

**IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi

AO COM 36 of 2024

WITH

AP COM 208 of 2024

Union of India

Vs.

Senbo Engineering Limited

With

OCOT 1 of 2025

Union of India

Vs.

Senbo Engineering Limited

For the Appellant	:	Mr. Sidhartha Lahiri, Adv. Mr. Nandlal Singhania, Adv. Ms. Amrita Pandey, Adv.
For the Respondent	:	Mr. Pradip Kr. Dutta, Sr. Adv. Mr. Nilay Sengupta, Adv. Mr. Sujit Banerjee, Adv. Mr. Mohit Gupta, Adv.
Hearing Concluded on	:	January 21, 2026
Judgement on	:	March 11, 2026

DEBANGSU BASAK, J.:-

1. Appellant has assailed the judgment and order dated August 5, 2024 passed in AP-COM 208 of 2024 in AO COM 36 of 2024.

Respondent has filed a cross objection which was registered as OCOT 1 of 2025.

2. For the sake of convenience the parties in the appeal and the cross objection are referred to in the manner as they appear in the appeal. Both the appeal and the cross objection were heard together.

3. By the impugned judgment and order, learned Single Judge in exercise of powers under Section 34 of the Arbitration and Conciliation Act, 1996, has allowed a part of the challenge by setting aside a portion of the impugned award of the Arbitral Tribunal before it, and allowed and upheld the balance part of the award.

4. Learned advocate appearing for the appellant has contended that, a tender dated February 11, 2011 was floated in which, the respondent participated. The appellant had issued the Letter of Acceptance on July 19, 2011. Finding that, the respondent was not executing the contract in terms thereof, appellant had terminated the same on November 10, 2017. A notice under Section 21 of the Act of 1996 was issued on June 21, 2017. The Arbitral Tribunal had entered into reference and in consequence thereto made and

published the award on March 9, 2021 with a corrigendum thereof on November 27, 2021.

5. Learned Advocate appearing for the appellant has drawn the attention of the Court to the statement of claim. He has contended that, all claims made by the appellant before the Arbitral Tribunal fell within the excepted clause of the arbitration agreement. In this regard, he has referred to the arbitration clause and the excepted clause contained in the contract.

6. Learned advocate appearing for the appellant has contended that, out of 11 claims, the Arbitral Tribunal allowed claim nos. 1,2,7,8 and 11. All of such claims which were allowed by the Arbitral Tribunal had fallen within the excepted clause.

7. Relying upon **2014 Volume 9 Supreme Court Cases 246 (Harsha Constructions Vs. Union of India and Others), 2022 Volume 4 Supreme Court Cases 463 (Indian Oil Corporation Limited Vs. Shree Ganesh Petroleum Rajgurunagar) and 2023 Volume 2 Supreme Court Cases 539 (Indian Oil Corporation Limited Vs. NCC Limited)** learned Advocate appearing for the appellant has contended that, since, the disputes adjudicated upon fell within the excepted clause, the award cannot be sustained.

Learned Judge has erred in sustaining a portion of the award passed by the Arbitral Tribunal.

8. Learned Senior Advocate appearing for the respondent has contended that, none of the claims allowed by Arbitral Tribunal fell within the excepted clause. He has relied upon **2011 Volume 5 Supreme Court Cases 758 (J.G. Engineers Private Limited Vs. Union of India and Another)** and **2025 SCC Online SC 419 (Dr. Poornima Advani and Anr Vs. Government of NCT and Anr)** in support of such contention.

9. Learned Senior Advocate appearing for the respondent has referred to the claims made by the Arbitral Tribunal as also the excepted clause. He has contended that, none of the claims fell within the excepted clause.

10. Learned Senior Advocate appearing for the respondent has contended that, the learned Judge erred in disallowing claim Nos. 2,8 and 11 which were granted by the Arbitral Tribunal. He has contended that, none of those claims fell within the excepted clause.

11. In course of hearing of the appeal and this cross objection we had invited the attention to the learned counsel for the parties to **2024 SCC Online SC 2632 (Punjab State Civil Supplies**

Corporation Limited Versus Sanman Rice Mills) on the scope and ambit of Section 37 of the Act of 1996. The learned Counsel for the respective parties had made their submissions on the same.

12. The appellant had invited bids comprising of a technical and financial construction of viaduct including related works for 2.16 km length including substructure on pile foundation with substructure and superstructure work of Dum Dum cantonment station building. The respondent had participated in such tender process and was successful therein. Appellant had issued a work order dated July 19, 2011 to the respondent.

13. The contract between the parties had reciprocal obligations to be performed by each of the parties. Disputes and differences had arisen between the parties which were referred to arbitration of the Arbitral Tribunal.

14. In the arbitration proceedings, the respondent had filed a statement of claim containing 11 heads of claims, which are as follows:-

Claim No.	Description	Claim Amount in (Rs.)

Claim No. 1	Claim of amount for Rs. 2,47,81,885.20 withheld in CC/30 th Account Bill	Rs.6,30,01,176.26
	Claim of amount withheld/not released towards CC/7 th Escalation Bill for Rs. 2,24,53,931.00 against escalation in prices calculated in terms of the formula provided in the contract.	
	Claim Amount for Rs. 98,16,012.33 against CC/31 st On Account Bill submitted.	
	Claim Amount for Rs. 59,49,347.73 towards CC/8 th Escalation Bill submitted.	
Claim No. 2	Recovery of Security deposit as retention money from the Claimant's On Account Bills for Rs. 10,48,723/-	Rs. 10,48,723.00
Claim No. 3	Claim for Refund of total Bank Guarantees invoked amounting to Rs. 22,55,37,111/-	Rs.22,55,37,111.00

Claim No. 4	Loss due to idle on-site and off-site overheads during the entire period upto 30-08-2017 = Rs. 23,65,23,517/-	Rs.23,65,23,517.00
Claim No. 5	Loss due to idle machinery upto 30-08-2017=Rs. 30,47,30,000/-	Rs.30,47,30,000.00
Claim No. 6	Loss of profit during the entire period upto 30-08-2017=Rs. 57,55,40,556/-	Rs.57,55,40,556.00
Claim No. 7	Refund of interest on Mobilization Advance paid by the Claimant so far beyond the original schedule and waiver of the same in future=Rs. 2,97,35,112/-	Rs. 2,97,35,112.00
Claim No. 8	Refund of commission paid to Bank for extension of Bank Guarantees from time to time beyond the original contractual period = Rs. 1,95,10,505/-	Rs. 1,95,10,505.00
Claim No. 9	Non-payment of item for dismantling of hutments for removal of encroachments from site and reconstruction of new hutments along with improvement	Rs. 1,70,00,000.00

	of land and drainage system – Rs. 1,70,00,000/-	
Claim No. 10	Claim for loss due to unauthorised offloading of work between Ch. 3009.945 M to Ch. 3123.445 M for Rs. 4,90,00,000/-	Rs. 4,90,00,000.00
Claim No. 11	Claim for interest	
Claim No. 12	Cost of Arbitration Proceedings = As to be accrued.	
Total claim Amount is Rs. (Rupees One Hundred Fifty Two crore sixteen lacks twenty six thousand seven hundred and paisa twenty six)		Rs.152,16,26,700.26

15. The appellant had filed a counter statement and counterclaim before the Arbitral Tribunal. In the counter statement and counterclaim, the appellant had two heads of claims, namely claims on account of damages and claims for costs of arbitration. The respondent had filed a rejoinder to the counter statement and counterclaim of the appellant.

16. Arbitral Tribunal had made and published the award on March 9, 2021. Arbitral Tribunal had corrected the award on March 27, 2021. Arbitral Tribunal had by the award as corrected allowed

all the 11 claims of the respondent and dismissed the two counterclaims of the appellant. The Arbitral Tribunal had rejected claims counter No. 1 (iv), 4, 5, 6, 9, and 10 of the respondent. These rejections have not been challenged by the respondent.

17. Appellant had challenged the award dated March 9, 2021 as corrected on March 27, 2021 under Section 34 of the Arbitration and Conciliation Act, 1996. Such challenge has been partly allowed and partly disallowed by the impugned judgement and order.

18. By the impugned judgement and order, learned Single Judge has upheld the challenge in respect of claims Nos. 2, 8 and 11 of the respondent before the Arbitral Tribunal while rejecting the challenge towards claim Nos. 1, 3 and 7.

19. The appellant has premised the primary, if not the only, ground of challenge to the award upon the Excepted Clause in the contract, which is as follows: –

Existing Clause	Revised Clause
63 – Matters finally determined by the Railway – all disputes and differences of any kind whatsoever arising out of or in	63 – Matters finally determined by the Railway – All disputes and differences of any kind whatsoever arising out of or

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 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 provisions 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 (xii)(B) of General Conditions of Contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' and decisions of the Railway	in connection with the contract, whether during the progress of the work or after it's 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 (xii)(B) of General Conditions of Contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' shall stand specifically excluded from
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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 and not be referred to arbitration.	the purview of the arbitration clause.
Note : Existing Clause be read with Correction Slip No. 2 issued vide Board's letter No. 96/CE-I/CT/29 dated 22-2-2021.	

20. *Harsha Constructions (supra)* has held that, even if a non arbitrable dispute is referred to arbitration or even if an issue is framed by arbitrator as to such dispute, it is not open for an arbitrator to arbitrate on such non arbitrable dispute since it was beyond his jurisdiction.

21. *Shree Ganesh Petroleum Rajgurunagar (supra)* has held that, award on issues and matters beyond the scope of arbitration clause are invalid.

22. *NCC Limited (supra)* has held that, an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. If a clause stipulates that under certain circumstances there can be no arbitration and they are demonstrably clear thus the controversy pertaining to appointment of arbitrator has to be put to rest.

23. *J.G. Engineers Private Limited (supra)* has considered the excepted matter clause in the contract. It has held that, a contract cannot provide that one party will be the arbitrator to decide whether he committed breach or the other party committed the breach. Consequently, it has held that, the question whether the employer or the contractor was responsible for the delay in the execution of work was arbitrable.

24. *Dr. Poornima Advani (supra)* has held that, if on the facts of the case, the doctrine of restitution is attracted interest should follow. It has held that, when a person is deprived of the use of his money to which he is legitimately entitled, he has a right to be compensated for the deprivation which may be called interest or compensation.

25. Arbitral Tribunal has dealt with the plea of Excepted Clause as follows: –

“ 7.2 Excepted Matters

7.2.1. Respondent's Case: The Respondent took a plea of various Matters being Excepted Matters in terms of the contract with regard to various claims like measurements, determination of rates for new items etc.

7.2.2. Claimant's Case: The Railway have taken the plea of Excepted matters with regard to the final measurements, and rates for newly introduced item E2 for affecting reduction. The claimant argued that they were not associated in either the final measurements not the determination of the new negative rate and his protestations were also simply ignored. Without following the due process as per GCC of associating the Contractor or entertaining his representation, the Claimant argued that the Railway's plea of Excepted matter has no merit.

7.2.3. Deliberations of the AT: A Contract has to be read in its totality. AT is of the view that the exceptions like Excepted Matter cannot be applied in isolation. To take the Respondent's argument regarding Measurement of quantities, undoubtedly there is a contractual provision that it is an 'excepted matter', but subject to certain pre-conditions enjoined in the agreement being observed. The Railway cannot on one hand not follow the requisite procedure for jointly recording measurements, formally resolving representations etc. and then hide behind the plea of Excepted Matter. Hence while AT takes note and record that the Respondent have made this plea from time to time but nevertheless, the Respondent have been amiss in not following the due process as provided in the Contract, which would have made the Excepted matter immune to Arbitral interference. Hence, AT is not convinced of the Respondent's plea of treating such matters as Excepted Matters. However

AT will again discuss this matter in the Claims awards discussion where the Respondent has taken the plea of "Excepted Matter."

26. Arbitral Tribunal has dealt with the plea of excepted matters specifically. In the award, Arbitral Tribunal has dealt with contentions of the respective parties on such an issue. Arbitral Tribunal has held that, a contract has to be read in its totality. Arbitral Tribunal has noted the quality of the claims of the respective parties. It has held that, new items of claim with respect to the bills not paid, forfeiture of security deposit are inextricably linked to the dispute and are within the scope of arbitration.

27. It is trite law that, an Arbitral Tribunal has the jurisdiction to decide on the parameters of the arbitrable disputes. In the facts and circumstances of the present case, Arbitral Tribunal has come to the finding that, all claims are inextricably intertwined with each other and therefore, the excepted clause will not apply. In addition thereto, Arbitral Tribunal has noted that the appellant before us, conducted its affairs contemporaneously in such a manner so as not to distinguish between excepted matters and matters which are arbitral at the time of execution of contract.

28. The view taken by the Arbitral Tribunal on the issue of excepted matters being plausible, no interference is called for by the Court exercising its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 or under Section 37 thereof.

29. A Court exercising jurisdiction under Section 37 of the Act of 1996 is to consider whether, the Section 34 of the Act of 1996, Court exercised jurisdiction within the parameters of law or not. In the facts and circumstance of the present case, Section 34 Court has set aside the award in respect of claim nos. 2, 8 and 11. Claim no. 2 is on account of recovery of security deposit while claim no. 8 is on account of refund of commission paid to bank for extension of bank guarantee and claim no. 9 is on account of interest.

30. So far as the claim no. 2 is concerned, the claimant/respondent herein, is entitled to the security deposit which was deducted from bills of the claimant/respondent from time to time. When the Arbitral Tribunal has held that, the appellant before us, was guilty of delay in handing over the work site, deleting and adding to the contract, and unilaterally introducing new item causing reduction in rates of RCC items and that to with retrospective effect, and where the Arbitral Tribunal has arrived at the finding that, the appellant created circumstances

for making the respondent unable to perform its obligation under the contract and where, the Arbitral Tribunal has concluded that the termination of contract is without merit, then, claim no. 2 on account of recovery of security deposit should be allowed.

31. Similarly, claim no. 8 is inextricably intertwined with the other claims. It has been established before the Arbitral Tribunal that, the appellant had brought about a circumstance which prevented the respondent from executing the contract. Arbitral Tribunal has recorded a finding that the termination of contract itself is without any merit. Arbitral Tribunal has also held that, there was undue delay on the part of the appellant in handing over work sites, deletion and addition of contract and introducing new items. Therefore, the respondent was required to extend the bank guarantee from time to time for no fault of theirs. Consequently, it is just and proper that, the respondent be reimbursed with the commission paid to the bank for extension of the bank guarantee. Contract had required the respondent to furnish a bank guarantee which the respondent did. Respondent had from time to time extended such bank guarantee. Obtaining such extensions of bank guarantee was obviously at a cost to the respondent. The appellant being guilty of delay with regard to the execution of the contract,

has to compensate the respondent for the commission that the respondent was required to pay for extension of bank guarantee.

32. The issue of claim for interest under claim no. 11 has to be considered in light of the ratio of ***Dr. Poornima Advani (supra)***. Delay in execution of contract being attributable to the appellant and the termination of the contract by the appellant being held to be illegal, and, the appellant being found to be withholding money belonging to the respondents wrongfully, then, the natural course of compensation for the wrongful withholding money belonging the respondent is a compensation by way of interest being awarded in favour of the respondent.

33. In view of the above discussions, we find that, the Court exercising powers under Section 34 of the Act of 1996 did not apply the parameters of law for setting aside a portion of the award, appropriately. Learned Single Judge did not find, claim nos. 2, 8 and 11 which were disallowed were severable from the other parts of the award itself.

34. In view of the irregular exercise of jurisdiction by the Section 34 Court, we set aside the impugned judgment and order dated August 05, 2024. Challenge to the award consequently fails.

35. AO COM 36 of 2024 is dismissed without any order as to costs.

36. OCOT 1 of 2025 is allowed. No order as to costs.

[DEBANGSU BASAK, J.]

37. I agree.

[MD. SHABBAR RASHIDI, J.]