

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on April 07, 2015

Judgment delivered on April 15, 2015

+ **O.M.P. 122/2007**

UNION OF INDIA (MINISTRY OF RAILWAYS) & ORS.

.....Petitioners

Through: Mr.A.K.Singh, Adv.

versus

M/S J. SONS ENGINEERING CORPORATION LTD. AND ANR.

....Respondents

Through: Mr.Raman Kapoor, Sr. Adv.
with Mr.Aviral Tiwari, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this petition is to the Award dated November 28, 2006 passed by the learned Sole Arbitrator, whereby the learned Arbitrator has allowed the claim Nos.1, 2, 3, 5, 8((b) and 9 of the respondent for an amount of Rs.10,37,000/- with 12% simple interest from the date of the award till the date of payment to the respondent. Simultaneously, the learned Arbitrator rejected the counterclaim of the petitioners for Rs.37,62,350/-.

2. Some of the facts necessary for the adjudication of this petition are that in the year 2002-03 the petitioners herein floated a tender for supply

and fabrication of steel girders for new bridge of 10x18.3 meters span over Dhakai river in Bihar. The respondent submitted its bid on February 17, 2003 which was accepted by the petitioners vide letter dated June 10, 2003. The letter dated June 10, 2003 stipulated that the total value of the work was Rs.78,70,150/-. The period of completion was 6 months from the date of issue of the letter i.e. June 10, 2003 with a further stipulation that the work was to start within ten days of the issuance of the said letter. The respondent acknowledged the letter dated June 10, 2003 of the petitioners. It was the case of the petitioners that vide letter dated July 02, 2003 it had requested the respondent to collect the drawings for the work from the office of the petitioner No.5 at Bhagalpur Bihar. However, none from the office of the respondent had come. On July 08, 2003 the petitioner No.5 sent the drawings to the respondent, which were in all six in numbers. It was the case of the petitioners that petitioner No.5 had received a letter dated July 12, 2003 wherein the respondent referring to the letter of the petitioners dated July 02, 2003 had shown its inability to send the representative to collect the drawings. The respondent called upon the petitioner No.5 to send the drawings immediately. It appears that no response was sent to this letter by the petitioner no.5 informing the respondent that the drawings had already been sent. Be that as it may, on August 25, 2003, the petitioner No.5 handed over the drawings to the

representative of respondent.

3. It was the case of the petitioners that the respondent did not take any effective steps towards commencement of the work. According to the petitioners, it was after about three months from the stipulated date of the commencement of work, vide its letter dated September 26, 2003 the respondent had proposed the name of RDSO for doing inspection of the girders in terms of welded bridge code, para 27. The respondent vide letter dated November 25, 2003 informed the petitioner No.5 about its interaction with the officers of the RDSO and the response received by it from the RDSO office that the RDSO would not entertain any proposal directly from the respondent and the same should be routed through the Railways for conducting inspection of welded girder indicating the details of the agreement, acceptance of the contract awarded to the respondent. The respondent vide the said letter called upon the petitioner No.5 to send the proposal for conducting inspection of the welded girders along with QAP prepared by the respondent to RDSO to ensure that the proposal is accepted and with a further request to call upon the RDSO to undertake the inspection of first stage i.e. jigs and fixtures and raw material so that actual fabrication may be taken up early. It may be mentioned here that the respondent had stated in the said letter that it is ready for first stage inspection. Simultaneously the respondent for the

following reasons: (i) late supply of drawings received by them on August 25, 2003; (ii) engaging of the RDSO for inspection of the girders is yet in progress; (iii) agreement of the work is also yet to be signed, had requested the petitioner No.5 for extending the date of completion of work by 5 months i.e. upto May 10, 2004 without any penalty with original conditions of contract.

4. On December 16, 2003 the petitioners sent the proposal sent by the respondent to the RDSO. It is also noted that the petitioner No.5 vide its letter dated December 17, 2003 had extended the period for completion of the work to May 10, 2004 on the same rates, terms and conditions of the contract with a clear stipulation that no damage, compensation or escalation shall be payable for the extension.

5. It appears that on March 24, 2003 a communication was sent by the petitioners to the RDSO and the same is clear from the letter dated March 25, 2004 addressed to the respondent whereby the petitioners had called upon the respondent to submit a fresh QAP which may be sent to the RDSO for further approval. Be it noted that the petitioner No.5 had annexed the copy of the letter written by the petitioners dated March 24, 2004 to the RDSO. As the petitioner No.5 did not receive the fresh QAP, the petitioner No.5 wrote a letter dated April 05, 2004 to the respondent calling upon it to submit a fresh QAP. Before the respondent could act

upon the request of petitioner No. 5, it was the case of the respondent that it was in receipt of a notice dated April 13, 2004 of seven days under clause 61(1) of the GCC calling upon it to make good the default and the deficiencies and progress with the work to the entire satisfaction of the engineer and on failure to do so the petitioners shall be entitled after giving 48 hours notice to rescind the contract as a whole or in part and to adopt either or both of the courses. The respondent vide its letter dated April 20, 2004 had called upon the petitioner No.5 to send to it the objections/comments received from the RDSO for rectifying the objections. Meaningfully read, it appears that till notice dated April 13, 2004 was issued the petitioner had not even informed the respondent of the objections received from the RDSO on the QAP submitted by the respondent.

6. Further, it is noted that the petitioners in supersession to the notice dated April 13, 2004 issued a notice dated April 26, 2004 under clause 62 granting seven days time to the respondent calling upon it to make good the progress in the work failing which action would be taken to terminate the contract at its risk and costs. The reply to the said notice was sent by the respondent highlighting the following aspects:-

(i) Delay in issue of drawings

(ii) Non-finalization of work vis-a-vis inspection by RDSO

(iii) Late finalization of contract agreement on February 17, 2004

whereas the acceptance has been issued on June 10, 2003

(iv) Abnormal rise in prices of steel

7. On May 07, 2004 the petitioner No.5 observing that the respondent has not taken any action to commence the work/show adequate progress of the work had given a 48 hours notice, on expiry of which the contract was to stand rescinded at the risk and cost of respondent. Suffice to state, vide letter dated May 10, 2004 the petitioners rescinded the contract under clause 62 of the general conditions of the contract. Even though the respondent vide its letter dated May 12, 2004 had called upon the petitioners to withdraw the notices dated April 26, 2004 and May 07, 2004 and also vide letter dated May 21, 2004, called upon the petitioners to withdraw the letter dated May 10, 2004, the letters were not withdrawn by the petitioners, the disputes arose which resulted in the appointment of the learned Sole Arbitrator.

8. The respondent No.1 had filed the following claims:-

“(1) Claim no.1- Claim for declaring the letter no. WT/388/1257 DT. 10.05.2004 of Dy. Chief Engineer/Xens/Eastern Railway, Bhagalpur, vide which the Above mentioned Contract Agreement has been rescinded by him for and on behalf of the President of India, illegal.

(2) Claim no.2 for payment of Rs.10,00,000.00 for expenditure incurred on additional deployment of resources for completion of the work.

(3) Claim no.3- for payment of Rs.7,87,000.00 for compensation for loss of profit suffered by the Claimant on account of illegal rescinding of the contract agreement by preventing the Claimant from doing the work.

(4) Claim no.4- for payment of Rs.7,08,000.00 for expenditure incurred by the Claimant on monthly overhead/establishment Charges.

(5) Claim no.5- for refund of security FDR of Rs.50,000.00 deposit and interest thereon.

(6) Claim no.6- for refund of any recovery, if affected by Respondents from the Claimant either from this contract Agreement or from any dues of the other contract agreements.

(7) Claim no.7- Claim on account of any other relief which may accrue during the period the claims are settled.

(8) Claim no.8 for Payment Of Interest As Per Section 31 Sub-Section 7(a) And 7(b) of the Arbitration And Conciliation Act, 1996.

(9) Claim No.9 for payment of Rs.1,00,000.00 for Cost Of Arbitration As Per Section 31, Sub-Section 8 of Arbitration & Conciliation Act, 1996.”

9. Simultaneously, the petitioners herein filed the following

counterclaims:-

“(1) Railways dues from Claimant towards risk and cost Rs.37,62,350.00.

(2) Claimants dues towards initial security Rs.NIL (Forfeited). Since the Contract was terminated on risk and cost with forfeiture of initial security money of Rs.50,000.00.

(3) Therefore, Railways Counter Claims stands for Rs.37,62,350.00.”

10. The learned Arbitrator framed six issues.

11. On issue No.1, which relates to the respondent's failure to get QAP approved from the RDSO upto May 10, 2004. The learned Arbitrator was of the following view:-

“On appreciating the matter, I find that the fabrication of the Girders was to be done as per RDSO drawings. It was to conform to IRS Code of Welded bridges. For maintaining and ensuring quality, the RDSO was required to do inspection at various stages. As per conditions of contract, the Respondents could have entrusted this work to RITES. But in this contract this work was given to RDSO. Obviously, the Railways should have been concerned about the QAP for the safety of the running trains. But it appears that no efforts were made by the Respondents to prepare the QAP in consultation with the RDSO although admittedly as per the Respondents own admission the

Claimant was ready with jigs, fixtures and raw material inspection on or before 16.12.2003. It cannot be denied that Quality Assurance Plan for inspection, testing and approval were the domain of the Employer for maintaining the Quality of the work. The Respondents in this case did not rise to the occasion and failed to implement the QAP for inspection & testing by RDSO as per contract conditions and Code for Welded Bridges.

It was for the Respondents to ensure the quality of the work by arranging stage-wise inspection and testing by RDSO for which RDSO had to approve the action plan. The Respondents failed to prepare this plan which should have been their priority. The Contractor could not have started the fabrication of the girders without inspection of the preparatory work and 1st stage inspection by RDSO. He prepared himself and offered for such inspection but the Respondents could not arrange this inspection as RDSO did not oblige the Respondents to inspect the work done by the Contractor without 1st approving the QAP. No further work of fabrication by the Contractor was possible without 1st stage inspection by RDSO. No fault can, therefore, be found with the Claimant for this.”

12. Based on the finding on issue No.1, it was the finding of the learned Arbitrator that the petitioners were not justified in cancelling the

contract agreement on May 10, 2004. In fact, the learned Sole Arbitrator on issue No.3 had also concluded that the cancellation of contract dated May 10, 2004 also suffered from procedural impropriety inasmuch as the show cause notice dated May 07, 2004 having received by the respondent on May 11, 2004, whereas the contract was cancelled on May 10, 2004, the petitioners did not allow the respondent to even reply to the show cause notice before issuing the impugned order dated May 10, 2004. Hence, there was a breach of procedure.

13. Based on the aforesaid conclusion, the learned Arbitrator allowed the claim No. 2 which is relatable to issue No. 4(b), which was a claim for an amount of Rs. 10 lakhs for expenditure incurred on additional deployment of resources for completion of work. The learned Arbitrator was of the view that the respondent had definitely done preparatory work and was ready for first day inspection i.e. jigs, fixtures and raw materials as is evident from the petitioners' letters dated December 16, 2003 and March 24, 2004. According to him, as it has been held by him in the award on claim No. 1 that the petitioners were never justified in cancelling the contract agreement of the respondent and by drawing an inference that the respondent may have made investments, and it must have suffered loss in non utilization of these items had granted Rs. 2 lakhs, and against claim No. 3, the learned Arbitrator had contemplated

to earn 15% profit but had claimed a loss of profit of 10% only and the contract agreement was for an amount of Rs.78,70,150/- and the petitioners were not justified in cancelling the contract, he had awarded 10% of the total contract value as against the loss of profit i.e. Rs.7,87,000/-.

14. Similarly, the claim No. 5 which relates to refund of security of Rs. 50,000/-, the Arbitrator on a finding that the cancellation of the contract has been held to be illegal, has granted the claim of Rs. 50,000/-.

15. Insofar as the counter claim is concerned, the Arbitrator was of the following view:

“In the evidence, to substantiate their counter claim, the respondents have not filed the details of actual cost of extra cost incurred by them in getting the balance work done through third agency, the copy of such contract agreement, comparative statement and certificate of the Engineer-in-Chief certifying the extra cost has also not been filed before me. The counter claim no. 1 is not sustainable on this ground alone. Moreover, it has already been concluded hereinabove that the contract failed only because the respondents could not fulfil their precedent obligations and they cancelled the contract agreement in an unjustified way. The impugned order dated 10.05.2004 cancelling the contract also suffers from procedural impropriety.

As per this, the counter claim no. 1 is also not sustained in view of the law as laid down by the Apex Court in the case of K.C. Skaria Supra.

The respondents have no reason to recover any amount from the claimant, as risk and cost expenses or any sort of damages from the claimant in this respect. The claimant's claim No. 6 is, therefore, sustained and the respondents counter claim No. 1 for the recovery of Rs.37,62,350.00 is rejected.

I B. Lal, Sole Arbitrator, therefore, direct the respondents (Union of India & Others) that they are not entitled to recover Rs.37,62,350.00 or any other amount as risk and cost expenses or any sort of damages from the claimant in this respect of this contract”.

16. Mr. A.K. Singh, learned counsel appearing for the petitioners, has after taking me through the facts as noted above, would submit that the claims raised by the respondents herein were not arbitrable being “excepted matters” in view of clauses 62, 63 and 64(i) of the General Conditions of Contract. Apart from that, he would state that the finding of the learned Arbitrator is totally perverse. According to him, it was the respondent, who had failed to discharge its obligations in getting the approval from RDSO. In this regard, he would state that even though, the contract had commenced from June 10, 2003, it was only on September

26, 2003 that the respondent had proposed to engage RDSO for doing the inspection of the girders in terms of the welded bridge code, para 27. Further, he would state that the revised QAP which was supposed to be prepared by the respondent has not been prepared despite various communications from petitioner No. 5. He would justify the termination of the contract. He would state that there was no illegality in termination of the contract. He would state, instead of entertaining the claims of the respondent, the learned Arbitrator should have granted the counter claim of the petitioners. He would rely upon the following judgments of this Court:

1. NTPC Ltd. Vs. Deconar Services Pvt. Ltd., 2010 (5) AD (Delhi) 698

2. Videsh Samachar Nigam Ltd. Vs. Ess Kay Furnishers, 2009 (6) R.A.J. 1

17. On the other hand, Mr. Raman Kapoor, learned Senior Counsel appearing for the respondent would at the outset, submit, by drawing my attention to the scope of judicial review in a matter of this nature where objections have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Act, in short) by referring to the judgment of this Court reported as ***(2004) 3 Arb.L.R. 548 (Delhi) (DB), Delhi Development Authority Vs. Bhagat Construction Co. (P) Ltd. and Anr.,***

to contend that it is a settled position of law that on a decision rendered by the Arbitrator, this Court will not substitute its own view even if this Court comes to a different conclusion unless the decision of the Arbitrator is manifestly perverse or has been arrived at on the basis of the wrong application of law. He would also submit that the petitioners are estopped/precluded from taking a plea of “excepted matters” in terms of clause 62, 63 and 64 of the General Conditions of Contract as no such plea was ever advanced before the Arbitrator. He would state that the appropriate remedy for the petitioners was to file an application under Section 16 of the Act. In the absence of any such application, the Arbitrator proceeded on a premise that he had the jurisdiction to decide the claims. That apart, he would also rely upon the judgment of the Supreme Court reported as **2008 (12) SCALE, Bharat Sanchar Nigam Ltd. and Anr. Vs. Motorola India Pvt. Ltd.**, wherein, according to him, the Supreme Court has held, a stipulation of a similar nature as existed in clause 63 of the General Conditions of the Contract, whereby any dispute decided by the Railways is final and cannot be challenged, has been held to be in violation of Section 28 and under Section 74 of the Indian Contract Act. In other words, it is his case that clause 63 which stipulates that the matters which have been decided by the Railways on the contractor’s representation relating to clauses 8, 18, 22(5), 39, 43(2),

45(A), 55, 55A(5), 57, 57A, 61(1), 61(2) and 62(I) to (XIII) (B) of General Conditions of Contract would be deemed to be 'excepted matters' which will stand specifically excluded from the purview of the arbitration clause and could not have been referred to arbitration, as void. He has drawn my attention to the reply filed by the petitioners before the Arbitrator wherein, according to him, despite taking an objection, such a plea was not urged before the learned Arbitrator. In fact, no issue related to this objection was framed. On merit, it was his contention that the delay in execution of the contract was attributable to the petitioners. In that regard, he would state the Letter of Acceptance having been given on June 10, 2003, it was only on August 25, 2003, the drawings could be collected from the office of the petitioner No. 5. Immediately, thereafter, the QAP was prepared and sent to RDSO on September 25, 2003. A copy of the letter was sent to the petitioners with a request to pursue with the RDSO. According to him, the RDSO had informed the respondent that RDSO does not entertain proposal directly and it has to be routed through the Railways. It was only on December 16, 2003 that the Railways could able to send the proposal along with the Quality Assurance Plan to the RDSO. Unfortunately, the objections put forth by RDSO were not communicated by the petitioners to the respondent till March 25, 2004 even thereafter. Vide its communication dated March

25, 2004, the petitioners had sent a copy of the letter, which they had sent to the RDSO. According to Mr. Raman Kapoor, till the issuance of the show cause notice dated April 26, 2004 or for that matter, May 7, 2004, the petitioners had not informed the objections as raised by the RDSO. In other words, there was no occasion for the petitioners to remove the objections as put forth by the RDSO in the QAP. He would also state that the notice dated May 7, 2004 was received on May 11, 2004, after communication dated May 10, 2004 was issued. He would state that keeping in view the aforesaid facts and the limited scope of judicial review, the present petition need to be dismissed.

18. Having considered the submissions made by the learned counsel for the parties, the first and foremost question that would arise for consideration is whether, the claims raised by the respondent are 'excepted matters' in view of clause 62, 63 and 64.1 of the General Conditions of Contract. To appreciate the said submission, I reproduce herein the said clauses:

“61.(1) Right Of Railway To Determine The Contract

: The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved

materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefor shall be conclusive evidence thereof.

*(2) **Payment On Determination Of Contract** : Should the contract be determined under sub clause (1) of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the work, the Railways shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive.*

(3) The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract.

62. Determination Of Contract Owing To Default Of Contractor : (1) If the Contractor should :

- (i) Becomes bankrupt or insolvent, or*
- (ii) Make an arrangement with of assignment in favour of his creditors, or agree to carry out the contract under a Committee of Inspection of his creditors, or*
- (iii) Being a Company or Corporation, go into*

liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or (iv) Have an execution levied on his goods or property on the works, or (v) Assign the contract or any part thereof otherwise than as provided in Clause 7 of these Conditions, or (vi) Abandon the contract, or (vii) Persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or (viii) Fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period, or (ix) Fail to remove materials from the site or to pull down and replace work after receiving from the Engineer notice to the effect that the said materials or works have been condemned or rejected under Clause 25 and 27 of these Conditions, or (x) Fail to take steps to employ competent or additional staff and labour as required under Clause 26 of the Conditions, or (xi) Fail to afford the Engineer or Engineer's representative proper facilities for inspecting the works or any part thereof as required under Clause 28 of the Conditions, or (xii) Promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent or servant to any officer or employee of the Railway or to any person on his or on their behalf in relation to the execution of this or any other contract with this Railway. (xiii) (A) At any time after the tender relating to the contract, has been signed and submitted

by the Contractor, being a partnership firm admit as one of its partners or employee under it or being an incorporated company elect or nominate or allow to act as one of its directors or employee under it in any capacity whatsoever any retired engineer of the gazetted rank or any other retired gazetted officer working before his retirement, whether in the executive or administrative capacity, or whether holding any pensionable post or not, in the Railways for the time being owned and administered by the President of India before the expiry of two years from the date of retirement from the said service of such Engineer or Officer unless such Engineer or Officer has obtained permission from the President of India or any officer duly authorized by him in this behalf to become a partner or a director or to take employment under the contract as the case may be, or (B) Fail to give at the time of submitting the said tender : (a) The correct information as to the date of retirement of such retired engineer or retired officer from the said service, or as to whether any such retired engineer or retired officer was under the employment of the Contractor at the time of submitting the said tender, or (b) The correct information as to such engineers or officers obtaining permission to take employment under the Contractor, or (c) Being a partnership firm, the correct information as to, whether any of its partners was such a retired

engineer or a retired officer, or (d) Being in incorporated company, correct information as to whether any of its directors was such a retired engineer or a retired officer, or (e) Being such a retired engineer or retired officer suppress and not disclose at the time of submitting the said tender the fact of his being such a retired engineer or a retired officer or make at the time of submitting the said tender a wrong statement in relation to his obtaining permission to take the contract or if the Contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor.

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63. Matters Finally Determined By The Railway : *All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of*

Standard General Conditions of Contract or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, 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.

64.(1) 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.*

19. The aforesaid clauses have come up for consideration before the Supreme Court in the case reported as **(2002) 4 SCC 45, General Manager, Northern Railway and Another Vs. Sarvesh Chopra**, wherein, the Supreme Court has held as under:

“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

some one 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'.

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16. 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."

17. 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.

18. 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.

20. Suffice to state, the Supreme Court has in unequivocal terms held the 'excepted matters' as not arbitrable and the judgment in **General Manager, Northern Railway and Another (supra)** has been distinguished in **Bharat Sanchar Nigam Ltd. and Anr. (supra)** referred to above and on which reliance was placed by the learned Senior Counsel for the respondent. In view of the distinction drawn in para 12 of **Bharat**

Sanchar Nigam Ltd. and Anr.'s case (supra, the same has no applicability in the facts of this case.

21. Now, it has be seen whether the claims which have been made by the respondent before the learned Arbitrator would be 'excepted matters' and could not have been arbitrated upon.

22. As noted above, the claims made by the respondent and allowed by the Arbitrator are primarily; the rescinding of the contract is illegal (claim No 1); expenditure on additional deployment of resources for completion of the work (claim No. 2); loss of profit (claim No. 3); refund of security amount (claim No. 5); interest (claim No. 8b); arbitration cost (claim No. 9). The clause 61 of the General Conditions of Contract relates to the termination effected for the reasons attributable to the Railways. Clause 62 relates to determination of contract owing to the default of the contractor. It is an undisputed fact that in the notice dated April 26, 2004, the reasons given for the proposed action was that the respondent had failed to abide by the instructions issued to commence the work/to show adequate progress of work. The reasons are found mentioned in clause 62(vii) of the General Conditions of Contract. The reply to the notice was given by the respondent on May 4, 2004. Vide letter dated May 7, 2004, the petitioners issued another notice of 48 hours under clause 62 of the G.C.C. on expiry of which period, the contract was

to stand rescinded. The notice dated May 7, 2004, according to the respondent, was received on May 11, 2004, after the petitioners had rescinded the contract on May 10, 2004. The respondent made a representation dated May 21, 2004 against the letter dated May 10, 2004. As noted from the petition, the petitioner No. 2 addressed a letter dated September 10, 2004 suggesting a panel of Arbitrators seeking consent of the respondent for constitution of an Arbitral Tribunal. The demand for arbitration and the constitution of an Arbitral Tribunal was under clause 64 of the G.C.C. There is nothing on record to suggest that the petitioners had considered the respondent's representation and notified the decision in terms of clause 63 of the G.C.C. In the absence of a decision under clause 63, the bar under clause 63 would not apply. In other words, all matters related to the clauses mentioned in clause 63 would be treated as 'excepted matters' if a decision is taken by the Railways. The necessary corollary is the claims made by the respondent cannot be deemed as 'excepted matters'. I note, the petitioners had taken a Ground (A) in the petition as the claims being 'excepted matters'. The petitioners have not averred nor placed on record any notification, notifying their decision on the respondent's representation as contemplated in clause 63 of the G.C.C. The decision dated May 10, 2004 would be a decision under clause 62 and not under clause 63.

Suffice to state, after a decision under clause 62, the petitioners had taken a decision under clause 64 without resorting to clause 63. Suffice to state, the claims are not ‘excepted matters’. Insofar as the judgments relied upon by the learned counsel for the petitioners are concerned, in *NTPC Ltd. (supra)*, the Division Bench has held, if the Arbitrator allows a claim covered by an ‘excepted matter’, the award would not be legal merely because the claim was referred to by the Court to Arbitration and 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 the legal misconduct of Arbitrator. Insofar as the judgment in *Videsh Sanchar Nigam Ltd. (supra)* is concerned, therein also, this Court has held that the adjudication of and ignorance of various crucial and material documents by the Arbitrator in proper award on items was barred being ‘excepted matters’, therefore, made beyond jurisdiction and contrary to contractual terms. Award, therefore, was directed to be set aside. In view of the facts of this case and my conclusion above, the judgments referred to by the learned counsel for the petitioners would have no applicability.

23. Insofar as the conclusion arrived at by the learned Arbitrator is concerned, on claim No. 1 wherein the respondent had sought a declaration that the agreement rescinded by the petitioners is illegal, the

learned Arbitrator had first answered the issue No. 1, which issue was whether the petitioners failed to get the QAP approved from the RDSO upto May 10, 2004. The learned Arbitrator was of the view that, it was the obligation of the Railways to arrange for inspection and approval at various stages from the RDSO before the girders could be installed at site, which they failed to fulfil. It has also come on record that before the QAP is approved by RDSO, the Railways were required to approve it and thereafter, the Railways had to submit to the RDSO for approval. The learned Arbitrator has come to a conclusion that the quality assurance was the requirement of the Railways and steps should have been taken by the petitioners to implement the quality assurance through the RDSO. The learned Arbitrator had also noted that the petitioners had sent QAP prepared by the respondent to the RDSO on December 16, 2003 by which the date of completion of work had already expired. Even the extension of time of contract was informed by the petitioners to the RDSO only on March 24, 2004. The Arbitrator had also concluded that the copy of the contract agreement could not have been made available to the RDSO by the petitioners in time as a document was executed between the parties on February 17, 2004 only. According to him, it was rather strange that an agreement having date of start as June 10, 2003 and date of completion as December 9, 2003 was formally executed on February

17, 2004. The learned Arbitrator also noted that on March 25, 2004, the petitioners had informed the respondent to submit the fresh QAP as the RDSO has put some objections on the earlier QAP. In a telephonic conversation on March 31, 2004, the respondent asked the petitioners to send to it the details of the objections as projected by the RDSO so that it may get them removed and prepare a fresh QAP. There is a conclusion of the learned Arbitrator that the petitioners did not communicate the objections to the respondent, instead issued a 7 days' show cause notice on April 13, 2004. The learned Arbitrator also noted that the respondent on April 20, 2004, replying to the show cause notice dated April 13, 2004 asked the petitioners to make available to it the objections of the RDSO on QAP so that they may be removed and fresh QAP be submitted. The said request was not acceded to. On Issue No. 1, the following is the finding of the learned Arbitrator:

“On appreciating the matter, I find that the fabrication of the Girders was to be done as per RDSO drawings. It was to conform to IRS Code of Welded bridges. For maintaining and ensuring quality, the RDSO was required to do inspection at various stages. As per conditions of contract, the respondents could have entrusted this work to RITES. But in this contract this work was given to RDSO. Obviously, the Railways should have been concerned about the QAP for the safety

of the running trains. But it appears that no efforts were made by the respondents to prepare the QAP in consultation with the RDSO although admittedly as per the respondents own admission the claimant was ready with jugs, fixtures and raw material inspection on or before 16.12.2003. It cannot be denied that Quality Assurance Plan for inspection, testing and approval were the domain of the employer for maintaining the quality of the work. The respondents in this case did not rise to the occasion and failed to implement the QAP for inspection and testing by RDSO as per contract conditions and Code for Welded Bridges.

It was for the respondents to ensure the quality of the work by arranging stage-wise inspection and testing by RDSO for which RDSO had to approve the action plan. The respondents failed to prepare this plan which should have been their priority. The contractor could not have started the fabrication of the girders without inspection of the preparatory work and 1st stage inspection by RDSO. He prepared himself and offered for such inspection but the respondents could not arrange this inspection as RDSO did not oblige the respondents to inspect the work done by the contractor without 1st approving the QAP. No further work of fabrication by the contractor was possible without 1st stage inspection by RDSO. No fault can therefore be found with the claimant for this.

The issue No. 1 is accordingly answered in affirmative”.

24. Based on the above conclusion on issue No. 1, the issue No. 2 which relates to the justification in rescinding the contract vide letter dated May 10, 2004, the learned Arbitrator was of the view that the petitioners have not been able to establish any default on the part of the respondent. The stand of the petitioners that the delay was attributable to the respondent, was rejected by the learned Arbitrator. According to him, the petitioners had acted in haste with an intention to cancel the contract. He has also concluded that the stand of the petitioners that they had no obligations under the contract and the obligations were that of the respondent were unfounded. Finally, the learned Arbitrator held that the respondent was not responsible for the delay caused in the completion of work; so the cancellation of the contract was not justified.

25. That on issue No. 3; whether the impugned order dated May 10, 2014 suffers from any procedural impropriety, the learned Arbitrator has held as under:

“Obviously, the respondents did not allow the statutory 7 days period to the claimant for reply. The contention of the respondents that the claimant in reply to show cause notice only asked for arbitration does not appears to be correct at this stage. The 7 days show cause notice dated 26.04.2004 was replied by the claimant on 04.05.2004. The respondent issued the 48 hours notice on

07.05.2004. Obviously, the respondent did not have the claimant's letter dated 04.05.2004 while issuing 48 hours notice. In this 48 hours notice, no reference has been made to claimant's reply dated 04.05.2004. Obviously, the respondent's contention is an after thought. The contractor submits that he had invoked the arbitration clause vide his letter dated 04.05.2004 for adjudication of the disputes by an arbitrator who was to be appointed by the respondents themselves. I wonder, whether, the respondents should have proceeded to cancel the contract agreement without getting the dispute adjudicated by an arbitrator as requested by the claimant.

The claimant has contended that the respondents gave a 48 hours notice on 07.05.2004 and cancelled the contract agreement after 3 days on 10.05.2004. In this case, the respondents did not allow even the time taken by the postal department in onward transmission of notice/letter what to say for the back transmission of its reply. The respondents obviously counted the 48 hours notice from the date of issue of the letter on 07.05.2004. This show cause notice was received by the claimant on 11.05.2004. But his contract agreement had already been cancelled on 10.05.2004. The respondents have not been able to rebut these allegations of the claimant.

From the above discussion, it is clear that the respondents although issued 7 days and 48 hours statutory notices but did not allow these periods to the claimant for his reply

before issuing the impugned order dated 10.05.2004 cancelling the contract. Obviously, the order dated 10.05.2004 vide which the contract agreement, has been cancelled suffers from procedural impropriety. Issue No. 3 is thus answered accordingly.”

26. I agree with the aforesaid conclusion of the learned Arbitrator on issue No. 3.

27. The findings on issue No. 4, which relates to claim Nos. 2, 3, 8 & 9, the learned Arbitrator relying upon the judgment of the Supreme Court in the case of ***A.T. Brij Paul Singh Bros. Vs. State of Gujarat, AIR 1964 SC 1703; Y.C.Rattaya and Anr. Vs. D.Venketramaya, AIR 1959 AP 551; Gambhirmull Vs. Indian Bank Ltd. and Anr., AIR 1963, Cal 163*** was of the view that as per the respondent, it had contemplated to earn 15% profit on contract agreement and the respondent having claimed loss of profit at 10% only coupled with the fact that the petitioners have failed to counter the claim of the respondent and the fact that the petitioners were not justified in cancelling the contract, the learned Arbitrator awarded an amount of Rs. 7,87,000/- being 10% of the total contractual value. The award under this claim of loss of profit is a necessary consequence of cancelling of the contract illegally. I have already upheld the conclusion of the learned Arbitrator that the rescinding of the contract

was illegal. I find, the profit of 10% awarded is justified and not on the higher side.

28. Against claim No. 2, even though the respondent had sought Rs. 10 lakhs as the expenditure incurred on additional deployment of resources for completion of work, the learned Arbitrator on a conclusion that the respondent had done preparatory work and was ready for first stage inspection i.e. for jigs, fixtures and raw material for taking up the work and it had suffered loss in non utilization of these items, on a rough estimate, had awarded Rs. 2 lakhs, which I find, is justified, not on the higher side, keeping in view the total contract value being Rs. 78,70,000/-.

29. The issue No. 6 which relates to claim No. 5 for refund of security of Rs. 50,000/- which was been granted by the learned Arbitrator on the ground that the same was withheld illegally as the termination of the contract was held to be illegal, the award for refund of Rs. 50,000/- is justified.

30. Insofar as the grant of interest against claim No. 8(b) is concerned, the learned Arbitrator had granted an interest @ 12% p.a. to meet the ends of justice by relying upon Section 31(7)(b) of the Act, which I find is on the slightly higher side as it is a common knowledge that the bank interest rates were in and around 10%, I deem it fit to reduce the interest

to 10%. *[Reference: (2005) 6 SCC 678 Rajendra Construction Co. vs. Maharashtra Housing & Area Development Authority and Ors. & 166 (2010) DLT 99 Mittal Estates Private Ltd. vs. Delhi Development Authority & Ors.]*

31. On claim No. 9 relating to cost of arbitration, the learned Arbitrator noting that his total fee was Rs.80,000/- to be paid equally by both the parties, whereas the respondent had paid its share of Rs. 40,000/- and the petitioners had paid only Rs.10,000/- as their share, with a condition that the balance amount of Rs. 30,000/- if not paid by the petitioners, to be paid by the respondent and the respondent having actually paid Rs.30,000/- on November 10, 2006, the learned Arbitrator has allowed the claim to the extent of Rs. 50,000/-, which included Rs. 30,000/- paid by the respondent on behalf of the petitioners, in effect, the cost of arbitration awarded by the Arbitrator is only Rs. 20000/-, the same is justified.

32. Insofar as the counter claim filed by the petitioners is concerned, the same was rightly rejected, as the learned Arbitrator has held the termination of the contract was illegal.

33. In view of conclusion above, I am of the view, the award of the learned Arbitrator is proper and justified and this Court would not like to interfere with the same except the interest against claim No. 8(b) is

reduced from 12% to 10%.

34. The petition is disposed of accordingly. No costs.

(V.KAMESWAR RAO)
JUDGE

APRIL 15, 2015
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