CASE NO.:
Appeal (civil) 1791 of 2002

PETITIONER:
GENERAL MANAGER NORTHERN RAILWAYS & ANR.

Vs.

RESPONDENT:
SARVESH CHOPRA

DATE OF JUDGMENT: 01/03/2002

BENCH:
R.C. Lohati & Brijesh Kumar

JUDGMENT:

R.C. Lahoti, J.

The respondent was granted by the appellants work of construction on bored piles 500 mm dia by cast in Situ method for widening and raising of Pul Mithai (S). A contract was entered into between the parties on 27.4.1985. The contract is subject to the General conditions of the contract of Railways read with Special Conditions. Disputes arose between the parties and the respondent moved a petition under Section 20 of the Arbitration Act, 1940 praying for the arbitration agreement being filed in the Court and six claims set out in the petition being referred to the Arbitrator for settlement. The learned Single Judge of the High Court of Delhi (Original Side) directed two claims to be referred but as to claims numbers 3 to 6 formed an opinion that the claims being 'excepted matters' within the meaning of Clause 63 of General Conditions of Contract were not liable to be referred to arbitration. An intra-Court Appeal preferred by respondent has been allowed and the four claims have also been directed to be referred by the Division Bench to arbitrator on forming an opinion that they were not covered by 'excepted matters'. The appellants have filed this petition seeking special leave to appeal against the decision of Division Bench.

Leave granted.

Clause 63 of the General Conditions of the Contract provides as under:-

"Matters finally determined by the Railway All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1) (XII)(B)(e)(b) of the General conditions of

Contract or in any clauses of the special conditions of the contract shall be deemed as excepted matters and decisions thereon shall be final and binding on the contractor provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration."

Clauses 9.2., 11.3 and 21.5 of Special Conditions of contract are as under:-

"9.2. No material price variation or wages escalation on any account whatsoever and compensation for "Force Majaure" etc. shall be payable under this contract.

11.3. No claim whatsoever will be entertained by the Railway on a/c of any delay or hold up of the works arising out of delay in supply of drawings, changes, modifications, alterations, additions, omissions, omissions in the site layout plans or detailed drawings or designs and or late supply of such materials as are required to be arranged by the Railway or due to any other factor on Railway Accounts.

21.5. No claim for idle labour and/or idle machinery etc. on any account will be entertained. Similarly no claim shall be entertained for business loss or any such loss."

Claims numbers 3 to 6 whereon reference is sought for by the respondent to the Arbitrator are as under:-

3. There occurred tremendous increase in cost of building materials. 52 Nos. of piles were bored after the expiry of stipulated completion period and particularly when the prices were too high. Additional cost incurred @ Rs.250/- for these 42 Nos. of piles may please be paid. This has also been verified by your staff at site, Rs.250 x 42 Rs.10500/-.

4. Piling rig with diesel driven wench, mixture, machine, driving pipe, wheel barrows, hoppers and other tools and plants remained idle at site for 24 months, i.e. for 75 days. The entire machinery was procured from the market on hire charges. Rent was paid @Rs.1070/- per day for this machinery. Hire charges amounting to Rs.80,250/- (1070x75) may please be reimbursed.

5. The site was not made available for one month. Changes took place and decisions were delayed. The Work which was required to be completed within 3Â½ months but dragged on for additional period of 6 months. Establishment period of 6 months at a cost of Rs.10,000/- per month. These losses may please be paid. (Rs.10,000/-x6 Rs.60,000).

6. The work of Rs.5,95,000/- was required to be completed within 3Â½ months meaning thereby, monthly progress would not be less than Rs.1,75,000/-. As against the entire work could be

completed within a period of 9Â½ months i.e. Rs.75,000/- per month. The losses sustained for less output may be compensated and this comes to Rs.40,000/-."

According to the appellants, claims numbers 3, 4 and 5 are covered respectively by Clauses 9.2, 21.5 and 11.3. Claim No.6 is covered by Clause 11.3 of Special Conditions. On this there does not appear to be any serious controversy. The core issue is the interpretation of Clause 63 of the General Conditions and Section 20 of the Arbitration Act, 1940.

A bare reading of Clause 63 shows that it consists of three parts. Firstly, it is an Arbitration Agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for adjudication by arbitration, by the Railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with 'excepted matters'. 'Excepted matters' are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any clauses of the Special Conditions of the Contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause and hence shall not be referred to arbitration. The source of controversy is the expression "matters for which provision has been made..in any clauses of the Special Conditions of the contract shall be deemed as 'excepted matters' and decisions thereon shall be final and binding on the contractor." It is submitted by the learned counsel for the respondent that to qualify as 'excepted matters' not only the relevant clause must find mention in that part of the contract which deals with special conditions but should also provide for a decision by an authority of the Railways by way of an 'in-house remedy' which decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an 'excepted matter'. The learned counsel supported his submission by reading out a few clauses of General Conditions and Special Conditions. For example, vide Clause 18 of General Conditions any question or dispute as to the commission of any offence or compensation payable to the Railway shall be settled by the General Manager of the Railway in such manner as he shall consider fit and sufficient and his decision shall be final and conclusive. Vide Clause 2.4.2.(b) of Special Conditions a claim for compensation arising on account of dissolution of contractor's firm is to be decided by Chief Engineer (Construction) of the Railway and his decision in the matter shall be final and binding on the contractor. Vide clause 12.1.2. of Special Conditions a dispute whether the cement stored in the godown of the contractor is fit for the work is to be decided by the Engineer of Railways and his decision shall be final and binding on the contractor. The learned counsel submitted that so long as the remedy of decision by some one though he may be an authority of the Railways is not provided for, the contractor's claim cannot be left in lurch by including the same in 'excepted matters'. We find it difficult to agree.

In our opinion those claims which are covered by several clauses of the Special Conditions of the Contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2., 11.3 and 21.5 of Special Conditions are illustrative of such claims. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will

be entertained by the Railway", or "no claim will/shall be entertained". These are 'no claim', 'no damage', or 'no liability' clauses. The other category of claims is where the dispute or difference has to determined by an authority of Railways as provided in the relevant clause. In such other category fall such claims as were read out by the learned counsel for the respondent by way of illustration from several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clause 2.4.2.(b) and 12.1.2. The first category is an 'excepted matter' because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within 'excepted matters' because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to the second category of 'excepted matters'.

The learned counsel for the respondent placed reliance on Vishwanath Sood Vs. Union of India & Anr., (1989) 1 SCC 657, and Food Corporation of India Vs. Sreekanth Transport, (1999) 4 SCC 491 to strengthen his submission that an 'excepted matter' should be one covered by a clause which provides for a departmental remedy and is not arbitrable for that reason. We have carefully perused both the decisions. Vishwanath Sood's case is one wherein Clause 2 of the contract envisaged determination of the amount of compensation for the delay in the execution of work only by the Superintending Engineer whose decision in writing shall be final. In Food Corporation of India's case also the relevant clause provided for the decision of Senior Officer being final and binding between the parties. Both were considered to be 'excepted matters'. A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on. The two decisions relied on by the learned counsel for the respondent hold a Clause providing a departmental or in-house remedy and attaching finality to decision therein to be an 'excepted matter' because such were the Clauses in the contracts which came up for the consideration of this Court. Those decisions cannot be read as holding nor can be relied on as an authority for the proposition by reading them in a negative way that if a departmental remedy for settlement of claim was not provided then the claim would cease to be an 'excepted matter' and such should be read as the decision of this Court.

It was next submitted by the learned counsel for the respondent that if this Court was not inclined to agree with the submission of the learned counsel for the respondent and the interpretation sought to be placed by him on the meaning of 'excepted matter' then whether or not the claim raised by the contractor is an 'excepted matter' should be left to be determined by the arbitrator. It was submitted by him that while dealing with a petition under Section 20 of the Arbitration Act, 1940 the Court should order the agreement to be filed and make an order of reference to the arbitrator appointed by the parties leaving it open for the arbitrator to adjudicate whether a claim should be held to be not entertainable or awardable being an 'excepted matter'. With this submission too we find it difficult to agree. While dealing with a petition under Section 20, the Court has to examine: (i) whether there is an arbitration agreement between the parties, (ii) whether the difference which has arisen is one to which the arbitration agreement applies, and (iii) whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. The word 'agreement' finding place in the expression 'where a difference has arisen to which an agreement applies', in sub-section(1) of Section 20 means 'arbitration agreement'. The reference to arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or

ministerially by the Court; it is a consequence of judicial determination, the Court having applied its mind to the requirements of Section 20 and formed an opinion, that the difference sought to be referred to arbitral adjudication is one to which the arbitration agreement applies. In the case of Food Corporation of India (supra), relied on by the learned counsel for the respondent, it has been held as the consistent view of this Court that in the event of the claims arising within the ambit of 'excepted matters', the question of assumption of jurisdiction by any arbitrator either with or without the intervention of the Court would not arise. In Union of India Vs. Popular Builders, Calcutta (2000) 8 SCC 1, and Steel Authority of India Ltd. Vs. J.C. Budharaja, Government and Mining Contractor - (1999) 8 SCC 122, Ch. Ramlinga Reddy Vs. Superintending Engineer & Anr. (1994) 5 Scale 12 (pr.18), M/s Alopi Parshad Vs. Union of India (1960) 2 SCR 793 at page 804 this Court has unequivocally expressed that an award by an arbitrator over a claim which was not arbitrable as per the terms of contract entered into between the parties would be liable to be set aside. In M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project & Anr., (1991) 1 SCC 498, a claim covered by 'excepted matter' was referred to arbitrator in spite of such reference having been objected to and the arbitrator gave an award. This court held that the arbitrator had no jurisdiction in the matter and that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void.
In Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, (1988) 3 SCC 82, the contract provided for the work being completed by the contractor in spite of rise in prices of material and labour charges at the rates stipulated in the contract. It was held that on the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. An award given by the arbitrator for extra claim given by the contractor was held to be vitiated on the ground of misconduct of arbitrator. There were specific clauses in the agreement which barred consideration of extra claims in the event of price escalation.

In Ch. Ramalinga Reddy Vs. Superintending Engineer & Anr., 1994 (5) Scale 67, claim was allowed by arbitrator for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". Clause 59 of A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim was found to be outside the defined exceptions. When extensions of time were granted to the appellant to complete the work the respondents made it clear that no claim for compensation would lie. For both these reasons, this Court held that it was impermissible to award such claim because the arbitrator was required to decide the claims referred to him having regard to the contract between the parties and, therefore, his jurisdiction was limited by the terms of the contract.

A Division Bench decision of High Court of Andhra Pradesh in State of A.P. Vs. M/s. Associated Engineering Enterprises, Hyderabad, AIR 1990 A.P. 294, is of relevance. Jeevan Reddy, J. (as His Lordship then was), speaking for the Division Bench, held that where clause 59 of the standard terms and condition of the contract provided that neither party to the contract shall claim compensation "on account of delays or hindrances of work from any cause whatever", an award given by an arbitrator ignoring such express terms of the contract was bad. We find ourselves in agreement with the view so taken.

In Hudson's Building and Engineering Contracts (11th Edition, pp.1098-9) there is reference to 'no damage' clauses, an American

expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined 'delays' including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, that damages or compensation are not to be recoverable therefor. These 'no damage' clauses appear to have been primarily designed to protect the owner from late start or co-ordination claims due to other contractor delays which would otherwise arise. Such clauses originated in Federal Government contracts but are now adopted by private owners and expanded to cover wider categories of breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result of positive acts of interference by the owner, and (iv) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and Commonwealth. Not dissimilar principles have enabled some commonwealth courts to avoid the effect of 'no damage' clauses. [See Hudson, ibid].

In our country question of delay in performance of contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (Twenty-Eighth Edition, 1999, at p.1106, para 22-015) states "a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")." If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of

"excepted matters". While dealing with a petition under Section 20 of the Arbitration Act, the Court will look at the nature of the claim as preferred and decide whether it falls within the category of "excepted matters". If so, the claim preferred would be a difference to which the arbitration agreement does not apply, and therefore, the Court shall not refer the same to the arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the Court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator. Russell on Arbitration (Twenty-First Edition, 1997) states vide para 1-027 (at p.15) "Arbitrability. The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement. The New York Convention, for example, refers to non-arbitrability as a ground for a court refusing to recognize and enforce an award."
To sum up, our conclusion are: (i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the Court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or 'in-house' remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, (iii) an issue as to arbitrability of claim is available for determination at all the three stages - while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the Court.

In the case before us, the claims in question as preferred are clearly covered by "excepted matters". The statement of claims, as set out in the petition under Section 20 of the Arbitration Act, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was, in our opinion, not right in directing the said four claims to be referred to arbitration.

After the hearing was concluded the learned counsel for the respondent cited a few decisions by making a mention, wherein the view taken is that 'interpretation of contract' is a matter for arbitrator to decide and the Court cannot substitute its own decision in place of the decision of the arbitrator. We do not think that the cited cases have any relevance for deciding the question arising for consideration in this appeal. None of the cases is an authority for the proposition that the question whether a claim is an 'excepted matter' or not must be left to be decided by the arbitrator only and not adjudicated upon by the Court while disposing of a petition under Section 20 of the Arbitration Act, 1940. We cannot subscribe to the view that interpretation of arbitration clause itself can be or should be left to be determined by arbitrator and such determination cannot be done by Court at any stage.

For the foregoing reasons we are of the opinion that the view of

the 'excepted matters' taken by the Division Bench of the High Court cannot be sustained. The appeal is allowed, the impugned decision of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored. No order as to the costs.

J.
(R.C. LAHOTI)

J.
(BRIJESH KUMAR)

March 1, 2002