

(1990) 11 MAD CK 0002

In the Madras High Court

Case No : Original Petition No. 35 of 1990

Tamil Nadu Electricity Board

APPELLANT

Vs

M/s. Hindustan Construction Company Ltd., P.N.
Vedanayagam and A. Mohanakrishnan

RESPONDENT

Date of Decision : 07-11-1990

Acts Referred:

Arbitration Act, 1940 — Section 33, 9(b)

Citation : (1990) 11 MAD CK 0002

Hon'ble Judges : Lakshmanan, J

Bench : Single Bench

Advocate : N.C. Raghavachari, for the Appellant; Kurian for M/s. King and Patridge for 1st Respondent, for the Respondent

Judgement

Lakshmanan, J.—This petition was filed by the Tamil Nadu Electricity Board represented by its Secretary, u/s 33 of the Arbitration Act

(hereinafter referred to as "the Act") with the following prayer:-

to pass an order declaring

(i) that there is no valid arbitration agreement in existence between the parties in respect of the claims put forward in the claim statement filed by the

first respondent before the Arbitrators, as stated above;

(ii) that the claims put forward above are beyond the scope of the arbitration clause and the arbitrators have no jurisdiction to decide the same;

(iii) that the above claims do not arise for decision of arbitrators at all:

The short facts which are relevant for the purpose of deciding this case are extracted herein below:- The first respondent is M/s. Hindustan

Construction Company Limited, Bombay/Contractor. The second and third respondents are arbitrators. In or about January, 1979, the then

Superintending Engineer/Project Civil/Hydel, Tamil Nadu Electricity Board on behalf of Tamil Nadu Electricity Board, Madras invited sealed

tenders for the work of construction of access tunnel, cable shafts, water conductor system. Power House Cavern etd., for Kadamparai Pumped

Storage Hydro Electric Project, in Coimbatore District.

2. On 7.2.1979, the first respondent, vide their letter No. Hc/3405 dated 5.2.1979, submitted the tender for the aforesaid work and furnished a

sum of Rs. 26,62,100/- as Earnest Money Deposit in the shape of Bank Guarantee. On or about 7.2.1979, tenders were opened by the

Superintending Engineer, Project (Civil Hydel). There were in all six tenderers including the first respondent. After negotiations, the tender of the

first respondent was accepted by the Chief Engineer, (Hydro Projects) Electricity Avenue, Madras-2 and acceptance was communicated to the

first respondent by letter dated 31.5.1979. A formal agreement was thereafter executed between the first respondent and the Electricity Board to

complete the work on top priority in 36 months. The first respondent executed the work and completed the same on 31.3.1988 and the project

has been put to commercial use. The completed works were taken over by the Electricity Board on 31.3.1988.

3. During the course of execution of the work, and at the time of finalisation, certain disputes arose which could not be settled mutually and those

disputes were referred to Arbitration. Since the claims made by the first respondent were rejected by the petitioner, the first respondent wrote to

petitioner on 30.9.1989 relating to reference of the dispute for arbitration and nominating and appointing the second respondent as an Arbitrator

for resolving the disputes. The Electricity Board replied to the above on 12.10.1989 and nominated and appointed the third respondent as the

second arbitrator. The first sitting of the Arbitrators was held at Madras on 22.11.1989 and as seen from the proceedings of the said hearing the

Arbitrators stated that they mutually agreed to nominate Mr. S.P. Namasivayam, Public Works Department Chief Engineer (Retd.) as the Umpire

and that the said Umpire had given his consent for the same by his letter dated 3.11.1989. Thereafter, the fees and other expenses payable to the

Arbitrators were specified and also procedure relating to the future hearings was agreed upon between the petitioner and the first respondent.

After some discussions it was decided at that hearing that the first respondent will file a statement of claim before the arbitrators on or before

8.12.1989 and the petitioner would file their counter-statement on or before 3.2.1990. The first respondent was to file the rejoinder on or before

17.2.1990 and the second sitting of the Arbitrators for hearing of the dispute was also specified as 17.2.1990 at Madras. The first respondent

accordingly filed their statement of claim within the specified time. The petitioner was expected to file their counter-statement by 3.2.1990.

However, the first respondent was served with a letter dated 30.1.1990 sent on behalf of the Electricity Board by their counsel stating that an

interim stay of the proceedings before the arbitrators was ordered by this court on 29.1.1990 in Application No. 422 of 1990 in O.P. No. 35 of

1990.

4. The petitioner submits that even before the completion of the work, the first respondent had put forth number of claims on matters not provided

in the signed contract and also in an attempt to re-open and revise the quantum of escalation for some items, even though the petitioner had paid

for the same as required by the first respondent which was received by first respondent without demur. These claims put forward therefore were

not sustainable not only under the terms of the Contract but also in view of what is stated above and hence the said claim was rejected by the

Electricity Board as unsustainable. In view of the fact that the petitioner rejected the claim of the first respondent, the first respondent had invoked

the arbitration clause and had appointed the second respondent as arbitrator. It is stated in the petition that the Electricity Board had to nominate

the third respondent as the Arbitrator within the time, as otherwise under the provisions of the Arbitration Act the single Arbitrator would take up

the dispute for hearing. Before the second and third respondents, the first respondent has filed a claim statement putting forward the following

claims under various heads:

S. Particulars Amount Rs. P.

No

1. Change in location of TRT Gate 49,11,782.70

shaft from contractual location

2. Excavation of Adit-3 and HRT 38,02,870.36
3. Construction of HRT Gate Shaft 2,19,152.74
4. Extra expenses incurred and/or 2,60,47,094.46

losses suffered by us due to delay

in execution of works of

Construction Access Tunnel,

Cable Shafts, water conductor

systems and Power House Cavern

etc. for Kadamparai Pumped

Storage Hydro Electric Project

against Specification No.C.1261

5. Revision in the rate of works 2,67,33,356.95

6. Revision in escalation components 75,02,388.39

According to the Electricity Board these claims are not arbitrable and cannot arise for arbitration and the first respondent has no case for invoking

arbitration clause. According to the petitioner, the second and third respondents have no jurisdiction to decide those non-arbitrable items. The

question whether they are arbitrable or not also cannot be decided by the arbitrators and hence it is stated in the petition that the Electricity Board

was constrained to file this petition u/s 33 of the Act in this Court.

5. I have heard elaborate arguments advanced on behalf of the Electricity Board of Mr. N.C. Raghavachari, learned Senior Advocate and Mr.

Kurian, learned Senior Advocate, on behalf of King and Patridge, counsel for first respondent. According to Mr. N.C. Raghavachari, the claims

made by the first respondent are not arbitrable and also not admissible under the terms of the contract. According to the learned counsel, the

change of location is nothing but same kind of work in the substituted place at the end of the tunnel not involving any change in the scope of the

contract, not involving any additional expenditure.

6. Several contentions like these on merits have been raised by the petitioner-Electricity Board in this petition, which in my opinion, cannot be

resolved in the proceedings u/s 33 of the Act. In my opinion these are all matters for the arbitrators to decide. The High Court is not the forum for

going into the details of the disputes as to whether the amounts claimed now are in excess of the amounts claimed earlier which again is a matter for

the arbitrators to decide about the justiciability of the same. Hence I am not considering any of the claims made by the Electricity Board touching

the merits or the rival claims. The only question for determination is whether the claims made by the first respondent is arbitrable or not and

whether it arises under the contract and covered by the arbitration clause.

7. According to Mr. N.C. Raghavachari, the claim made by the first respondent is covered under the dispute prevention Clause-23, which is

extracted below:

CLAUSE - 23 (Pages 93 and 94 of Contract Document)

In order to prevent disputes from arising (either before the commencement, during the progress or after the completion of the works by the

Contractor or after entry on and taking possession of the works by the purchaser rightly or wrongly or after the abandonment of the works by the

Contractor) as to any and every claim by the Contractor, whether arising under or out of the Contract or from the breach or alleged breach thereof

or in any way incidental thereto, or connected therewith, or not herein provided for, including without limiting the generality of the foregoing

provisions, questions as to the quality, quantity and kind of materials labour, supervision, workmanship, plant and temporary works, the order of

the works and the several parts thereof, the prescribed or extended times (if any) for completion of the works, the measurements and valuations of

the works, and materials and all additional, altered, modified, substituted or omitted works and certificates of satisfaction and for payment and as

to all other matters and things in the contract documents left to or dependent on the decision, opinion, order direction, requisition and or certificate

of the Engineer, his measurement, valuation decision shall be final and binding upon the Contractor and the Purchaser (fraud or frauds and collusion

only excepted) and the purchaser shall not be liable in respect of any of the matters or things aforesaid unless and until the liability of the purchaser

and the amount of such liability in respect of the claim shall have been certified by the Engineer, whose certificate shall be a condition precedent to

any liability of the purchaser or any right of action against the purchaser in respect of such claims.

It was further contended that the claims made in first respondent's letter dated 16.1.1985 was examined and considered in detail by the Engineer-in-charge as per Clause-23 of the Contract and adjudicated by the Engineer-in-charge. An agreement was reached between the Board and the first respondent during the discussion on 23.6.1988 and 24.6.1988 and adjudicated upon. The details of the claims adjudicated by the Engineer-in-charge were communicated to the first respondent in the form of minutes signed by both the parties in letter dated 28.6.1988. It is the further case of the Electricity Board that even though these claims do not arise under the terms of the Contract, the claims were considered and adjudicated by the Engineer-in-charge as provided under Clause-23 and the amount settled was informed to the first respondent orally who accepted the same during the discussion under various sub heads as detailed in the petition itself.

8. As stated above several contentions have been raised by the Electricity Board in paragraphs Nos.11 to 14, 16 to 30, and 35 to 37 on merits

which in my opinion, cannot be resolved in proceedings u/s 33 of the Act and are all matters for the arbitrators to decide. The arbitrators alone can decide about the justiciability of the said claim. Hence the contentions raised in the above paragraphs are not being dealt with by me on merits. It

was contended by Mr. N.C. Raghavachari, that some other items which now find a place under Item - "a" before the Arbitrator have already been

rejected by the Engineer in-charge as per Clause 23 of the Contract Document and they are not arbitrable. Again it is further submitted that

regarding claims "d", "e" and "f" now raised in the claim petition are not arbitrable since according to the learned counsel, the first respondent by

letter dated 24.2.1985 gave a solemn written undertaking that there will not be any further claim except 1 to 7 mentioned in respect of works

already completed by contract C.1261, and hence in view of the said undertaking that had been made, the first respondent is not entitled to put

forward the present claim and hence the first respondent is debarred from putting forward any other claim for the work done prior to 24.2.1985

on the doctrine of promissory estoppel. Regarding claim "e" (Revision in rate of works) the learned counsel submits that it is totally outside the

arbitration clause and that no dispute can be raised on agreed term. According to the learned counsel, escalation having been paid as requested,

the first respondent cannot claim revision in rate of work in law and therefore the dispute is beyond the jurisdiction of all the arbitrators and outside

the scope of the arbitration clause and has to be rejected in limini. Having accepted the amount after negotiation, the first respondent is not entitled

to claim more percentage under the alleged claim for revision and escalation of components and this has been fixed and received unconditionally by

the respondent and receipts obtained, without any demur and without any protest. As there has been accord and satisfaction, the claim is not

arbitrable.

9. Thus Mr. Raghavachari contended that clause 23 of the general conditions of the Contract is a bar to the arbitration proceedings and

consequently the arbitrators have no jurisdiction to proceed with the arbitration proceedings.

10. In answering to the said contention Mr. Kurian, learned Senior Advocate appearing for the first respondent submitted that Clause 23 of the

general conditions of the contract does not in any way over-ride Clause 25 thereof and Clause 25 of the same is not subject to the provision of

Clause 23 thereof. According to the learned counsel Clause 23 of the Contract does not in any way affect the right of the arbitrators to proceed

with the hearing of the dispute and pronouncing an award.

11. Clause 25 of the General Conditions of Tender relating to reference of disputes between the parties to arbitration reads as follows:

25.0. ARBITRATION

25.1. If at any time any question dispute or difference whatsoever shall arise between the purchaser or the Engineer and the other party upon or in

relation to or in connection with the contract either party may forthwith give to the other notice in writing of the existence of such question, dispute

or difference and the same shall be referred to the arbitration of two persons, one to be nominated by the purchaser and the other by the other

party or failing agreement between these two to an Umpire appointed by them. Such submission shall be deemed to be a submission to arbitration

within the meaning of the Indian Arbitration Act, 1940, or any statutory modification thereof. The award of the Arbitrator or Umpire shall be final,

and binding upon the parties upon every or any such reference, the costs of and incidental to the reference and award respectively shall, subject to

the conditions that amount of such costs to be awarded to either party shall not in respect of a monetary claim exceed the percentage set out below

of any such award, irrespective of the actual fees, costs and expenses incurred by either party, be in the discretion of the arbitrators of umpire, who

may determine the amount thereof, or direct the same to be taxed as between the solicitor and client or as between party and party, and shall

direct by whom and to whom, and in what manner the same shall be borne and paid. Work under the contract shall, if reasonably possible,

continue during the arbitration proceedings and no payments due or payable by the purchaser shall be withheld on account of such proceedings.

25.2. The percentage above referred to are five per cent on any such monetary award which does not exceed Rs. 10,000/-, 3 per cent on the next

Rs. 40,000/- or any part thereof, two per cent on the next Rs. 50,000/- or any part thereof, and one per cent on any excess over Rs. 1,00,000/-

It was submitted by the learned counsel that Clause 25 of the Contract applies to any question, dispute or difference whatsoever between the

parties in relation to or in connection with the Contract. In my opinion Clause 25 of the Contract is couched in very wide terms and will cover all

disputes relating to the contract, and that Clause 23 of the General Conditions of the Contract does not in any way bar disputes from being raised

before the arbitrators as provided in the agreement. Consequently Clause 23 of the Contract in my opinion, does not in any way affect the right of

the arbitrators to proceed with the hearing of the dispute and pronouncing an award. The very fact that both parties are relying on the provisions of

the contract to sustain the claim or to reject the same, makes it abundantly clear that the dispute arises in relation to or in connection with the

Contract and consequently the disputes are arbitrable. The Electricity Board does not seem to deny the existence of the contract between the

parties which includes Clause 25 of the Contract (Arbitration Clause) and as long as Clause 25 of the Contract is there, it is for the arbitrators to

decide whether the disputes raised by the first respondent, come within the purview of the arbitration clause or not. In answering the said

contentions of Mr. N.C. Raghavachari that payments have already made at the rates provided in the Contract and hence the present claim is not

maintainable, Mr. Kurian submitted that there is no ground to deny the just claims of the first respondent arising in terms of the contract, and that

the petitioner was entitled to further payments in respect of the claims, is clear from the correspondence exchanged between the parties. Mr.

Kurian, further submitted that the Electricity Board having nominated their own arbitrator within time, it is not now open to them to come and say in

this Court that the issues raised before the arbitrators are not arbitrable. Nothing prevented the Electricity Board from approaching the competent

Court at the time request was made by the first respondent to the petitioner to nominate an arbitrator. It is seen from the records that the first

respondent had written to the petitioner on 5.9.1989 stating that the first respondent was contained to invoke the arbitration agreement. The first

respondent nominated and appointed the arbitrator by its letter dated 30.9.1989 and the petitioner appointed the other arbitrator by its letter dated

12.10.1989. Having thus nominated their arbitrators and having also attended the hearing before the arbitrators, and having also agreed to the

further proceedings before the arbitrators as to be seen from the proceedings of the arbitrators relating to the hearing on 22.11.1989. I hold that

the petitioner is not entitled to approach this Court at this stage for the reliefs claimed. The said conduct of the parties also implied how the parties

understood the relevant provisions of the contract. It is also seen from the records that the claims now specified in the Statement of Claim filed

before the arbitrators, are exactly the claims which were earlier raised by the first respondent before the petitioner and rejected by them. In my

opinion these disputes arise under the contract or in relation to or in connection with the contract and are consequently arbitrable. In my opinion,

the second and third respondent have ample jurisdiction to decide these claims. As already indicated the claims made in the letter dated

16.1.1985, the first respondent could only be in respect of losses and damages suffered and extra expenses incurred upto that time and further

losses, expenses and damages were placed before the petitioner by the first respondent thereafter. The fact that the Engineer-in-charge may or

may not have expressed his views in respect of these matters, is not a ground for saying the first respondent is not entitled to invoke the arbitration

clause for resolving the disputes between the parties. As stated earlier the High Court is not the forum for going into the details of the disputes as to

whether the amounts claimed now are in excess of the amounts claimed earlier. If however, they are in excess as stated, then there are adequate

reasons for the same and it is for the arbitrators to decide about the justifiability of the same or admissibility of the same, which are all matters for the arbitrators to go into and decide, at the time of making and pronouncing the award. It is open to the petitioner to raise all those matters before the arbitrators if they genuinely feel there is any substance in these averments or contentions. Likewise the revised rates that are now claimed is again a matter which has to be gone into by the arbitrator. It is true that agreement provided for certain rates for certain work to be executed within a certain period. It does not mean that the same rates should hold good if the period of execution is extended considerably. Again it is a matter to be considered by the arbitrator in terms of the provisions of the arbitration clause. The claims pending before the arbitrators are not in respect of any matters which have been settled between the parties. Assuming for the sake of argument that the claims which are now pending before the arbitrator have already been settled by the parties, it is always open to the petitioner to raise such contention before the arbitrators and it is for the arbitrators to decide whether the same is correct or not.

12. In reply to the argument of Mr. Kurian, Mr. N.C. Raghavachari, submitted and reiterated his earlier contention and said that Clause 23 of the Contract is a bar for raising the dispute under Clause 25 of the Contract, unless the Engineer in charge has refused to decide. According to him, the first respondent is estopped from invoking Clause 25 of the Contract without pursuing further and settling all matters before the Engineer-in-charge furnish the signed minutes for some items of disputes. According to him, Clause 25 of the contract cannot be invoked at all and does not override Clause 23. Mr. Raghavachari then contended that Clause 23 of the Contract comes before Clause 25 and that the latter clause is subject to the earlier clause. According to him the dispute prevention clause no doubt makes the decision of the Engineer final. Only if the Engineer is unable to decide, then that dispute between the Engineer and the Contractor is subject matter of Arbitration in Clause 25(1). But if the Engineer gave a decision it is final under Clause 23. The first respondent having invoked Clause 23 and having signed the minutes dated 23.6.1988 and 24.6.1988, cannot go back and ignore the signed minutes. I am unable to accept the contention raised by the learned counsel for the petitioner in

his interpretation in Clause in regard to the over-riding nature of Clause 23 over Clause 25.

13. The main point taken by the petitioner is that Clause 23 of the General Conditions of the Contract is a complete bar to the arbitration

proceedings and therefore the Arbitrators have no jurisdiction to proceed with the Arbitration proceedings. It therefore becomes necessary to

consider the scope and ambit of Clause 23 and Clause 25 of the General Conditions of the Contract which are extracted above in paragraphs

supra.

14. Clause 25, in my considered view is couched in very wide terms and it covers Any question, dispute or difference whatsoever between the

purchaser or Engineer and the other party upon or relation to or in connection with the Contract. The operation of Clause 25 does not depend on

Clause 23. Clause 23 provides that the decision, opinion, order, direction, requisition and or certificate of the Engineer, his measurement, valuation,

decision shall be final and binding upon the Contractor and the purchaser (fraud or frauds and collusion only expected) and the purchaser shall not

be liable in respect of any other matters or things unless and until the liability of the purchaser and the amount of such liability in respect of the claim

shall have been certified by the Engineer whose certificate shall be a condition precedent to any liability of the purchaser or any right of action

against the purchaser in respect of such claims.

15. This clause makes it clear that the certificate of the Engineer is only a condition precedent to the liability of the purchaser or any right of action

against the purchaser. Having regard to the wide terms of the arbitration clause no finality is attached to the certificate issued by the Engineer under

Clause 23. In other words it is open to the parties under Clause 25 to impeach the certificate and exercise the right of action against the purchaser

in respect of claims. Therefore the contention of the petitioner that Clause 23 bars arbitration proceedings under Clause 25 is wholly untenable.

16. In my opinion the certificate of the Engineer made under Clause 23 is a condition precedent to the liability of the purchaser or any right of

action against the purchaser. Hence Clause 23 and Clause 25 operate at two different stages and Clause 23 cannot destroy the arbitration

machinery provided under Clause 25.

17. It is the case of the petitioner that the claims made by the first respondent were examined and considered in details by the Chief Engineer as

per Clause 23 of the Contract and adjudicated by the Engineer-in-charge, and the aforesaid adjudication was communicated to the first

respondent. Therefore the condition precedent viz., a decision under Clause 23 has been fully satisfied and therefore the arbitration proceedings

under Clause 25 are maintainable.

18. Further Clause 25 not only comprehends within itself the dispute or difference between the petitioner and the first respondent but also a dispute

or difference between the Engineer and the first respondent. Therefore the certificate of the Engineer which is only a condition precedent for right

of action can also form the subject matter of Arbitration proceedings. It is open to the arbitrator to go behind to review and revised the certificate.

19. Mr. N.C. Raghavachari, has placed before me a number of authorities to show that the questions referred to arbitrators are arbitrable or not

can be decided only by this Court. In view of my decision in regard to interpretation of the two clauses it is unnecessary for me to refer to those

decisions.

20. According to Mr. Kurian, if the parties relied on the provisions of the Contract or if the parties have recourse to the Contract to support or

dispute or deny the claim the dispute is arbitrable. He further contended that if a reference to the contract is necessary to settle the dispute, then it

is arbitrable. In support of the said proposition of law Mr. Kurian has cited a decision reported in Tarapore and Company Vs. Cochin Shipyard

Ltd., Cochin and Another, in which case the Supreme Court has held as follows:

In the facts before us, the respondent in para 4 of its counter-statement filed before the arbitrator specifically referred to clause 16 of the General

Conditions of Contract and to the Additional Terms and Conditions - Modifications forming part of the contract document. In paragraph 11, it was

stated that the claim of the appellant was completely outside the purview of the Contract and the same does not fall within the purview of the first

paragraph of Clause 40. It was further stated in paragraph 13 that the contract provides for escalation in certain respects and that is the only

escalation which is admissible in terms of the contract, and the claim made by the appellant does not come within the escalation clause nor in the

agreed formula relating to such escalation. The contractor relied upon Clause 13 of the Additional Terms and Conditions-Modifications which form

part of the contract document to sustain its claim. From the pleadings, it clearly transpires that both the parties had recourse to the contract which

is admittedly entered into in support of the rival contentions and therefore, the claim made by the appellant would be covered by the arbitration

clause, which is of the widest amplitude. It is thus satisfactorily established that the claim made by the contractor would be covered by the

arbitration clause.

Applying the said ratio laid down by the Supreme Court in the above decision, it clearly transpires that both the petitioner and first respondent had

recourse to the contract which is admittedly entered into in support of the rival contentions and therefore, the claim made by the first respondent

would be covered by the arbitration clause, which is of the widest amplitude and couched in widest terms. It is thus satisfactorily established by the

first respondent that the claims made by them would be covered by the arbitration clause.

21. In support of his contention, Mr. Kurian has also cited a decision in Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another, . In

the said case the Supreme Court has held that both the parties admitted the contract and stated that they were bound by it. In fact each of them

relied upon it to support its case. The difference between the parties was therefore a difference arising out of the policy and the arbitrator had

jurisdiction to decide it, the parties having made him sole Judge of all differences arising out of the policy. In the instant case there is no question of

determining the effect of the arbitration agreement because there was no dispute between the parties as to what it meant. The language of the

arbitration clause was quite clear and both parties admitted the contract and stated that they were bound by them. In fact both parties relied upon

to support its case.

22. Mr. Kurian, further submitted in support of his contentions and has cited another decision reported in Union of India (UOI) Vs. Salween

Timber Construction (India) and Others, . The Supreme Court has held as follows:

There was a dispute between the appellant and respondent regarding the supply of timber. In pursuance of the clause in the contract which

provided that in the event of any question or dispute arising under the contract or in connection with the contract it should be referred to arbitration,

the dispute was so referred. One of the items in dispute was a claim by the respondent that there was an excess supply of timber to cover up

possible rejection, which should be returned by the appellant with compensation for deterioration, or that payment should be made for it at the

market value. The appellant contended that the terms of the contract did not require the respondent to tender for inspection any quantity in excess

of the contracted quantity, that the claim was to be treated as relating to an involuntary bailment and not in relation to anything done in the

performance, implementation or execution of the contract; and therefore, it was not a dispute arising out of the contract or in connection with the

contract.

On the question whether the arbitrators had jurisdiction to adjudicate upon the claim,

HELD: The test for determining the question is whether recourse to the contract, by which both the parties are bound, was necessary for the

purpose of determining whether the claim of the respondent was justified or otherwise. Since it was necessary to have recourse to the terms of the

contract for the purpose of deciding the matter in dispute, the matter was within the scope of the arbitration clause and the arbitrators had

jurisdiction to decide it.

23. Mr. Kurian, has cited another decision in support of his contention, reported in A.M. Mair and Co. Vs. Gordhandass Sagarmull, . The

principal dispute raised in that case was whether the extension of time for delivery was granted within the time limit in the contract. The further

dispute that the brokers/appellants before the Supreme Court, were not parties to the contract in their own right as principals but entered into the

contract only on behalf of the Bengal Jute Mill Company was not raised until the matter went to the arbitrators. The Supreme Court while deciding

the question whether it was open to the respondents to raise such an objection, after the other dispute which clearly fell within the arbitration clause

was referred to the arbitrators held the further dispute is also one which turns upon the true interpretation of the contract, so that the respondents

must have recourse to the contract to establish their claim that the appellants

were not bound as principals while the latter say that they were. The Supreme Court further held that such a dispute, the determination of which turns on the true construction of the contract, would also seem to be a dispute, under or arising out of or concerning the contract. In a passage quoted in *Heyman v. Darwins Ltd.*, 1942 A.C. 356:3 L.J. K.B.

241=1942 1 All E.R. 337 at 341. Lord Dunedin propounds the test thus:

If a Party has to have recourse to the contract, that dispute is a dispute under the contract.

24. Applying the said ratio I have no hesitation to hold that both the petitioner and the first respondent have recourse to the contract and that the dispute now raised whether Clause 23 will over-ride Clause 25 is a dispute under the contract. Here the first respondent must have recourse to the contract to establish their case and therefore it is a dispute falling within the arbitration clause.

25. In the above judgment the Supreme Court has held as follows:

Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute.

Hence in my opinion the decisions referred to above are all directly and substantially applicable to the facts of the present case and hence in my

opinion the disputes that are raised by the first respondent are referable to the arbitration for consideration. Yet another circumstance which

compels me to hold against the petitioner was that they had to nominate third respondent as an arbitrator within the time. If it was the petitioner's

case that the dispute was not arbitrable, nothing prevented them from approaching this Court at that time the request was made by the first

respondent to the petitioner to nominate the arbitrator. There was plenty of time between then and the first hearing before the arbitrators on

22.11.1989 for the petitioner to approach this Court. In fact, the first respondent had written to the petitioner as early as on 5.9.1989, stating that

the first respondent was constrained to invoke the arbitration agreement. The first respondent nominated and appointed the arbitrator by its letter

dated 30.9.1989, and the petitioner appointed the other arbitrator by its letter dated 12.10.1989. Having thus nominated their arbitrators and

having also attended the hearing before the arbitrators, and having also agreed

to the further proceedings before the arbitrators, at the hearing on 22.11.1989, the petitioner, in my opinion, is not entitled to approach this Court at this stage for the reliefs claimed. The said conduct of the parties also implied how the parties understood the relevant provisions or the contract. It is also seen from the records that the claims specified in the Statement of Claim filed before the Arbitrators, are exactly the claims which were earlier made by the first respondent before the petitioner and rejected by them. In my view these disputes are different, arise under the contract or in relation to or in connection with the contract and are consequently referable to the arbitration. It is also mentioned in the counter-affidavit that none of the claims are adjudicated or decided by anyone. It is also seen from the records that the further details were furnished as called by the petitioner, and no adjudication was made by the Engineer-in-charge. According to the first respondent he was not competent to make such an adjudication. Assuming he did so, it was submitted that the same does not in any way preclude the arbitrators from considering matters.

26. It is also stated in the reply statement filed by the petitioner that this Court alone shall decide u/s 33 of the Act and the question raised by the petitioner has also been decided by me. The petitioner further submitted that the amounts of escalation consequent on extension of time as demanded by the first respondent having been paid which amounts to accord and satisfaction and hence the said claim for escalation cannot be a subject matter of arbitration. I am unable to agree with the said contention in view of the decision reported in Damodar Valley Corporation Vs.

K.K. Kar, In the said case the tenderer entered into a contract with the Corporation to supply coal but as he failed to do so in accordance with the terms of the contract, the Corporation unilaterally repudiated the contract and ultimately paid the respondent for the supply of coal. But it was the case of the corporation that these payments, including the return of the deposit amount, finally settled the claims of the tenderer. After receiving those payments the tenderer claimed from the Corporation damages for repudiation of the contract. When the Corporation did not agree the respondent served a notice of his intention to refer the matter to the arbitration under the arbitration clause contained in the contract. The arbitration clause provided for reference to the adjudication of the arbitrators after notice,

any question, dispute or difference arising between the parties upon or in relation to or in connection with the contract. The question arose whether the court on an application under Sections 9(b) and 33 of the Act was entitled to enquire into the truth and validity of the averment as to whether there was or was not a final settlement on the ground that if that was proved, it would bar a reference to the arbitration inasmuch as the arbitration clause itself would perish. The Supreme Court on a consideration of the entire matter held that the question whether there had been a full and final settlement of a claim under the contract was itself a dispute arising "upon" or "in relation" or "in connection with" the contract. A claim for damages was a dispute or difference which arose between the respondent and the appellant and was "upon" or "in relation" or "in connection with" the contract, and the reference to the arbitrator by the respondent was not barred.

27. Mr. N.C. Raghavachari, learned Senior Advocate appearing for the petitioner relies on a decision reported in Vishwanath Sood Vs. Union of

India (UOI) and Another, . At the outset it is to be mentioned that the arbitration clause with which the Supreme Court considered was totally

different, from the one before me. Clause 25 of the agreement in our case is very widely couched and it is not provisions of the agreement.

Whereas in the case dealt with by the Supreme Court the arbitration clause opens with the words ""except where otherwise provided in the

contract."" Such a clause is totally absent in the case on hand, Therefore no support can be drawn by the petitioner from the judgement referred to

above. In the result, this petition is dismissed with costs. The petitioner is not entitled for any declaration as prayed for. The claims put forward by

the first respondent are within the scope of the arbitration clause and the arbitrators have jurisdiction to decide the same. In view of the dismissal of

the maintain petition, Application No. 422 of 1990 is also dismissed. The stay granted already is vacated.