to the power of arbitrator to award interest. However, in the Arbitration & Conciliation Act, 1996, there is a specific provision with regard to award of interest by the arbitrator. The bar under Clause 1.15 is absolute and interest cannot be awarded without rewriting the contract."

8. No doubt, this latest judgment is rendered by two Judges Bench. However, it has interpreted the earlier two Constitution Bench judgments and it is well established principle of law that the interpretation given by the Apex Court to the earlier judgments is also law under Article 141 of the Constitution and binding on High Courts and Subordinate Courts. The principle which clearly emerges from the reading of the aforesaid judgment culled out from the G. C. Roy (supra) is that in case where agreement is silent about the award of interest, the discretion lies with the Arbitrator to award or not to award the interest. The Arbitrator shall have the power to award the pendente lite interest though it would be in his discretion to exercise such a power and decide whether to award or not to award the interest in a given case. On the other hand, if the arbitration clause specifically prohibits grant of interest, then, the arbitrator is bound by such contractual provision and would have no power to grant the interest. It would be of interest to mention at this stage that situations have occurred where the clause in the agreement prohibits the contractor from claiming the interest and on such clause issues have arisen as to whether the Arbitrator can still grant the interest. In Sayeed Ahmed (supra) the Supreme Court was categorical in holding that in the face of such a provision even the Arbitrator was powerless.

9. It was for this reason that when the contract barred the Arbitrator from granting any interest or bars the contractor from claiming any interest, it would amount to a clear prohibition regarding interest as the Arbitrator could not ignore such express bar in the contract.

10. Applying the aforesaid principle to the facts of this case, the clear answer would be that the Arbitrator had no power to award pendente lite interest. As pointed out above, Clause 16(2) of GCC stipulates in no uncertain terms that the interest would not be payable. The said Clause reads as under:

"16(1) xxx xxx xxx

(2) Interest on amounts - No interest will be payable on the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in term of sub-clause (1) of this clause will be repayable with interest accrued thereon."

11. We, thus, are of the view that the award of pendente lite interest by the Arbitrator was not legally justified. That order of the learned Single Judge making the award a rule of the Court on this aspect is set aside.

12. The appeal is disposed of accordingly.

13. There shall be no order as to costs.

ACTING CHIEF JUSTICE (SANJAY KISHAN KAUL)

JUDGE (RAJIV SHAKDHER) JUDGE

FEBRUARY 24,2012

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Annexure – 11.5

Supreme Court of India

Chittaranjan Maity vs Union of India, on 03.10.2017

CIVIL APPELLATE JURSIDCITON
CIVIL APPEAL NOS. 15545-15546 OF 2017
(Arising out of SLP (C) Nos.39038-39039 of 2012)

SRI CHITTARANJAN MAITY … APPELLANT

VERSUS

UNION OF INDIA RESPONDENT … RESPONDENT

Author: S. ABDUL NAZEER, J.

JUDGMENT

1. Leave granted.

2. The appellant, in these appeals, has challenged the legality and correctness of the judgment and order 29.9.2011 in A.P.O. No.213/2009 in A.P. No.35/2006 whereby the Division Bench of the High Court of Calcutta has set aside the judgment and order of the learned Single Judge in A.P. No.35/2006 dated 27.1.2009.

3. Brief facts necessary for the disposal of these appeals are as follows:

4. On 20.3.1991, respondent invited tender for the execution of balance of earthwork for formation of banks for laying railway line, roads, platforms and miscellaneous work in connection with new goods terminal yard of South-Eastern Railway at Sankrail in Howrah District. The appellants tender dated 23.03.1991 for Rs. 61,24,159/- was accepted by issuance of Letter of Acceptance dated 17.06.1991. In this connection, an agreement was entered into between the appellant and the respondent on 22.8.1991. In the said agreement, General Conditions of the Contract (for short GCC) were incorporated and the parties were bound by the terms and conditions thereof.

5. Various disputes and differences arose between the parties regarding execution of work and its purported abandonment. The respondent issued notice dated 24.10.1991, seeking termination of the agreement. Another notice dated 15.11.1991 was issued to the appellant under Clause 62(1) of the GCC for rescission of the contract. However, at the request of the appellant through letter dated 2.4.1992, the validity of the contract was extended till 30.6.1992. The respondent further granted extension of time to complete the work up to July 1993. According to the appellant, the delay and/or hindrances occurred due to breaches committed by the Railway Administration. The remaining work was abandoned by the appellant w.e.f. 03.11.1993.

6. The appellant raised the claim before the respondent by his letter dated 30.10.1996. By a subsequent letter dated 22.6.1998, the appellant demanded reference of the dispute to the arbitration. Finally, the appellant filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short the

1996 Act) for appointment of an Arbitrator for adjudication of the claims and disputes before the High Court of Calcutta. The Chief Justice of the High Court of Calcutta passed an order dated 06.12.2001, whereupon the General Manager, South Eastern Railway, was directed to appoint Arbitrators from their panel within four weeks from the said date. Pursuant to the said order, the Arbitral Tribunal was constituted which adjudicated the disputes and claims raised by the appellant, as also the respondent.

7. The Arbitral Tribunal passed an award on 20.09.2006. The respondent moved an application, being A.P. No. 35 of 2006 under Section 34 of the 1996 Act, for setting aside the said award. The said application was dismissed by the Single Judge of the High Court. The respondent assailed the order of the learned Single Judge by filing an appeal in A.P.O. No. 213 of 2009, wherein it was contended that the appellant had issued a No Claims Certificate to the respondent, thereby forfeiting his right for any claim from the respondent in regard to which the dispute could not be adjudicated by the Arbitral Tribunal. As noticed above, the Division Bench has set aside the order of the learned Single Judge and also the award and directed holding of fresh reference by the Arbitral Tribunal.

8. Learned senior counsel appearing for the appellant submits that the Division Bench failed to appreciate the question that issuance of No Claims Certificate by the appellant was not urged before the Chief Justice in the proceedings under Section 11(6) of the 1996 Act. The said plea was not even urged before the Arbitral Tribunal or before the learned Single Judge. The issue relating to existence of any live claim or the arbitrability of the dispute ought to have been urged in the proceedings under Section 11(6) of the 1996 Act or at least before the Arbitral Tribunal. The question as to whether there was any arbitral dispute or not, could not have been entertained by the Division Bench for the first time. It is further submitted that the Tribunal has rightly passed an award and granted pre-award and pendente lite interest from 17.07.1992 till the realization of the award amount.

9. On the other hand, learned Additional Solicitor General appearing for the respondent submits that having regard to the No Claims Certificate issued by the appellant, the appellant has no right to make any claim except for security deposit of Rs. 15,000/- from the respondent. There was no arbitral dispute between the parties. Therefore, the claim itself was not maintainable. It is further argued that, at any rate, the appellant was not entitled for any interest having regard to the terms of the contract. He prays for dismissal of the appeals.

10. Having regard to the contentions urged, the first question for our consideration is whether the Division Bench was justified in considering the arbitrability of the dispute for the first time in the appeal. It is evident from the materials on record that the dispute had arisen between the parties in relation to the contract in question. Therefore, the appellant filed an application before the Chief Justice of the High Court of Calcutta under Section 11(6) of the 1996 Act, for appointment of an Arbitrator in terms of the contract which was allowed and an Arbitral Tribunal was constituted for adjudication of the dispute. The Arbitrator after giving the parties opportunities of hearing and after considering the materials placed on record made and published the award. The amounts claimed and the amounts awarded against each item of the claim are briefly mentioned as follows:

Claim	Claimed Amount (Rs.)	Awarded Amount (Rs.)
1. Balance amount payable	45,37,230/-	2,39,657/-
2. Claim for price variation due to rise in price of materials, labour and fuel	21,82,719.58	1,17,060/-
3. Claim for security deposit	15,000/-	15,000/-
4. Claim on account of advance payment towards labour supplier	51,000/-	15,300/-
5. Claim for advance payment to the earth supplier	1,80,000/-	54,000/-
6. Claim for remaining idle wage payment	1,80,000/-	54,000/-
7. Claim for overhead charges, i.e., staff salary and house rent	22,000/-	15,000/-
8. Claim for blockage of capital and business loss	12,75,000/-	6,03,119/-
9. Claim for Interest	1,58,23,193.16	12,44,546/-

11. Learned Single Judge had dismissed the application filed by the respondent for setting aside the said award. The issue relating to arbitrability of the dispute was not raised in the proceeding under Section 11(6) of the 1996 Act. One of the issues which can be considered by the Chief Justice under this provision is whether the claim is a live claim. This issue can also be kept open to be decided by the Arbitral Tribunal provided the said plea is urged before the Chief Justice. [(See: National Insurance Company Limited vs. Boghara Polyfab Private Limited (2009) 1 SCC 267)]. The respondent had not raised the said plea before the Chief Justice. Be that as it may, the respondent has not urged the said plea either before the Arbitral Tribunal or before the learned Single Judge in the proceedings under Section 34 of the 1996 Act.

12. This Court, in Mcdermott International Inc. vs. Burn Standard Co. Ltd. and Others (2006) 11 SCC 181, has held that the party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator. It has been held as under:

"51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act."

13. It is also necessary to observe that intervention of the court is envisaged only in few circumstances like fraud or bias by the Arbitrators, violation of natural justice. The court cannot correct the errors of the Arbitrators. That is evident from para 52 of the judgment in Mcdermott International Inc (supra), which is as under:

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the

arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the courts jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

14. Therefore, the Division Bench was not justified while considering the arbitrability of the disputes for the first time, particularly, when the respondent has not urged the issue relating to No Claims Certificate before the Chief Justice, Arbitral Tribunal or before the learned Single Judge.

15. The next question for consideration is whether the Arbitral Tribunal was justified in awarding interest on the delayed payments in favour of the appellant. The total interest awarded by the Arbitral Tribunal is Rs. 12,44,546/- which includes interest for the pre-reference period and also pendente lite interest. Section 31(7)(a) of the 1996 Act provides for payment of interest, as under:

"31(7)(a) - Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."

In this Section, a specific provision has been created, whereby if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and pendente lite period), the Arbitrator cannot award interest for the said period.

16. Admittedly, the GCC, governing the contract between the parties, contains a clause which bars the payment of interest, which is as under:

"16(2): No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon."

17. Relying on a decision of this Court in M/s Ambica Construction vs Union of India (2017) SCC OnLine SC 678, (C.A.No.410 of 2008, disposed of on 26.04.2017) learned senior counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the Arbitrator was justified in awarding the pendente lite interest. However, it is not clear from M/s. Ambica Construction (supra) as to whether it was decided under The Arbitration Act, 1940 (for short the 1940 Act) or under the 1996 Act. It has relied on a judgment of Constitution Bench in Secretary, Irrigation Department, Government of Orissa and Others. vs. G.C. Roy (1992) 1 SCC 508. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the Arbitrator from awarding interest for the pre-reference, pendente lite or post award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the Arbitrator

cannot award interest for the said period. Therefore, the decision in M/s Ambica Construction (supra) cannot be made applicable to the instant case.

18. Learned Additional Solicitor General appearing for the respondent submits that the position of law for cases covered under the 1996 Act, i.e. if agreement prohibits award of interest then the grant of pre-award interest is impermissible for the Arbitrator, has been reiterated by this Court in various judgments.

19. In Sayeed Ahmed and Company vs. State of Uttar Pradesh and Others (2009) 12 SCC 26, this Court noted that the 1940 Act did not contain any provision relating to the power of the Arbitrator to award interest. However, now a specific provision has been created under Section 31(7)(a) of the 1996 Act. As per this Section, if the agreement bars payment of interest, the Arbitrator cannot award interest from the date of cause of action till the date of award. The Court has observed that in regard to the provision in the 1996 Act, the difference between pre-reference period and the pendente lite interest has disappeared insofar as award of interest by the Arbitrator is concerned. Section 31(7)(a) recognizes only two periods, i.e. pre-award and post-award period.

20. In Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and Others (2010) 8 SCC 767, this Court was dealing with an identical case wherein Clause 16 of the GCC of Railways had required interpretation. This is the same Clause 16(2) of the GCC prohibiting grant of interest which is also applicable in the facts of the present case. The Court held that where the parties had agreed that the interest shall not be payable, the Arbitral Tribunal cannot award interest between the date on which the cause of action arose to the date of the award.

21. In Union of India vs. Bright Power Projects (India) Private Limited [(2015) 9 SCC 695[, a three-Judge Bench of this Court, after referring to the provisions of Section 31(7)(a) of the 1996 Act, held that when the terms of the agreement had prohibited award of interest, the Arbitrator could not award interest for the pendente lite period. It has been held thus:

"10. Thus, it had been specifically understood between the parties that no interest was to be paid on the earnest money, security deposit and the amount payable to the contractor under the contract. So far as payment of interest on government securities, which had been deposited by the respondent contractor with the appellant is concerned, it was specifically stated that the said amount was to be returned to the contractor along with interest accrued thereon, but so far as payment of interest on the amount payable to the contractor under the contract was concerned, there was a specific term that no interest was to be paid thereon.

11. When parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, in our opinion, they were bound by their understanding. Having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal. Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal.

22. The Arbitral Tribunal had determined the amount payable to the appellant in a sum of Rs. 11,13,136/- and interest of Rs. 12,44,546/-. A sum of Rs. 38,82,150/- was deposited by the respondent which includes the award amount, interest for the pre-reference period, pendente lite and post-award interest. We have held that the appellant is not entitled for any interest. The appellant has already withdrawn 50% of the amount deposited by the respondent, which is in excess of the award amount exclusive of interest. Having regard to the facts and circumstances of the case, we deem it proper to direct the respondent not to recover the excess amount withdrawn by the appellant. Ordered accordingly.

23. The appeals are partly allowed and disposed of in the aforesaid terms without any order as to costs.

...J. (J. CHELAMESWAR)

...J. (S. ABDUL NAZEER)

New Delhi; October 03, 2017

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Annexure – 11.6

Supreme Court of India

Jaiprakash Associates Ltd. vs Tehri Hydro Development, on 07.02.2019

Author: A Sikri
Bench: M. R. Shah, S. A. Nazeer, A. Sikri

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO(S). 1539 OF 2019
(ARISING OUT OF SLP (C) NO. 13551 OF 2013)

JAIPRAKASH ASSOCIATES LTD. (JAL)
THROUGH ITS DIRECTOR .....APPELLANT(S)

VERSUS

TEHRI HYDRO DEVELOPMENT CORPORATION INDIA LTD. (THDC)
THROUGH ITS DIRECTOR .....RESPONDENT(S)

JUDGMENT

A. K. SIKRI, J.

Leave granted.

2. The appellant herein was awarded the contract under which it was to execute certain Works. Agreement in this behalf was signed on 18th December, 1998. Some disputes arose between the parties. Since the agreement contained an arbitration clause, two claims raised by the appellant were referred for arbitration. The arbitral tribunal was of three Arbitrators. This arbitration was under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act'). The majority award pronounced on October 10, 2010 allowed the two claims to certain extent. On the said claims awarded, the Arbitrators also granted interest at the rate of 10% per annum from the date when the arbitration was invoked, i.e., October 09, 2007, till 60 days after the award. Future interest at the rate of 18% per annum till the date of payment was also awarded.

3. Dispute which has travelled up to this Court pertains only to the question as to whether the Arbitrators could award any interest in view of Clauses 50 and 51 of the General Conditions of Contract (GCC) which governed the terms between the parties. The objections were filed before the High Court. A Single Judge of the High Court of Delhi passed the order dated November 15, 2011 quashing the award limited to the interest that was awarded by the Arbitrators. The appellant preferred intra-court appeal which has been dismissed by the Division Bench of the High Court, thereby upholding the judgment of the Single Judge. The effect is that the High Court has held that no interest is payable as Clauses 50 and 51 of GCC bar the arbitrators from granting interest.

4. It may be pointed out that on interpreting Clauses 50 and 51 of the General Conditions of Contract, the view taken by the High Court is that these clauses categorically provide that no interest would be payable to the contractor on the money due to him. The said Clauses read as under:

"Clause 50.0 Interest on money due to the contractor: No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.

Clause 51.0: No claim for delayed payment due to dispute etc. No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to nay dispute, different or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments on in any other respect whatsoever."

The Award makes the following observations in this behalf:

"As seen from above, Clause 50.0 and 51.0 of the Contract deny interest on the Claimant's dues by the Respondent due to dispute etc. However as per above quoted judgment of Hon'ble Supreme Court of India, the claim for interest can be considered by the Arbitration Tribunal."

Notwithstanding the same, the learned Arbitrators granted the interest by relying upon the law declared by this Court in Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age and following observations from the said judgment were quoted:

"……..In other words, according to their Lordships the arbitrator is expected to act and make his award in accordance with general law of the land but subject to an agreement, provided, the agreement is valid and legal. Lastly, it was pointed out that interest pendent like is not a matter of substantive law, interest for the period anterior to reference. Their Lordship concluded that when the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute is referred to the arbitrator, he will have the power to award interest pendente lite for the simple reason that in such a case it is presumed that interest was implied term of the agreement between the parties; it is then a matter of exercise of discretion by the arbitrator. The position of law, has, therefore, been clearly stated in the aforesaid decision of the Constitution Bench.

……...Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to the arbitration the discretion of the Arbitrator is not, in any manner, stifled by this term of the contract and the Arbitrator would be entitled to consider the question of grant of interest pendent lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the Arbitrator was in no manner prohibited from awarding interest pendente lite."

5. As stated above, the High Court, on the other hand, has taken the view that if interest is prohibited as per the expressed terms of the contract between the parties, the Arbitrator does not get jurisdiction to award interest. Further, insofar as interpretation to the aforesaid clauses is concerned, the High Court noticed that these Clauses were on the same terms as Clause 1.2.14 and 1.2.15 of the contract which were subject matter of construction in Tehri Hydro Development Corporation (THDC) Limited & Anr. v. Jai Prakash Associates Limited [(2012) 12 SCC 10]. In the said judgment, this Court has categorically held that those clauses to mean that no interest was payable on claim for delayed payment due to the contractor. Therefore, same construction needed to be given to Clauses 50 and 51 of GCC in the instant case.

6. Mr. Rupinder S. Suri, learned senior counsel appearing for the appellant made two-fold submissions before us, which are to the following effect:

(i) In the first place, it is submitted that judgment in Jaiprakash Associates Limited case is contrary to the earlier judgment rendered by this Court in State of Uttar Pradesh v. Harish Chandra and Company [(1999) 1 SCC 63]. Both the judgments are by the Benches of Three-Judges. His submission is that judgment of Harish Chandra is earlier in point of time, which has not been taken note of in Jayprakash Associates Limited case. In such a scenario, as per Mr. Suri, the judgment which is passed earlier should hold the field and, therefore, we should be guided by the law laid down in Harish Chandra case.

(ii) Second submission, in the alternative, is that in order to resolve the conflict, the matter should be referred to a larger Bench.

7. Dilating on the first submission, an attempt of Mr. Suri was to show that the clauses of the contract in question, when interpreted correctly would clearly bring about that these clauses did not prohibit the Arbitrators from granting interest. The learned counsel emphasised the words "or any other respect whatsoever" occurring in Clause 51 of the GCC and argued that these are to be read ejusdem generis and should take their colour from the earlier part of clause. He submitted that when these words are read in the aforesaid manner, it is only in those cases where some amount or balance is lying with the respondent because of any dispute different or misunderstanding between the parties etc., interest is not payable. Such a situation would not arise in those cases where claim is raised on other counts and awarded by the Arbitrators. He also submitted that Clause 51 in the contract in the instant case was similar to Clause 1.9 of the contract in Harish Chandra case and the Court interpreted the said clause to mean that Arbitrator was not precluded from awarding the interest.

8. In this hue, his alternate submission was that two similar or almost identical clauses are interpreted in a different manner in Harish Chandra case and Jai Prakash Associates case and, therefore, conflict arises which needs to be resolved.

9. Mr. Gourab Banerji, learned Senior Counsel appearing for the respondent gave equally emphatic reply to the aforesaid submissions of Mr. Suri. His first argument was that clauses in Harish Chandra case and the present case were altogether different. Insofar as the instant case is concerned, it was governed by the law laid down in Jai Prakash Associates judgment which was in fact a case between the same parties and in that case the Court had, while construing the

identically worded clauses, came to the conclusion that the Arbitrators were precluded from granting any interest. His another contention was that there was a difference between the scheme provided under the Arbitration Act, 1940 (hereinafter referred to as the '1940 Act') when contrasted with the 1996 Act. He argued that most of the judgments cited by the appellant including Harish Chandra were under 1940 Act whereas in the instant case award was passed under the 1996 Act. He also referred to certain recent judgments which have been rendered by this Court touching upon this very aspect. The precise manner in which he structured his arguments are recapitulated below:

10. In the first instance, he pointed out that even the arbitrators accepted, on the interpretation of GCC Clauses 50 and 51, that these clauses deny interest on the appellant's dues by the respondent due to dispute etc. Notwithstanding the same, the majority opinion awarded the interest relying upon the judgment of this Court in Board of Trustees for the Port of Calcutta. The learned Single Judge of the High Court, while reversing the aforesaid view, pointed out that 1996 Act had altered the position contained in the 1940 Act. Under the new Act, an arbitrator could not award pendente lite interest when there was an express bar against award of such an interest. This legal position is contained in Section 31(7)(a) of the 1996 Act and the legal position stood crystallised in the case of Sayeed Ahmed and Company v. State of Uttar Pradesh & Ors. (2009) 12 SCC 26. Therefore, held the learned Single Judge, when Clauses 50 and 51 of GCC imposed a complete bar on arbitral tribunal to award pendente lite interest, the arbitrators had no jurisdiction to award interest. Mr. Banerji submitted that the learned Single Judge even noticed the judgment in Harish Chandra case and distinguished the same on the ground that it arose under the 1940 Act. Furthermore, clause 1.9 in Harish Chandra case was indeed restrictive and differed from the wordings of Clauses 50 and 51 of the GCC which were closer to Clause G1.09 in Sayeed Ahmed case. On that basis, Harish Chandra judgment was distinguished which position has been upheld by the Division Bench of the High Court also. Mr. Banerji submitted that by the time Division Bench decided the case in September, 2012, it had the benefit of another judgment of this Court in THDC case which was not only between the same parties but even the clauses in the said case are pari materia with the clauses in the present case.

11. We have considered the respective submissions and have gone through the legal position contained in the case laws cited before us by both the parties.

12. Insofar as power of the arbitral tribunal in granting pre-reference and/or pendente lite interest is concerned, the principles which can be deduced from the various judgments are summed up below:

(a) A Constitution Bench judgment of this Court in the case of Secretary, Irrigation Department, Government of Orissa & Ors. v. G. C. Roy [*(1992) 1 SCC 508]* exhaustively dealt with this very issue, namely, power of the arbitral tribunal to grant pre-reference and pendente lite interest. The Constitution Bench, of course, construed the provisions of the 1940 Act which was in vogue at that time. At the same time, the Constitution Bench also considered the principle for grant of interest applying the common law principles. It held that under the general law, the arbitrator is empowered to award interest for the pre-reference, pendente lite or post award period. This proposition was culled out with the following reasoning:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas [Seth Thawardas Pherumal v. Union of India, (1955) 2 SCR 48 : AIR 1955 SC 468] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case [(1988) 1 SCC 418 : (1988) 1 SCR 253] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre- reference period). For doing complete justice between the parties, such power has always been inferred."

It is clear from the above that the Court decided to fall back on general principle that a person who is deprived of the use of money to which he is legitimately

entitled to, has a right to be compensated for the deprivation and, therefore, such compensation may be called interest compensation or damages.

(b) As a sequitur, the arbitrator would be within his jurisdiction to award pre-reference or pendente lite interest even if agreement between the parties was silent as to whether interest is to be awarded or not.

(c) Conversely, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases. This proposition is predicated on the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in G.C. Roy case in the discussion that ensued thereafter:

"44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest.

This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

(d) Insofar as 1940 Act is concerned, it was silent about the jurisdiction of the arbitrator in awarding pendente lite interest. However, there is a significant departure on this aspect insofar as 1996 Act is concerned. This distinction has been spelt out in Sayeed Ahmed case in the following manner:

"Re: Interest from the date of cause of action to date of award

7. The issue regarding interest as noticed above revolves around Clause G1.09 of the Technical Provisions forming part of the contract extracted below:

"G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever." xx xx xx

14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the

discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996."

13. The aforesaid position is reiterated in Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat & Ors. [(2010) 8 SCC 767] and Union of India v. Bright Power Projects (India) Private Limited [(2015) 9 SCC 695]. Later judgment is by a bench of three Judges. This legal position is reiterated in Sri Chittaranjan Maity v. Union of India which is authored by one of us (Nazeer, J.). In that case, the Court considered the same very question which falls for determination by us, namely, whether the arbitral tribunal was justified in awarding interest on delayed payments in favour of the appellant? After noticing that clause 16(2) of GCC in that case bars the payment of interest, it was held that under the 1996 Act, the position wherein is different from 1940 Act, the interest could not be awarded. Following observations from this judgment may be noted:

"16. Relying on a decision of this Court in Ambica Construction v. Union of India [Ambica Construction v. Union of India, (2017) 14 SCC 323] , the learned Senior Counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the arbitrator was justified in awarding the pendente lite interest. However, it is not clear from Ambica Construction [Ambica Construction v. Union of India, (2017) 14 SCC 323] as to whether it was decided under the Arbitration Act, 1940 (for short "the 1940 Act") or under the 1996 Act. It has relied on a judgment of Constitution Bench in State of Orissa v. G.C. Roy [State of Orissa v. G.C. Roy, (1992) 1 SCC 508]. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the arbitrator from awarding interest for the pre-reference, pendente lite or post-award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period. Therefore, the decision in Ambica Construction [Ambica Construction v. Union of India, (2017) 14 SCC 323] cannot be made applicable to the instant case."

14. In a recent judgment in the case of Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited [(2018) 9 SCC 266], the entire case law on the subject is revisited and legal position re-emphasised. That was also a case which arose under the 1940 Act. The Court held that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act as well as pendente lite and future interest, however, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Further, the Court has evolved the test of strict construction of such clauses, and unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Further, unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely

states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest. Further, the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. Also, the position under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.

15. After discussing and analysing almost all the judgments on this subject, the legal position is summed up in the following manner:

"24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act, 1978 as well as pendente lite and future interest. However, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in Second Ambica Construction case [Ambica Construction v. Union of India, (2017) 14 SCC 323 : (2018) 1 SCC (Civ) 257] with the clause in Tehri Hydro Development Corpn. Ltd. [Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd., (2012) 12 SCC 10 : (2013) 2 SCC (Civ) 122] , it becomes clear that unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest under the 1940 Act. As has been held in First Ambica Construction case [Union of India v. Ambica Construction, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36], the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. We hasten to add that the position as has been explained in some of the judgments above under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered."

16. In this whole conspectus and keeping in mind, in particular, that present case is regulated by 1996 Act, we have to decide the issue at hand. At this stage itself, it may be mentioned that in case clauses 50 and 51 of GCC put a bar on the arbitral tribunal to award interest, the arbitral tribunal did not have any jurisdiction to do so. As pointed out above, right from the stage of arbitration proceedings till the High Court, these clauses are interpreted to hold that they put such a bar on the arbitral tribunal. Even the majority award of the arbitral tribunal recognised this. Notwithstanding the same, it awarded the interest by relying upon Board of Trustees for the Port of Calcutta case. The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is clarified in Sayeed Ahmed and Company case. This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above.

17. Another reason given by the High Court is equally convincing. The Clauses 50 and 51 of GCC are pari materia with Clauses 1.2.14 and 1.2.15 of GCC in THDC case. Those clauses have been interpreted by holding that no interest is payable on claim for delayed payment due to the contractor. Same construction adopted in respect of these clauses, which, in fact, is a case between the same parties, is without any blemish.

18. In this backdrop, the only argument of the appellant that remains to be considered is as to whether such a construction is contrary to the judgment in Harish Chandra case.

19. Complete answer to this argument is provided in Reliance Cellulose Products Limited judgment. Following discussion contained therein which discussed THDC judgment would amply demonstrate this:

"Also, unlike the clause in Tehri Hydro Development Corporation Ltd. (Supra), clause 16 does not contain language which is so wide in nature that it would interdict an arbitrator from granting pendente lite interest. It will be remembered that the clause in Tehri Hydro Development Corporation Ltd. (supra) spoke of no claim for interest being entertained or payable in respect of any money which may be lying with the Government owing to disputes, difference or misunderstanding between the parties and not merely in respect of delay or omission;

Further, the clause in Tehri Hydro Development Corporation Ltd. (supra) goes much further and makes it clear that no claim for interest is payable "in any other respect whatsoever."

It is pertinent to mention that the aforesaid judgment also discusses and analyses Harish Chandra case. In the first place, the judgment in Harish Chandra case is under the 1940 Act. More pertinently, this judgment is explained and distinguished in Sayeed Ahmed and Company case in the following paragraphs:

"17. The appellant strongly relied upon the decision of this Court in State of U.P. v. Harish Chandra & Co. [(1999) 1 SCC 63] to contend that Clause 1.09 of the contract did not bar the award of interest. The clause barring interest that fell for consideration in that decision was as under: (SCC p. 67, para 9)

"1.09. No claim for delayed payment due to dispute, etc.—No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in making periodical or final payments or in any other respect whatsoever."

This Court held that the said clause did not bar award of interest on any claim for damages or for claim for payment for work done. We extract below the reasoning for such decision: (SCC p. 67, para 10)

"10. A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in making periodical or final payments or in any other respect whatsoever. The words 'or in any other respect whatsoever' also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government.

Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication." (emphasis supplied)

18. In Harish Chandra [(1999) 1 SCC 63] a different version of Clause 1.09 was considered. Having regard to the restrictive wording of that clause, this Court held that it did not bar award of interest on a claim for damages or a claim for payments for work done and which was not paid. This Court held that the said clause barred award of interest only on amounts which may be lying with the Government by way of security deposit/retention money or any other amount, refund of which was withheld by the Government.

19. But in the present case, Clause G1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under Clause G1.09 in this case being absolute, the decision in Harish Chandra [(1999) 1 SCC 63] will not assist the appellant in any manner."

20. It is also pertinent to note that the judgment in Sayeed Ahmed and Company distinguishing the restrictive wording in Harish Chandra has been consistently followed by this Court in number of cases thereafter. In this scenario, when we find that Harish Chandra case which is of the vintage of 1940 Act and is distinguished in Sayeed Ahmed and Company coupled with the fact that the ratio

of Sayeed Ahmed and Company has been consistently followed, there is no reason to deviate from the construction to Clauses 50 and 51 of the GCC given by the arbitral tribunal in the first instance as well as the High Court. Above all, these clauses is *pari materia* with Clauses 1.2.14 and 1.2.15 of GCC in THDC case which was a judgment between the same parties.

21. Insofar as argument based on the principle of *ejusdem generis* is concerned, the Division Bench has held that that is not applicable in the present case. We find that it is rightly so held. *Ejusdem generis* is the rule of construction. The High Court has negated this argument in the following manner:

> *"18. The rule of ejusdem generis guides us that where two or more words or phrases which are susceptible of analogous meaning are coupled together, a noscitur a sociis, they are to be understood to mean in their cognate sense and take colour from each other but only if there is a distinct genus or a category. Where this is lacking i.e. unless there is a category, the rule cannot apply."*

As rightly held, the rule of ejusdem generis would be applied only if there is distinct genus or a category, which is lacking in the instant case. This rule is applicable when particular words pertaining to a clause, category or genus are followed by general words. In such a situation, the general words are construed as limited to things of same kind as those specified. In that sense, this rule reflects an attempt 'to reconcile incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute were presumed to be superfluous'. (See Lokmat Newspapers Pvt. Ltd. v. Shankarprasad) [(1999) 6 SCC 275]. In fact, construing the similar clause, this Court in the case of Bharat Heavy Electricals Limited v. Globe Hi-Fabs Limited [(2015) 5 SCC 718] has held that rule of ejusdem generis is not applicable inasmuch as:

> *"12. The rule of ejusdem generis has to be applied with care and caution. It is not an inviolable rule of law, but it is only permissible inference in the absence of an indication to the contrary, and where context and the object and mischief of the enactment do not require restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning. As stated by Lord Scarman:*
>
> *"If the legislative purpose of a statute is such that a statutory series should be read ejusdem generis, so be it, the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule like many other rules of statutory interpretation, is a useful servant but a bad master." So a narrow construction on the basis of ejusdem generis rule may have to give way to a broader construction to give effect to the intention of Parliament by adopting a purposive construction.*
>
> *15. A word of caution is here necessary. The fact that the ejusdem generis rule is not applicable does not necessarily mean that the prima facie wide meaning of the word "other" or similar general words cannot be restricted if the language or the context and the policy of the Act demand a restricted construction. In the expression "defect of jurisdiction or other cause of a like nature" as they occur in Section 14(1) of the Limitation Act the generality of the words "other*

cause" is cut down expressly by the words "of a like nature", though the rule of ejusdem generis is strictly not applicable as mention of a single species "defect of jurisdiction" does not constitute a genus. Another example that may here be mentioned is Section 129 of the Motor Vehicles Act which empowers any "police officer authorised in this behalf or other person authorised in this behalf by the State Government" to detain and seize vehicles used without certification of registration or permit. The words "other person" in this section cannot be construed by the rule of ejusdem generis for mention of single species, namely, "police officer" does not constitute a genus but having regard to the importance of the power to detain and seize vehicles it is proper to infer that the words "other person" were restricted to the category of government officers. In the same category falls the case interpreting the words "before filing a written statement or taking any other steps in the proceedings" as they occur in Section 34 of the Arbitration Act, 1940. In the context in which the expression "any other steps" finds place it has been rightly construed to mean a step clearly and unambiguously manifesting an intention to waive the benefit of arbitration agreement, although the rule of ejusdem generis has no application for mention of a single species viz. written statement does not constitute a genus.

16. In the present case we noticed that the clause barring interest is very widely worded. It uses the words "any amount due to the contractor by the employer". In our opinion, these words cannot be read as ejusdem generis along with the earlier words "earnest money" or "security deposit".

22. The upshot of the aforesaid discussion would be to hold that the conclusions of the High Court in the impugned judgment are correct and need no interference. This appeal is accordingly dismissed.

.....J. (A.K. SIKRI)

.....J. (S. ABDUL NAZEER)

.....J. (M. R. SHAH)

NEW DELHI;
FEBRUARY 07, 2019

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Annexure – 12.1

Supreme Court of India

Hindustan Steel Ltd. vs M/S Dalip Construction Company, on 18.02.1969

CIVIL APPELLATE JURISDICTION
Civil Appeal No. 2425 of 1968

HINDUSTAN STEEL LTD. … PETITIONER
Through: C. K. Daphtary, and I. N. Shroff

Vs.

M/S. DALIP CONSTRUCTION COMPANY … RESPONDENT
Through: Rameshwar Nath and Mahinder Narain

BENCH: SHAH J.C., RAMASWAMI V., GROVER A.N.
AUTHOR: SHAH J.C., J.

ACT: Indian Stamp Act, ss. 35, 36 and 42-Unstamped document filed in Court-Impounded- Whether can be acted upon after payment of duty and penalty.

HEADNOTE: The dispute between the appellant and the respondents in relation to a contract were referred in accordance with their contract to arbitration. The award was filed in the District Court and notice of filing was given to the parties. The appellant applied to the Court under S. 30 and 33 of the Indian Arbitration Act, 1940 to have the award set aside on the ground inter alia that it was unstamped. The District Judge ordered the document to be impounded and directed that an authenticated copy of the instrument be sent to the Collector together with a certificate in writing stating the receipt of the amount of duty and penalty.

Against that order the appellant moved the High Court of Madhya Pradesh in exercise of its revisional jurisdiction. The High Court rejected the petition. By special leave appeal was filed in this Court. Relying on the difference in the phraseology between S. 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because S. 35 operates as a bar to the admission in evidence of an instrument not duly stamped as well as to its being acted upon, and the Legislature has by S. 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument.

HELD: The appellant's argument ignored the true import of S. 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceedings on the ground that it has not been duly stamped. Section 36 does not, prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly 'stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt if any is resolved by the terms of S. 42(2) which enact in terms unmistakable, that every instrument endorsed by the Collector under S. 42(1) shall be admissible in evidence and may be acted upon as if it had been duly stamped. [740 C-E]

The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponents. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon, S. 40 provides the procedure for the instrument being impounded, Sub-s. (1) of S. 42 provides for certifying that an instrument is duly stamped, and Sub-s. (2) of S. 42 enacts the consequences resulting from such certification. [740 F--G]

Observations of Desai, J. in Mst. Bittan Bibi and Anr. v. Kantu Lal and Anr. [I.L.R. [1952] 2 All, 984] disapproved.

JUDGMENT

1. The respondents entered into a contract with Hindustan Steel Ltd. for 'raising, stacking, carting and loading into wagons limestone at Nandini Mines". Dispute which arose between the parties was referred to arbitration, pursuant to Cl. 61 of the agreement. The arbitrators differed, and the dispute was referred to an umpire who made and published his award on April 19, 1967. The umpire filed the award in the Court of the District Judge, Rajnandgaon in the State of Madhya Pradesh and gave notice of the filing of the award to the parties to the dispute. On July 14, 1967 the appellant filed an application for setting aside the ward under S. 30 and S. 33 of the Indian Arbitration Act, 1940. One of the contentions raised by the appellants was that the award was unstamped and, on that account, "invalid and illegal and liable to be set aside". The respondents then applied to the District Court that the award be impounded and validated by levy of stamp duty and penalty. By order dated September 29, 1967, the District Judge directed that the award be impounded. He then called upon the respondents to pay the appropriate stamp duty on the award and penalty and directed that an authenticated copy of the instrument be sent to the Collector, Durg, together with a certificate in writing stating the receipt of the amount of duty and penalty.

2. Against that order the appellant moved the High Court of Madhya Pradesh in exercise of its revisional jurisdiction. The High Court rejected the petition and the appellant appeals to this Court with special leave.

3. It is urged by Counsel for the appellant that an instrument which is not stamped as required by the Indian Stamp Act, may, on payment of stamp duty and penalty, be admitted in evidence, but cannot be acted upon, for, "the instrument has no existence in the eye of law". Therefore, counsel urged, in proceeding to entertain the application for filing the award, the District Judge, Rajnandgaon, acted without jurisdiction.

4. The relevant provisions of the Stamp Act may be summarised. Section 3 of the Act provides:

"Subject to the provisions of this Act the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore, respectively, that is to say-

(2) *every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899.*

"Instrument" is defined in S. 2(14) as including: *"every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded".* An instrument is said to be "duly stamped" within the meaning of the Stamp Act when the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in India.

S. 2 (11). Item 12 of Sch. 2 prescribes the stamp duty payable in respect of an award. Section 33(1) provides, insofar as it is relevant:

"(1) Every person having by law or consent of whom any instrument, chargeable with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same."

Section 35 of the Stamp Act provides, insofar as it is relevant "*No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Provided that…….."*

Section 36 provides: "*Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped*."

Section 38 deals with the impounding of the instruments: provides:

"(1) When the person impounding an instrument under section 33 has authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 35 or ……..he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof……"

By S. 39 the Collector is authorised to adjudge proper penalty and to refund any portion of the penalty which has been paid in respect of the instrument, sent to him. Section 40 prescribes the procedure to be followed by the Collector in respect of an instrument impounded by him or sent to him under S. 38. If the Collector is of the opinion that the 'instrument is chargeable with duty and is not duly stamped, he shall require the payment of proper duty or the amount required to make up the same together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the 'amount of the proper duty or of the deficient portion thereof.

Section 42 provides:

" (1) When the duty and penalty (if any), leviable in respect of any instrument have been paid under section 35, section 40 or the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof

(3) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:

Provided that-

5. The award, which is an "instrument" within the meaning of the Stamp Act was required to be stamped. Being unstamped, the award could not be received in evidence by the Court, nor could it be acted upon. But the Court was competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the Instrument so received the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. If the duty and. penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid.

6. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer.

7. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Relying upon the difference in the phraseology between S. 35 and S. 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because S. 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by S. 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of S. 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of s. 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under S. 42(1) shall be admissible in evidence and may be acted upon as if it had been duly stamped.

8. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the

Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the Scheme is clear: S. 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon section 40 provides the procedure for instruments 'being impounded, Sub-s. (1) of S. 42 provides for certifying that an instrument is duly stamped, and Sub-s. (2) of S. 42 enacts the consequences resulting from such certification.

9. Our attention was invited to the statement of law by M.C. Desai J., in Mst. Bittan Bibi and Another v. Kuntu Lal and Another [I.L.R.[1952] 2 All. 984] that:

> "*A court is prohibited from admitting an 'instrument in evidence and a Court and a public officer both are prohibited from acting upon it. Thus, a Court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course, it cannot be acted upon without its being admitted, but it can be admitted and yet be not acted upon. It every document, upon admission, became automatically liable to be acted upon, the provision in S. 35 that an instrument chargeable with duty but not duly stamped, shall not be acted upon by the Court, would be rendered redundant by the provision that it shall not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it.*"

10. In our judgment, the learned Judge attributed to S. 36 a meaning which the Legislature did not intend. Attention of the learned Judge was apparently not invited to S. 42(2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had 'been duly stamped.

11. The appeal fails and is dismissed with costs.

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Annexure – 13.1

SUPREME COURT OF INDIA

Sai Babu vs M/s Clariya Steels Pvt. Ltd., on 01.05.2019

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4956 OF 2019
(Arising out of SLP (C) No. 20641 of 2017)

Sai Babu ……. Appellant(s)
Through: Ms. Kiran Suri, Sr. Adv.
Ms. T. S. Shanthi, Adv., Ms. Aishwarya Kumar, Adv.
Mr. Narendra Kumar, AOR

Versus

M/s Clariya Steels Pvt. Ltd. ……Respondent(s)
Through: Mr. Charudatta Mahindrakar, Adv.
Mr. Pramit Chhetri, Adv., Mr. C. B. Gururaj, Adv.
Mr. Prakash Ranjan Nayak, AOR

CORAM:
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE VINEET SARAN

ORDER

Leave granted.

2. The sole arbitrator who was appointed in this case terminated proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act'), by order dated 04.05.2017. However, on an application dated 05.05.2017 to recall the aforesaid order, the learned arbitrator passed an order on 18.05.2017 stating that, as good reasons had been made out in the affidavit for recall, he was inclined to recall the order even though under the Act, in law, it may be difficult to do so. A revision filed against the aforesaid order was dismissed by the High Court on 14.06.2017.

3. Having heard learned counsel for the parties, we are of the view that the matter is no longer *res integra.* In *SREI Infrastructure Finance Limited* v*. Tuff Drilling Private Limited* [(2018) 11 SCC 470], this Court held:

"22. Section 32 contains a heading "Termination of Proceedings". Sub-section (1) provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) enumerates the circumstances when the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings. The situation as contemplated under Sections 32(2)(a) and 32(2)(b) are not attracted in the facts of this case. Whether termination of proceedings in the present case can be treated to be covered by Section 32(2)(c) is the question to be considered. Clause (c) contemplates two grounds for termination i.e. (i) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary, or (ii) impossible. The eventuality as contemplated under Section 32 shall arise only when the claim is not terminated under Section 25(a) and

proceeds further. The words "unnecessary" or "impossible" as used in clause (c) of Section 32(2), cannot be said to be covering a situation where proceedings are terminated in default of the claimant. The words "unnecessary" or "impossible" has been used in different contexts than to one of default as contemplated under Section 25(a). Subsection (3) of Section 32 further provides that the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings subject to Section 33 and sub-section (4) of Section 34. Section 33 is the power of the Arbitral Tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the award. Section 34(4) reserves the power of the court to adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. On the termination of proceedings under Sections 32(2) and 33(1), Section 33(3) further contemplates termination of the mandate of the Arbitral Tribunal, whereas the aforesaid words are missing in Section 25. When the legislature has used the phrase "the mandate of the Arbitral Tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be recommenced."

4. It is clear, therefore, that a distinction was made by this Court between the mandate terminating under section 32 and proceedings coming to an end under Section 25. This Court has clearly held that no recall application would, therefore, lie in cases covered by section 32(3).

5. This being the case, we allow the appeal that is being filed and set aside the judgment of the High Court of Karnataka dated 14.06.2017. However, this is not the end of the matter. Section 15(2) of the Act states:

15. Termination of mandate and substitution of arbitrator.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

By the consent of the parties, Hon'ble Mr. Justice K. N. Keshavanarayana, former Judge of the High Court of Karnataka, is appointed to be the sole arbitrator to decide all disputes between the parties.

The appeal stands disposed of accordingly.

……., J.
[ROHINTON FALI NARIMAN]

……., J.
[VINEET SARAN]

New Delhi; May 01, 2019.

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Annexure – 14.1

DELHI HIGH COURT

Classic Motors Limited vs Maruti Udyog Limited, on 13.12.1996

Author: M. K. Sharma, J.

Bench: M.K. Sharma, J.

JUDGMENT

1. The present suit is instituted by the plaintiff against the defendant praying for declaration and permanent injunction.

2. In 1985, M/s. Maruti Udyog Limited (in short MUL) issued an advertisement in various newspapers inviting applications for appointment of dealers in various cities of India including Union Territory of Delhi for the vehicles manufactured by it. Criteria for selection and appointment of such dealers was mentioned in the said advertisement. In pursuance of the aforesaid advertisement the partnership firm known as M/s. Competent Builders, of which Mr. Raj Chopra and Mr. Narendra Anand were the partners, applied for grant of such dealership. The offer of the said firm was accepted by MUL in pursuance of which the dealership was granted. The automobile business was started in the name of M/s. Competent Motors which was a partnership business between Mr. Raj Chopra and Mr. Narender Anand. M/s. Competent Motors established its show room in Connaught Place and Service Station at Mathura Road, New Delhi. It is stated in the plaint that Competent Motors made huge investments in order to meet the criteria laid down by MUL for a dealer. Subsequent to the grant of the aforesaid dealership an agreement was executed by and on behalf of Competent Motors and also by and on behalf of MUL in the year 1983 on a standardized form of contract. It is stated that every dealer who is appointed by MUL in response to the advertisement issued by it was called upon to sign identical agreement and that there was no scope of negotiations with regard to any of the terms of the aforesaid standardized terms of the contract between the dealer appointed and MUL.

3. It is also stated that in order to meet the criteria laid down by MUL a dealer has to employ a large number of staff for the establishment of the show room and the service station and that the total value of the capital assets of M/s. Competent Motors amounted to Rs. 1,06,41,691.00 as per the balance sheet as on 31.3.1986. It has been further stated that on advertisements and publicity as well as on repairs and maintenance of the show rooms as well as the service station Competent Motors spent Crores of rupees.

4. In 1986, it appears that a dispute arose between the partners of M/s. Competent Motors, as a result of which, they arrived at a settlement for availing of the dealership on altogether new terms by separating the assets between themselves which were being used in connection with the dealership and for this purpose executed a modification deed dated 30.9.1986. On being approached the MUL under their letter dated 9.1.1988 agreed to allow these two partners to separate and establish independent dealership subject to the conditions, inter alia, that the existing dealership will cease to exist and that separate agreement for

dealership by Mr. Raj Chopra and Mr. Narender Anand will be executed with MUL. In terms of the same, a fresh agreement was executed on the standardized form of contract between the plaintiff and the defendant. Some of the relevant clauses of the dealership agreement entered into between the plaintiff and the defendant having a bearing on the present suit are extracted below for ready reference:

2. FRANCHISE: (a) Subject to the following terms and conditions the Company appoints "the dealer" for the period of this Agreement as its non-exclusive Dealer for its products in the Territory. (b)The Company reserves the right to withdraw any portion or portions of this territory at its sole discretion.

3. DURATION/CANCELLATION Of Previous AGREEMENT: (a) ... ... (b) ... ... (c) This Agreement shall be deemed to have commenced and taken effect from the 15th day of January, one thousand nine hundred and eighty eight and (subject to the other provisions for termination herein contained) shall continue until terminated by either party giving to the other 90 days prior written notice to that effect expiring on any date.

21.TERMINATION Of AGREEMENT: This Agreement shall remain and continue in force and govern all transactions between the parties hereto until cancelled or terminated in the manner hereinafter expressed. Notwithstanding the provisions of any Clause hereof either party may by giving the other 90 days notice in writing terminate this Agreement without assigning any cause.

22.OBLIGATIONS Upon TERMINATION: (a) ... ... (b) ... ... (c) After the giving of notice to terminate or the occurrence of any event which would entitle the Company to terminate this Agreement forthwith the Company shall be entitled to appoint a new dealer(s) for the Territory and to accept orders from and deliver Products to such new dealer(s) notwithstanding that such Products may be delivered before the date of termination of this Agreement provided that the Company shall require any new dealer not to sell such Products in its capacity as a Dealer in the Territory or any part thereof before such date of termination.

23.SUPPLY After TERMINATION: If the Company continues to supply Products to the Dealer after the termination of this Agreement, this shall not be construed as a waiver of termination or as a renewal of this Agreement.

Thus on 20.1.1988 the dealership which stood in the name of M/s. Competent Motors stood surrendered and separate dealerships were granted by the defendant to the erstwhile two partners namely Mr. Raj Chopra in the name of M/s. Competent Automobiles Pvt. Ltd. and Mr. Narender Anand in the name of M/s. Classic Motors (plaintiff).

5. It is stated that from 1988 to 1994 the plaintiff made huge investments and created fixed assets including the building and maintenance of show room worth crores of Rupees. The plaintiff also raised loans worth lacs of rupees by way of over-draft facilities from banks and other financial institutions in order to fulfill the criteria and obligations laid down by the defendant.

6. In spite of the plaintiff fulfilling the obligations laid down in the advertisement the defendant issued a show cause notice dated 6.4.1991 alleging certain breaches committed by the plaintiff in respect of sales policies of the

defendant. The plaintiff being aggrieved filed a petition under Section 20 of the Arbitration Act in this Court registered as Suit No.1224-A/1991 praying for reference of the disputes arising between the parties to an Arbitrator. On the plaintiff seeking an injunction against the defendant restraining it from terminating the dealership agreement, this court granted an ex-parte injunction which was later on confirmed on 18.11.1991.

7. Being aggrieved by the aforesaid order dated 18.11.1991 passed by this court, the defendant filed a Special Leave Petition in the Supreme Court, registered and numbered as Special Leave Petition (C) No.837/1992 on which while issuing notice on 3.2.1992, the Supreme Court, stayed the order dated 18.11.1991 but observed that it would be open to the plaintiff to file its reply to the show cause notice. The Supreme Court further directed that the order of the High Court under appeal would remain stayed subject to the undertaking of the defendant that pursuant to the show cause notice no order of termination of the dealership would be made. The Supreme Court by order dated 18.8.1994 finally disposed of the said Special Leave Petition (C) No. 837/1992 directing that all the points urged by the two sides would remain open for fresh consideration by the High Court in the first instance while deciding the main matter on merits and that the observations made on any of the points including clause 21 of the agreement in the impugned order dated 18.11.1991 would be treated by the High Court as its tentative opinion only. It was further directed that the order of injunction issued by the High Court against the defendant would not be construed as restraining the defendant from exercising the power that they might have under clause 21 of the agreement and in case the defendant chooses to exercise its power under clause 21 of the agreement the parties would be entitled to their respective rights as a result thereof as might be available to them in accordance with law. It was made clear that this Court's order dated 20.4.1991 read with the order dated 18.11.1991 would be construed and understood in the manner indicated in the said judgment.

8. The defendants thereafter, by order dated 31.8.1994 terminated the dealership of the plaintiff with 90 days' notice. Being aggrieved by the aforesaid termination of the dealership the plaintiff filed a petition under Section 20 of the Arbitration Act before this court, which was registered as Suit No.2005/1994. Along with the said petition, the plaintiff also filed an application under Section 41 of the Arbitration Act on which an interim order was passed on 9.9.1994 by this court permitting the plaintiff to book the vehicles upto 29.11.1994. The said order was challenged in the Supreme Court in a Special Leave Petition filed by the defendant and registered as Special Leave Petition (C) No.15796/1994. The Supreme Court by order dated 15.9.1994 while issuing notice on the petition granted an interim stay in respect of the order 9.9.1994 passed by this court. Thereafter the Supreme Court after hearing the counsel for both the parties by order dated 26.9.1994 set aside the order of this court and directed that the matter be disposed of finally without any such interim orders being made in the suit. The said petition filed in this court under Section 20 of the Arbitration Act, it appears, was finally heard and the judgment in the said case was reserved. However, by a subsequent application, which was registered as I.A. 10014/1994, the plaintiff sought to withdraw the petition as he had taken recourse to another remedy namely - filing of the present suit in this court. This court however, by order dated 22.11.1994 passed in Suit No.2005 of 1994 held that since the plaintiff was not interested in pursuing the petition under Section 20 of the Arbitration Act the same, accordingly, stood dismissed as withdrawn.

9. The plaintiff instituted the present suit where summons in the suit and notices on the application were directed to be issued. By order dated 29.11.1994 this court ordered that in the interest of justice status quo as of that day would continue till the next date and on the next date i.e. on 30.11.1994 the interim order was continued and finally by order dated 3.2.1995 this court stayed the implementation of the show cause notice dated 31.8.1994 issued by the defendant.

10. Being aggrieved by the aforesaid order the defendant approached the Supreme Court through a Special Leave Petition which was registered as SLP(C) No.4490/1995. By order dated 28.2.1995 the Supreme Court stayed the operation of the order dated 3.2.1995 passed by the High Court and also stayed the further trial of the present suit and to avoid any further confusion in the matter it was made clear that no order of any kind be passed by the High Court during the pendency of the matter in the Supreme Court. The Supreme Court by order dated 3.11.1995 remanded the matter back to the High Court by setting aside the order of injunction granted by this court on 3.2.1995 in the present suit leaving all questions of fact and law between the parties open for decision by this Court at the time of disposal of the suit itself. It was further directed that during the pendency of the suit and subject to its final outcome, the dealership Code No.0807 which was assigned to the plaintiff, Classic Motors, would be kept vacant by the MUL to enable it to give the same to the plaintiff in case the plaintiff ultimately succeeds in the present suit pending in the High Court. It was however, made clear that the aforesaid direction to the defendant would not be understood or construed as permitting the plaintiff to hold itself entitled to use of the same by virtue of the Supreme Court's order pending decision in the suit.

11. Subsequent to the aforesaid direction of the Supreme Court, the suit was taken up for further trial by this court, during the course of which, the parties filed their documents and on the basis of the pleadings of the parties the following issues were framed: 1. Whether the agreement in favour of the plaintiff is legally and validly terminated by the defendant? 2. Whether the plaintiff is entitled to claim the decree for specific performance of the agreement dated 15.1.1988 between him and defendant No.1? 3. Whether the plaintiff is entitled to get a decree for injunction as sought for? 4. What order and decree?

12. During the trial, on behalf of the plaintiff 2 witnesses were examined and on behalf of the defendant also 2 witnesses were examined.

13. The counsel appearing for the parties advanced lengthy and in-depth arguments on each of the issues arising for my consideration and also have painstakingly taken me through the oral as well as the documentary evidence adduced by the parties. I wish to put on record at this stage, my appreciation for their painstaking efforts and assistance.

14. Having considered the pleadings of the parties and the entire evidence on record, let me now proceed to record my findings on each of the issues:

Issue No. 1:

15. The learned counsel for the parties state that the court at the time of framing of issues framed issue No.1 as a broad issue and assured the counsel appearing for the parties that whatever connected issues the parties might seek to raise at the time of arguments, even if the same is remotely connected with issue No. 1 would be allowed to be argued and shall be considered by the Court. Accordingly, I allowed both the counsel appearing for the parties to advance their arguments on all the issues that might be connected with, even if remotely, with issue No.1.

16. Mr. Madan Bhatia, Senior Advocate, appearing for the plaintiff submitted that the notice of termination dated 31.8.1994 issued by the defendant terminating the dealership agreement of the plaintiff is liable to be set aside as illegal and void and that the suit is liable to be decreed on ground of abuse of the process of Court. The counsel for the plaintiff further submitted that even otherwise, Clause No.21 of the franchise agreement is void and is hit by Section 23 of the Indian Contract Act. It was submitted that under Clause 21 of the agreement, the defendants could not have terminated the franchise agreement entered into with the plaintiff without there being a cause which could be found to be valid and strong and without there being such a such cause which goes to the root of the agreement. He further submitted that the agreement entered into by the defendant with the plaintiff is in the nature of franchise agreement and is of permanent and indeterminable in nature and the same, therefore, could not have been terminated as was sought to be done in the present case. To put the entire argument of the counsel for the plaintiff in a nut-shell, the following points were mainly urged in respect of issue No.1:

(106) *Notice of termination dated 31.8.1994 is illegal and void.*
(ii) No good commercial reason and/or cause has been assigned by the defendant while terminating the agreement.
(iii) That no reason existed for termination of the agreement and even if any reason existed for such termination, the same not being of such nature as would go to the root of the agreement, the agreement could not have been cancelled on such reason.
(iv) That the agreement is a franchise agreement which stands on a different footing from that of other agreements and that the present agreement is of a permanent nature and indeterminable in character. (v) That Clause 21 of the agreement is void being against the public policy and is hit by Section 23 of the Indian Contract Act.
(vi) The notice of termination on the ground that it was open to the defendant to terminate the agreement by 90 days notice on the same causes and reasons as are contained in the show cause notice dated 6.4.1991 is illegal and bad as against the said show cause notice there was an interim order operating passed by this court and sustained by the Supreme Court.

17. Mr. Arun Jaitley, Senior Advocate assisted by Mr. T. K. Ganju, appearing for the defendant not only strongly refuted the submissions of the counsel for the plaintiff but also submitted that the suit against the defendant is itself an abuse of the process of the Court. The counsel drew my attention to the conduct of the plaintiff in filing the present suit with clear intention of wriggling out of the directions passed by the Supreme Court in Special Leave Petition I No.15796/1994 to the effect that the matter be disposed of finally without any interim order being passed. According to the learned counsel, the present suit was instituted by the

plaintiff in order to by-pass/evade the direction of the Supreme Court and, therefore, an abuse of process of law.

18. It was further submitted that the present suit is barred under Order 2 Rule 2(3) Civil Procedure Code and also under Order 23 Rules 1 and 3 CPC. The counsel submitted that the defendant never intended the dealership agreement to be permanent and it could not be held and said to be a perpetual agreement and that the defendant was entitled to terminate the agreement at any time without assigning any reason by giving 90 days notice or even without notice. The counsel submitted that Clause 21 is legal and valid and is not in any manner hit by any of the provisions of the Contract Act.

19. Let me, therefore, take up the submissions advanced by the counsel for the parties one by one and record my findings on each of the aforesaid submissions made before me.

"*Whether the notice of termination dated 31.8.1994 is liable to be set aside as illegal and void in view of interim injunction granted by this court restraining any action on the show cause notice*."

20. The counsel appearing for the plaintiff drew my attention to the pleadings of the defendant in its written statement, wherein, it has been stated that the notice of termination dated 31.8.1994 had been issued for valid and sufficient cause. In Para 126 of the written statement, it has been stated that the said notice of termination is just and fair and has been issued for valid and sufficient cause. Further in Paragraph 122 of the written statement, it has been contended that the defendant had given reasons for terminating the dealership. The counsel appearing for the plaintiff also drew my attention to the order dated 14.12.1994, wherein it has been recorded thus:

> "*Yesterday, Ms. Kalra was asked whether there was any file showing the cause. Today Mr. Lalit Bhasin appeared and states that there is no file indicating any cause after 6th April, 1991 except the breaches indicated in the notice dated 6th April, 1991 to which the plaintiff did not reply. Hence, the defendant has exercised independent right under Clause 21*."

21. Relying on the aforesaid order, the counsel submitted that the defendant having not led any evidence at all to show that the aforesaid notice of termination was issued for some other reason or cause than that mentioned in the show cause, it is proved that the said notice was issued on the same grounds, reasons or causes as are contained in the show cause notice dated 6.4.1991, as against which there was an interim injunction order granted by the Court, injuncting the defendant and restraining it from taking any action on the show cause notice and accordingly, the aforesaid notice of termination having been issued in defiance of the Court's order, the same is illegal and void and is, thus liable to be set aside.

22. I have heard the learned counsel appearing for the defendant who also has taken me through the various orders passed by this court and also by the Supreme Court in connection with and subsequent to the issuance of the show cause notice dated 6.4.1991 and the notice of termination dated 31.8.1994. As against the aforesaid show cause notice dated 6.4.1991, the plaintiff filed a suit under Section 20 of the Arbitration Act, wherein, the plaintiff was granted an ex-parte injunction

which was later on confirmed by this Court on 18.11.1991. The counsel for the plaintiff submitted that in view of the aforesaid order passed by this court confirming the ex-parte order of injunction passed by this court, the defendant was restrained from terminating the dealership agreement. It is stated that the Supreme Court also did not interfere with the aforesaid restraint order passed by this court on the injunction application.

23. However, the records of the case appear to speak otherwise. The Supreme Court in Special Leave Petition I 837/1992 while issuing notice on 3.2.1992 made it clear that the petitioner could file its reply to the show cause notice. Besides, against the order passed by this court on 18.11.1991, a Special Leave Application was preferred by the defendant which was registered as Special Leave to Appeal No. 837/92 and by order dated 3.2.1992 it was ordered that the order of the High Court under appeal would remain stayed subject to the undertaking of the petitioner which was placed on record, that pursuant to the show cause notice, no order of termination of the dealership would be made. The aforesaid Application was finally heard and was disposed of by the Supreme Court by order dated 18.8.1994 inter alia, as follows:

"....In view of the order, we propose to make, we consider it necessary to refer to or decide any of them. It is sufficient to observe that all the points urged by the two sides would remain open for a fresh consideration by the Supreme Court in the first instance while deciding the main matter on merits. The observation made on any of the points including Clause 21 of the agreement in the impugned order will be treated by the High Court as it is tentative opinion only ... ... For the present appeal, it is sufficient to say that the order of injunction issued by the High Court against the appellants would not be construed as restraining the appellants from exercising the power that they may have under Clause 21 of the agreement; and in case the appellants choose to exercise their power under Clause 21 of the agreement, parties would be entitled to their respective rights as a result thereof as may be available to them in accordance with law. The High Court order dated 20.4.1991 read with order dated 18.11.1991 shall be construed and understood in the manner indicated herein by us."

24. In view of the aforesaid directions of the Supreme Court, it is apparent that there was no restraint on the defendant exercising its right to terminate the dealership agreement of the plaintiff. The Supreme Court further observed that in case the defendant chose to exercise the said right, the plaintiff would be entitled to remedies in accordance with law. Under those circumstances, it cannot be said that there was any restraint operating regarding cancellation/ termination of the dealership agreement in favour of the plaintiff. The first submission of the learned counsel for the plaintiff, therefore, is held to be without any force.

Whether clause 21 of the agreement is void and is hit by Section 23 of the Indian Contract Act:

25. Clause 21 of the agreement stands extracted. By the aforesaid clause an option was given to both the parties who may by giving the other 90 days notice in writing terminate the agreement without assigning any cause. The counsel for the plaintiff submitted that the aforesaid dealership agreement including clause 21 thereof is in the nature of a standardized form of agreement and that the said

clause 21 was not part of the advertisement inviting offers for dealership and such power was not in the contemplation of the plaintiff when the plaintiff applied for the dealership in response to the invitation inviting such application. The counsel further submitted that the said agreement is in the nature of a standardized form of agreement and the Chairman and Managing Director of the plaintiff was compelled to sign the said agreement containing clause 21 on dotted lines, on the basis of `take it or leave it'. It is submitted that the defendant having a bargaining power over the plaintiff and the plaintiff being unequal in the aforesaid bargaining power as compared to the defendant the Chairman of the plaintiff had no other option but to put his signature on the dotted line although the said clause is unconscionable & against public policy.

26. The counsel appearing for the defendant, on the other hand, submitted that PW1, who is the Chairman and Managing Director of the plaintiff is a rich commercial businessman and he had the best legal advice in relation to the dealership and that he had never protested in writing against the termination clause contained in the agreement. The further submission of the learned counsel for the defendant was that the agreement in question is a commercial transaction between an affluent businessman and the defendant company and the power of termination has been mutually accepted. His submission was that the aforesaid clause 21 should be so interpreted and given a meaning commensurate with private commercial transaction and not interpreted in the light of the same expression occurring in Statutes or in contract which are in the realm of public contract or law.

27. In order to appreciate the contentions raised in this regard, let me consider the oral evidence adduced by the parties. On behalf of the plaintiff, Mr. Narender Anand the Chairman and the Managing Director of the plaintiff was examined as PW1 and he stated on oath as follows:

"Maruti Udyog called us to execute the dealership agreement. They called us at their office at 6th floor, 15, Hansalya, Barakhamba Road, New Delhi. Myself and Mr. Raj Chopra went to execute the agreement; We said we wanted to read the agreement. Mr. R. C. Bhargava, who at the time was looking after marketing told us that this is a printed agreement for dealership and if we wanted the dealership, we had to sign the same on dotted lines. He said that no change is possible in the dealership agreement. ... ... We did not see what was the agreement. Both myself and Mr. Raj Chopra signed the agreement".

P.W.1 further stated in his evidence as follows:

"Classic Motors signed the dealership agreement on 15.1.1988 and thereafter I changed the name to Classic Motors Pvt. Ltd. This new agreement was signed at 25, Kasturba Gandhi Marg, on the 11th floor in the defendant's office. ... ... I had asked him at that time whether there was any change in the agreement after the one signed by us earlier. It was earlier said that this was a printed agreement which they were obtaining from all the dealers from all over India and there was no question of any negotiations about the same at that stage. I had not read the clauses of the agreement. I had not read them as they had not allowed the same saying that they were similar to the agreement signed in 1983. ... ... I have no bargaining power for executing the works as a dealer of the defendant. Before signing the dealership agreement, I was not told

by the defendant orally that the said agreement could be terminated with 90 days' notice."

28. In the cross-examination PW1 was asked as to whether at the time of signing the dealership agreement on 2.11.1983 he wanted any change in the said agreement to which he replied that as he was not allowed to read the dealership agreement he did not want any change in the same. PW1 was again asked as to whether he had made an attempt to read the dealership agreement before signing the same, to which he replied that Mr. Bhargava told him that he should sign the last page of the agreement and that he need not read the same and therefore, he signed the same. He further stated that even after signing the agreement he never read the dealership agreement and that he read the dealership agreement for the first time after receiving notice on 6.4.1991. He also stated that he did not read the same at the time when he received a photo copy of the same from Mr. Raj Chopra in 1986 when Mr. Raj Chopra and he got separated. He further stated that he had not read the photo copy of the said agreement which he received from Mr. Raj Chopra even in 1986 and that he did not even read the photo copy of the said agreement from 1986 to 1991 as there was no occasion for him to read the same.

29. The counsel for the plaintiff in support of his submission that the aforesaid clause 21 is void relied upon the decision of the Supreme Court in Kumari Srilekha Vidyarthi & others Vs. State of U.P.& Others; and the decision of Central Inland Water Transport Corpn. Ltd. Vs. Brojo Nath Ganguly and another; and also the decision of the Supreme Court in LIC of India & another Vs. Consumer Education and Research Centre & Others. In the light of the aforesaid submissions of the counsel for the parties with the decisions of the Supreme Court relied upon by them, I shall proceed to decide as to whether the said clause is arbitrary and void.

30. On a bare perusal of the said clause it appears that option had been given to either of the parties to terminate the contract without assigning any cause but on a condition that a notice in writing giving 90 days time to be communicated by the said party desiring to terminate the contract. Therefore, the said clause is applicable and available to both the parties to the agreement. The stand taken by PW1 that he never read the aforesaid clause 21 of the agreement before 1991 although he had entered into such agreement with the defendant in partnership with Mr. Raj Chopra, as far back as 1983 and individually in 1988 after the dealership was given to him in his personal own firm's name, cannot be believed. PW1, as it appears, is an educated person and a successful commercial businessman. He has stated in his evidence that his assets include several properties and that he has rental income, farm house, motor workshop and business in real estate. It can never be believed that a person like PW1 would not read the clauses of the agreement including clause 21 thereof till the year 1991 when the definite evidence on record is that he had received a copy thereof at least in the year 1986 from Mr. Raj Chopra. The dealership agreement further contains an endorsement just above the signature of PW1 to the effect that he had read the contents of the agreement. It appears that PW1 has taken such an extreme stand of not having gone through the contents of the aforesaid agreement till 1991 in order to wriggle out of the objection taken by the defendant in the suit that there is inordinate delay in challenging the validity of the said clause 21. It is apparent that the plaintiff has chosen to challenge validity of clause 21 of the dealership agreement after a long lapse of time and that also after taking full advantage of the benefits of the dealership agreement from 1983 onwards. Such

a challenge, in my opinion, is not permissible on the ground of waiver and estoppel as has been held by the Supreme Court in Pdm Reddy Vs. P. A. Rao, that the doctrine of waiver which the courts of law would recognize is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. It is further held that the essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The ratio of the aforesaid decision Application to the facts of the present case with full force. The plaintiff by electing to reap the benefits of the agreement and having enjoyed the same from the year 1983 could not have challenged clause 21 thereof after a lapse of about ten years.

31. The plea of the plaintiff that clause 21 is invalid because of unequal bargaining power and duress and coercion also needs to be examined at this stage. My attention is drawn to a decision of this Court in Unikol Bottlers Ltd. Vs. Dhillon Kool Drinks [1994 (28) Drj 483]. Paragraph 32 of the said judgment being relevant for my purpose is extracted below:

"For a valid contract it is essential that the parties have given their free consent for it. Section 10 of the Contract Act statutorily recognises the requirement of free consent for a valid contract. Section 13 of the Contract Act defines consent as follows:

`two or more persons are said to consent when they agree upon the same thing in the same sense'. Section 14 of the said Act defines `free consent' as `consent is said to be free when it is not caused by:

(1) Coercion, as defined in Section 15;
(2) undue influence, as defined in Section 16; or
(3) fraud, as defined in Section 17 or
(4) misrepresentation, as defined in Section 18; or
(5) mistake, subject to the provisions of Sections 20,21, and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake,' Section 15 & 16 define coercion and undue influence. What follows from these statutory provisions is that an agreement to be valid should be the result of free consent apart from other requirements. While dealing with the question of duress/coercion and unequal bargaining power one is really concerned with the question of free will i.e. did the parties enter into the agreement with a free will? It is the plaintiff who has raised the question of its will being dominated by the defendants and, therefore, not being a free agent. Therefore, the plaintiff is on test. It has to be ascertained whether the plaintiff exercised a free will or not while entering into the Supplemental Agreement. For this purpose there are several factors which need to be looked into. They are –

(1) Did the plaintiff protest before or soon after the agreement?
(2) Did the plaintiff take any steps to avoid the contract?
(3) Did the plaintiff have an alternative course of action or remedy? If so, did the plaintiff pursue or attempt to pursue the same?
(4) Did the plaintiff convey benefit of independent advice?"

32. Let me now examine and apply the principle of the aforesaid factors in order to test the plea of the plaintiff. The plaintiff admittedly did not make any protest before entering into the agreement but on the other hand, went ahead with its performance. The validity of a clause of the agreement is now being sought to be challenged when it was terminated. Even in the earlier two petitions filed by the plaintiff under Section 20 of the Arbitration Act, the plaintiff did not challenge the validity of the agreement. Thus the plaintiff has taken full advantage under the agreement and reaped benefits from it and now when the same was terminated, the plaintiff immediately rushes to this court challenging the validity of the agreement. Therefore, the first two questions are to be answered in the negative i.e. the plaintiff did not raise any protest before entering into or soon after entering into the agreement and also did not take any steps to avoid the agreement. Rather it affirmed the agreement and reaped all the benefits of the agreement from 1983 onwards till it was terminated. After having done so, the plaintiff is not entitled to challenge the agreement. In North Ocean Shipping Co. Ltd. Vs. Hyundai Construction Co. Ltd. [1978(3) All. E.R. 170], it has been held that if the party complaining of an unfair contract does not do anything to avoid it and accepts it then the complaining party cannot make a grievance of the contract. Therefore, the third factor also stands answered. So far the question of independent advice is concerned, from the facts delineated above, it is apparent that PW1, the Chairman and Managing Director of plaintiff is a rich and flourishing businessman having number of properties and various businesses. He, therefore, had full knowledge as to the implication of the terms of the agreement and he also had access to the best of advices and suggestions. But in spite of being placed at such an advantageous position PW1 did not react in any manner to the terms of the agreement, rather continued to reap the benefits under the agreement.

33. From the facts available before me, it is crystal clear that the defendant did not exercise any duress on the plaintiff or that the agreement was arrived at with the plaintiff without its free consent. At paragraph 37 of the judgment in Unikol Bottlers Ltd. (Supra.) it has been held thus: "*The contracts are meant to be performed and not to be avoided. Justice requires that men who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. The real test is to first establish that the means pursued were illegitimate in the sense of amounting to or threatening a crime, tort or a breach of contract (though possible not plausible breach of contract will suffice). Secondly, one must establish that the illegitimate means were a reason, though not necessarily the pre- dominate reason for the victim's submission. Applying these tests to the facts of the present case. I am unable to persuade myself to hold that the consent of the plaintiff to enter into the Supplemental Agreement was not free or was vitiated on any of the grounds urged before me and discussed hereinbefore*."

34. The aforesaid tests when applied to the facts of the present case bear out that the agreement was free and not vitiated by any coercion or duress. Accordingly, clause 21 of the agreement cannot be held to be invalid on that count.

35. The question of a clause being against the public policy and/or arbitrary or unconscionable could definitely be advanced when the contract relates to the realm of public law. However, when such a clause relates to a private contract the law definitely would stand on a different footing. In a private contract a party can deal with a party with whom he wants to, and such a party cannot be compelled

to deal with a person they are unwilling to do so. In Srilekah Vidyarthi case (supra) it has been held by the Supreme Court that there is a fundamental difference between the contract in the public law field and the private field. Upholding the appointment of Public Prosecutors, the Supreme Court held that the words `without assigning any cause' would still mean there exists reason even though the same is not communicated. In Central Inland case (Supra) relied upon by the plaintiff the Supreme Court while examining the question of economic duress and unconscionability of contracts based the ratio of its judgment on the principle of Article 14 and terms of the contract. The Supreme Court however, was conscious of the fact that the law laid down therein would not be applicable when the case relates to a commercial transaction, when it observed at page 216: "This principle however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both the parties are businessmen & the transaction is a commercial transaction". The Supreme Court further held at paragraph 102 of the judgment thus:- "*it is not possible to equate the employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile contract between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee*".

36. Similarly the case of LIC of India (Supra) is a case relating to a contract entered into by an instrumentality of a State in the realm of public law and in that context the Supreme Court held in paragraph 29 of the said judgment that the actions of the appellants (LIC of India) bear public character with an imprint of public interest element in their offers regarding terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance and that it is not a pure and simple private law dispute without any insignia of public element. It was further held that the actions of the State, its instrumentality, any public authority or persons whose actions bear insignia of public law element or public character are amenable to judicial review and validity of such an action would be tested on the anvil of Article 14.

37. The ratio of the aforesaid decisions, therefore, cannot be said to be applicable in a case of dealership agreement entered into by the defendant, purely on private commercial transaction, who has been held to be not an instrumentality of State by a Division Bench of this Court in P. B. Ghayalod Vs. MUL & others.

38. While enforcing the contract for a gas dealership by Bharat Petroleum the Allahabad High Court has held in the case of Shyam Gas Co. Vs. State, that the principle of unconscionability of a clause will not apply in case of commercial transaction where both the parties were businessmen but carved out an exception only in the Scheduled Caste quota in order to salvage the down-trodden and economically distressed.

39. The Privy Council in the case of 1979 (3) All England Reports 65 (Vol. V), on the question of economic duress leading to unconscionability, held that where the businessmen are negotiating at arm's length, it is difficult to uphold the rule of public policy.

40. In the case of AlecLobb (Garages) Ltd. & others Vs. Total Oil G. B .Ltd. [1983 (1) All E.R. page 944], it has been held that, "*so far as there was no compulsion to enter into any transaction with the defendant upon the plaintiff,*

merely because of financial difficulties which were of his own creation, the plaintiff could not take the plea of unequal bargaining power."

41. In view of the aforesaid discussion, in my considered opinion the plea of economic duress and the plea of unconscionability is not available in the instant case where the transaction is purely a commercial contract between two private parties, the defendant having been held by this court not to be a `authority' under Article 12 of the Constitution of India in the case of P. B. Ghayalod (supra).

42. Reference may be made to a decision of the Supreme Court in Bihar State Electricity Board Vs. M/s. Green Rubber Industries & Others. In the said case also the agreement was in a standardized form of contract like the present case. In that context the Supreme Court observed that the standard clauses of the contract have been settled over the years and have been widely adopted because experience shows that they facilitate the supply of electric energy & that such a contract is presumed to be fair and reasonable. In that case it was further observed that it is settled law that a person who signs a document which contains a contractual term is normally bound by them even though he has not read them. To the similar effect is also the decision of the Supreme Court in Bharathi Knitting Company Vs. DHL Worldwide Express; wherein it has been held that the parties to an agreement are bound by the terms of the agreement.

43. Under these circumstances, I have no hesitation in my mind to hold that the aforesaid clause 21 is a valid clause to which the parties hereto agreed upon to abide by the same. Besides the said clause having been the part of the agreement entered into between the plaintiff and the defendant for the first time in 1983 and thereafter again in 1988 could not have been challenged in the present suit filed after several rounds of earlier litigation.

44. The next issue on which the learned counsel for the parties laboured hard and advanced very elaborate arguments is as to whether the agreement is indeterminable and permanent in character.

Whether the agreement in question is indeterminable and permanent in nature?

45. The counsel appearing for the plaintiff submitted that clause 21 does not at all give the power to the defendant to terminate the agreement without any cause. According to the counsel by its very nature the agreement is indeterminable and permanent in character. It was further submitted that clause 21 of the agreement on which the defendant acted upon while terminating the contract cannot be read in isolation and that it has to be read harmoniously with the rest of the agreement as a whole. The counsel also submitted that the aforesaid clause 21 is to be interpreted in the light of the factual matrix and the setting in which the agreement was executed. According to him clause 21 is to be interpreted taking into consideration the background and the context in which the parties entered into the agreement and also taking into consideration the surrounding circumstances.

46. The counsel drew my attention to the advertisement inviting applications for dealership and submitted thereon that the contents of the said advertisement make it crystal clear that the dealership was intended to be permanent. There was no time limit fixed for the dealership at that time. The specific terms and obligations imposed upon the plaintiff under the dealership agreement executed

between the parties left no manner of doubt that the agreement was intended to be permanent. In this connection reference was also made to paragraph 55 of the plaint wherein it was pleaded by the plaintiff that the defendant was in full knowledge of the expectations of the dealers/ franchisees, their confidence and trust and the good-faith in the defendant that if they 648ulfil and perform those obligations in accordance with the dealership agreement or the agreement of franchise the franchise would not be terminated arbitrarily. It was further pleaded therein that the defendants induced the dealer including M/s. Competent Motors to sign the agreement on a dotted line and thus said action resulting in detriment to the dealers or the franchisee could be interpreted as an estoppel against the defendant from arbitrary termination, and there was a duty cast on the defendant to act in good faith in the exercise of even otherwise purported power of termination of the franchise.

47. My attention was also drawn to the deposition of Shri Narender Anand, PW1 wherein he stated that Shri R. C. Bhargava, who at that time was looking after marketing told him that the dealership agreement would continue as long as the factory would run. He was told by Shri Bhargava that also said that this would be a permanent income to him and his children. He was also told that this was a long term agreement and a franchise agreement and that the dealership agreement would be a professional agreement. In the examination-in-chief, the said witness further stated that Mr. R. C. Bhargava gave an assurance to the plaintiff that this was a long term benefit for them provided they kept on spending money. He also deposed that according to him the relation between the dealer and Maruti Udyog Limited was a Joint Venture and that Maruti Udyog Limited were producing the vehicles and the dealers were promoting their sale and maintaining their vehicles.

48. The learned counsel also drew my attention to the observations of the House of Lords in their judgment in Director, Llanelly Railway & Dock Company Vs. Directors, London & North Western Railway Co.; reported in 1875 English and Irish Appeals (Vol. 7) page 500 at page 564, 565 and submitted that the said observations apply equally to the present dealership agreement. The relevant portion of the said observation is extracted below:

"Then my Lords, that being so, I am at a loss to see how it can be supposed that an agreement of this kind, the subject matter being such as I have described it, namely – the exercise of running powers over the Llanelly Railway which for all time would be of use to the London and North Western Railway Company – how it can be supposed, nothing being said in the agreement to that effect, that they entered into this agreement only with this view; this will be an agreement which shall be valid and binding on us and the Llanelly Company so long as we think fit on either side, and no longer; we are to provide the clerks: if we start a traffic of our own, if we exercise our running powers, we are to be compellable to carry the local passengers, and we must accommodate our rolling stock for the purpose of carrying that extra amount of traffic which we should otherwise not have had to carry; we must provide that stock, and we must also provide the necessary staff of clerks, and when we have done all that (I will not say this week, because it is not necessary to put the highest and most improbable case, but), when we have done that and gone on for six months, then the Llanelly Company may find the agreement, in some way or other, to be burdensome, and may say: we do not care in the least for your additional rolling stock, or for the additional staff or clerks that you have provided, but we give you notice to terminate the

agreement, and we shall terminate it accordingly. I have not said anything about the pound 40,000, but I have confined myself strictly to the agreement. To suppose any company would enter into an agreement of that kind seems to me to be an entirely irrational supposition, and there is nothing which should induce your Lordship to fix a limit when none can be fixed which is reasonable as between the parties, and nothing is said as to such a limit from beginning to end of the contract".

Relying upon the ratio of some other judgments like Sherman Vs. British Leyland Motors Ltd. Reported in 601 Fed. Reporter 2d 429, wherein it was held that the distributor dealership agreement between an automobile manufacturer and dealer is a franchise agreement; and also to Canadian Law Journal and the case of United States Supreme Court in United States Vs. Arnold, Schwin & Co. et all [(1967) 388 U.S. 365], the counsel submitted that clause 21 is a part of an agreement which is a franchise agreement and has to be interpreted in a manner as would be in consonance with the law relating to the power of the franch is or to terminate a franchise agreement. Drawing support from the aforesaid decisions he submitted that by now it is an established law that the franch is or cannot have arbitrary power to terminate the franchise agreement at his sweet will and fancy without cause or in bad faith and that the franch is or must exercise his right of termination in accordance with the principles of justice, equity and good conscience.

49. The counsel appearing for the defendant, on the other hand, drew my attention to the different clauses of the agreement for the purpose of ascertaining the character of the agreement. Referring to clause 21 of the agreement he submitted that the power under clause 21 is a power available to both the parties who are entitled to terminate the same without assigning any cause and that it is a power based on mutuality. According to him if such a clause was not there and if the parties were not allowed to terminate the contract at their will the same would have amounted to interfering with the right of freedom of trade of either party in the realm of private contract. He further submitted that the defendant is a private company and so held by this court in the case of P. B. Gehlot Vs. M/s. Maruti Udyog Limited and others;(supra). He submitted that the said clause – in the context of a private company which is not an instrumentality of the State and not bound by the restraint and constraint of Article 14 means that no cause need to exist for exercising power under clause 21. Relying on the various clauses of the agreement the counsel submitted that the agreement was never intended to be permanent and that in the context of dealership sales agreement between two private parties agreement of the present nature could never be perpetual and that any one of the said parties is entitled to terminate the agreement upon the happening of an event and that either party may terminate without assigning any reason by giving 90 days notice and that none of the parties could be compelled to have the consent of the other party for terminating the contract.

50. In the backdrop of the rival submissions of the parties in respect of the nature of the agreement let me consider and determine as to whether the agreement is indeterminable and permanent in nature.

51. The plaintiff entered into a dealership agreement with defendant on 15.1.1988 which is Ex.D-33. This dealership was given to the plaintiff as a special case as has been delineated above. The plaintiff is seeking all its rights and basing all its claims on the said agreement. The said agreement dated 15.1.1988 was

signed by PW1, the Chairman and Managing Director of the plaintiff. There appears an endorsement above his signatures on the said agreement that – "*We, M/s. Classic Matters, New Delhi having carefully read all the clauses in this agreement hereby agree thereto*". In the context of the aforesaid endorsement made just above his signatures would belie the contention of the plaintiff that PW1 had never read the clauses of the contract. The counsel for the plaintiff drew my attention to the deposition of PW1 in support of assurances given by Mr. R. C. Bhargava at the time of execution of the dealership agreement in 1983 with Competent Motors to the effect that the agreement was permanent and that it was to give permanent income to the family members of the Managing Director of the plaintiff and that the said agreement was franchise agreement. DW1 appearing for the defendant categorically denied that any such assurance was given by Shri R. C. Bhargava to PW1 at the time of entering into the aforesaid agreement with the plaintiff. He also further stated that Shri R. C. Bhargava had no such authority to give any such assurance. Besides, when the terms and conditions of an agreement are clear and certain and do not suffer from any ambiguity no extraneous evidence or oral evidence could be led by any of the parties in respect of proving the intention of the parties in respect of such an agreement. Moreover, all the aforesaid statements of PW1 relate to the agreement entered into in the year 1983 between Competent Motors and the defendant company which is not the subject matter of the present suit.

52. It is settled law that no oral evidence is admissible for interpreting the terms of the contract. Sections 91 and 92 of the Evidence Act make the aforesaid position clear. In this connection reference may also be made to the decision of Tsang Chuen Vs. Li Po Kwai [AIR 1932 PC 255]. In the said decision the Privy Council has held that where words of any written agreement are free from any ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such case evidence de hors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible.

53. That is the settled position of law in respect of admissibility of oral evidence in respect of a written instrument followed by various courts of India. In this connection reference can also be made to the decisions in Vellappa Gounden Vs. Palani Gounden & another [AIR 1915 Madras 1079] and Panna Lal and another Vs. Nihai Chand [AIR 1922 PC 46]. More recently, the Supreme Court has approved the aforesaid principles of law laid down by the Privy Council in the decision of R. Thangadurai Nadar Vs. Deivayanai Ammal, and others [1995 (Suppl.)(3) SCC 108] and in the case of Tamil Nadu Electric Board Vs. N. Raju Chettiar. The same being the settled principles of law no oral evidence could be led in respect of the contents of the documents by any of the parties. Therefore, I am required to read the various clauses of the agreement and then come to a finding by reading the aforesaid clauses as to whether the said agreement is indeterminable and permanent in character.

54. The plaintiff has entered into the dealership agreement dated 15.1.1988 of its own free will and without any coercion as has been held by me in foregoing paragraphs and which is also an admitted position by PW1 in his deposition

recorded in this court. He specifically stated that no force or coercion was used on him for signing the dealership agreement either in the year 1983 or in the year 1988. He also deposed that he was eager to get the dealership as the same was a profitable venture and that he had also made profits out of the aforesaid venture. PW1 in his cross-examination has further stated that he did not check as to whether Mr. Bhargava had any such authority to give any verbal assurance.

55. Clause 2 of the agreement uses the word `Franchise'. Relying heavily on this expression in the dealership agreement the counsel for the plaintiff submitted that the same is in fact a franchise agreement. However, the said submission of the learned counsel that because of the use of the expression `franchise' in clause 2 of the agreement the agreement itself is a franchise agreement cannot be accepted in view of the contents of clause 32 of the agreement wherein it is stated that clause headings are inserted for convenience only and shall not affect the interpretation of this agreement. Clause 3 of the said agreement refers to duration of the agreement. Sub-clause I of clause 3 specifically provides that the agreement would continue until it is terminated by either party on giving of 90 days prior notice to that effect. This power of 90 days notice as provided for in clause 3I however, is subject to the other provisions contained in the agreement. Clause 21 of the agreement provides that the agreement would remain and continue in force and govern all transactions between the parties thereto until cancelled or terminated in the manner as expressed thereafter and that notwithstanding the provisions of any clause either party may by giving the other 90 days notice in writing terminate the agreement without assigning any cause. Clause 22I further gives a power to the defendant that after giving of notice to terminate or the occurrence of any event which would entitle the Company to terminate this Agreement forthwith the Company shall be entitled to appoint a new dealer(s). Sub-clause I of clause 22 read with clause 21, therefore, implies that two kinds of terminations of the agreement have been envisaged i.e. one under clause 3I & 21 where a notice of termination could be given and second under clause 22I on the occurrence of any event which would entitle the company to terminate the agreement forthwith. It is pertinent to note that in the latter case even the requirement of 90 days notice as provided for in clause 21 is not a condition precedent for terminating the agreement under clause 22I. Therefore, it is apparent from the aforesaid clauses in the agreement, by which the parties were bound, that the defendant is entitled to terminate the agreement without assigning any reason by giving 90 days notice or upon the happening of an event without giving prior notice of 90 days as provided for under clause 21 and clause 22.

56. Having set out the various clauses of the present agreement, I may now proceed to notice the laws relating to franchise agreement in U.K. and U.S.A. on which extensive reliance was placed by the learned counsel for the plaintiff in support of his submission that the present agreement is perpetual, permanent and indeterminable.

57. On reappraisal of the various articles and the decisions relied upon by the counsel for the parties it appears that the original scheme of franchise was under Public Law. The right to use roads, waterways and other municipal amenities was considered to be a franchise. But there also it is envisaged that a franchise agreement could be terminated provided reasonable notice is given. Notice of termination may be required either by the express terms of the franchise

agreement or by Statute. Franchise agreements commonly contain provisions for termination upon notice and it has been held that cancellation in accordance with such a provision effectively terminates the agreement and no damages can be claimed on account of such termination. In Similar Vs. Western Men Inc.; 437 Pacific Reporter 2nd Series 1598, on which the counsel for the plaintiff relied upon, it was held that where parties enter into a contract involving the granting of a franchise and there is no express provision that it may be cancelled without cause, it is fair and reasonable to assume that both parties entered into the arrangement in good faith, intending that if the service be performed in a satisfactory manner the contract would not be cancelled arbitrarily. The ratio of this decision is not applicable to the agreement in hand which admittedly contained an express provision that the agreement with the plaintiff could be cancelled without assigning any cause. Another case relied upon by the plaintiff is the case of Shell Oil Company Vs. Frank Marinello, 307 Atlantic Reporter, 2nd Series page 598. The said case was decided by the Canadian Court in the context of a legislation called Franchise Practices Act which prohibits a franch is or from terminating, cancelling or failing to renew a franchise without good cause. Shell's case however, stood superseded in U.S.A. by a Statute called Petroleum Marketing Practices Act. This decision also, could not be made applicable to the facts of the present agreement as in our country there is no such legislation regulating or controlling a dealership agreement. On the other hand, section 14 of the Specific Relief Act provides for law governing Specific Performance and lays down that a Contract which is terminable cannot be enforced.

58. The Supreme Court in Saghir Ahmed Vs. State of U.P., noticed the doctrine of franchise as applicable in England and America. It observed that "*the doctrine of franchise or privilege has its origin in English Common law and was bound up with the old prerogative of the Crown. This doctrine continued to live in the American Legal World as a survival of the pre-independence days, though in an altered form. The place of the royal grants under the English common law was taken by the legislative grants in America and the grant of special rights by legislation to particular individuals or companies is regarded as franchise*." The Supreme Court observed that the doctrine of franchise has no place in our Constitution.

59. A critical analysis of the various articles and decisions placed at the bar shows that termination of a franchise agreement is possible provided reasonable notice is given so that slight recoupment of profits is made by the party against whom such an action is envisaged. It is thus apparent that the franchise agreements are terminable in character. Besides it must be noticed that there are State Legislations in America whereunder franchise agreements have been recognized and provisions have been made therein for terminating such agreements at will terminable for good cause, terminable with reasonable notice or terminable after profits have been recouped as would appear from reappraisal of the following cases:

60. In the case of Gary H. Sharman Vs. British Leyland Ltd. [601 Fr 2d 429] which was heavily relied upon by the counsel for the plaintiff in support of his submissions appears to be a case rendered in the context of the local State Legislation. In the said case it was held that a showing of coercion and intimidation which produces unfair and inequitable results is essential to a valid claim of lack of good faith.

61. In Hill Oils & Sales Ltd. Case [1987 LRC 468], on the ratio of which the counsel for the plaintiff relied upon, appears to be a case where there was no provisions for termination without cause. In the said case the court held that the contract could not be terminated immediately without cause since there was no provisions for immediate termination without cause. The court further held that the rule requiring reasonable notice of termination should be implied as a reasonable term of contract.

62. Gillespie Brothers Ltd. [1973(1) All E.R. 193] is a case based on difference of opinion between the two Judges – wherein Lord Denning took a view that an unconscionable term should not be enforced, while Lord Buckley took a view that since the contract is between commercial businessmen, the contention and plea of unconscionability does not arise.

63. In Martin Baker Aircrafts Vs. Canadian Flight Equipment [1955(2) All E.R. 722] the Queen's Bench decision distinguished the case of Llanelly Railway and Doc Co. by holding that the Llanelly case was based on a peculiar agreement which did not provide for a termination power and the statutory scheme under which there was an indication of such an agreement being permanent. It was further held that mercantile and commercial agreements were always intended not to be permanent.

64. In 1928 (1) Chancery 447 (Vol.II) the case of Credit on Gas Company it was held that the contract for supply and purchase of gas without determination and termination of the contract was held not to be permanent in character.

65. In Staffordshire Area Health Authority Vs. South Staffordshire Waterworks Co. [1978(3) All E.R. 769] the Court of Appeal held that the contract for water supply to a Hospital at a given rate was terminable after giving reasonable notice.

66. The law, therefore, laid down by the aforesaid decisions rendered by the various courts outside India did not intend to lay down a law that an agreement is indeterminable and permanent in character. The judgments of United States were in the context of the State Legislations therein and original scheme of such franchise was under public law. However, the law governing specific performance in India is covered under Section 14 of the Specific Relief Act, a provision similar to that does not exist under the American law. The scheme of legislation in United States and India is entirely different and unless and until there is Legislation on the similar line as existing in the U.S.A, it is not possible to import the idea and concept of franchise as exists in American law particularly in the realm of private contract arising out of purely private commercial transaction.

67. The counsel for the plaintiff also urged that the expression "without assigning any cause" as appearing on clause 21 should be given a liberal interpretation explaining that there could be no termination without a cause and that cause must exist on record before a termination of an agreement could be effected although the same may not be communicated. According to him not only cause must exist on record but such cause must be valid and good cause going to the root of the matter. In view of the aforesaid submissions it would be necessary to deal with this issue specifically although the issue was discussed by me

hereinabove as an ancillary issue. Interpretation and meaning of the expression "without assigning any cause:"

68. The aforesaid expression appears in clause 21 of the agreement which states that either party to the agreement could terminate the contract after giving to the other party a notice of 90 days `without assigning any cause'. The present agreement, it must be remembered, was entered into by the parties in the realm of private law as a result of purely private commercial transaction. It is also to be remembered that in a private contract a party is free to choose the person and the subject matter of the transaction according to its own free will. No restriction or fetter could be imposed on either of the parties to the manner, mode and the nature of the agreement that they choose to enter into. But the law applicable would be different when such an agreement is entered into in the realm of public law.

69. The decisions that the learned counsel relied upon on this issue in support of his aforesaid submission relate to the contracts in the realm of public law. The case of Srilekah Vidyarthi (Supra) is a case on point in hand. In that case the Supreme Court held that the expression `without assigning any cause' means without communicating any cause and that the said expression is not to be equated with `without existence of any cause' and that it only means the reason for which termination is made, need not be assigned or communicated to the other party. Another case in which the Supreme Court took similar view is the case of Liberty Oil Mills and others Vs. Union of India; wherein it was observed that the expression `without assigning any reason' implies that the decision has to be communicated but for the reasons for the decision have not to be stated. It was held that the reasons must exist otherwise, the decision would be arbitrary. The case of Liberty Oil Mills (supra) was considered and referred to by the Supreme Court along with other cases in the case of Srilekah Vidyarthi (Supra). But it is to be noted that in Srilekah Vidyarthi (Supra) the Supreme Court was also fully conscious of the difference between a contract between private parties and a contract to which the State is a party. It held "there is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions acts for public good, and in public interest". It further held in paragraph 17 thus: "*We are, therefore, unable to accept the arguments of the learned Additional Advocate General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the government excluding judicial review*." This decision, therefore, envisages that reasons are required to be recorded in a case where public element and the provisions of Article 14 of the Constitution may be attracted. In Lic Vs. Escorts Ltd., the Supreme Court held that the Life Insurance Corporation of India cannot be restrained from calling an extraordinary General Meeting of the company for moving a resolution nor it is bound to disclose the reasons for moving the resolution. In paragraph 102 of the judgment it is held that the court will not debate academic matters or concern itself with the intricacies of trade and commerce and that if the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Similar principle of law has also been laid down by the Supreme

Court in M/s. Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & Ors. And in Central Inland Water Transport Corporation Ltd. (supra). In M/s.Vijay Traders Vs. M/s. Bajaj Auto Limited, the Supreme Court has upheld a notice giving only 15 days time holding that period of 15 days cannot be said to be unreasonable for termination of distributorship.

70. In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reason with a reasonable period of notice in terms of such a clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

71. On an overall view of the entire matter, it appears to me that the present agreement was never intended to be permanent and that in respect of dealership sales agreements between private parties such agreements could never be held to be perpetual unless so intended by the parties and specifically stated in the agreement itself. On a reasonable construction of the agreement in hand I hold that either party to the agreement was entitled to terminate the contract without assigning any reason by giving 90 days notice or even without giving any notice upon the happening of an event. Termination without cause in common law is a valid power which the parties may give to themselves.

Whether the notice of termination is liable to be held as illegal and void as no cause exists for termination of dealership:

72. The counsel for the plaintiff submitted that the defendant issued a show cause notice dated 6.4.1991 spelling out various alleged breaches on the part of the plaintiff and calling upon the plaintiff to show cause why its dealership should not be cancelled. He also relied upon the averments made in the written statement that the agreement had been cancelled for valid and sufficient cause and not arbitrary or malafide reason. On the basis thereof, the learned counsel submitted that since the termination of the agreement was based upon the same grounds for which show cause notice was issued by the defendant the plaintiff is entitled to show that the said grounds are false, non-existent, irrelevant, malafide and if it is found by the court that it is in fact so, the termination notice is required to be set aside by this court.

73. The counsel for the defendant, on the other hand, submitted that no cause is required to be shown for terminating the dealership agreement when the defendant intended to take action under the provisions of Clause 21 which contains the expression "without assigning any cause". The counsel further submitted that the plaintiff has failed to lead any independent evidence to establish that the grounds on which show cause notice was issued by the defendant was false and baseless.

74. Since an extensive argument has been advanced on this aspect, I propose to deal with the same although in fact in the context of my findings and decision above it is not necessary to do so since the defendant is empowered to terminate the contract without assigning any reason under Clause 21 of the agreement which power has been invoked by the defendant in the present case. Let me, therefore,

look at the grounds cited in the show cause notice dated 6.4.1991 which was issued to the plaintiff by the defendant calling upon the plaintiff to show cause in respect of various allegations of irregularities committed by the plaintiff to examine whether they are false, irrelevant or non-existent as submitted on behalf of the plaintiff. It is to be noted that no reply was filed by the plaintiff to the aforesaid show cause notice in spite of the fact that the Supreme Court by its order dated 3.2.1992 in Special Leave Petition No. 837/1992 permitted the plaintiff to file the reply to the said show cause notice.

75. The first ground on which the aforesaid show cause notice was issued to the plaintiff relates to false reports of bookings, short-fall in deposit, delayed deposit of payments etc. Under the sales policy dated 7.11.1990, the dealers are required to accept bookings from customers by way of bank drafts in the name of Maruti Udyog Limited A/c. dealer's name and deposit the same with Bank of America. The plaintiff has accepted the payments, on his own admission, through cheques but the payments of the customers were not deposited with the defendant on day to day basis in the account of the defendant with the said Bank. There is yet another allegation in respect of the same that there was a short-fall to the extent of Rs. 7.81 Crores between the number of bookings reported by plaintiff as against the funds remitted by it to the Bank of America as found out during reconciliation on or about 22.2.1991. That there were inaccurate daily booking reports submitted by plaintiffs to the defendant reporting the number of bookings as 1229 as against only a figure of 490 is admitted by them. There was a further default and delay by plaintiff in depositing the admitted shortfall amount of Rs. 1.09 crores even in respect of the actual 490 bookings as reported by the plaintiff.

76. Sales Policy dated 7.11.1990 has been placed on record as Ex.D-1. The said policy lays down that a dealer is required to accept bookings from customers by way of deposit of a bank draft in the name of the defendant a/c. dealer name with Bank of America on a daily basis. There was no change of policy in that regard under the subsequent sales policy dated 1.1.1991 which is exhibited as Ex. PX-204 which was issued as a further clarification to sales policy dated 7.11.1990. That payment was received from customers by cheques instead of bank draft is admitted by PW-1. The fact that there was a short-fall of Rs. 7.81 crores upon reconciliation between the bookings reported and payments received from the Bank of America is also admitted by the plaintiff. Further, the plaintiff gave an explanation to the aforesaid it was a mistake as stated in their letter dated 11.3.1991 which was exhibited as Ex. D-35 in reply to defendant's letter dated 28.2.1991 which is Ex. DW1/X1. In respect of reported bookings of 1229 vehicles as against 490 actual bookings, it is stated by PW1, that the same was a mistake and an error on the part of the staff of the plaintiff. The defendant stated that the same could not be a case of error but is a clear case of false reporting so as to receive a higher quota of vehicles as stated in the show cause notice since the allocation of the vehicles depended upon the bookings and payments reported by the dealers.

77. However, it appears in the light of the aforesaid facts that there was, in fact, violation of the conditions of the sales policy of the defendant by the plaintiff. Besides reconciliation of accounts with the dealer based on statement of bank remittances from Bank of America admittedly is done once in a quarter as admitted by PW1 in his cross-examination. Apparently, during the course of such reconciliation the aforesaid infraction and/or violation was detected which was

subsequently on a representation by the plaintiff stated to be an error on the part of the staff. The explanation sought to be given by the plaintiff that delay in depositing the money of customers was because it was entitled to deposit the same within a period of 7 days, for which no evidence could be produced, cannot be held to be justified and proper in view of the fact that the sales policy categorically lays down that the deposit of the amount in respect of the bookings from customers should be deposited with the Bank of America by way of bank drafts in the name of the defendant on day to day basis.

78. In respect of the second part of the allegation as mentioned in Para 1 of the show cause notice, it appears, that the Income Tax Department informed the defendant that after income tax raid on the premises of plaintiff they found 2273 FDRs as against the reported figures of 3637 FDRs given by them to the defendant in their daily reports. The short-fall of 770 FDRs was sought to be explained as a clerical mistake. However, the plaintiff informed the defendant that some of such bookings were cancelled subsequently. Besides the sale policy dated 28.3.1990 which was marked Ex. D/34 provides that all the FDRs for booking of vehicles must be free from banker's lien/encumbrance. The Income Tax department in its letter dated 31.1.1991, which is Ex. D-3 brought to the notice of the defendant that about 500 FDRs of the plaintiff issued by Vyasa Bank were found by them. In the said letter it was informed that the bank's Manager, Shri Ram Gopal had confirmed in writing to the Income Tax Department that the bank had a charge/lien in the reported FDRs. The plaintiff however, sought to explain away the same under its letter dated 15.12.1990 which is marked Ex. P-114 that all the aforesaid FDRs are not in their possession and they cannot comment upon 90 FDRs which are still with the Income Tax Department. Plaintiff however, relies upon the certificate of Vyasa Bank which however, has not been produced in evidence and was marked only for the purpose of identification. Vyasa Bank admittedly is a tenant of the plaintiff and is also not a nationalized bank. The fact that about 500 bookings were made over a short period of one month only through Vyasa Bank itself raises doubt about the transactions. The plaintiff also produced some FDRs to show that the Bank had no lien on the said FDRs which would belie the allegation raised in the show cause. However, no evidence has been led to show that the said FDRs are the same as that of the FDRs referred to by the Income Tax Department.

79. Para 3 of the show cause notice relates to delay in payment of interest and/or in adjusting the same in the invoice. The sales policy of the defendant dated 7.11.1990 requires all dealers to pay interest to customers on their deposit after a period of 7 days from the date of booking till delivery and the amount of interest to be adjusted in their invoice. It was alleged that the directions in the said policy are being consistently violated by the plaintiff. In this connection, the defendant has cited the case of Ambience Chit Fund and their complaint dated 11.3.1993 which was exhibited in the suit as Ex. D-2. From the said complaint it appears that the interest payable to customer was not paid at the time of delivery of vehicle and not adjusted in their invoice. The aforesaid fact was explained by the plaintiff that the interest was paid to the customer on 6.8.1991. According to the terms of the Sale Policy of the defendant the interest was payable at the time of delivery of vehicle and handing over the invoice to the customer. In the instant case the plaintiff paid the interest after six months from the date of delivery of the vehicle and that also after long and protracted correspondence.

80. Similarly, in the case of Mr. R. N. Dhanda also, no interest was paid to him upon delivery of the vehicle and delivery of the invoice on 4.3.1991. On 11.3.1991 when said Mr. Dhanda visited the plaintiff, his original invoice was taken and destroyed and a fresh invoice dated 26.2.1991 marked Ex. P/116 was given to him along with interest calculated upto 26.2.1991 although the car was delivered to him on 4.3.1991. The plaintiff tried to explain the said violation by stating that the car was delivered to Mr. Dhanda on the basis of his authority letter Ex. P-117, wherein the authority was only for delivery of the car and not for payment of money. Such an explanation appears to be baseless and unacceptable and it appears that the plaintiff intentionally violated the terms of Sales Policy in order to make unwarranted gains out of such transaction.

81. Similarly, the allegations made in Para 4 of the show cause notice relate to cut off date. Mr. P. Nayyar's booking date was 11.5.1990, whereas cutoff date at the relevant time in October, 1990 was declared by the defendant as 3.5.1990. The plaintiff accepted payment from Mr. Nair on 6.10.1990. According to the defendant no dealer could accept any payment from the customer beyond the cutoff date, and therefore, the defendant alleged that the plaintiff accepted the payment from Mr. Nayyar on 6.10.1990 contravention of the Sales Policy of the defendant. However, it appears, that the customer was going out of station and he intimated the said fact to the plaintiff vide Ex. P-112, and therefore, the said amount was accepted. The said action in accepting the amount has also been explained by PW1 in his examination that he did so after contacting the Regional Manager. Since acceptance of the amount from Mr. Nayyar was at his request and after intimation to the Regional Manager, the same in my considered opinion, cannot be faulted.

82. Paragraph 5 of the show cause relates to failure to maintain reports properly. The Inspection reports proved as Ex. DW1/12 and Ex. DW1/11 outline certain violations in maintaining proper reports including furnishing false daily reports by the plaintiff. It is also alleged that payment and delivery registers were also not properly maintained. The plaintiff has explained the said lapses on its part by stating that the allegations are vague and that Mr. Suresh who was examined as DW2 did not specifically state in his deposition about the violations. Be that as it may, reports against the plaintiff about his non maintaining the official procedure and proper records do exist on record.

83. Another allegation levelled against the plaintiff in paragraph 6 of the show cause notice related to the plaintiff violating the instructions of the defendant for sending notice by registered post to all customers intimating them about the change in the purchase procedure. Admittedly, the said intimation was sent under certificate of posting, which proves violation of the instructions of the defendant, which was issued so as to enable the defendant and its dealers to prove service of letters on the customers.

84. The next allegation is in respect of charging higher price in respect of the Gypsy Pickup delivered to Mrs. A. Then Cho. Maruti's stockyard price for Gypsy Pickup at the relevant time of its delivery to Mrs. Then Cho was Rs. 1,52,894.00 but the customer was given a proforma invoice (Ex. P/122) showing price of Rs. 1,53,079.00 plus Rs. 1,000.00 as handling charge. According to the policy of the defendant, no dealer was authorised to charge any amount as handling charge. When the plaintiff was questioned about it, the same was explained as charge

towards purchase of accessories. Relating to price variation, the counsel for the plaintiff relied upon price list (Ex. P-120), which according to the counsel for the defendant relates to Delhi and is not relevant to show the stockyard price at Gurgaon. This allegation, therefore, appears to have strong basis.

85. Some other violations by the plaintiff have been outlined in paragraph 8 of the show cause notice. It appears that there were number of allegations against the plaintiff as is reflected from the aforesaid allegations listed in the show cause notice. Plaintiff did not submit any reply to the show cause notice as stated above instead of giving liberty by the Supreme Court to the plaintiff to file such a reply to the show cause notice. It is not necessary for the court to find out the veracity of each of the allegations made in the said show cause notice in the present suit. However, as detailed above some of the allegations at least, if not all are found to have strong basis and reasons and therefore, it cannot be said that they are totally non-existent and baseless. The parties were private parties dealing in the realm of private contract. Therefore, it is for the defendant to decide whether in view of such allegations and evidence against the defendant the agreement should not be terminated or not. It cannot be said that the allegations made in the show cause notice are no reasons at all or false and/or malafide. As a matter of fact the said grounds as delineated in the show cause notice are specific and definite reasons. However, in view of the specific provision in the agreement that the defendant could terminate the contract in accordance with clause 21 without assigning any reason, which according to the defendant was resorted to in the present case, this finding appears to be not very material for the purpose of answering issue No.1.

Was there malafide in the action of the defendant in terminating the agreement?

86. The counsel for the plaintiff also alleged malafide on the part of Mr. R. C. Bhargava, the Managing Director of the defendant. According to him said Shri R. C. Bhargava was very close to Mr. Raj Chopra who was the partner of Mr. Narender Anand, the Chairman and Managing Director of the plaintiff at the time when their earlier agreement was entered into in the year 1983 by the defendant with M/s. Competent Motors. It is alleged that subsequently, said Mr. Raj Chopra and PW1 fell out and as Mr. R. C. Bhargava had a very close intimate friendship with Mr. Raj Chopra, he was inimical to PW1 and therefore, the entire action of terminating the dealership agreement with the plaintiff was the handiwork of Shri R. C. Bhargava. He also submitted that an adverse inference should be drawn by the court for non-examination of said Shri R. C. Bhargava in the present suit. PW1, during the course of his examination has stated that he has a grievance only against Shri R. C. Bhargava and not against the defendant.

87. The defendant in its pleadings has categorically denied any malafide in the instant case. The defendant has further denied that said Shri R. C. Bhargava was in any manner inimically positioned against PW1.

88. The facts of the present case disclose that when disputes arose between PW1 & Shri Raj Chopra the defendant could have terminated the agreement and washed off its hands from dealing with both of them or even with PW1. But the defendant did not do so and in fact it entered into a separate fresh dealership license with the plaintiff on 15.1.1988. Therefore, the very fact of entering into a fresh dealership agreement with the plaintiff would prove and establish that there was no malafide on the part of the defendant as against PW1 at any point of time.

Besides, although malafide has been alleged against Mr. R. C. Bhargava, he has not been made a party in the present suit. It has been held that the person as against whom major grievance and personal allegation is made is always to be made a party. It is settled law that to prove malafide mere allegations are not enough and that higher proof is required and it is for the plaintiff to prove its case. In E. P. Royappa Vs. State of Tamil Nadu, the Supreme Court has held that the burden of establishing malafide is very heavy on the person who alleges it and the very seriousness of such allegations demands proof of a high order of credibility. The evidence on record has been carefully perused by me on this issue. There is no credible evidence available on record to come to a finding that there was any malafide in the impugned action. Rather the factors delineated above prove and establish that no case of malafide has been made out in this case. In my considered opinion no adverse inference can also be drawn for non-examination of Shri R. C. Bhargava in this case. Was there waiver on the part of the defendant?

89. The plaintiff has further alleged that because in 1994 there was an action plan issued by the defendant in pursuance of which the plaintiff made investment, the show cause notice issued by the defendant should be held to be deemed to have been waived by the defendant in view of investment made by plaintiff in pursuance of the said action plan. The said contention of the plaintiff however, is without any merit, inasmuch as, since the plaintiff, prior to introduction of the said action plan in 1994, approached this court and obtained an injunction in his favour the plaintiff continued to be a dealer under the defendant and, therefore, the defendant was obliged to treat it as a dealer and all schemes that were made applicable to other dealers were to be made also equally applicable to the plaintiff. Therefore, treating the plaintiff as a dealer and making various schemes applicable to it in view of the order of injunction passed by the court cannot be said to be an act of waiver on the part of the defendant, for it is held by the Supreme Court in the case of P. Dasa Muni Reddy Vs. P. Appa Rao; that any act done which is under the injunction of a court can never be deemed to be an act of waiver.

Is the conduct of the plaintiff in resorting to repeated litigation amounted to circumventing orders of the Supreme Court?

90. The defendant, on the other hand, laid much stress on the conduct of the plaintiff in approaching this court through the present suit with the clear intention of wriggling out of the directions passed by the Supreme Court in connection with the petition filed by the petitioner under section 20 of the Arbitration Act to the effect that "*the entire matter has to be decided finally without any interim order being passed*." According to the defendant any proceeding launched in order to by-pass/evade directions of a superior court is an abuse of the process of law as laid down in Advocate General, State of Bihar Vs. Madhya Pradesh Khair Industries; DDA Vs. Skipper Construction; Bloom Dekor Limited Vs. Arvind B. Seth & Ors. As discussed above, it appears that the Supreme Court passed an order that the entire matter has to be decided finally without any interim order being passed in connection with the proceeding initiated by the plaintiff under Section 20 which was subsequently withdrawn by the plaintiff after filing of the present suit wherein it was granted an interim injunction. Of course, in the present suit an additional issue has been raised i.e. validity of clause 21 of the agreement which was not raised in the petition filed under Section 20. In view of the order passed by the Supreme Court that no interim order shall be passed without

deciding the main matter, it appears that the present suit was filed although another petition was pending which act does not appear to be justifiable.

Whether the suit is barred under Order 2 Rule 2(3) and Order 23 Rule 1(3) of the Code of Civil Procedure:

91. Another contention raised by the defendant was that the present suit is barred under Order 2 Rule 2(3) of the Code of Civil Procedure and also under the provisions of Order 23 Rule 1(3). Under the provisions of Order 2 Rule 2(3) Civil Procedure Code it is provided that a person must sue for his entire claim and cause of action. If however, he relinquishes any part of the same he cannot file a second suit without seeking for and availing of leave of the court. In the present suit, according to the defendant the plaintiff filed the second application under Section 20 of the Arbitration Act challenging termination of the dealership without obtaining leave while withdrawing the petition filed under Section 20 of the Arbitration Act seeking for appointment of an arbitrator and referring the disputes between the parties to an arbitrator in terms of the arbitration agreement. I have considered the submission and find the same to be without merit. The plaintiff filed the earlier petition under Section 20 seeking for reference of the disputes to an arbitrator. In the said petition he did not seek to challenge the validity of clause 21 of the agreement, for the purpose of filing the said petition was to get the entire dispute decided by the Arbitrator. But the issue with regard to challenge to the validity of a clause of the agreement could have been done only through the procedure of filing a civil suit in the present case and it is only the court who could decide the said issue, if and when raised. The plaintiff, therefore, was not entitled to sue for the said issue in the said petition and therefore, entitled to raise the same through the present suit.

92. The second submission in respect of the bar as provided for under the provisions of Order 23 Rule 1(3) CPC, it appears that the plaintiff withdrew the second petition under Section 20 of the Code of Civil Procedure without the leave of the Court to institute a fresh action. The plaintiff instituted the present suit on 16.11.1994 whereas the application to withdraw the petition under Section 20 was filed on 15.11.1994 which was permitted to be withdrawn without any leave to institute a fresh suit on 22.11.1994. Therefore, the date on which the earlier suit was withdrawn the present suit was in fact pending in the court and therefore, there was no occasion for seeking leave to file a fresh action. Besides issues in both the proceedings were also not the same, there being an additional issue namely – challenge to the validity of clause 21 of the Arbitration Agreement. Therefore, the bar as contemplated under Order 23 Rule (1) is not applicable to the facts of the present suit. Whether Section 39 of the Contract Act is at all applicable in the facts of the present suit?

93. The counsel for the plaintiff further submitted that it is only in the case of substantial failure on the part of a party going to the root of the contract that the defendant would be entitled to terminate the contract under Section 39 of the Contract Act. The counsel placed before me the provisions of Section 39 of the Contract Act and on the basis thereof submitted that the expression occurring in the aforesaid provision "failed to perform in its entirety" means a substantial failure going to the root of the contract.

94. The counsel appearing for the defendant, on the other hand, submitted that the aforesaid submission of the learned counsel is fallacious and erroneous. Section 39 of the Indian Contract Act provides that if a person indulges in any fundamental breach of the contract and the other party does not acquiesce to the breach, the person not breaching is not bound under the liabilities of the contract. It is already held by me in the foregoing paragraphs that either of the parties could terminate agreement in terms of clause 21 and 22 of the agreement. I have also found the said clause 21 to be valid. Accordingly, in my considered opinion, the provisions of Section 39 of the Indian Contract Act have no application at all to the facts and circumstances of the present case.

95. In view of the aforesaid discussions I hold that the agreement in question was legally and validly terminated by the defendant. Accordingly, the Issue No. 1 is decided against the plaintiff and in favour of the defendant.

96. The next two issues were argued at length and are important and therefore, I proceed to answer the said issues No. 2 & 3 as well.

Issues No. 2 & 3:

97. The aforesaid 2 issues being inter-connected they are taken up together for consideration. The counsel appearing for the plaintiff submitted that the plaintiff is entitled to seek for specific performance of the contract and that he is also entitled to the injunction as prayed for in the suit. The counsel relied upon the provisions of Section 10, 38 and also Section 42 of the Specific Relief Act in support of his submission. According to the learned counsel the compensation in money in the instant case would not be an adequate relief nor does there exist any standard for ascertaining the actual damages which would be caused and are likely to be caused to the plaintiff if the defendant is allowed to get away with the termination of the dealership agreement. Counsel submitted that Section 10 specifically provides that unless and until the contrary is proved the court would presume that contract to transfer immovable property cannot be adequately relieved by compensation in money, when it consists of goods which are not easily available in the market. It was submitted that the plaintiff had incurred huge investment and had put in its labour, expertise, manufacturing skill in sale promotion of the vehicles manufactured by the defendant. Accordingly, if the injunction is not granted to the plaintiff the plaintiff would be put out of business and would face utter financial ruin.

98. On the other hand, the counsel appearing for the defendant submitted that the present agreement cannot be enforced under the provisions of Specific Relief Act. In this connection, the counsel drew my attention to the provisions of Section 14 of the Specific Relief Act and on the basis thereof submitted that the contract which is terminable would not be enforceable under Section 14(1)I and accordingly the question of enforcement of determinable contract under Section 10 of the Act does not at all arise. It was further submitted that a contract which could be compensated for damages in terms of money cannot be enforced. The counsel also submitted that in a contract where no specific performance can be granted the grant of declaration and injunction as prayed for is not sustainable.

99. Section 42 of the Specific Relief Act provides that notwithstanding anything contained in clause I of Section 41, where a contract comprises of the affirmative

agreement to do a certain act, coupled with a negative agreement express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

100. In the present agreement, admittedly, there is no negative covenant and therefore, ex-facie the provisions of Section 42 of the Specific Relief Act do not apply to the facts and circumstances of the present case and reliance on the same by the learned counsel for the plaintiff, in my considered opinion, is misconceived. The provisions of Section 14 of the Specific Relief Act appear to be relevant. The provisions of Section 14(1)(a) of the Specific Relief Act require that if a breach of contract can be compensated on payment of damages the contract cannot be specifically enforced. Sub-section (b) thereof provides that where enforceability of the contract depends upon the personal qualifications or volition of the parties, the court cannot enforce specific performance of its material terms. Sub-section (c) appears to be very material and relevant on the facts and circumstances of the present case. The said provision requires that determinable contracts cannot be enforced by decree of specific performance. The provisions of sub- section (d) state that a contract, performance of which involves the performance of a continuous duty which the court cannot supervise cannot be enforced by such a decree. On a discussion of the material terms of the clauses of the agreement it has already been held by me that the present agreement is not permanent and indeterminable in nature and therefore, the present agreement is in its very nature determinable. Therefore, to the facts and circumstances of the case the provisions of Section 14(1)(c) appear to be applicable. Besides compensation in money in the present case could be an adequate relief in the nature of the present case and therefore, the present contract, in my considered opinion, cannot be specifically enforced.

101. In this context reference may also be made to the "Law of Contract" by G. S. Treitel, 15th Edition at page 762. It states that if the party against whom specific performance is sought is entitled to terminate the contract, the order will be refused as the defendant could render it nugatory by exercising his power to terminate. This principle applies whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance.

102. In Pollock & Mulla's Contract and Specific Relief Act (11th Edition, Vol. 2) page 1271, it is stated that where distributorship contract could be terminated by the Indian Oil Corporation in accordance with the terms of the agreement and the arbitrator finding that there was no valid termination ordered the breach of the contract to be remedied by restoration of the distributorship, the Supreme Court held that the relief of restoration of the distributorship even on the finding that the breach was committed by the Corporation was contrary to the mandate of Section 14(1) of the Specific Relief Act since clause I thereof specifies that a contract which is in its nature determinable cannot be specifically enforced. The decision of the Supreme Court referred to therein is discussed below.

103. Chitty on Contract (27th Edn. Vol.I) has stated that if a contract is expressed to be revocable by the party against whom an order of specific performance is sought, the order will be refused, and on this ground a contract to enter into a partnership at will is not specifically enforceable.

104. We may, therefore, refer to the landmark decision of the Supreme Court in M/s. Indian Oil Corporation Ltd. Vs. Amritsar Gas Corporation. In the said decision the Supreme Court has held in the following manner:

"Shri Salve is, therefore, right in contending that the further questions of public law based on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us. .... Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is `a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause I clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so, granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to `the law governing such cases.' The grant of this relief in the award cannot, therefore, be sustained.... .... In such a situation, the Agreement being revocable by either party in accordance with clause 28 by giving thirty days' notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent No.1 is, therefore, entitled to compensation being the loss of earnings for the notice period of third days instead of restoration of the distributorship."

105. In the light of the aforesaid decisions it is to be held that a contract which is in its nature determinable can never be enforced. In the present case also the agreement having been held by me to be determinable also cannot be enforced being an agreement covered by Section 14(1)I of the Contract Act. Therefore, since I have held that no specific performance of the agreement in question being permissible no declaration and injunction as prayed for by the plaintiff in the present suit could be granted to the plaintiff. The aforesaid two issues are, therefore, held against the plaintiff and in favour of the defendant.

106. The aforesaid three issues having been held against the plaintiff and in favour of the defendant the suit filed by the plaintiff stands dismissed with costs.

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Annexure – 15.1

IN THE HIGH COURT OF DELHI AT NEW DELHI

UNI Construction vs IRCON International Ltd., on 16.07.2020

O.M.P.(I)(COMM) 159/2020 & I.A. 4824/2020

UNI Construction ..... Petitioner
Through: Mr. Abhay Anturkar and
Mr. Abhikalp Pratap Singh, Advs.

Versus

IRCON International Limited ……..... Respondent
Through: Mr. Suman K. Doval, Adv.

CORAM: HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT
(ORAL) (Video-Conferencing)

1. The prayer clause, in this petition, preferred by the petitioner, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), reads thus:

"In the light of the facts and circumstances mentioned hereinabove, it is most respectfully prayed that this Hon'ble Court may be pleased to:

a) Pass an order/direction restraining the Respondent from invoking the bank guarantee of Rs. 7,00,000/- (Rs. Seven Lakh only);

b) Pass an order/direction restraining the Respondent from blocking the due payments of the Petitioner and awarding the balance contract out of Rs. 4,70,25,482 (Rupees Four Crore Seventy Lakhs Twenty Five Thousand Four Hundred Eighty Two only) to any other contractor;

c) Pass such other and further order or direction, as may be deemed fit and proper."

2. On 24th October, 2017, a Notice Inviting Tenders (NIT) was issued by the respondent, for "construction of depot building, service building, station building and residential building at Saphale, Palghar, Maharashtra of VAITARANA-SACHIN section in connection with construction of Western dedicated freight corridor Phase-II". The petitioner applied, in response to the aforesaid NIT on 20th November, 2017. The financial bid of the petitioner was opened on 7th December, 2017 and letter of acceptance, awarding the work contract to the petitioner, was issued on 18th January, 2018, by the respondent.

3. Clause 8.0 of the General Conditions of Contract (GCC), between the petitioner and the respondent, dealt with performance security and retention money. Sub-clauses 8.2 and 8.4(a), thereunder, read thus:

*"**8.2 Performance Security for Contracts valuing more than Rs. 1.00 Crore:***

(i) The successful bidder shall submit a Performance Guarantee (PG) in the form of irrevocable bank guarantee on the proforma annexed as Annexure-11 from any Scheduled Bank for an amount of 5% (Five percent) of the contract value. The value of PG to be submitted by the Contractor will not change for variation upto 25% (either increase or decrease). In case during the course of execution, value of contract increases by more than 25% of the original contract value, an additional Performance Guarantee amounting to 5% (five percent) for the excess value over the original contract value should be deposited by the contractor. Alternatively, the performance security can be furnished by the Contractor in the form of Fixed Deposit Receipt (FDR) from a scheduled bank endorsed in favour of the Employer.

(ii) Performance Guarantee (PG) shall be submitted by the successful bidder after the letter of acceptance has been issued, but before signing of the agreement. The agreement should normally be signed within 28 days after the issue of LOA and the PG shall also be submitted within this time limit. This guarantee shall be initially valid upto the stipulated date of completion plus 60 days beyond that. In case, the time for completion of work gets extended; the contract or shall get the validity of PG extended to cover such extended time for completion of work plus 60 days.

(iii) No payment under the contract shall be made to the Contractor before receipt of performance security.

(iv) Failure of the successful tenderer to furnish the required performance security shall be a ground for the annulment of the award of the Contract and forfeiture of the Earnest Money Deposit.

8.4 Release of Performance Security:

(a) Performance Security shall be returned to the Contractor, subject to the issue of Completion Certificate by the Engineer in accordance with clause 65 of these conditions. This shall not relieve the Contractor from his obligations and liabilities, to make good any failures, defects, imperfections, shrinkages, or faults that may be detected during the defect period specified in the Contract.

4. The petition avers that, as required by the aforesaid stipulation in the GCC, two bank guarantees, covering 50% of the contract value, totaling Rs. 23,51,300/- , were submitted by the petitioner. This is factually inaccurate, as the petitioner had furnished two Term Deposits, for Rs. 16,51,300/- and Rs. 7,00,000/- respectively.

5. The petition alleges that, though the date of completion of the work, as per the contract, was 15th April, 2019, the petitioner was hindered from doing so, owing to delay, on the part of the respondent, in providing the requisite drawings. This, it is further averred, resulted in extension of the date of completion of the contract, by the respondent, to 30th June, 2020. Prior to the said date, the COVID-2019 pandemic intervened, and the country faced lockdown, from the last week of March, 2020 onwards. During the period of lockdown, avers the petition,

the workforce of the petitioner returned to its villages and the contract site was declared as a containment zone in April/May, 2020. These circumstances, asserts the petition, constituted "*force majeure*" which fact was communicated by the petitioner to the respondent on 7th April, 2020.

6. On 16th June, 2020, the respondent addressed a seven days' notice to the petitioner, invoking Clause 50 of the GCC, which sets out the circumstances in which the contract between the petitioner and the respondent could be terminated. Subject to existence of any of the said circumstances, the clause required the respondent to serve, on the petitioner, a notice of seven days, allowing the petitioner to make good its default, whereafter the respondent was entitled to terminate the contract on 48 hours' notice.

7. The petitioner responded, to the aforesaid notice, on 19th June, 2020, relying on Clause 71 of the GCC, which was the "*force majeure*" clause.

8. Following thereupon, the petitioner has moved the present petition, under Section 9 of the 1996 Act, stating that the petitioner apprehended invocation, by the respondent, of the bank guarantee (actually the term deposit) of Rs. 7 lakhs furnished by the petitioner.

9. The petition draws attention to the fact that Clause 73 of the GCC, between the petitioner and the respondent, provided for resolution of disputes by arbitration.

10. On the last date of hearing, Mr. Suman Doval, learned counsel for respondent, submitted that this petition was liable to be dismissed on the ground of suppression of fact, inasmuch as the petitioner has failed to disclose the fact that, prior to the completion of work, the petitioner had, *suo-motu* and without any notice to the respondent, encashed the term deposit of Rs. 16,51,300/-, in stark violation of the terms of the GCC, and had concealed the said fact from this Court in the present petition.

11. Mr. Anturkar, learned counsel for the petitioner, had, thereupon, sought time to take instructions and file an affidavit in this regard.

12. An affidavit has, thereafter, been filed by the petitioner, in which it acknowledged thus:

> *"I. That I had liquidated the Bank Guarantee of Rs. 16,51,300 because at that time I was handling three contracts for the Respondent Company and the Respondent were, holding bills for all three contracts. Due to this I was not in a position of clearing the bill of the vendors and they were creating pressure on me.*
>
> *II. Due to this urgent need of funds, I requested the Respondent Company to clear the payment for work done but they did not clear the bill. I called them daily, sent messages and emails to clear my bills but they did not clear the bills. Due to the pressure created by vendors and unresponsive attitude of the Respondent Company in respect of clearance of payment of work done, I was forced to liquidate the FD to clear payments of the vendors."*

13. It is clear that there is a conscious suppression, from the petition, of the fact that, even prior to the completion of work and in obvious violation of the terms of the contract, the term deposit of Rs. 16,51,300/- which covered almost 75% of the performance security required to be provided by the petitioner in terms of Clause 8.1 of the GCC, had been liquidated by the petitioner. This fact has studiedly been suppressed in the petition, which, nonchalantly, refers only to the term deposit of Rs. 7 lakhs.

14. Even in the affidavit, filed in terms of the directions of this Court, dated 6th July, 2020, the date of encashment of the aforesaid term deposit of Rs. 16,51,300/-, is not forthcoming.

15. Mr. Doval submits that his client had come to know of his clandestine act, on the part of the petitioner, only when on 29th June, 2020, the respondent had approached the Bank to encash the term deposits, upon which the Bank informed the respondent that the term deposit of Rs. 16,51,300/- stood encashed, by the petitioner, on 22nd August, 2019.

16. Interlocutory relief, be it relatable to Section 9 of the 1996 Act, Order XXXIX of the Code of Civil Procedure, 1908, or for that matter, Article 226 of the Constitution of India, is fundamentally discretionary in nature. Invocation of the discretionary jurisdiction of a court necessarily requires, as a condition precedent, the applicant invoking the jurisdiction to be candid, and to make a clean breast of its affairs; to approach the Court, as it were, "with clean hands". Suppression of material facts, from the Court, has, classically, been held to constitute fraud, in this oft-quoted aphorism from *S. P. Chengalvaraya Naidu v. Jagannath*:

> *"A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."*

Suppression of material fact, and invocation of the discretionary and equitable jurisdiction of the court, are strange bedfellows.

17. In view thereof, I had queried of Mr. Anturkar, learned counsel for the petitioner, as to whether his client sought to press this petition, or would take his chance before the arbitrator. Mr. Anturkar, on instructions, submits that his client desires that an order on merits be passed by this Court, and that his client was unwilling to withdraw the petition.

18. The facts, stated hereinabove are, even by themselves, sufficient to disentitle the petitioner to any discretionary relief, under Section 9 of the 1996 Act.

19. That apart, having unjustly, and in stark violation of the terms of the contract with the respondent, encashed the term deposit of Rs. 16,51,300/-, even before the work had been completed, the petitioner cannot seek an injunction, against the respondent, against encashment of the sole remaining term deposit receipt of Rs. 7 lakhs.

20. The circumstances in which interim relief can be granted, under Section 9 of the 1996 Act, are, it is trite, analogous to those which applies to under Order XXXIX of the Code of Civil Procedure, 1908 ("the CPC"). Relief in such case can be granted only if the considerations of a *prima facie* case, balance of convenience, and irreparable loss, are cumulatively made out.

21. Irrespective of the question of the *prima facie* merits of the case of the petitioner against the respondent – which appropriately would have to be examined by the arbitrator – it cannot be said that the considerations of balance of convenience and irreparable loss would justify injuncting the respondent, at this stage, from encashing the term deposit of Rs. 7 lakhs, furnished by the petitioner as security, pending performance of the contract.

22. On a conspectus of the facts, I am of the opinion that the petitioner is not entitled to any relief.

23. The petition is, accordingly, dismissed, with no order as to costs.

24. I.A. 4824/2020 also stands disposed of.

……J.
C. HARI SHANKAR

JULY 16, 2020

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