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

**Date of Order: August 02, 2018**

+ FAO(OS) 233/2013, C.M. Appl. No. 7339/2018  
PUNJAB NATIONAL BANK

..... Appellant

versus

PRIME ENGINEERS CONSULTANTS

..... Respondent

+ FAO(OS) 234/2013  
PUNJAB NATIONAL BANK

..... Appellant

versus

PRIME ENGINEERS AND CONSULTANTS

..... Respondent

**Counsel for the Appellant:**

Mr. Rajesh Kumar Gautam, Advocate

**Counsel for the Respondent:**

Ms. Anusuya Salwan, Ms. Nikita Salwan, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE A. K. CHAWLA**

**ORDER**

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**S. RAVINDRA BHAT, J. (ORAL)**

1. In both these appeals under Section 37 of the Arbitration & Conciliation Act (hereinafter referred as the "Act"), the Punjab National Bank (hereinafter referred as "PNB") questions the decision of the learned Single Judge/adjudicating its objections to two separate

awards, rendered by one common Tribunal. The Tribunal adjudicated the disputes with respect to two works contracts awarded by PNB – first related to the Office premises (in Branch Office) and the other Staff Quarters.

2. The disputes, which were the subject matter of arbitration proceedings before the Tribunal, were contracts entered into on 19.05.1994. The respondent (hereinafter called the “Contractor”), which was entrusted with the execution of works, demanded various amounts as due and payable by PNB, later disputed its liability and primarily contended – in the arbitration proceedings, that some of the claims were barred on account of the Clause 5.46 since they fall in the category of “excepted matters”. With respect to the other claims, various other objections were raised. The Tribunal adjudicated all these and granted different amounts to the Contractor (₹ 31 lakhs in respect of the premises for branch and ₹ 16 lakhs in respect of the Staff Quarter Complex). The PNB agreed and had approached this court under Section 34. In those proceedings contentions urged were mainly three fold; firstly, that the award so far as it dealt with delayed execution, was an “accepted matter” and, that the Tribunal had proceeded beyond the contract; likewise the Award of interest in respect of the delay in the refund of earnest money deposited and security amount, was inadmissible under the contract; and lastly, that the Tribunal patently erred in law in discarding the expressly agreed price variation clause (Clause 5.41) in both the contracts and goes on ahead in the simpler arithmetical calculation on the subject.

3. The learned Single Judge noticed PNB's primary objections with respect to the arbitrability in having regard to Clause 5.46 but proceeded and rejected in the following terms:

9. *It has been rightly pointed out by Ms. Anusuya Salwan, learned counsel appearing for the Respondent, that the learned Arbitrator was justified in examining whether the plea of arbitrability of some of the in fact tenable. In MIs. J.G. Engineers Pvt. Ltd v. Union of India AIR 2011 SC 2477, it was explained by the Supreme Court that even where a contract provides that a named officer will have the final say in respect of certain items of claim, it would be open to the learned Arbitrator to examine whether in fact the plea of arbitrability was tenable. Reference was made to the earlier decisions of the Supreme Court in State of Karnataka v. Shree Rameshwara Rice Mills Thirthahalli (1987) 2 SCC 160 and Bharat Sanchar Nigam Limited v. Motorola India Pvt. Ltd, AIR 2009 SC 357. Ultimately it was concluded on the facts of the case that "the question whether Appellant was responsible or Respondents were responsible for the delay in execution of the work, was arbitrable". It was further held that "once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the Respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the Respondents".*

10. *Turning to the case on hand, as pointed out by the Respondent Clause 5.46 requires the named officer to take a decision in relation to the claims which constituted 'excepted' matters. The PNB does not appear to have*

*demonstrated before the learned Arbitrator that the named officer took such decision. The mere acceptance of the final bill by the Respondent would not amount to a waiver of its claims. Such a plea is in the teeth of Section 28 of the Act. This was not a case where the Respondent gave an undertaking that it would not raise any claim. Therefore the mere acceptance of the payment under the final bill did not preclude the Respondent from raising claims before the learned Arbitrator. The objection rinsed by the PNB to both the impugned Awards on the issue of arbitrability is hereby rejected.”*

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*16. The other substantial sums as far as Cases-I and II are concerned was with reference to price deviation. This pertained to Claim No.3 (b) in Case-I and Claim No. 1(g) and Claim No. 4(b) in Case-II. Under Clause 5.41 PVA would be admissible for the period of would not be admissible for the delay attributable to the Contractor. It was admissible for delay beyond six months. The Respondent submitted along with its statement of facts the quantification of the claims whereas no alternative quantification was provided by the PNB. In the circumstances, the learned Arbitrator has accepted the quantification submitted by the Respondent. The above determination of the PVA payable by the PNB does not appear to the Court as suffering from any illegality. The learned Arbitrator also clarified that he was not deciding the question whether the PNB was right in its decision. The scope of examination was confined to the correctness of the arithmetical computations and interpretations of the clause and its sub clauses. This is consistent with the legal position explained in MIs. **J.G. Engineers Pvt. Ltd.** Accordingly this Court does not find any reason to interfere with the impugned Awards as regards payment of PVA.”*

*17. The other substantial sums awarded by the learned Arbitrator in Case-I was with reference to deviated quantities. This was Claim No.2 in both Cases-I and II. Clause 5.35 (vii) of the agreement provided for payment of quantities up to a variation of plus 25% at the tender rates. In respect of minus 25% variation, the clause is silent as I regards the rates. The grievance of the Respondent was that instead of adopting the agreed rates for increase beyond 25% and adhering to tender rates for decrease beyond 25%, the PNB made arbitrary and unjustified reduction in both categories of items. The PNB tried to explain its actions by alleging that the work was sub-standard and that the rates were reduced on account of defects. The learned Arbitrator observed that "it seems surprising that sub-standard work was found only in reduced quantities and not in increased quantities (no evidence shown to the contrary)". The other defence taken was that since the Respondent had accepted the final bills, it should be taken to have waived its claims. The learned Arbitrator has rightly rejected this defence while dealing with the preliminary objections as to arbitrability."*

4. Mr. Rajesh Gautam, learned counsel appearing for the PNB urges that the impugned judgment requires to be set aside as the Award in this case discloses a patent error of law. It is submitted that the Tribunal virtually ignored Clause 5.46 which clearly spelt out that the finality to the Engineer Incharge's decision with respect to the cases for delay. It is submitted that the reliance placed upon J.G. Engineers Pvt. Ltd. vs. UOI, (2011) 5 SCC 758, in the circumstances of the case was not warranted. Learned counsel elaborated, by stating that in J.G. Engineers (supra), the condition interpreted was not as clear with respect to the delay or causes of delay in the execution of the contract as in the present instances. Clearly therefore, the Tribunal

exceeded its jurisdiction; such excess amounted to violation of Article 28(3) of the Act, which warranted interference so far as the Award pertains to “excepted matters”. Likewise, learned counsel urged that the Tribunal ignored clause 5.41 in which the parties have agreed in unequivocal terms that interest for a period beyond six months, would not be admissible in respect of EMD and security amounts. Learned counsel in this regard, relied upon *Union of India vs. Bright Power Project (India) Private Limited*, (2015) 9 SCC 695, in which the Supreme Court had occasioned to deal with the identical clause. The court then held that the Tribunal’s power to grant relief is circumscribed by such condition. Likewise, it was submitted that the Tribunal acted contrary to the mandate of the parties in the contract inasmuch as it proceeded to discard the price variation clause holding it to be complicated and instead substituting it with what the Arbitrator felt was a more reasonable and simpler method of calculation.

5. Ms. Salwan, learned counsel appearing for the Contractor urged that the reasoning of the learned Single Judge in the impugned order is sound and does not call for interference. She relied upon the judgment in *J.G. Engineers (supra)* to say that the court generally stated that the contract conditions which tendered to execute certain specific items, should be read in the proprietary and in no circumstances, should the aggrieved party denied the forum to ventilate its grievances. Urging that the conditions interpreted by the Supreme Court were in no way different, learned counsel stated that

the decision is to be read in a broad way and not in narrow manner. It was thus contended that the Tribunal's finding with respect reference to the cause of delay was upon its objective analysis of the facts and circumstances and not dependent upon one of the parties (i.e. the bank's Engineers) interpretation of it or the facts of the case. Being a neutral and impartial adjudicator, his decision should be left alone and considered final. As far as the grant of interest comes, learned counsel supported the Award submitting that there was inexplicable delay which necessitated the Award beyond the period stipulated. She highlighted that the PNB unreasonably did not allow the EMD and security amount to be converted into Fixed Deposits. Given these facts, the grant of rates of interest for period beyond the agreed or stipulated time cannot be construed as patent error. It was submitted with respect to last item (price variation) that the Tribunal was a sole Arbitrator and an expert in the field i.e. Retired Director General of CPWD. In his opinion, the conditions that PNB had raven into contract was price variation was undue complicated as it assimilated conditions that were peculiar different sectors. Instead the Arbitrator adopted a broad common sense and simple approach or mathematical calculation while dealing with price variation. In this view of the matter, it is submitted that the decision of the learned Single Judge does not call for interference.

6. The relevant conditions of the contract, (i.e. Clause 5.41 so far as it pertains to the dispute), which are the subject matter, are set out below:

#### 5.41 PRICE VARIATION ADJUSTMENT

*The rate quoted shall be firm throughout the tenure of the contract (including extension of time, if any, granted) and will not be subject to any fluctuation due to increase on account of sales tax, octroi and other taxes and levies etc. However price variation adjustment to the value of work payable to the contractor at tendered rates shall be made towards variation in the prices of materials and labour in the manner specified hereunder:*

*If, after the written order to commence the work and during the operative period of this contract including any authorized extensions of the original stipulated completion period:-*

- (a) there be any variation in the consumer price index-general index- for industrial workers (Base 1982= 100) (source data published from time to time in Indian Labour Journal) by the Labour Bureau, Government of India).*
- (b) there be any variation in the All India Whole sale Price Index for all the commodities (Base 1981-82=100) (as published from time to time in the RBI bulletin based on the date issued by the office of Economic Adviser to the Government of India).*

*Price Variation adjustment (PVA) towards (1) labour component and (2) material component shall be calculated in accordance with the formulae A and b respectively, given below, subject to stipulations hereinafter mentioned.*

*Formula (A) for labour*

$$VL = 0.87 P \frac{K1}{100} \times \frac{(C1-C0)}{100}$$

*Formula (B) for materials*

$$VM = 0.87 \times P \frac{K2}{100} \times \frac{11-10}{100}$$

Where –

*VL = Amount of Price Variation Adjustment – increase or decreases in rupees due to Labour Component.*

*VM – Amount of Price Variation Adjustment – increase or decrease in rupees on account of materials component.*

*Note: Bill (noted hereunder) signified the period of actual execution and not date of measurement or preparation bill.*

*P - Cost of work done during the period under consideration (bill period) excluding advances on materials cost of extra/substituted items and/or adjustments thereof.*

*K1 = Percentage of labour component as calculated as indicated in Note (1) below.*

*K2 = Percentage of materials component as indicated in Note (1) below.*

*CO = Consumer price index – general index number for industrial workers (Base 1982 = 100) referred to at (a) above, ruling on the last date for receipt of tenders, and as applicable to the centre, nearest to the place of work, for which the index is published.*

*C1 = Average of above mentioned consumer price index number during the period under consideration (bill period).*

*10 = All India wholesale price index number for all commodities referred to at (b) above, ruling on the last date for receipt of tenders and as applicable to the centre, interest, to the place of work for which the index is published.*

*11 = Average of above mentioned monthly All India Wholesale Price index numbers during the period under consideration (bill period).*

*Note: (1) K1 shall be taken as under:-*

- a. Component of work: Civil work including ancillary works and external work and R.C.C./tanks, septic tank etc. If any for sanitary and plumbing work. 30%*
- b. Sanitary and plumbing works including fittings and fixtures (internal work only) 20%*
- c. Electrical installations work including fittings and fixtures (external and internal works). 20%*

*Note: (2) K2 shall be taken as under:-*

- a. Civil work including ancillary works as detailed under Note (1)(a) above. 70%*
- b. Sanitary and plumbing works including fittings and fixtures as detailed under Note (1) above. 80%*
- c. Electrical installations work including fittings and fixtures as detailed under Note (1)(c) above. 20%*

*Stipulations:*

- 1. P.V.A. clause is operative either way i.e. if the variations in above referred price indicates are on the plus side, PVA shall be payable in the contractor and if they are on the negative<sup>3</sup> side PVA shall be recoverable from the contractor, for the respective bill period of occurrence of*

*fluctuations.*

2. *The rates quoted by the contractor shall be treated as firm for the value of work required to be done in the first 6 months of the contract period from the date of written order to commence work, and no PVA is admissible on the same on any grounds whatsoever. The value of work required to be done during the first 6 months of the contract period shall be taken as 80% of the value of work to be done on pro-rata basis in 6 months as compared to the total stipulated completion period. No PVA is admissible on the value of work required to be done in the first 6 months as worked out above, even if this value of work is actually done in a period longer than 6 months. However, in case of any delay in the first 6 months due to genuine reasons which are not attributable to the contractor and which are beyond his control, such period of delay will be deducted from 6 months, and the value of work to be done will be 80% of the prorated value of work to be done in such reduced period of prorated basis.*
- iii. (a) *For works where the original stipulated period of completion is not more than 6 months no PVA whatsoever is permissible under this clause. However, if the period of completion is delayed beyond 6 months on account of genuine reasons which are not attributable to the contractor and which are beyond his control, PVA will be admissible on the value of work done only in excess of value of work required to be done on a prorated basis in the first 6 months minus the period of such genuine delay.*
- iii. (b) *For purposes of admissibility of PVA all the cumulative period of extensions granted for reasons which are solely attributable to the*

*contractor is excluded from the total extended period of the contract and PVA shall not be admissible on the value of work done during such period of extensions, which are granted for keeping the contract current, but only due to reasons for which the contractor was solely responsible. Periods for extensions granted on account of genuine reasons which are not attributable to the contractor and which are beyond his control will, however, be included in the period for which PVA is admissible.*

- iii. *(c) Notwithstanding anything to the contrary mentioned in any other clause-clause of the contract, extensions of the contract period shall be granted by the Architect only with prior approval of the bank. Extensions granted by the Architect without bank's prior approval shall not bind the bank for payment of PVA for work done in the concerned period of extension.*
- iv. *(a) Where the total costs of work done beyond the value of work required to be done in the first 6 months (vide note (ii) and (iii) above) does not exceed Rs.10 lacs and the total amount of PVA worked out on the basis of provisions of foregoing stipulations will be limited to an upper ceiling of 10% of such value of work done in excess of value of work required to be done in the first 6 months.*
- iv. *(b) Where the total value of work done beyond the value of work required to be done in the first 6 months exceeds Rs.50 lacs the PVA on the first Rs.50 lacs will be calculated as provided for in the foregoing para and for the balance value of work done for which PVA is admissible subject to foregoing conditions, the PVA will not have the upper ceiling of 10% but it will be worked out at a lower rate i.e. at 80% of the amount worked out.*

- v. *In working out the amount of PVA as per all the foregoing stipulations, value of such extra items or such portions of extra items the rates of which are derived from the prevailing market rates of materials and labour will not be included in the value of work done. Value of only such extra items or such portions of extra items, rates of which are derived from tendered rates will be included in the value of work on which PVA is calculated.*
- vi. *For claiming the payment of PVA the contractor shall keep such books of accounts and other documents, vouchers, receipts etc. as may be required by the bank/Architect, for verification of the increased claims for reductions, to be made as the case may be and he shall also allow inspection of books, documents, by the Site Engineer and bank's Engineer and/or other duly authorized representation of the bank/Architects and furnish such information as may be required or called for to enable verification of the claim within a week of such request.*
- vii. *The contractor is required to submit to the bank, through the Architect, his claims for PVA separately for each running bill for the individual bill period for the work paid to him by the bank. He will also be required to submit detailed calculations in support of the claims.*
- viii. *No claim will be entertained from the contractor for interest or any other grounds for non-payment or for any delay in payment of PVA due to late publication or non availability of the necessary price indices or due to delay in preparation of the running or final bills.*
- ix. *In view of adjustments for variations of prices of materials and labour which have been covered in t*

*his clause no other adjustments for any reasons whatsoever like statutory measures, taxes, levies escalation in prices of Cement & Steel etc. will be allowed.*

- x. In all cases of disputes under this clause the decision of the competent authority who shall given a reasonable hearing to the contractor in person (not through Agents/Advocates) shall be final and binding.*
- xi. If any material at fixed rate or services rendered by the Employer, the value of the same shall not be taken into consideration for calculating PVA.*

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#### **5.46 EXCERPTED MATTERS FROM ARBITRATION**

*If the dispute or differences pertain to the undernoted matters (called excepted matters) the decision and in writing of the officer named in the contract shall be final, conclusive and binding on the parties. Instruction, transactions with local authorities, proof of quality of material. Assigning or under letting of the contract certificate as to the causes of delay on the part of the contractor and justifying extension of time. Rectifying of defects pointed out during the defects liability period. Notice to the contractor to the effect that he is not proceeding with due diligence certificate that the contractor has abandoned the contract. Notice of determination of contract by the employer.*

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#### **5.12 EARNEST MONEY AND SECURITY DEPOSIT**

*The tenderer will have to deposit an amount of Rs.25,000/- in cash, demand draft only (not in the form of*

*Bank Guarantee) in favour of Punjab National Bank at the time of submission of tender as an Earnest Money. The employer is not liable to pay any interest on the Earnest Money. The Earnest Money of the unsuccessful tenderers will be refunded without any interest soon after the decision to award the work is taken or expiry of the validity period of the tender.*

*The successful tenderer to whom the contract is awarded will have to deposit as initial security deposit a further sum to make up 2% of the value of the accepted tender including the Earnest Money. The initial Security Deposit will have to be made within 14 days from the date of acceptance of tender, failing which the Employer at his discretion may revoke the letter of acceptance and forfeit the earnest money deposit furnished along with the tender. The initial security deposit shall be accepted in the form of cash or D.D. and not by Bank Guarantee.*

*Apart from the initial security deposit made as above, retention money shall be deducted from progressive running bills 8% of the gross value of each running bill until the total security deposit i.e. the initial security deposit plus the retention money equals.*

- (a) 10% of the first rupees one lakh of the tendered cost of work*
- (b) 7.50% on the next rupees one lakh of the tendered cost of work*
- (c) 5% on the remaining amount of the tendered cost of work, subject to a ceiling on total security deposit at rupees ten lakhs (Rs.10,000,00/-)*

*The initial security deposit including earnest money shall be refunded to the contractor after 14 days of issue of virtual completion certification by the Employer. The retention money shall be refunded to the contractor one*

*month after the defect liability period is over provided he has satisfactorily carried out all the works and attended to all the defects in accordance with the conditions of contract and has received the Employer and architect's certificate that the contractor has rectified all the defects to the satisfaction of employer and architect subject however to clause 6.15, 5.29 and 5.43. No interest is allowed on initial security deposit. Earnest money and Retention money.*

7. In J.G. Engineers (supra), the Supreme Court had to deal with clause 25(2) and 25(3) of the Contract. These are described in the following manner:-

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*(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the contractor shall pay as compensation for every day's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. What is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for every day's delay, that is, whether it should be 1% or lesser. His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.*

*(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending*

*Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for every day the due quantity of the work remains incomplete, subject to a ceiling of ten per cent. This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.*

*(iii) The first part of Clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date, certain consequences as stated therein, will follow. What is made final by this provision is the decision of the Engineer-in-charge as to whether the contractor will be able to secure the completion of the work by the due date of completion, which could lead to the termination of the contract or other consequences. The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the Department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of the Engineer-in-charge is made final.*

*(iv) The second part of Clause (3) of the agreement provides that where the contractor had*

*made himself liable for action as stated in the first part of that clause, the Engineer-in-charge shall have powers to determine or rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-charge shall be conclusive evidence of such termination or rescission. This does not make the decision of the Engineer-in-charge as to the validity of determination or rescission, valid or final. In fact it does not make any decision of the Engineer-in-charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-charge under his signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined.*

*(v) After determination or rescission of the contract, if the Engineer-in-charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the Engineer-in-charge in regard to such excess shall be final and conclusive, shall be borne and paid by the original contractor. What is made final is the actual calculation of the difference or the excess, that is, if the value of the unexecuted work as per the contract with the original contractor was Rs. 1 lakh and the cost of getting it executed by an alternative contractor was Rs. 1,50,000 what is made final is the certificate in writing issued by the Engineer-in-charge that Rs. 50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-charge is valid and legal and whether it was due to any breach on the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on*

*which the decision of Engineer-in-charge is made final.*

8. After outlining, the execution clauses and interpreting it, the court observed as follows:

*“18. Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the Department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.”*

9. It is quite evident from the juxtaposition of the execution condition, which was a subject matter of J.G. Engineers Pvt. Ltd. on the one hand and Clause 5.46 on the other, that the stipulation with regard to what is executed is categorical “as to the cases of delay on the part of the contract certificate, as to the part of contract and justifying extension time”. Clearly therefore, the Contractor in the

present case could not have sought arbitration before the Tribunal with respect to their excepted matters.

10. This court also notes that in *J.G. Engineers Pvt. Ltd. (supra)*, the condition with respect to delay was not as forthright as in the present case. It was in that context that the court went on to hold that the cases for delay are an arbitrable issue, whereas the controversy for delay as to who is responsible would be arbitrable and the other consequential issues with respect to calculation would be left to the Engineer. In this case, however the condition is categorical inasmuch as to what are the cases of delay that are non-arbitrable and are excepted matters. This court is also of the opinion that there is no merit in the Contractor's submission that such excepted matters leave it with no forum. The judgments in this regard i.e. with respect to the forums excluded matters [*Vishwanath Sood vs. Union of India and another*, (1989) 1 SCC 657, ***General Manager, Northern Railway vs Sarvesh Chopra*** reported in (2002) 4 SCC 45] only meant that the dispute is not arbitrable; however, the Contractor is at liberty to approach the concerned forum i.e. the court for appropriate adjudication.

11. In view of the aforesaid discussion, it is held that the impugned judgment to the extent it holds that the Award with respect to the cases of delay and the consequential amounts awarded to the contractor cannot be sustained.

12. With respect to the price variation clause and with respect to

the interest on delay, stipulated beyond a particular period, this court notices that the judgment in *Bright Power Project (India) Private Limited* (supra) is equally forthright. The court had then occasioned to consider the conditions and stated in its reasoning as to why such interest is impermissible in law, which reads as under:

*“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.”*

13. This court is bound by the reasoning in *Bright Power Project* (supra), the interest to the extent it was granted in excess of the stipulated and agreed amount is therefore inadmissible and clearly amounts to an error in law inasmuch as it proceeds beyond the contractual condition.

14. The Arbitrator with respect to the price variation clause stated as follows:-

*“The complicated clause 5.41 has been made more cumbersome and difficult to operate by the stipulations that follow, It seems surprising that for a simple type of construction work, such a bulky contract-agreement has been framed - which looks like a collection of various provisions existing in different P.W.D. or private contracts. There is no need to mention here that bulkier the document, greater are the chances of errors, repetitions, and internal self. contradictions -both technical and legal. Simpler tenders would encourage a simpler and more competitive response.”*

15. In this court's opinion, the Arbitrator clearly transgressed the expressly agreed condition in proceeding to discard what in his judgment was “complicated terms” and preferring the method that was to his own liking. Parties' autonomy to write the contract and impose such conditions as binding upon each other is only emphasized in all legal proceedings – be it in arbitration or in courts. It is only when parties expressly consent to discard or waive or modify condition that the court or appropriate forum and proceed to do so. In this case, there was no such consent or consensus. Clearly therefore, the unilateral decision of the Arbitrator to re-write the contract contravene Section 28(3) and amounted to a patent error of law, calling for interference with the Award.

16. In view of the above reasoning, this court is of the opinion that the impugned judgment cannot be sustained so far as the three aspects dealt with the concerned. It is accordingly set aside as is the award in

respect of claims 1(a), 1(c) and 3(b) made in FAO (OS) No.233/2013 and the award in respect of claim 1(a), 1(d) and 4(b) in FAO (OS) No. 234/2013 for the same reasons. It is, however, open to the Contractor to withdraw the amount except to the extent that the appeals stand allowed, and are accordingly directed to appear before the Registrar on 23.08.2018 for consequential purposes.

17. The appeals are partly allowed to the extent indicated above.

**S. RAVINDRA BHAT, J**

**A. K. CHAWLA, J**

**AUGUST 02, 2018**  
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