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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 23.08.2017.
Judgment Pronounced on: 22.09.2017.

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O.M.P. (COMM) 313/2017
UNION OF INDIA

Through

Mr.Joydeep
Mr.Debojyoti
Advocates

..... Petitioner
Mazumdar &
Bhattacharya,

versus

M/S CHENAB CONSTRUCTION
COMPANY (REGD)

Through

Mr.Sandeep Sharma, Advocate

..... Respondent

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No. 9513-14/2017 (exemption)

Allowed subject to all just exceptions.

**O.M.P. (COMM) 313/2017 and IA No. 9512/2017 (stay) & 9515/2017
(codonation of delay of 110 days in re-filing)**

1. This petition is filed under Section 34 read with Section 28(1) and 28(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to set aside the Award of the learned Sole Arbitrator dated 26.12.2016.

2. Some of the relevant facts are that the petitioner invited tenders for the work of 'Construction of Tunnel No. 12 & 12-A from Km. 42/450 to Km.42/500 and Km. 42/585 to Km. 42/775 and cut and cover from Km. 42/425 to Km. 42/450 and Km. 42/450 to Km. 585 and Km. 42/775 to Km.

42/805, including earth work in approaches, breast walls, retaining walls, protection works, drains, etc. in zone No.E-24 from Km. 42.400 to 42.825 on Jammu Udhampur Rail Line Project. On 24.05.1994, the tender of the respondent was accepted for an amount of Rs.2,10,37,997/-. On 19.09.1994 a formal agreement was entered into. The work was to be completed within a period of 15 months i.e. between 24.05.1994 and 24.08.1995. It is the case of the petitioner that the progress of the work had been very slow. The respondent was unable to complete the work within the stipulated period i.e. up to 23.08.1995. On 25.08.1995, the petitioner is said to have written to the respondent that despite a passage of 15 months, the physical progress of work was merely 17% whereas total payment of Rs. 23.75 lakhs had been made up to 03.08.1995 excluding mobilization advance and machinery advance. The time for completion was extended by the petitioner up to 23.02.1996 without penalty and without PVC. Further extensions were also granted from time to time. Lastly the date of completion was extended up to 31.05.2001. Keeping in view the fact that the respondent was unable to complete the work, the petitioner states that it was forced to rescind the contract on 21.11.2001 under Clause 62 of GCC on risk and cost basis. It is urged that the respondent was able to achieve only 83% of the contractual work till September 2000 and thereafter, no work was done and hence, the petitioner had no option but to rescind the contract and issue a fresh tender.

3. Disputes having arisen between the parties, the respondent invoked the arbitration clause vide its letter dated 29.09.2004. The petitioner is said to have appointed two arbitrators for adjudication of the disputes. In January 2009, the Presiding Arbitrator was nominated. In 2013, the respondent filed a petition being OMP No. 381/2013 pointing out that on account of transfer

of the Arbitrators, no fruitful hearing was taking place. Orders were sought for termination of the Arbitral Tribunal and appointment of a sole arbitrator. On 25.02.2015 this court terminated the mandate of the Arbitral Tribunal and appointed Mr. Justice Devinder Gupta (Retd.) as the sole Arbitrator to adjudicate the disputes under the aegis of Delhi International Arbitration Centre (DIAC). The learned Arbitrator has now passed his award.

4. The respondent raised 11 claims before the learned Arbitrator which read as follows:-

“Claim No.1 for Rs.1,50,000/- refund of Rs.1,50,000/- as Bank Guarantee Bond No.9/99 dated 25.05.1998 was encashed by the Respondent.

Claim No.2 for Rs.20,000/- Refund of earnest money.

Claim No.3 for Rs.38,50,000/- being the balance payment not paid by way of final bill. Now reduced to Rs.30,46,968/-.

Claim No.4 for Rs.30,00,000/- Payment due as escalation.

Claim No.5 for Rs.15,00,000/- for installation of fittings, power lines, HT wires, water supply items, etc ..

Claim No.6 for Rs.10,00,000/- being extra expenses incurred as hire charges of compressor, cutting machinery, equipments, etc. for the additional period i.e. after expiry of stipulated period on 23.08.1995.

Claim No.7 for Rs.5.50 lacs extra expenses incurred for wire mesh brought at site, fixed but subsequently for some improper decision payment not released.

Claim No.8 for Rs.15,00,000/- as Extra expenses incurred on staff, establishment, machinery etc. on additional period after expiry of original time.

ClaimNo.9 for Rs.7,00,000/- on account of extra expenses on preliminary and mobilized arrangements, loss of advances, etc.

Claim No.10 for interest @ 24% p.a. on the aforesaid amounts from due dates till the date of payment.

Claim No.11 for Rs.50,000/- on account of cost of arbitration proceedings.”

The petitioner raised a counter claim for Rs.23,08,599/-.

5. The learned Arbitrator in the award noted that the terms of the contract provide that prior to termination of the contract the petitioner should serve on the respondent a notice in writing mentioning the cause due to which the contract is sought to be terminated and if within 7 days, the respondent does not make good the default, the petitioner would be entitled to terminate the contract after giving 48 hours notice in writing. After termination of the contract, the petitioner had the option to carry out the whole or part of the work from the contractor or get the same completed by another contractor. As the said mandatory procedure was not followed while terminating the contract on 21.11.2001, the Award holds the recession of the contract as illegal.

On claims no. 1 and 2 for refund of security deposit of Rs.1.50 lakhs and earnest money of Rs. 20,000/-, the Award grants the said relief to the respondent rejecting the defence of the petitioner that the said amount was adjusted against the liquidated damages for non-performance of the contract by the respondent.

On claim No. 3 which pertains to the balance amount not paid from the final bill, the Award holds that the petitioner is not justified in denying

the payment for the work done by the respondent which was admittedly measured and found to be correct and hence, the petitioner has wrongly withheld the said dues of the respondent. An amount of Rs.30,46,868/- was awarded.

On claim No. 4 being price escalation, the Award notes that the petitioner has on the final bill worked out an amount of Rs.3,30,363/- towards escalation. The award holds this calculation to be incorrect. The Award also notes that the claim is for price escalation under Clause 18 of the Agreement. The plea of the petitioner that the said claim was one of the 'excepted matters' and cannot be arbitrated upon was rejected. The award also notes that during the subsistence of the contract, liquidated damages were never imposed or recovered by the petitioner. No such claim has been filed. Hence, the plea of the petitioner that the respondent delayed in completion of the project was rejected. Merely, because in some of the communications extending time, it is mentioned that the extension has been granted under Clause 17(4) of the General Conditions of the Contract the said provisions would not be of any help to the petitioner. Accordingly, the respondent was awarded a sum of Rs. 30 lakhs under claim No. 4

On claim No. 5 pertaining to escalation of fitting of power line, etc., the learned Arbitrator awarded Rs.16 lakhs for the same.

Claim No. 6 which pertains to extra expenses incurred by the respondent for hire charges of compressor, cutting machinery, etc. for the additional period was allowed awarding Rs.5 lakhs to the respondent.

Claim No. 7 regarding expenses incurred for wire mesh was also allowed. Claims No. 8 and 9 pertain to alleged extra expenses incurred for

staff, establishment for the additional period after the expiry of the original time. The same were rejected.

Regarding claim No. 10 which pertains to interest, the plea of the petitioner that no interest was payable in view of clause 16 (2) of the General Conditions of the Contract was rejected and the Award granted pendente lite interest from the date of filing of the said claim petition till the date of the Award @ 12% p.a. The Award upheld the plea of the petitioner that for the period prior to filing of the statement of claim interest cannot be awarded. However for pendente lite interest, the plea was rejected keeping in view the judgment of the Single Judge of this Court in the case of *Union of India vs. M/s. Chenab Construction Joint Venture (2010) ILR 4 Delhi 163*. The above judgment was upheld by the Division Bench by its judgment dated 29.10.2015. An amount of Rs.9,47,935/- was also awarded towards costs.

On the counter claim of the petitioner, the learned Arbitrator awarded a sum of Rs.6,81,146/-. Accordingly, an Award of Rs. 1,05,00,000/- was awarded to the respondent and Rs.98,70,000/- was awarded towards interest and Rs.9,47,935/- towards costs being a total of Rs.2,13,17,935/- along with future interest @ 12% p.a.

6. I have heard learned counsel for the parties.

7. Learned counsel for the petitioner has submitted that the impugned Award is liable to be set aside for the following reasons:-

(i) He has pointed out that in the claim petition, the respondent has sought costs of Rs.50,000/- whereas the Award grants him a sum of Rs.9,47,935/- as costs. It is urged that this cost was never sought for and it is far beyond the plea of the respondent and hence is liable to be set aside.

(ii) It is also pointed out that a large number of matters which were 'excepted matters' have also been adjudicated upon by learned Arbitrator. It is urged that under Clause 63 of the general conditions of the contract the 'excepted matters' are specifically excluded from the purview of arbitration clause and cannot be referred to arbitration. It is urged that ignoring this clause, the learned Arbitrator has adjudicated upon these matters though they were not referred by the petitioner. It is stated that hence claims No. 5 to 9 have been wrongly dealt with being 'excepted matters' and should be quashed.

(iii) The next plea raised is that escalation amount has been wrongly awarded to the respondent contrary to clause 17(4) of the GCC. It is urged that the date for completion of the contract was 24.08.1995. The contract was rescinded on 21.11.2001. The last date of extension was granted on 02.02.2001. Reliance is placed on clause 18(1) of the Special Conditions of Contract which states that price variation/adjustment shall be applicable up to the date of completion or from the date extension granted except extension granted under clause 17(4) of GCC. It is urged that the extension had been granted under Clause 17(4) of GCC and hence, the escalation has been granted to the respondent in the Award wholly contrary to the agreed terms of the contract between the parties.

(iv) It is further urged that under Clause 16(2) of the General Conditions, no interest could be awarded. The learned Arbitrator has wrongly awarded interest from the date of filing of the claim petition which is contrary to the terms of the contract.

8. The learned counsel for the petitioner/respondent has on the issue of cost submitted that the arbitration took place under the aegis of the DIAC

and the costs have been awarded by the learned Arbitrator in terms of the internal rules of the DIAC. He has filed in court the bill of costs that was filed before learned Arbitrator on the directions of the learned Arbitrator on the basis of which the costs have been awarded. On ‘the interest part, he relies upon the judgment of Supreme Court in the case of *Union of India vs. M/s Pradeep Vinod Construction Co., Civil Appeal No. 2099/2017, judgment dated 03.08.2017 MANU/SCOR/30509/2017* to contend that a similar clause as in the present clause has been interpreted by the Supreme Court to mean that the same is only applicable to earnest money and security deposit and not to the dues payable to the contractor.

9. I may first deal with the plea of the petitioner regarding the award of costs. It is no doubt true that under the claim petition, the respondent has sought costs of Rs.50,000/- only and the learned Arbitrator has awarded Rs.9,47,935/-. However, the learned Arbitrator had asked the parties to file their bill of costs. The respondent had filed their bill of costs. A perusal of the Bill of costs filed by the respondent shows that a sum of Rs.1,97,935/- was sought on account of the amounts deposited with the DIAC. A sum of Rs.6 lakhs is claimed on account of the fees paid to the advocate. A sum of Rs.1,50,000/- is claimed as travelling expenses of the respondent. Under the un-amended provisions of Section 31(8) of the Act which would be applicable to the present proceedings, the costs of an arbitration are to be fixed by the arbitral tribunal unless otherwise agreed upon by the parties. The Tribunal has accepted the bill of costs of the respondent. There are no reasons to differ with the said order.

10. Reference in the above context may be had to the judgment of this court in *Delhi Development Authority vs. Amita Nanda Aggarwal*

Associates (2010) 166 DLT 43 wherein it was held that the learned Arbitrator is empowered and authorised to apportion and award the cost under Section 31(8) of Act.

11. Coming to the second contention of the petitioner regarding the 'excepted matters'. Clause 63 and 64.1 of the GCC reads as follows:-

“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 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 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 not be referred to arbitration.

64. Demand for Arbitration. (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 a reasonable time, then and in any such case, save the 'excepted matters' referred to in clause 63 of these condition, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(ii) The demand for arbitration shall specify the matter which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made, shall be referred to arbitration and other matters shall not be included in the reference.

(iii) 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 Government 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.

xxx”

12. Hence, as per the above clause 63, the matters stated therein stand outside the purview of the arbitration clause. The learned arbitrator has concluded that a reading of clause 63 above makes it clear that where there is any in house mechanism provided under the contract for taking decision on matters referred by the contractor in writing, such a matter on which decision has been taken shall be deemed to be an “excepted matter” and the decision thereon shall be final and binding. The Award also notes that before the learned Arbitrator it was submitted that the concerned matters are such on which the petitioner has decided not to grant any relief to the respondent and therefore, these matters fall under the category of ‘excepted matters’. The learned Arbitrator noted the judgments of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. Vs. Motorola India Pvt. Ltd., 2009(2) SCC 337*** and ***General Manager Northern Railways & Anr. Vs. Sarvesh Chopra,***

2002(2) Supreme 170 to support the conclusion that where a claim is liable to be adjudicated upon by any authority of the Railways whose decision is agreed to be final and binding, such a claim is an 'excepted matter' and will not be arbitrable. The Award notes that the petitioner are objecting to claims No. 5 to 9 which were not referred to arbitration as these are said to have fallen in the category of 'excepted matters'. The Award also notes that the petitioner have failed to show any in-house mechanism provided under the Special Conditions of the Contract or under GCC to deal with such issues nor any decision has been taken by the petitioner on these claims. The Award further notes that the petitioner is only raising this plea of 'excepted matters' without substantiating the same. Hence, the plea of the petitioner was rejected.

13. In the course of the arguments, before this court, except for arguing that these are 'excepted matters' learned counsel for the petitioner was not able to point out as to how claims No. 5 to 9 can be termed to be 'excepted matters' and are covered by Clause 63 of GCC and hence, not referable to arbitration. I may only note that in the present petition filed under Section 34 of the Act, the petitioner has stated that on 05.06.2008 claims 1 to 4 and 7 were referred for arbitration. A perusal of the reply to the claim petition filed before the learned arbitrator would show that in response to claims 4 to 10, a plea had been taken by the petitioner before the learned Arbitration that these are excepted matters. The award however notes the objection regarding the excepted claims being only claims 5, 6, 7, 8 and 9. It appears that the petitioner themselves are not clear to which of the matter are Excepted Matter. However, this confusion as to which of the claims the petitioner

claims forms part of the Excepted Matters may not be relevant for the view I have taken below.

14. I may look at the legal position regarding “excepted matters”. The award noted the judgment of the Supreme Court in *Bharat Sanchar vs Motorola India Pvt. Ltd 2009 (2) SCC 337*. The Supreme Court in the said judgment relying upon the earlier decision on *Food Corporation of India vs Shreekant Transport 1999 (4) SCC 491*, recorded as follows:

“17. In order to satisfy us in the aforesaid contentions, the learned Additional Solicitor General, Mr. Gopal Subramaniam placed strong reliance on *Food Corpn. of India v. Sreekanth Transport [(1999) 4 SCC 491]* which has given the following principles relating to “excepting matters” as under: (SCC p. 493, paras 1-3)

“1. These appeals by the grant of special leave pertain to the effect of the usual ‘excepted clause’ vis-à-vis the arbitration clause in a government contract. While it is true and as has been contended, that the authorisation of the arbitrators to arbitrate, flows from the agreement but the High Court in the judgment impugned thought it fit to direct adjudication of ‘excepted matters’ in the agreement itself by the arbitrators and hence these appeals before this Court.

2. At the outset, it is pertinent to note that in the usual governmental contracts, the reference to which would be made immediately hereafter, there is exclusion of some matters from the purview of arbitration and a senior officer of the department usually is given the authority and power to adjudicate the same. The clause itself records that the decision of the senior officer, being the adjudicator, shall be final and binding between the parties—this is what is popularly known as ‘excepted matters’ in a government or governmental agencies’ contract.

3. ‘Excepted matters’ obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator—concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the

courts have been found out lacking in their jurisdiction to entertain an application for reference to arbitration as regards the disputes arising there from and it has been the consistent view that in the event of the claims arising within the ambit of excepted matters, the question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what these exceptions are however are questions of fact and usually mentioned in the contract documents and form part of the agreement and as such there is no ambiguity in the matter of adjudication of these specialised matters and being termed in the agreement as the excepted matters.”

15. The learned arbitrator also noted the judgment of the Supreme Court in *General Manager Northern Railways v. Sarvesh Chopra (2002) 4 SCC 45*. The award concludes the legal position regarding “excepted matters” as follows:

“It was held that Excepted matter is that for which mode of decision of dispute is provided in the agreement itself. Where 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 no arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to this category of 'excepted matters'.”

16. The judgment of the Supreme Court in *General Manager Northern Railway v. Sarvesh Chopra (supra)*, has interpreted Clause 63 of GCC which is also the clause which is also the subject matter of dispute in the present petition. The Supreme Court in the judgment held as follows:

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 of the 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”.

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 the 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 Railways”, 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 the 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 Clauses 2.4.2(b) and 12.1.2. The first category is an “excepted matter” because the claim as per the 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 v. Union of India [(1989) 1 SCC 657] and Food Corpn. of India v. 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 case [(1989) 1 SCC 657] 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 Corpn. of India case [(1999) 4 SCC 491] also the relevant clause provided for the decision of the 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 an in-house remedy and attaching finality to the 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.”

17. A reading of the above judgment would show that the excepted matters as per Clause 63 of GCC would be those matters for which provisions have been made in specified clauses of General Conditions and matters covered by any clauses of Special Conditions. Matters of the Special Conditions are categorized into two. The first category is which cannot be raised or are not entertainable. These are cases of no claim, no damage or no liability clauses. The other category is where the dispute or difference had to be determined by an authority of the Railways as provided in the relevant clause.

18. In view of the above what follows is that the conclusions of the learned arbitrator and as to what would fall under the category of excepted matters in terms of Clause 63 of GCC was only partially correct as he had confined “Excepted Matters” to only such matters which were to be adjudicated/decided finally by a named authority. This finding is contrary to the law laid down by the Supreme Court in ***General Manager Northern Railway Vs. Sarvesh Chopra***. Excepted Matters would also include claims which are covered by no claim, no damages or no liability clauses.

19. Having noted the legal position regarding the term ‘Excepted matters’. I, however am not willing to disturb the findings recorded by the learned arbitrator that claim 5 to 9 are not part of ‘Excepted Matters’. This is so as there is no attempt on the part of the petitioner to explain or to show as to why claims 4 to 10 can be termed as ‘Excepted Matters’. Merely arguing that they are ‘Excepted Matters’ and nothing more, is not sufficient to reach a conclusion that they are excepted matters.

20. A perusal of the defense statement filed before the learned arbitrator by the respondent would show that there is no explanation given as to why claims 4 to 10 are excepted matters. The only plea taken before the learned arbitrator in the defense statement is as follows:

“The claim falls under “Excepted Matter” as per contract agreement signed between claimant and respondent. Since the matter falls under “Excepted Matter” hence this claim is not tenable and is denied.”

Similarly, in the present petition under Section 34 of the Act, the same position is repeated. Even in the course of arguments before this court other than saying that claims 5 to 9 form part of the excepted matters, the position was not elaborated. It is manifest that merely labeling a claim as “Excepted Matter” does not make it an Excepted Matter. The petitioner was obliged to state the clauses of the agreement which prohibit such claims from being raised and the decision of the competent authority of the respondent that this claim is an Excepted Matter. Alternatively it had to be shown that a particular claim as per contract had to be decided upon by a particular authority whose decision is final. No such plea/explanation has been raised before the learned Arbitrator/or before this court.

21. In view of this state of affairs, I accept the findings of the learned arbitrator that the claims in question namely claims 4 to 10 cannot be termed to be excepted matters. In the absence of any cogent reasons being given by the petitioner, there are no reasons to disturb the findings of the learned Arbitrator on this issue.

22. I may now deal with the third contention of the petitioner that escalation has been wrongly awarded to the respondent. Escalation is granted under clause 18(1) of the Special Conditions of the Contract which reads as follows:-

“Clause 18.1

The price variation during extended period of contract; The price adjustment as worked out above i.e. either increase or decrease will be applicable up to the stipulated date of completion and for all extensions of time granted to the stipulated date of completion of work except extension(s) granted under clause 17(4) of Northern Railway, General Conditions of Contract.”

23. Clause 17(4) of the GCC reads as follows:-

“17. Time Limitation.-

xxx

(4) *Time to be of the essence of the contract.*-The time for completing the works by the date, or extended date fixed for completion shall be deemed to be of the essence of the contract and if the Contractor shall fail to complete the works within the time prescribed, the Railway shall, if satisfied that the works can be completed by the Contractor within a reasonably short time thereafter be entitled, without prejudice to any other right or remedy available 'on that behalf, to recover by way of a certain and liquidated damages a sum equivalent to one half of one per cent of the contract value of the works for each week or part of week the Contractor is in default and allow the contractor such further extension of time as the Engineer may decide after serving on the contractor, a notice of Railway's intention to recover the said liquidated damages (Form Annexure VIII). If the Railway is not satisfied that the works can be completed by the contractor and in the event of failure on the part of the Contractor to complete the works within the further extension of time allowed as aforesaid the Railway shall be entitled, without prejudice to any other right or

remedy available in that behalf, to appropriate the Contractor's security deposit and rescind the contract under Clause 62 of these conditions whether or not actual damage is caused by the such default.”

24. Hence, a contractor is not entitled to price variation if extension of time is granted under Clause 17 (4) of GCC. The admitted fact is that the petitioner has accepted an escalation of Rs.3,30,363/- payable to the respondents. The plea of the petitioner before the learned Arbitrator was that the time has been extended for completion of the contract to the respondent without price variation, as the delay in completion of the work was because of the respondent's lack of resources and mismanagement. The plea of the petitioner that time was extended under Clause 17(4) of the GCC was held to be misplaced as no liquidated damages were imposed on the respondent while extending the time.

Clause 17(4) categorically states that in case the contractor is unable to complete the work within the time prescribed and the Railways are satisfied that the contractor may complete the same within a reasonably short time, liquidated damages may be imposed and the contractor may be allowed further extension of time. Merely claiming that the extension was granted under Clause 17(4) of the GCC is not sufficient inasmuch as the extension was not as per terms and conditions stated in clause 17(4) of the GCC. No liquidated damages have ever been imposed on the respondent. Clause 17 (4) of GCC would be attracted if extension of time is granted subject to liquidated damages. The interpretation of the learned Arbitrator of Clause

17(4) of GCC was within his domain and the interpretation cannot be said to be illegal in any manner. The plea is without merit.

25. Regarding the contention of the petitioner on interest, the plea was that under Clause 16(2) of GCC, interest could not have been awarded. As noted above, the learned Arbitrator has disallowed interest for the period prior to filing of the statement of claim. However, pendente lite interest has been awarded @ 12% per annum from the date of filing of the statement of claim. Clause 16(2) of the GCC reads as follows:-

“16. Earnest money and security deposit- xxx

(2) *Interest on* amounts.-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 this clause will be repayable with interest accrued thereon.”

26. Learned Arbitrator has noted the judgment of this court in the case of ***Union of India vs. M/s. Chenab Constructions joint Venture(supra)*** i.e. between the same parties in OMP 4/2010 which was decided on 05.03.2010 where it was held that clause 16(2) only refers to interest on earnest money and security deposit. This judgment was also upheld by the Division Bench in FAO(OS) 302/2010 dated 29.10.2015.

27. The Supreme Court in ***Union of India vs. M/s. Pradeep Vinod Construction Co. (supra)*** interpreting an identical clause 16 held as follows:-

“7. Having given our thoughtful consideration to the contractual obligations entered into by the parties through clause 16, we have no reason to doubt, firstly, that the clause related exclusively to

earnest money and security deposit. The above Clause did not relate to the other contractual obligations between the parties. A perusal of clause 16(1) further clarifies the position, inasmuch as, even if some payment under the contractual obligation was diverted to make good the security deposit payable, no interest would be payable thereon as well. Therefore, there can be no doubt, that non-payment of interest, contemplated between the parties under clause 16, was exclusively limited to the component of earnest money and the security deposit, which was held by the appellant and nothing else.”

28. In view of the above judgment of the Supreme Court, the learned Arbitrator has rightly awarded interest and the same cannot be said to be contrary to clause 16(2) of GCC.

29. Regarding other aspects of the Award, no submissions have even been made. In any case these are findings of fact which cannot be assailed in a petition under Section 34 of the Act. No grounds are made to disturb the award in exercise of powers under Section 34 of the Act.

30. The petition is without merit and is dismissed.

(JAYANT NATH)
JUDGE

SEPTEMBER 22, 2017
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