

(2009) 10 DEL CK 0237

In the Delhi High Court

Case No : CS (OS) 2143 of 2002 and OMP 21 of 2004

Karam Chand Thapar and Bros(CS) Ltd.

APPELLANT

Vs

National Hydroelectric Power Corp. and Another

RESPONDENT

Date of Decision : 13-10-2009

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 14, 20, 27

Constitution of India, 1950 — Article 227

Contract Act, 1872 — Section 73

Citation : (2009) 10 DEL CK 0237

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : P. Mishra and Sandeep Sharma, for the Appellant; S.K. Taneja Sachin Datta and Shaila Arora, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—CS(OS) 2143A/2002 was registered on the filing of a petition u/s 14 of the Arbitration Act 1940 for directing the arbitrator to file the original interim award dated 22nd November, 2002 in this court alongwith the entire arbitration proceedings/record. Vide order dated 3rd January, 2003 the arbitrator was directed to file the award and proceedings in this court. The petitioner even without awaiting the filing of the award by the arbitrator in this court filed IA.No. 5933/2003 under Sections 30 and 33 of the 1940 Act for setting aside the interim award dated 22nd November, 2002. The pleadings in the said application have been completed. OMP 21/2004 was filed under Sections 5, 11 and 12 of the 1940 Act for revoking the authority of the arbitrator, so as to prevent him from proceeding further with the arbitration proceedings after the interim award aforesaid and for appointment of an arbitrator in his place. Vide order dated 23rd January, 2004 in the OMP though further proceedings before the arbitrator were allowed to be continued, it was ordered that the arbitrator shall not pass the final award. The said order has remained in force. The counsels have informed that though the arbitrator has concluded the proceedings and even heard arguments, however, the award has not been published owing to

the order aforesaid in these proceedings. It was further informed that the arbitrator who is a retired judge of the Allahabad High Court is over 83 years of age.

2. The senior Counsel for the petitioner contended that if this court were to allow the OMP, the ground for revocation of authority wherein is the bias of the arbitrator in favour of the respondent, the interim award against which objections have been filed in CS(OS) 2143A/2002 would also become liable to be set aside.

3. In the OMP the grounds taken for revocation of authority of the arbitrator are, the arbitrator acting in a high handed fashion in the matter of hearings preceding the interim award and pronouncing the interim award. It is pleaded that the interim award given by the arbitrator has shaken the faith of the petitioner in the conduct of the arbitration proceedings by the arbitrator; a letter dated 30th December, 2002 is also stated to have been written by the petitioner to the arbitrator in this regard expressing their loss of faith in the arbitrator. The interim award subject matter of challenge in CS(OS) 2143A/2002 is on the arbitrability of the claims of the petitioner against the respondent. The arbitrator has held some of the claims of the petitioner to be not arbitrable. The said interim award is inter alia challenged and it is also a ground in the OMP that the arbitrator rushed into pronouncing on the arbitrability of the claims though the contention of the petitioner before the arbitrator was that the said arbitrability could not be gone into without adducing evidence; the arbitrator is alleged to have disregarded the said submission of the petitioner and rushed into making the interim award. It is also pleaded in the OMP that subsequent claims of the petitioner against the respondent with respect to the same contract were referred to the arbitration of Justice H.C. Goel (Retd) of this court vide order dated 10th April 2003 in Arbitration Application 299/2000 and it is prayed that after revoking the authority of the arbitrator in this case, the disputes subject matter of these cases be also referred to Justice H.C. Goel. During the hearing it was informed that Justice H.C. Goel has since recused himself and petition is pending in this court for appointing a substitute arbitrator.

4. The petitioner has also filed I.A. No. 3193/2004 in the OMP stating that it has come to know that the arbitrator whose authority is sought to be revoked is the panel arbitrator of the respondent and has been doing a number of arbitrations for the respondent and has in all arbitrations to which the respondent is a party given an award in favour of the respondent; it is further alleged in this application that to the knowledge of the petitioner the arbitrator is paid a monthly salary as fee by the respondent for doing the arbitration matters; information was sought from the respondent in this regard; the petitioner also filed copies of arbitral awards in other arbitration proceedings in which the respondent was party and in which the awards were published in favour of the respondent by the same arbitrator.

5. The respondent in pursuance to the directions of this court on 25th August, 2004 in the OMP filed an affidavit verified on 9th October, 2004 of its Deputy

Manager (Civil) and in which it is stated that the arbitrator is on the panel of arbitrators of the respondent; that the arbitration with the petitioner is the only ongoing arbitration of the respondent before the same arbitrator; that the other arbitration proceedings of the respondent were before other arbitrators; that the same arbitrator has acted as the arbitrator in only ten arbitrations of the respondent; that the awards passed by the same arbitrator in none of those arbitrations has been set aside by any court; it was denied that any monthly salary/fee was paid by the respondent to the arbitrator and it was stated that the arbitrator's fee was shared by both parties to the arbitration in all the cases and no extra remuneration had at any time been given by the respondent to the said arbitrator. In fact, allegations of abuse of process of this court are made against the petitioner. It is contended that the petitioner surreptitiously, while seeking the order for filing of interim award in this court also sought the order of calling for arbitral record in this court and which resulted in scuttling the further arbitration proceedings before the arbitrator, of stay whereof there was no order also from this court.

6. To complete the narrative of facts, in the interim award dated 22nd November, 2002 under challenge, the arbitrator has held the 1940 Act to be applicable to the arbitration proceedings and negated the contention of the petitioner of the applicability of the 1996 Act. The senior Counsel for the petitioner has not challenged the said part of the interim award.

7. The arbitrator has by the interim award dated 22nd November, 2002 adjudicated the plea of the respondent of the claims of the petitioner being not arbitrable. The petitioner had made seven claims against the respondent. The arbitrator has held claims 1, 3, 6 and 7 to be arbitrable and held claims 2, 4 and 5 to be not arbitrable.

8. The arbitrator in deciding the arbitrability has relied upon General Manager Northern Railways and Another Vs. Sarvesh Chopra, . According to the arbitrator, the Supreme Court in the said judgment has carved out two exceptions to the arbitrability i.e., those claims which as per the terms and conditions of the contract are simply not entertainable and secondly those which under the terms and conditions of the contract are liable to be adjudicated upon by an authority, in Sarvesh Chopra of the Railways and in the present case of the respondent; whose decision the parties have agreed to treat as final and binding and hence not arbitrable. The arbitrator has held claims 2, 4 and 5 to be not entertainable, i.e., with respect where to the contract provides that no claim shall be entertained, even though no "in house" mechanism for settling such claims is provided in the contract.

9. The senior Counsel for the petitioner has contended that when the same person is repeatedly appointed as the arbitrator by a party, it creates an apprehension as to the impartiality of that arbitrator. Reliance is placed on Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, He has further contended that the plea of bias can never be conclusively proved/made out and the court

can act only on the basis of circumstances. Reliance is placed on *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, laying down the criteria and the approach of the court in exercising the power to revoke the authority of the arbitrator. It is contended that repeated appointment by the respondent of the same arbitrator is a disqualification and raises a justifiable doubt to the petitioner as to why the respondent is relying upon one person only as the arbitrator. Reference is made to *Roshan Lal Sethi v. The Chief Secretary* AIR 1971 J&K 91 to contend that authority of arbitrator can be revoked on mere likelihood of bias. It is contended that the arbitrator in the present case has prejudged the matter. The judgments in *International Airports Authority of India Vs. K.D. Bali and Anr*, and in *Ranjit Thakur Vs. Union of India (UOI) and Others*, on, what is bias, have also been cited. It is urged that the arbitrator sought to be removed is a "stock arbitrator" of the respondent and the awards made by him in cases involving the respondent, and in which other parties were large construction companies, are under challenge. In response to another objection of the respondent of the challenge to the order dated 22nd November, 2002 (interim award) being not maintainable at this stage, reliance is placed on *Satwant Singh Sodhi Vs. State of Punjab and Others*, and *National Thermal Power Corporation v. Siemens Atiengesellschaft* 2005 2 ARBLR 172 Delhi to contend that where the award is final and will have force without the delivery of the final award, it is final for the objections to be preferred with respect thereto and to draw a distinction between the interim award and a final award.

10. The senior Counsel for the petitioner while addressing on the objections to the interim award drew attention to the arbitration Clause contained in Clause 55.1 of the General Conditions of the contract and which is as under:

55.1. Except as otherwise provided, in Clause 53 hereinbefore, 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 manner provided as under:...

Clause 53 is as under:

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 specifications, mode of procedure and the carrying out of the work as stipulated in the Clause numbers 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 34, 37, 38, 40, 41 and 44 the decision of the Engineer-in-charge which shall be given in writing, shall be final and binding on the contractor.

11. The claim No. 2 of the petitioner which the arbitrator has held to be not arbitrable was an account of use of higher size diameter of steel in casting precast concrete lagging, than 6 mm diameter steel bars as provided for in the drawings. It was inter alia the case of the petitioner that the drawings in which

the diameter of steel bars was shown as 6 mm and on the basis whereof the costs had been calculated by the respondent were supplied to the petitioner late but even prior thereto the petitioner under supervision of/instruction of the official of the respondent had been made to use the steel bars of a higher diameter resulting in additional costs to the petitioner. The arbitrator has held the said claim to be not arbitrable on the basis of Clause 21.2 of the agreement providing that the contractor shall not be entitled to any additional payment over and above the unit price contracted for various items of work, on account of variation in dimension of structure, layout, design and details of work during the execution of the work.

12. The arbitrator on an interpretation of Sarvesh Chopra (*supra*) to the effect that the claims, which under the terms of the contract were not entertainable or allowable were not arbitrable, held the claim of the petitioner on account of use of higher diameter steel bars not arbitrable.

13. The senior Counsel for the petitioner has also contended that the respondent, in its pleadings before the arbitrator did not controvert that the drawings were given by the respondent to the petitioner after the work using the aforesaid diameters steel bars had been carried out; that the petitioner till the delivery of the said drawings could not know the diameter of steel bar of which price had been provided; that the officials of the respondent had for geological reasons advised the petitioner to use the steel bars of a higher diameter; that the bar in Clause 21.2 (*supra*) is only of quoted items and would not apply to the items which the petitioner during the execution of the work is directed to use. It is argued that the 10 MM steel diameter of steel in claim No. 1 is not provided in the contract but only in the drawings. It is further contended that under Sub-clause (6) of the Arbitration Clause 55, where the claims are of over Rs. 1 lac, the arbitrator is required to give reasons. It is contended that the arbitrator has while holding claim No. 2 to be not arbitrable neither given any reason nor discussed the pleas of the petitioner.

14. Claim No. 4 of the petitioner was for extra expenses incurred due to disproportionate increase in minimum wages not compensated by the escalation formula. The arbitrator has held the said claim also to be not arbitrable for the reason of Clause 29.13 of the contract prohibiting any claim on account of the contractor being required to perform his obligation under the contract. Clause 29.5 provides for the contractor being liable to pay minimum wages.

15. The senior Counsel for the petitioner has contended that there was a delay of three years and three months and for which period the contract time was extended by the respondent without demur. Pleadings in OMP are relied on to demonstrate that the delay was attributable to the respondent. It is further urged that the respondent had allowed the petitioner to continue with the works even after the expiry of the time and thus the Clause 29.13 applicable during the term of the contract would not come into play. Reliance is placed on para 16 of Sarvesh Chopra (*supra*) to contend that whether a particular matter is excepted

or not is to be decided after considering the relevant material ? it is urged that the arbitrator in the present case has decided without considering any material or without giving any opportunity to the petitioner to lead evidence. Reliance is also placed on the pleadings in the objections to the award to contend that there is no express/specific denial by the respondent to the factual pleas in the objections also. The senior Counsel for the petitioner also relies upon *Paragon Constructions (India) Pvt. Ltd. v. UOI* 2008 II AD (Delhi) 502 where a Single Judge of this court has held that claims for prolongation of the contract cannot be blocked by a no claim Clause inasmuch as such claims are by way of damages u/s 73 of the Contract Act. I may however notice that in the said judgment the arbitrability was not in question. Reliance is also placed on *K.R. Raveendranathan v. State of Kerala* (1998) 9 SCC 410. However, in that case the Supreme Court only held that the court could not take upon itself the burden of saying whether the claim was contrary to the contract or not. The said two judgments are thus not found applicable. The senior Counsel for the petitioner next contended that the Clause 29.13 aforesaid bars a claim only during the term of the contract but not for a period beyond the terms of the contract.

16. Though no express arguments with respects to the claim No. 5 are addressed, the pleas in the objections with respect thereto are the same as with respect to the claim No. 4 aforesaid.

17. Per contra, the senior Counsel for the respondent has contended that the petitioner had in the present case instituted a suit u/s 20 of the Arbitration Act, 1940 for appointment of arbitrator being suit No. 1526A/1995; that the respondent had at that stage only taken the plea of the claims of the petitioner being not arbitral; that the said suit was disposed of vide order dated 10th April, 2001 leaving the question of arbitrability also to be decided by the arbitrator. It is further contended that it is not as if the arbitrator is the nominee of the respondent; in the order dated 10th April, 2001 aforesaid it was provided that the respondent shall send a panel of three names of retired judges of the High Court to the petitioner and the petitioner out of the said panel will select one to be appointed as the sole arbitrator in terms of the arbitration agreement between the parties; it is contended that it is the petitioner which has chosen the name of the arbitrator sought to be removed, to be the sole arbitrator pursuant to the order aforesaid. The respondent has also controverted the plea of the petitioner of the arbitrator having not given appropriate opportunity to the petitioner to address on arbitrability. It is contended that this court in order dated 10th April, 2001, with the consent of the parties, directed that the arbitrator will "first decide" the objection regarding arbitrability of the disputes and thereafter proceed to decide the disputes in accordance with law. It is thus contended that no bias, irregularity or misconduct can be attributed to the arbitrator in first deciding the aspect of the arbitrability. It is further urged that the record of the arbitrator shows that the arbitrator heard the Counsel for the parties on five dates of which three were taken by the Counsel for the petitioner, qua arbitrability. It is also contended that in fact it is the petitioner which after

the interim award dated 22nd November, 2002 aforesaid, on 5th December, 2002 took time to file evidence but thereafter changed its advocate and then wrote letter dated 30th December, 2002 for the first time alleging bias against the arbitrator. It is contended that the order was surreptitiously obtained from this court calling for the arbitral record also and not merely the interim award and which resulted in further proceedings before the arbitrator being held up. It is urged that the petitioner, at the time of hearing on arbitrability before the arbitrator, did not take a stand that the arbitrator should record the evidence first before adjudicating on arbitrability. It is also argued that in fact there is no interim award and only an order and objections at this stage do not lie. On query as to what is the remedy of the petitioner, being aggrieved by the interim award/order, the senior Counsel for the respondent contends that earlier there was a practice of preferring petitions under Article 227 of the Constitution of India before this court challenging the finding of the arbitrator on arbitrability.

18. The senior Counsel for the respondent has further urged that the petitioner has not filed affidavit of its Counsel who had appeared before the arbitrator or of any other official of the petitioner appearing before the arbitrator to the effect that any request was made to the arbitrator for adjudicating the arbitrability after recording evidence. The senior Counsel for the respondent relies on judgment of the Single Judge of this court in *G. Vijayaraghavan v. M.D., Central Warehousing Corporation* 2003 (3) Arb LR 35 in which *Nandyal (supra)* was also considered. Reference is also made to *Stench Electronics Ltd. Vs. K.N. Memani and Another*, where another Single Judge of this court on the allegations in that case, held no case of bias or revocation of authority of arbitrator to be made out.

19. Reliance is placed on *Uttam Singh Dugal and Co. Pvt. Ltd., New Delhi Vs. Hindustan Steel Ltd., Bhilai Steel Project, Bhilai*, where the Division Bench held an order of the arbitrator on a preliminary issue relating to jurisdiction to be not an interim award and no appeal there against being maintainable. On the same aspect reliance is also placed on *Union of India and Another Vs. M/s East Coast Boat Builders and Engineers Ltd.*, though under the 1996 Act.

20. On the merits of the award, besides *Sarvesh Chopra (supra)* forming the fulcrum of the interim award under challenge, reliance is also placed also on *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, where also the Supreme Court held that an award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would suffer from a jurisdictional error; that an arbitrator cannot award an amount which is ruled out or prohibited by the terms of the agreement; because of a specific bar stipulated by the parties in the agreement that claim could not be raised ? even if it is raised and referred to arbitration because of a wider arbitration Clause such claim amount cannot be awarded as the agreement is binding on the arbitrator and the arbitrator has to adjudicate as per the agreement.

21. On merits it is also urged that the Manager (Civil) of the respondent who is

stated to be the Engineer in Charge had vide letter dated 27th June, 1992 held the claim No. 2 of the petitioner to be untenable. Vis-?-vis the claims 4 and 5 it is stated that Clause No. 29.13 is applicable not only during the term of the agreement only but till the completion of the works and no claim for enhancement in minimum wages even after the expiry of term of the contract can be made in terms thereof also. The senior Counsel for the respondent contended that in the present case all the three claims held by the arbitrator to be non-arbitrable were raised before the Engineer in charge also and were negated after hearing; it is contended that the same is borne out from the correspondence. However, the senior Counsel admits that the arbitrator has not dealt with the said aspect in the award.

22. The senior Counsel for the petitioner in rejoinder has urged that the findings of the arbitrator on claim No. 1 and on claims 4 and 5 are inconsistent. It is contended that claim No. 1 has been held to be arbitrable notwithstanding there being no basis therefore in the agreement or for any in house determination for such a dispute. On the contrary, in the same facts claims 4 and 5 are held to be not arbitrable. It is further contended that the respondent had vide letter dated 28th June, 1993 rejected the claim No. 3 of the petitioner also but the arbitrator has held the same to be maintainable. It is denied that there is any decision of the Engineer-in-charge with respect to the claims held to be not arbitrable. It is also contended that this court should strike down any Clause in the agreement even if making a claim non-arbitrable as unconscionable inasmuch as the petitioner cannot be deprived of a remedy. It is contended that the parties having agreed on arbitration, there is no justification for holding some claims to be arbitrable and others not. It is also urged that the arbitrator has not even considered the entire Clause 21.2 on the basis whereof claim No. 2 has been held to be non-arbitrable.

23. In the aforesaid state of affairs, three issues requiring determination can be culled out:

A. what is the nature of the interim award/order dated 22nd November, 2002 and what remedy, if any, lies there against;

B. whether the authority of the arbitrator is liable to be revoked and a new arbitrator is to be appointed and;

C. whether the interim award if objections there against are permissible at this stage is liable to be set aside.

24. 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 provision, 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.

25. The second question to be considered is of the revocation of authority of the arbitrator. Such revocation was sought in the OMP on the ground of misconduct in the proceedings leading to the interim award. Subsequently as aforesaid the plea of the arbitrator being the stock arbitrator of the respondent was also taken. The appointment of the arbitrator at least in the present case was not as the nominee of the respondent. The said appointment was pursuant to the order dated 10th April, 2001 of this court in suit No. 1526A/1995. Thus, it is not as if the respondent imposed the arbitrator on the petitioner. The respondent in accordance with the order, furnished a panel of three names of retired judges of the High Court to the petitioner including that of the said arbitrator and it is the petitioner who selected the name of the arbitrator sought to be removed out of the said panel. Of course, the senior Counsel for the petitioner has contended that the petitioner was then not aware of the said arbitrator being the stock arbitrator of the respondent. However, in my view the same would also be immaterial. The courts have from time to time upheld the validity of arbitration Clauses enabling one of the parties only to appoint the arbitrator. Whenever such authority/power is given to one of the contracting parties, that contracting party would accordingly appoint someone in which faith is reposed by that party. If that party is involved in a number of arbitrations, the same person may be appointed as the arbitrator in all the arbitrations. That alone in my view would not constitute a ground for bias. Moreover, in the present case I find that no objection whatsoever as to the procedure adopted by the arbitrator was raised till the making of the interim award or in fact for more than one year thereafter. The pleas of bias came to be made only when the arbitrator decided against the petitioner on the matter of arbitrability. An aggrieved party cannot be permitted to make such allegation of bias for the reason of an unfavourable order. If the same were to be permitted, it would prevent the people, not willing to have their

names dragged into controversy, from acting as arbitrators.

26. In this regard another contention of the senior Counsel for the petitioner may also be noticed. It was suggested that the fact that the arbitrator notwithstanding objection by the petitioner was insisting upon continuing, speaks volumes of the bias of the arbitrator. I am unwilling to accept the said proposition also. If the same were to be upheld, it would give a handle to unscrupulous litigants to unreasonably delay the arbitral proceedings by raising allegations against the arbitrator. In *Eckersley v. Mersey Dock and Harbor Board* 1894 2 QB 667 quoted with approval in *Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.*, it has been held that the rule which applies to a judge or other person holding judicial office, namely, that he is not to hear cases in which he might be suspected of bias in favour of one of the parties does not apply to an arbitrator named in a contract to whom the parties have agreed to refer disputes which may arise between them under it. It was further held that in order to satisfy the court that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish at least the probability that he will in fact be biased in favour of one of the parties in giving his decision. In my view the same rule will apply even in the cases of appointment of an arbitrator as in the present case or where the arbitrator is stated to be the arbitrator in several of the arbitrations of the respondent. Such arbitrators are not required to recuse themselves merely because of allegation of bias being made against them.

27. None of the averments of the petitioner are found to be such which even prima facie establish before this court that the arbitrator has any bias against the petitioner or in favour of the respondent. This court cannot go into the merits of the other awards stated to be published by the arbitrator in other disputes concerning the respondent. This court thus cannot comment on perusal of the awards, copies of which have been filed in this case, that the arbitrator has dismissed the claims of other contractors against the respondent which otherwise were tenable. In fact I would go to the extent of holding that even if this court were to set aside the interim award of the arbitrator, in the absence of any mala fide being found, that alone would also not be a ground for changing the arbitrator.

28. That brings me to the last leg of this case i.e., on the merits of the interim award. The interim award as aforesaid is based on *Sarvesh Chopra (supra)*. *Sarvesh Chopra (supra)* undoubtedly lays down that the claims which under the terms of the contract are made, "not payable" are not entertainable or not arbitrable. The arbitrator in the present case on an interpretation of the various Clauses of the agreement has held that the claims 2, 4 and 5 fall in such category i.e., which were agreed by the parties to be not payable. The same proposition was reiterated in *Rajasthan State Mines and Minerals Ltd (supra)* with the addition that even if such claims were referred, the same were not to be allowed by the arbitrator inasmuch allowing the same would be in contravention of the agreement.

29. The petitioner has not really pointed out anything wrong in the finding of the arbitrator of the said claims being not maintainable and/or barred by agreement of the parties. However, I may add that even if this court on an interpretation of the Clauses of the agreement relied upon by the arbitrator to bar the said claims, were to hold a different opinion, the same would still not entitle this court to set aside the award. The arbitrator is a private court/forum chosen by the parties and the parties are bound by his interpretation of the contract. I even otherwise am of the same opinion as the arbitrator as to the interpretation of the Clauses of the agreement relied upon to hold claims 2, 4 and 5 to be non-arbitrable. I may notice that the arbitration Clause under consideration in *Sarvesh Chopra* (supra) was very widely worded and the only exception thereto also was the matters whereunder the decision of the Railway Authority was final. However, the Supreme Court held not only those matters which were expressly excepted but even those matters which were prohibited, to be not arbitrable. The position in the present case is the same.

30. In the aforesaid background, the contention of the petitioner of the drawings being given late or the work being executed before thereto loses its significance. Once a claim is barred under the agreement, the same would remain barred whatsoever may be the circumstances leading thereto. I also do not find any merit in the argument of any inconsistency in the award or of claim No. 3 being denied by the respondent and being held to be arbitrable by the arbitrator. No Clause in the agreement has been pointed out whereunder the claim No. 1 is barred. Merely because a provision is not made for a claim does not tantamount to saying that it is barred. In fact as noticed by the Single Judge of this court in *Paragon Construction India* (supra), claims which are not barred can be made u/s 73 of the Contract Act even though no remedy thereof is provided in the contract. Similarly, it is not stated that any Clause of the agreement bars the claim No. 3 held by the arbitrator to be arbitrable. Merely because the arbitrator has not agreed with the Engineer-in-charge/Manager of the respondent is no ground for finding fault with the award. In fact it shows that the arbitrator has not toed the line of the respondent. Again it is not as if the petitioner is remediless with the claims being held to be non-arbitrable. The petitioner has the remedy of a civil suit available to it with respect thereto, though it is a different matter whether the civil court also would allow the said claim or not, if the parties had agreed to such claim being not entertainable under the contract.

31. The petitioner has not been able to show that any of the claims held to be not arbitrable do not fall within the Clauses of the agreement prohibiting such claims. Undoubtedly the courts have allowed claims for escalation beyond the formulas agreed upon by the parties, upon finding the contractor to have incurred escalation for reasons attributable to the owner of the project. However, in none of those cases was there any prohibition in the agreement to such a claim. In the present case, the Clause 29.13 prohibits the petitioner from making the claims for the reason of complying with his obligation under the contract, inter alia, of payment of minimum wages. The wide of the said Clause cannot be

whittled down by giving an interpretation that the compliance of obligation is to be during the term of the agreement only. The parties had mutually extended the term of the agreement and it is not shown that such extension was on terms other than those earlier agreed between the parties. The same is the position with respect to the claim No. 5 for losses due to supply of electric power at low voltage. Clause 24.1 provides that the petitioner will not claim any damages or compensation for non-supply of power as agreed.

32. The objections of the petitioner to the award, as well as the OMP thus fail. The interim award dated 22nd November, 2002 is made a rule of the court and decree is passed in terms thereof. The petitioner is found to have held up the arbitral proceedings for a long span of seven years. The petitioner is as such burdened with costs of these proceedings of Rs. 50,000/-.