

(2011) 11 DEL CK 0159

In the Delhi High Court

Case No : FAO (OS) No. 66 of 2010

Karam Chand Thapar and Bros. (CS Ltd.)

APPELLANT

Vs

National Hydro Electric Power Corporation Ltd and Another

RESPONDENT

Date of Decision : 22-11-2011

Acts Referred:

Arbitration Act, 1940 — Section 14, 20, 27, 30, 33

Constitution of India, 1950 — Article 141, 227

Limitation Act, 1963 — Article 119

Citation : (2011) 185 DLT 729

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Pinaki Misra, with Mr. Debashish Moitra and Ms. Madhumita Kothari, for the Appellant; S.K. Taneja with Mr. Sachin Datta, Abhimanyu Kumar, Puneet Taneja and Mr. Amrit Anand, for the Respondent

Judgement

Rajiv Shakdher, J.—This is an appeal u/s 39 of Arbitration, 1940 (hereinafter referred to as Arbitration Act). By virtue of this appeal, the appellant seeks to assail the judgment of the learned Single Judge dated 13.10.2009, whereby its objections u/s 30 & 33 of the Arbitration Act were dismissed. The result of dismissal of the objections filed by the appellant was that the interim award passed by the learned Arbitrator (i.e. respondent no. 2) was sustained. The interim award declares certain claims filed by the appellant as non-arbitrable based on the principles enunciated in the judgment of the Supreme Court in the case of General Manager Northern Railways and Another Vs. Sarvesh Chopra, .

2. The appellant is essentially aggrieved by the fact that both the learned arbitrator as well as learned Single Judge have come to the view that the claims in issue are non-arbitrable as they fall within the clauses in the contract obtaining between the parties which either "except" arbitration or, are those which exclude payments on the ground of "no damage" and "no claim" etc.

3. It is also pertinent to note that in respect of the arbitrable claims, we are

informed that arguments have been heard by the learned Arbitrator and the pronouncement of award is deferred due to an interim order passed by this court. As a matter of fact the respondent before us has contended quite vociferously that the appellant has indulged in this litigation only to delay the pronouncement of the award qua the remaining claims. The delay accordingly to the respondent could be fatal given the advanced age of the learned arbitrator who is a retired Judge of the Allahabad High Court.

4. Given the aforesaid broad contours of the dispute, we may, notice certain background facts which have resulted in the institution of the present appeal.

5. On 11.08.1989 the respondent issued a Notice Inviting Tender (in short NIT) for construction of TRT-II Outlet Package at Salal, Hydroelectric Project (Stage-II) (hereinafter referred to as the said project). In response to the tender, an offer was made by the appellant. The appellant was declared successful and consequently, a Letter of Award (in short LOA) was issued in his favour 11.1.1990. In accordance with terms the appellant was required to convey its acceptance, which it did, vide letter dated 12.1.1990. A formal contract was executed between them 07.03.1990.

6. As per the terms of contract obtaining between the parties the project had to be executed within a period of 38 months from the date of issuance of LOA i.e., 11.1.1990. The total work was valued at Rs. 11,49,75,090/-. The scheduled date of completion was thus 11.3.1993.

7. There is no dispute as between the contestants before us that actual date of completion of project was 20.6.1996. Consequently, the project was delayed by a period of 37 months and 13 days. There is, however, a dispute as to who was responsible for the delay in the execution of the project. In the appeal the appellant before us, in paragraph 3 (vi) (a) to (k), has sketched out several grounds, based on which, it is averred that delay was attributable to respondent. Respondent on the other hand seeks to controvert that the delay was attributable to it. At this stage we are not called upon to comment on or examine this aspect of the matter. As noticed by us above, the appeal is confined to the exclusion of certain claims from the scope of the arbitration.

8. Continuing with the narrative; in view of the appellants stand that it had executed in the course of its work several extra jobs which were outside the ambit of the LOA and for which it had not been appropriately compensated, despite demands, it sought to invoke the arbitration clause contained in the contract vide its letter dated 20.3.1992. Since, the appointing authority constituted under clause 55 of the contract, which is, the arbitration clause, failed to discharge its duty, a petition u/s 20 of the Arbitration Act was filed. This petition was registered as Suit No. 156-A/1995. This Court vide order dated 10.4.2010 disposed of the petition referring disputes to respondent no. 2.

9. Accordingly, a statement of claim was filed by the appellant on 30.11.2001: to which a reply was filed by the respondent in February, 2002.

10. In the statement of claim the appellant raised seven (7) claims which included two (2) claims pertaining to interest and cost of arbitration. The learned arbitrator vide an interim award 22.11.2002 declared claim nos. 2, 4 & 5 as "non-arbitrable". It is this interim award which is impugned in the present proceedings. As noticed above, the learned Single Judge by the impugned judgment 13.10.2009 sustained the interim award.

11. Arguments in respect of the aforementioned claims on behalf of appellant were advanced by Mr. Pinaki Misra, Sr. Advocate assisted by Mr. Debashish Moitra and Ms. Madhumita Kothari, Advocates while those on behalf of respondent were advanced by Mr. S.K. Taneja, Sr. Advocate assisted by Mr. Sachin Datta and Mr. Abhimanyu Kumar and Mr. Amrit Anand, Advocates.

12. For the sake of convenience we intend to record their submissions claim-wise.

CLAIM NO. 2: Appellant's Submission

12.1 Insofar as claims no. 2 is concerned, which relates to: Claim for increase in size of reinforcement in the precast concrete lagging, Mr. Misra submitted that both the learned Arbitrator and learned Single Judge committed a serious error in advertent to clause 55 of the General Conditions of the Contract (GCC) which in turn excepted clause 53 of the GCC. It was the learned counsel's contention that a perusal of clause 53 of the GCC excludes from the scope of arbitration certain clauses referred to therein including clause 21 of the GCC, whereas what has been invoked in excluding from arbitration a dispute under claim no. 2 by taking recourse to clause 21.2 of the Special Conditions of the Contract (in short SCC). Mr. Misra thus submitted that on the face of the award there is an error apparent. It is his contention that the learned Single Judge, in the impugned judgment despite vigorous exhortation on this aspect, failed to notice this obvious error in the award.

13. Mr. Misra further contended that at the end of the day the appellant is only seeking an adjudication of his disputes. There being no cavil that the appellant had used steel bars of ten (10) mm for constructing precast concrete lagging. The appellant had quoted rates while submitting his offer based on steel bars of six (6) mm diameter keeping in mind the "industry standards". However, at the time of execution bearing in mind the "utility" and "functionality" of a concrete lagging it had used ten (10) mm steel bars. The respondent having enjoyed the benefit of the material used, could not deny the extra expenses incurred by the appellant, especially when, neither the drawing showing "reinforcement thickness" nor "reinforcements patterns" were provided to the appellant "at the time of tendering". It was further submitted drawings were made available only after work in regard to this item had been completed. The claim of the appellant was thus, not with regard to variation of unit rates or a demand for payment on account of variation in dimension of the structure or, lay out, design and detail of work. Therefore, according to the learned counsel the claim could not be denied by invoking clause 21 of the SCC.

Respondent Submission

14. As against this, Mr. Taneja drew our attention to the technical specifications agreed to between the parties which adverted to the size of the precast concrete lagging, and the fact that it would be reinforced and have a minimum strength of concrete equivalent to 200 kg/sq.cm. It was Mr. Taneja's contentions that in terms of contract only the appellant was required so far as this item is concerned, to provide a precast concrete lagging of requisite dimension and strength. On doing so, it was the respondent's obligation to pay the unit rate as stipulated under the contract. The appellant was not entitled to payment over and above the unit rate per cubic metre stipulated under the contract. The appellant's demand for extra payment on account of difference in weight equivalent 40 kg/RMT by virtue of having used steel bars of a diameter of ten (10) mm as against six (6) mm, was not payable in terms of the contract. Therefore, the learned arbitrator as well as the learned Single Judge had correctly declared the instant claim as non-arbitrable.

15 CLAIM NO.4

Appellant's submissions:

15.1 Mr. Misra submitted that the said claim which pertains to: Claim for extra expenses due to disproportionate increase in the minimum wages was wrongly excluded from arbitral process even though the delay in execution of project was attributable to the respondent. Mr. Misra submitted that the exclusion of this claim based on clause 46 of the contract was unmerited in view of the fact that the clause was operable if the contract had been allowed to be executed within the stipulated period of thirty eight (38) months from the date of LOA. To support his submissions, the learned counsel relied upon provisions of clause 29.1, 29.5 and 29.13. The submission was that, it was incumbent upon appellant to pay the wages to the labourers as per the stipulation under Minimum Wages Act, 1948, as amended from time to time, and this obligation was not excluded by virtue of provisions of various sub-clauses of clause 46, in particular, sub clauses (e) & (f). As a matter of fact clause 46.1 entitled the appellant to payment for any increase and decrease in cost of labour.

Respondent No. 1's Submission

16. Mr. Taneja, on the other hand, submitted that as per the terms of the contract, the respondent had to bear any increase in the minimum wages during the course of its execution. Such increase was not to be compensated under the escalation formula. The contract being a unit rate contract, the appellant was paid as per the rates quoted by him in respect of specific items of work. As a matter of fact, as per clause 29.5 of the GCC, the appellant was obliged to comply with the provisions of Minimum Wages Act, as obtaining at the relevant point of time and that in terms of clause 29.13 of the GCC, it could not demand payments or make claims except those which were specifically provided in clause 46. Mr. Taneja contended that clause 46 provides for increase in the price of

material(s), labour and diesel. Clause 46.2(d) expressly states, accordingly to Mr. Taneja, that the escalation clause will operate both during the scheduled period as well as the extended period. According to Mr. Taneja clause 46.2 (e), excludes specifically any increase in the cost of material or labour which may be brought about on account of statutory amendments including those which pertain to custom duty, excise duty, sales tax, octroi etc. According to the learned counsel, this is abundantly clear by virtue of the provision of 46.2(f) which excludes from the scope of price adjustment, variations other than those stipulated in clause 46. Therefore, as rightly held both by the learned arbitrator and the single Judge the aforementioned claim is not arbitrable.

17. CLAIM NO. 5. Appellant's Submission

As regards this claim, Mr. Misra submitted that the said claim pertain to damages suffered by the appellant due to supply of electricity by the respondent, which was its responsibility, at less than the stipulated voltage. It was thus contended that since the respondent No. 1 in terms of clause 24.1 had failed to provide power of 11 KV, in three (3) phases of 50 cycles, damage had been caused to the machinery of the appellant and, losses had been incurred on account of under-utilization of machinery and power. It was contended that the obligation to supply power was that of respondent no. 1 which could have been rectified through pro-active efforts of respondent no. 1.

Respondent No. 1's submission

18. Mr. Taneja, on the other hand, drew our attention to clause 24.1 which, according to him, envisaged that in case of failure of the hydel/grid power supply, the respondent no. 1 was required to supply power from diesel generating sets to the extent possible. The clause also relieved respondent no. 1 from the obligation to ensure supply of continued and un-interrupted power supply. In particular, the said clause has relieved respondent no. 1 from obligation to pay damages or compensation or even extend the construction period on its failure to ensure normal supply of power or diesel power by virtue of shut downs or other unforeseen circumstances. Reliance in regard was also placed section 19 of the SCC, which provided that contractor (appellant herein) could not make a claim or claim damages from the Corporation (respondent no. 1 herein), where the obligation for provision of facility and material was on the Corporation (i.e., respondent no. 1 herein) which was either not provided or was provided late i.e., beyond stipulated time frame. Mr. Taneja submitted that respondent no. 1 was itself dependent on a third entity for supply of power and that, therefore, it was incumbent upon the appellant to make its own stand-by arrangement of power in terms of clause 8 of the SCC. It was further contended that in this regard the appellant had made a claim vide lettered 30.10.1993, which was, declined by the Engineer-in-Charge vide letter 21.12.1993. The claim was barred under the principle of "no claim" enunciated in Sarvesh Chopra's case. 19. Apart from the aforesaid, Mr. Taneja had raised at the very outset a preliminary objection as to the maintainability of the appeal. Mr. Taneja had

submitted that the instant appeal was not maintainable in view of the fact that the appellant had filed a petition u/s 14 of the Arbitration Act, on 11.12.2002, followed by its objection Section 30 and 33 of the very same Act in the form of IA No. 5933/2003, on 21.1.2003; both of which, were much prior to the award being filed in court by the arbitrator in pursuance to a notice received from this court. The interim award in this case was passed on 22.11.2002. The learned Joint Registrar(JR) had issued notice to respondent no. 2 calling upon him to file the award on 3.1.2003. The respondent no. 2 i.e. the learned arbitrator had received the said notice on or about 15.3.2003. Therefore, admittedly the award was filed much later than the date on which objections u/s 30 & 33 of the Arbitration Act had been filed in Court. These objections, according to Mr. Taneja, were not only premature but were also non-est in law as they were filed prior to the date on which the said interim arbitral award was filed in court. For this purpose, the learned counsel relied upon the judgment of the Supreme Court in the case UOI & Ors Vs. Neelam Engineering and Construction Co. 2010 (1) Arb. LR 602 (SC).

Reasons

20. Having heard the learned counsel for the parties, we are of the view that the pleas of the appellant in respect of each of the claims in issue is without merit for the reasons given hereinafter. However, before we proceed further, let us in the first instance deal with the preliminary objections raised by Mr. Taneja. In respect of the said preliminary objection, we had put to Mr. Taneja as to the stand he had adopted before the Single Judge, that is, was it the stand of respondent no. 1 that, in law, the objections filed by the appellant u/s 30 and 33 of the Act were not maintainable because they sought to assail, what in respondent no. 1's view was an "order" and not an award interim or otherwise, passed by the learned arbitrator. Mr. Taneja fairly conceded that he had taken the said stand; though having failed to persuade the learned Single Judge to the contrary, he was, well within his rights to impugn the maintainability of the appeal based on the law declared by the Supreme Court in Neelam Engineering and Construction. According to the learned counsel the dicta enunciated in the said judgment of the Supreme Court would squarely apply to objections which are instituted prior to the award being filed in court. We may notice that the learned Single Judge in paragraph 1 of the impugned judgment has noticed the said objection. The learned Single Judge has also made a reference to the said issue against placitum "A" in paragraph 23 of the judgment. The learned Single Judge has given the following reasons for sustaining the objections to the maintainability of the action in paragraph 24 of the impugned judgment:

As far as the first of the aforesaid is concerned, the 1940 Act unlike the 1996 Act did not provide for any appeal against the order of the arbitrator holding a claim to be not arbitrable. In the absence of any such provisions, in my view the question posed does not really arise for consideration. Upon the arbitrator holding the particular claims to be not arbitrable, the only remedy there against

can be by way of proceedings under Sections 14, 30 and 33 of the Act. It is nobody's case that the aggrieved party in such a situation is remediless or has no other recourse. The senior counsel for the respondent had also suggested the recourse of Article 227 of the Constitution of India. However, since the finding of the arbitrator against arbitrability has an element of finality and of rejection of the claim at least before the arbitrator, I do not see any reason as to why the same could not be treated as interim award within the meaning of Section 27 of the 1940 Act. As far as the claims which are held to be not arbitrable, the arbitration proceedings would stand terminated and no purpose would be served in requiring the aggrieved party to wait till adjudication of the claims held to be arbitrable to make a challenge to the finding of the arbitrator of arbitrability then only. It has not been argued that the facts in this case are so ? as to render it impossible or inconvenient for this court to return a finding on arbitrability at this stage or which will cause prejudice to the adjudication of the other claims of the petitioner. If that be so, in a particular case the court may defer the decision on the objections qua the arbitrability till the decision on the claims held arbitrable by the arbitrator. That being not the case, in my view the present suit and the objections for setting aside of the award are maintainable. I respectfully disagree with the Division Bench of the Madhya Pradesh High Court in this regard.

21. It is pertinent to note that the impugned judgment was passed on 13.10.2009 well before the judgment rendered in Union of India (UOI) and Others Vs. Neelam Engineering and Construction Company, . The judgment in Neelam Engineering and Constructions (supra) was pronounced on 10.3.2010. The ratio of the judgment is contained in paragraphs 16 to 18. Being apposite for the sake of convenience, the same are extracted below:-

16. In view of Article 119 of the Limitation Act, 1963, the period of limitation for filing an application commences only after the date of service of the notice of the making of the Award. The *raison d'être* for filing objection under Sections 30 and 33 of the Arbitration Act, 1940, is the Award which has to be filed in Court either by the Arbitrator or at the instance of any of the parties requiring the Arbitrator to do so. Even the Court may direct the Arbitrator to file his Award on the application made by any of the parties thereto. Filing an objection against something which did not exist on the date when the objection was filed is unacceptable and must be rejected. All the decisions cited by Mr. Mahabir Singh take a similar view. The objections filed under Sections 30 and 33 of the Arbitration Act, 1940, by the Appellants herein, therefore, have been rightly held to be pre-mature and could not be treated to be an objection filed after the filing of the Award. While the original Award was filed in Court on 27th May, 1998, the objections filed under Sections 30 and 33 of the Arbitration Act, 1940, for setting aside the Award was filed on 3rd January, 1998. There was, therefore, no occasion for such an objection to be filed in terms of Article 119 of the Limitation Act, 1963.

17. The objection filed by the Appellant under Sections 30 and 33 of the

Arbitration Act, 1940, for setting aside the Award on 3rd January, 1998, was obviously on account of the fact that the Respondent had filed a petition in the Civil Court on 27th February, 1996, for making the Award a Rule of Court. At the time when the objection was filed, it was noted on 18th February, 1998, that the Award had not been received in Court and notice was issued to the Arbitrator to file the original Award in pursuance whereof the original Award was filed in Court on 27th May, 1998.

18. It is unfortunate that although the Appellants filed their objection under Sections 30 and 33 of the Arbitration Act, 1940, the same was done prematurely even before the filing of the Award and such objection could not be treated as a valid objection under Sections 30 and 33 of the Act in view of the provisions of Article 119 of the Limitation Act, 1963.

21.1 It may also be pertinent to note that the Supreme Court appears to have noticed the decision of the Bombay High Court in the case of *Ratanji Virpal and Co. Vs. Dhirajlal Manilal*, , where a similar question came up for consideration before the said court (see paragraph 141 of the Supreme Court Judgment).

22. In view of the above, we are of the opinion while, it may not be a happy state of affairs in permitting a party to litigation to resile from its stand taken in court, we cannot ignore the law declared by the Supreme Court which is binding on all courts under the provisions of Article 141 of the Constitution of India. Since the appeal is a continuation of the original proceedings, a party is entitled to take advantage of any interpretation that Supreme Court may place on provision of the statute which unless otherwise specifically provided in the judgment, would operate retrospectively as if, the position declared by the Supreme Court, always obtained in law. It is for this reason, we are of the view, that it would not be appropriate to give weight to the submissions made on behalf of appellant during the course of the arguments, that in order to nullify the preliminary objections raised by respondent no. 1, it would concede to the stand initially taken by respondent no. 1 before the Single Judge that what was impugned in their objections under Sections 30 & 33 of the Arbitration Act was in law, in the nature of an order. We, on a consideration of the observations made by learned Single Judge are even otherwise in agreement with the view expressed therein, that a decision on the issue as to whether a particular claim is arbitrable or not attains finality and, that such a decision would be in the nature of an interim award as referred to Section 27 of the Arbitration Award. It may perhaps be open to a court, in a given case, to permit its challenge only at the final stage when, a final award is passed; though the courts discretion in this regard cannot be fettered. The term "Award" used in Sections 30 & 33 of the Arbitration Act, would necessarily have to be construed as the genus of which, an interim award is only a specie. Therefore, as we construe the said provisions there is not a per se bar in maintaining a petition under Sections 30 & 33 of the Arbitration Act against an interim award. However, if we hold, as has been held by the learned Single Judge, that the objections filed by the appellant sought to

assail, what was, in the nature of an interim award, then the objections admittedly having been filed prior to the lodgment of the interim award in court would be pre-mature as the provisions of the Arbitration Act would apply to an interim award with full vigour, that is, mutatis mutandis as they would apply to a final award. We were concerned whether such a construction would result in the appellant being left remediless. In our view, the issue is not about the objector to an award being left remediless, but whether on the construction of the excepted matters, in terms of the contract obtaining in between the parties, it has been agreed that a claim would be decided either by taking resort to a stated mechanism or, as is agreed between parties consciously, at the stage of entering into a contract, that certain claim(s) would not be raised or, entertained in order to ensure a greater degree of certainty. In our view, it is only if the excepted matter(s) fall(s) outside the aforementioned two categories, can an aggrieved parties resort to a remedy other than that of a reference to an arbitral forum. In this regard, we must reject arguments made by Mr. Misra on behalf of appellant that at the end of the day the appellant is only seeking adjudication of its disputes raised under the claims in issue. In our view, the acceptance of such an argument would destroy the sanctity of rights and obligations provided under a contract. The instant contract does not fall under the principle enunciated in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , nor is such a case set up by the appellant before us. Therefore, in our opinion, what the arbitrator cannot do, surely the court, in continuation of those proceedings, cannot do, which is, issue a direction in the teeth of the terms of the contract obtaining between the parties. Apart from the caveat referred to above, we do not see any scope for curtailing the freedom of the parties to enter into a contract. To say that these are printed contracts with pre-defined rights and obligations would not be sufficient. The appellant, as stated above, is not an unequal party. It is a commercial contract; in regard to which the appellant has taken due benefit.

23. However, having regard to the fact that the interim award was passed on 22.11.2002 and the final award is ready for pronouncement, in fitness of things we have decided to examine the matter on merit even though we could have perhaps have rejected the appeal on the ground that it was not maintainable.

24. Before we proceed to examine claim on merits, it is a common ground between the parties that the test laid down in paragraph 8 of the Sarvesh Chopra would apply. For the sake of convenience, the observations made therein are extracted hereinbelow:-

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/sall 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 12.12. 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 fall 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?.

25. Claim No.2

In respect of Claim No.2, it may be relevant to refer to certain relevant parts of clauses 53 and 55.1 of GCC and the clause 21.2 of SCC. The said clauses read as follows:-

Clause 53 : Finality Clause

It shall be accepted as an inseparable part of the contract that in matters regarding materials, workmanship, removal of improper work, interpretation of the contract drawings and contract specification mode of procedure and the carrying out of the work as stipulated in the clause Nos. 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 34, 37, 38, 40, 41 & 44, the decision of the Engineer-in-Charge, which shall be given in writing, shall be final and binding on the contractor.

Clause 55: Arbitration

55.1 Except as otherwise provided, in clause 53 hereof before, all questions, disputes or differences in respect of which the decision has not been final and conclusive, arising between the contractor and the Corporation, in relation to or in connection with the contract shall be referred for arbitration in a manner provided as under and to the sole arbitrator appointed as follows:-

CLAUSE 21.2 of SCC

Tender Drawings and dimensions of various structures and layout shown on them are tentative only and nothing shown on them shall be construed to represent final design or any detail of the works to be executed under the contract. Final designs and details shall be shown on the construction Drawings issued from time to time, which shall depend upon actual geological conditions encountered during execution of the work. The work shall be carried out by contractor strictly as per construction Drawings issued from time to time during execution of the work. Except as otherwise provided elsewhere in the contract, the contractor

shall not be entitled to any additional payment over and above unit price (s) contracted for various items of work on account of variation in dimensions of structures, layout, design and details of work during execution of work.

26. A perusal of clause 55.1 of GCC stipulates that all question, disputes or difference are arbitrable except as otherwise provided in clause 53 of GCC. Clause 53 of GCC, which is a "finality" clause, provides that matters which are contained in the clauses referred to therein including, in particular clause 21 would be amenable to the decision of the Engineer-in-Charge, which shall be final and binding on the contractor (i.e., the appellant herein). The clauses which find mention in Clause 53 of the GCC would, therefore, necessarily refer to those clauses which are part of the GCC and it would include clause 21. The submission of Mr. Misra that the arbitrator has after referring to clause 55.1 of the GCC gone on to observe that the said claim is not arbitrable, as it falls in the category "no claim" and "no damage" clause in Sarvesh Chopra is untenable, in view of the fact that, a closer scrutiny of the award would show that in coming to the said conclusion, the learned arbitrator, has specifically referred to clause 21.2 of the SCC. As a matter of fact the learned arbitrator in coming to the conclusion has relied upon the relevant portion of clause 21.2 of the SCC by extracting the same in his award. Having regard to what is stated in the award we cannot lose sight of the fact that the conclusion of the arbitrator is based on the interpretation in respect of a correct provision, which is clause 21.2 of the SCC. That clause 21.2 of the SCC, is the clause, which ought to have been considered, is a fact, not disputed by Mr. Misra. Mr. Misra seeks to find a fault with the award of learned arbitrator for the reason that there is a reference to clause 55.1 of the GCC and for this purpose he relies on the following portion:-

This claim accordingly falls within the exception clause provided in opening part of Arbitration clause 55.1. This is a "no claim" "no damage" clause as defined by Hon"ble Supreme Court and is, therefore, not an arbitrable matter. I accordingly hold that claim No. 2 is not arbitrable.

27. As indicated by us above, the learned arbitrator in the preceding paragraph has noted the relevant portion of clause 21.2 of the SCC and has emphasized the portion relied upon by underlining the same. The purpose of examining the award and the reason given therein is to know what had passed through the mind of the Arbitrator. If regard is had to the observations made in paragraph 8 of the Sarvesh Chopra, it is quite clear that the learned arbitrator considered claim no.2 as one which fell in the second category i.e., claims which are considered as "no claim" or those against which damage or compensation is not payable. These are the very words which the learned arbitrator has used after extracting the clause 21.2 of the SCC and in coming to conclusion that the said claim is not arbitrable. Similarly, the learned Single Judge in paragraph 11 has referred to the clause 21.2 of the SCC. The learned Single Judge has adverted to, obviously, that portion of the award where the said clause is extracted in the award by the learned arbitrator. This aspect of the matter is clear on reading of

paragraph 11 and 12 of the impugned judgment. The mere fact that there is a reference in paragraph 10 of the impugned judgment of learned Single Judge to clause 55.1 and 53 of the GCC, would not, have us hold that there is an error apparent on the record. At the end of the day we are required to address ourselves to the question whether clause 21.2 prohibits arbitrability of the captioned claims.

28. We are of the view, as was the learned Single Judge, that the claim is not arbitrable. The reason for the same being under the contract the technical specifications provided are as follows:-

Precast concrete lagging shall be of size 300 mm wide by 75 mm thick of variable length to suit spacing of steel ribs. Precast concrete lagging shall be reinforced and have a minimum strength of concrete as 200 kg/cm²

29. A perusal of the specifications would show that the appellant was to provide precast concrete lagging of a specific dimension which had to be reinforced so as to come up to a standard of minimum strength as stipulated therein. The appellant was thus entitled to a unit rate as provided in clause 21.2 of the SCC, in accordance with the terms of the contract. It is not disputed as is evident upon reading the averments made in para 2(x)(a) that the appellant had quoted rates in the tender by assuming that it had to construct a pre-concrete lagging by using steel bars of six (6) mm diameter as per the "industry standard". The fact that the appellant, for the reasons best known to itself, ended up using steel bars of a higher diameter i.e., 10 mm, cannot be the basis for entertaining the said claim. The appellant does not dispute the fact that respondent no. 1 has applied the unit rate as stipulated in the contract. If that is the case, merely because the appellant has been out of pocket on account of using steel bars of greater diameter cannot result in respondent no. 1 being called upon to entertain such a claim as, on the face of it; it would fall in the category of a non-arbitrable dispute being a non-starter from the very beginning. An argument advance before us that respondent no. 1 has benefitted from the usage of steel bars of greater diameter is misconceived in view of the fact that the requirement under the contract from the point of view of the respondent no. 1 was to attain optimum strength; obviously keeping in mind cost implications. If the appellant sought to provide strength to the precast concrete lagging beyond what was optimally required under the contract the financial burden of such an outflow cannot be placed on respondent no. 1. The facts not being in dispute, the attractability of the relevant clause cannot be questioned in the instant case. Therefore, if the clause 21.2 of the SCC gets triggered then, obviously it is a claim which cannot be entertained and hence, was rightly rejected. We find that in the written submissions the appellant has made averments which were not referred to in the course of oral submission by Mr. Misra. Specifically, there was no reference to the fact that it was the Manager (Civil) of respondent no. 1 and not the Engineer-in-Charge, who was the designated authority under clause 53 of the GCC; who had rejected the said claim of the appellant. In our view, once it is held, which is

also the stand of the appellant, that clause 53 of GCC has no applicability, it would make no difference that it was not the Engineer-in-Charge who had rejected the claim of the appellant.

Claim No. 4

30. Insofar as the claim no. 4 is concerned, it may be relevant to refer to the relevant clauses of the contract. The said clauses are extracted hereinafter:-

Clause 29.1 The Contractor shall employ labour in sufficient number to maintain the required rate of progress and of quality to ensure workmanship of the degree specified in the contract and to the satisfaction of the Engineer-in-Charge. The Contractor shall not employ in connection with the works any person who has not completed fifteen years of age.

Clause 46.2 Provided further that adjustments on account of above as provided in sub-cl. 46.1 shall be subject to the following:-

a. The period for review i.e., the "Quarter" for calculating the price variation shall be "Calendar Quarter", defined hereunder:-

January to March 1st quarter (both months inclusive)

April to June 2nd quarter (both months inclusive)

July to September 3rd quarter (both months inclusive)

October to December 4th quarter (both months inclusive) In case, however, the contract is allotted during a particular quarter, calculation for price adjustment/variation for remaining part of this quarter, shall be made separately in accordance with the above procedure.

b. This clause shall be applicable only for the work that is carried out within the completion period as in Schedule "D" or extended time if any under clause 39 for which no compensation penalty is leviable on the contractor.

c. This clause shall not be operable during the period for which extension is granted due to lapse default on the part of the contractor as assessed by the Engineer-in-Charge.

d. Variations arising on account of payment related to rates for Extra, Altered and Substituted items whose cost has been worked out.

e. No separate escalation whatsoever shall be payable for any statutory or otherwise, increase custom duty, excise duty, sales tax, octroi, Dharat etc. on materials and on labour required for execution of the work over and above the provisions made in this clause.

f. No claims whatsoever for the Price Adjustments Variations other than those stipulated above shall be entertained.

31. The captioned claim is made with regard to the increase in the labour cost on

account of enhanced wages paid by virtue of the then prevailing provisions under the Minimum Wages Act. This argument was supported by Mr. Mishra by alluding to the fact that there was a delay attributable to respondent no. 1 of nearly 38 months. This claim has also been rejected by learned Arbitrator on the ground that it falls under the category of "no claim", "no damage" and "no compensation" clause. This view has been sustained by the Single Judge. On a reading of the aforementioned clauses, it is quite clear that the appellant was obliged to comply with the provisions of various applicable acts, laws, and bye laws while executing the project. In particular, under clause 29.5 of the GCC, it was required to comply with the provisions of Minimum Wages Act, 1948. Clause 46.1 read with clause 46.2 (e) and (f) clearly, exclude any payment on account of escalation by way of price adjustments/variation which flow from obligations provided under the statute qua "material" and "labour" used in the execution of the work(s) at hand. It appears that before the learned Single Judge it was submitted that the said clauses would not operate beyond the original period of the contract. This argument has been rejected on the ground that the party in this case has specifically agreed to the contrary and, the wide ambit of the said clauses could not be whittled down, by using interpretative tools. This reasoning is reflected in paragraph 31 of the impugned judgment of the learned Single Judge. We are in the agreement with the view of the learned Single Judge. The clause 46.2 (e) and (f) of the GCC quite clearly exclude claims of the nature sought to be made by the appellant.

Claim No. 5

32. It proceeds on the basis that the appellant suffered a loss on account of the respondent no. 1 not being able to ensure that the supply of power by it, was of the requisite specification(s) as contained in clause 24 of the GCC. For this purpose, once again, the relevant part of the said clause is quoted hereinafter:-

Clause 24 : Power Supply

24.1 Power (440 Volts, 3 Phase, 50 cycles) as received by the Corporation from the Transmission system and as required at site for use at the works by the contractor shall be supplied in bulk to him and charged at Rs. 0.65 per K.W.H. unit (as mentioned in Schedule "D") on meter reading basis. The Contractor shall indicate his requirement of power and the actual requirement of power will be determined by the Engineer-in-Charge whose decision in this regard shall be final and binding. In case of failure of the hydel Grid power supply, the Engineer-in-Charge may arrange supply of power from the Diesel Generating Sets only to the extent possible. The Corporation cannot ensure the continuous and uninterrupted supply of power as the possibility of interruptions/failure / shutdown in the supply of power cannot be ruled out. Failure of normal supply of power or of diesel power by shutdowns or other unforeseen circumstances will not entitle the contractor to claim any damages or compensation or extension in the construction period whatsoever. In the event of non-supply of power by the Corporation due to power failure or to meet any exigency, the contractor at his

own cost shall make his own alternative arrangements to meet the requirements of power so that the execution of the work remains uninterrupted.

33. A bare reading of clause 24.1 of the GCC would show that respondent no. 1 was hoping to receive power from the transmission system of: 440 watt, 3 phases, 50 cycles. The said power was to be made available to appellant for executing the project. The parties were, however, in terms of the said clause made aware that respondent no. 1 may not be in a position to ensure continuous and uninterrupted supply of power as there was a possibility of interruption, failure and shutdown and, therefore, such a failure to ensure "normal supply of power or of diesel power" by shutdown or other unforeseen reasons would not entitle the contractor (appellant herein), to lay claim by way of damages or compensation. This caveat extended to the period beyond the original time frame stipulated in the contract. It is also made clear in this very clause, that in the event of non-supply of power by respondent no. 1 due to power failure or to meet any contingency; it would be incumbent upon the contractor (i.e., the appellant herein) to make alternative arrangements to meet the requirements of power so as to enable it to execute the work uninterrupted at its own cost. Such being the ambit of clause, as rightly held by the learned Arbitrator and sustained by the learned Single Judge, the consequences which purportedly flowed from supply of power at low voltage cannot be laid at the door step of respondent no. 1. The reasoning of the learned Single Judge is, inter alia, contained once again in paragraph 31 of the impugned judgment. Consequently the submissions made in this regard to this claim are also rejected.

34. Before we conclude it ought to be noted that Mr. Mishra on instructions had given up before us, the challenge to the award on the alleged ground of bias of the Arbitrator.

35. We, therefore, find no error in the impugned judgment or the award of the learned Arbitrator which would call for our interference. For the foregoing reasons, we reject the appeal with cost quantified at Rs. 1,00,000/-.