

## **'EXCEPTED MATTER' in Arbitration — An analysis**

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### **Introduction:**

In agreements executed between parties to the contract, generally there exists an arbitration clause and when the subject matter touched the door steps of the Court/Tribunal for adjudication of the claims raised by the aggrieved party to the contract, the Court/Tribunal is concerned with interpreting an arbitration clause which stipulated, "*In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration...*" or the arbitration clause commenced with the words "*except where otherwise provided in the contract*" or "*The Superintending Engineer's / Engineer's decision shall be final*" or with similar words attaching finality to the decisions of the concerned authorities.

When a dispute arose between the parties, relating to (i) payment of compensation / damages (ii) extension of time, (iii) the power of any authority under the contract to take a decision on any issue relating to the contract and similar other matters, and when the aggrieved party to the contract raises such a claim, naturally the other party to the arbitration will raise the objection contending that the said claim(s) fall under excepted matters and as such they are outside the scope and jurisdiction of arbitrator/arbitral tribunal, because of the specific provision in the agreement. Therefore, it was contended that there was no valid arbitration agreement between the parties in respect of the particular dispute(s).

### **First category of excepted matters:**

The Division Bench of the Hon'ble Supreme Court construed the expression in clause 2 of the conditions of contract that 'The Superintending Engineer's decision shall be final' as referring only to finality by a specified official in the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the word 'final' in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under clause 25. The Court is unable to accept the view. Clause 25, which is the arbitration clause, starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have only reference to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words 'except where otherwise' provided in the contract would become meaningless. The Court is, therefore, inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator. **[Vishwanath Sood –vs- Union of India (AIR 1989 SC 952(SC))** This judgment declared that when the arbitration clause opens with the words 'except where otherwise provided in the contract' and somewhere in the contract finality was attached to the decisions of the specified authorities on the aid matters.

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## Second category of excepted matters:

Similarly, the Hon'ble Supreme Court brought in the concept of excepted matters to some other categories also.

The Supreme Court considered the matter and held that a bare reading of Clause 63 shows that it consists of three parts. One of the three parts is qualified by a proviso which deals with 'excepted matters'. 'Excepted matters' are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any clauses of the Special Conditions of the Contract. The other of the three parts is a further proviso, having an overriding effect on the earlier parts of the clause, that all 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause and hence shall not be referred to arbitration. The source of controversy is the expression "matters for which provision has been made in any clauses of the Special Conditions of the contract shall be deemed as 'excepted matters' and decisions thereon shall be final and binding on the contractor." It is submitted by the learned counsel for the respondent that to qualify as 'excepted matters' not only the relevant clause must find mention in that part of the contract which deals with special conditions but should also provide for a decision by an authority of the Railways by way of an 'in-house remedy' which decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an 'excepted matter'. ----- We find it difficult to agree. In our opinion those claims which are covered by several clauses of the Special Conditions of the Contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2., 11.3 and 21.5 of Special Conditions are illustrative of such claims. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railway", or "no claim will/shall be entertained". These are 'no claim', 'no damage', or 'no liability' clauses. The other category of claims is where the dispute or difference has to be determined by an authority of Railways as provided in the relevant clause. In such other category fall such claims as were read out by the learned counsel for the respondent by way of illustration from several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clause 2.4.2.(b) and 12.1.2. The first category is an 'excepted matter' because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within 'excepted matters' because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to the second category of 'excepted matters'. [GENERAL MANAGER NORTHERN RAILWAYS & ANR. –vs- SARVESH CHOPRA 2002 AIR 1272, 2002( 2 )SCR 156, 2002( 4 )SCC 45, 2002( 2 )SCALE394 , 2002( 2 )JT 445(SC)]

In a case, where the agreement had provided for complete machinery for settlement of disputes, including machinery for fixation of the liability, the position seems to be that "excepted matters" clauses will be construed strictly; and the Courts will prefer an interpretation narrowing the scope of "excepted matters". The Court can also consider another important issue, where the clause in the agreement providing for the computation of damages provided that the appellant would calculate the amount of damages in accordance with the agreed formula. The appellant had contended that the quantum of liquidated damages decided by the appellant, even if it is exorbitant and contrary to the formula, would be final and could not be challenged. The Supreme Court rejected this argument as well, saying that such an argument would mean that the agreement was contrary to Section 28 (agreement in restraint of legal proceedings is void) and Section 74 (compensation for breach of contract where penalty is stipulated) of the Indian Contract Act. In this connection, it is worth noting that although Section 28 does allow for an exception in the case of arbitration agreements, a provision stating that a certain person shall compute damages in accordance with a formula cannot be regarded as an 'arbitration' proceeding. In *K.K. Modi v. K.N. Modi* (AIR 1998 SC 1297), the Supreme Court had made clear the distinction between arbitration and an expert determination – the provision relating to the computation of damages in accordance with a given formula would be a 'determination' and not an 'arbitration'

### **Supreme Court on excepted matters:**

Clause in the contract stipulated that in case of dispute relating to rates and time for completion of work and proportion that additional work bears to the original contract work, the decision of Superintending Engineer shall be final. Claim for extra work made by the contractor. Award for lump sum payment to the contractor made. Held, on facts, points upon which arbitrator adjudicated not covered by the exception clause in the contract. **[State of Orissa –vs- Dandasi Sahu AIR 1988 SC 1791 = 1988 (4) SCC 12 (SC)]**

The Division Bench has construed the expression in clause 2 in parenthesis that 'The Superintending Engineer's decision shall be final' as referring only to a finality *qua* the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the word 'final' in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under clause 25. The Court is unable to accept the view. Clause 25, which is the arbitration clause, starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have only reference to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words 'except where otherwise' provided in the contract would become meaningless. The Court is therefore inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator. **[Viswanath Sood –vs- Union of India (AIR 1989 SC 952(SC))**

The Judge of the High Court held that clause 14 containing the arbitration agreement had no application to the dispute in question which fell under clause 13-A and, therefore, the arbitrator had no jurisdiction in the matter. He held that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void. The Court is in complete agreement with the reasoning of the Judge. **[M/s Prabartak Commercial Corporation Ltd., - vs- The Chief Administrator, Dandakaranya Project, (AIR 1991 SC 957 =1991 (1) SCC 498 (SC)],**

Arbitration clause in the agreement opening with the words 'Except where otherwise provided in contract'. Clause relating to extra work provided that in respect of the rates for such work done before determination of the rates, decision of Superintending Engineer would be final. When it was not the case that extra work was done before determination of rates for such work, held, there was no bar to the dispute relating to the rates for extra work being referred to arbitration. **[State of Orissa –vs- B.N. Agarwala AIR 1993 SC 2521 = 1993 (1) SCC 140 (SC)]**

Further even if such reasons are not recorded, the claim itself for such prohibited items was not entertainable by the arbitrator. In the agreement between the parties, there is a specific bar to raising of such claims. Hence the decision of arbitrator is without jurisdiction. This aspect is also dealt with by this Court in para 26, the Court held as under: (26) In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative, then, it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific terms in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of his jurisdiction. **[Steel Authority of India Ltd., -vs- JC Budharaja (1999(8) SCC 122)(SC)]**

Under clause 11 of the contract, there is an elaborate provision dealing with the power of the Engineer-in-charge to make any alterations or additions to the original specifications, drawings designs and

instructions.....In the event of a dispute the decision of the Superintending Engineer of the circle will be final. Under clause 23 except as otherwise provided in the contract all disputes are arbitrable as set out in that clause.....This Court in the case of *Prabartak Commercial Corporation Ltd.* considered the interrelationship between similar clauses in a construction contract. The Court was considering an appeal from the MP High Court. The two clauses, which the Court was required to consider, are set out in the decision of the MP High Court which is reported in *Chief Administrator, Dandakaranya Project case*. In that case also, clause 14 which was the arbitration clause contained the following words "except as otherwise provided in the contract" all disputes would be referred to arbitration as set out therein. Clause 13 –A of the same agreement was similar to clause 11 in the present case. The Engineer-in-Chief was to determine the rates for any additional works. The decision of the Superintending Engineer was final in the event of a dispute. The Court upheld the decision of the MP High Court to the effect that when an arbitration clause specifically excluded from its purview disputes which were covered by clause 13 – A, these Disputes would not be within the ambit of the arbitration clause. The awards, therefore, in that case were without jurisdiction and were void. The ratio of this case applies directly to the present case also. The arbitration award, therefore, in so far as it decides claims 2,3 and 6 is set aside." **[Executive Engineer REO –vs- Suresh Chandra Panda 1999 (9) SCC 92 = 1999(10) JT 555 = 1999(Suppl) ALR 567 = 2000(1) RAJ 489 (SC)]**

In the usual Governmental contracts, there is exclusive of some matters from the purview of arbitration and Senior Officer of the department usually is given the authority and power to adjudicate the same. Clause itself records that the decision of the Senior Officer, being the adjudicator, shall be final and binding between the parties. This is called "excepted matter" in Government or Governmental agencies contract.. 'excepted matter's do not require any further adjudication since the agreement itself provides a named adjudicator. Question of assumption of jurisdiction of any arbitrator either with or without the intervention of the Court would not arise. **[FCI –vs- Sreekanth Transport (1999 (3) RAJ 416 (SC)]**

The arbitration clause in the agreement (clause 74) was very widely worded: '...all disputes and differences arising out of or in any way touching or concerning this contract whatsoever, except as to any matter, the decision of which is expressly vested in any authority in this contract, shall be referred to the sole arbitration of....' While passing the award basic and fundamental terms of the agreement between the parties have been ignored. By doing so, it is apparent that he has exceeded his jurisdiction. **[Rajasthan State Mines and Minerals Ltd.-vs- Eastern Engineering Enterprises and anr. (1999 (9) SCC 283)(SC)]**

In the case in hand it cannot be held that the arbitrator per se had no jurisdiction to decide the issue of the validity of termination of contract. It depends upon the factual matrix. The issue of termination of contract in question, on the facts under consideration before the Court, does not relate to the jurisdiction of the arbitrator. Without going into the scope of clause 1.9 of the information and instructions to tenderers or that of clause 15 of the contract and assuming that issue of termination of contract can be brought within the scope of the clauses, and, thus, made an 'excepted matter' but that would depend upon the fact whether the Engineer's certificate under clause 1.9 has been issued or not. Therefore, specific plea had to be taken that such a certificate was issued and, therefore, the aspect of termination was not arbitrable. As already noticed no such fact was pleaded or contention urged in the counter statement of facts. In this view, it is not necessary to decide whether the issue of termination of the contract could be brought within the ambit of "excepted matter" or not or that the Engineer's certificate could be conclusive only as to the quality or measurement of the work done. The Division Bench was, thus, not correct in coming to the conclusion that the fundamental terms of the agreement between the parties prohibited the arbitrability of the 'excepted matters. The first ground on the basis of which the judgment of the single Judge was reversed is, thus, not sustainable. **[JG Engineer's (P) Ltd. –vs Calcutta Improvement Trust (2002(1) RAJ 266 = AIR 2002 SC 766 = 2002 (2) SCC 664= 2002 (1)ALR 344 (SC)),**

An arbitrator cannot go beyond the terms of contract between parties. In the guise of doing Justice he cannot award contrary to the terms of contract. If he does so he will have misconducted himself. **[State of Rajasthan –vs- M/s. Nav Bharat Construction Company 2005(3) RAJ 472(SC)]**

No award was passed by arbitrator in respect of claim 3. High Court set aside the award only on the ground that arbitrator had entertained claim 3 which was beyond his competence as the Court had not referred claim 3 to be adjudicated by arbitrator. As claim 3 was expressly negated by the arbitrator, High Court ought not to have interfered with the award of arbitrator on such basis. Order of High Court to be set aside. Appeals allowed. **[Mohiwal Construction Co. –vs- State of Punjab and ors 2006(2) RAJ 573(SC)]**

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Dispute between state of Kerala and Tamil Nadu regarding safety of Mullaperiyar Dam on increase of water level. Referability of dispute to arbitration. As per relevant lease deed between parties any dispute between them touching upon rights, duties or liabilities of either party to be referred to arbitration. As present dispute is not about the rights, duties and obligations or interpretation of any part of agreement but about the increase of water level dependent upon Safety of dam after strengthening step have been taken. Present dispute therefore not liable to be referred to arbitration. **[Mullaperiyar Environmental Protection Forum –vs- Union of India, AIR 2006 SC 1428 = 2006(3) SCC 643 = 2006(3) JT 31 = 2006(2) SCALE 680 = 2006(3) Supreme 579 = 2006(2) SLT 478 = 2006(3) SCJ 196 = 2006(3) SCJD 110 = 2006(4) SRJ 268 = 2006(1) ALR 374 (SC-3J)]**

Petition under Section 11(6) for appointment of arbitrator objected by respondent contending that clause 23 contained a condition that arbitrator's determination to be treated as final and binding between parties and parties had waived all rights of appeal or objection in any jurisdiction and thus in restraint of legal proceedings and against public policy. As per clause 20 of agreement if any provision is held invalid, illegal or unenforceable, it would not affect other clauses and thus objectionable part is clearly severable as it is independent of dispute being referred to arbitrator. First part of clause 23 clearly mandates for disputes to be referred to arbitrator. As in spite of request by petitioner respondent failed to appoint arbitrator, arbitrator to be appointed by Court under Section 11(6). In the present case, clause 23 relates to arbitration. It is in various parts. The first part mandates that, if there is a dispute between the parties, it shall be referred to and finally resolved by arbitration. It clarifies that the Rules of UNCITRAL would apply to such arbitration. It then directs that the arbitration shall be held in Delhi and will be in English language. It stipulates that the costs of arbitration shall be shared by the parties equally. The offending and objectionable part no doubt, expressly makes the arbitrator's determination final and binding between the parties and declares that the parties have waived the rights of appeal or objection in any jurisdiction. The said objectionable part, however, is clearly severable as it is independent of the dispute being referred to and resolved by an arbitrator. Hence, seen in the absence of any other clause, the part as to referring the dispute to arbitrator can be given effect to and enforced. By implementing that part, it cannot be said that the Court is doing something which is not contemplated by the parties or by interpretative process the Court is rewriting the contract which is in the nature of 'novatio'. The mention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a Court of law can be separated and severed by using a blue pencil. The agreement in the instant case can be enforced on an additional ground as well. As already noted, clause 20 (Severability) expressly states that if any provision of the agreement is held invalid, illegal or unenforceable, it would not prejudice the remainder. Clause 20 makes the matter free from doubt. The intention of the parties is abundantly clear and even if a part of the agreement is held unlawful, the lawful parts must be enforced. Reference of a dispute to an arbitrator, by no means can be declared illegal or unlawful. To that extent, therefore, no objection can be raised by the respondent against the agreement. Finally, it was submitted by the respondent that if the Court is not upholding the objection of the respondent and is inclined to grant the prayer of the petitioner, sometime may be granted to the respondent to make an appointment of an arbitrator. It was not done earlier because according to the respondent, clause 23 was not enforceable. The learned counsel for the petitioner objects to such a prayer. According to him, a letter/notice was

issued and in spite of request by the petitioner, the respondent had failed to exercise his right to appoint an arbitrator. At this belated stage, now, the respondent cannot be permitted to take advantage of its own default. Since there is failure on the part of the respondent in making an appointment of an arbitrator in accordance with the agreement, the prayer cannot be granted. For the foregoing reasons, the arbitration petition stands allowed and Hon'ble Mr. Justice M.L. Pendse (Retired) is accordingly appointed as Sole Arbitrator. In the facts and circumstances of the case, there shall be no order as to costs. **[Shin Satellite Public Co. Ltd. –vs- Jain Studios Limited, 2006(1) RAJ 344 = AIR 2006 SC 963 = 2006(2) SCC 628 = 2006(2) JT 89 = 2006(2) SCALE 53 = 2006(2) Supreme 10 = 2006(2) SLT 13 = 2006(2) SCJ 252 = 2006(3) SCJD 470 = 2006(3) SRJ 47 = 2006(1) ALR 286 (SC)]**

Appointment of arbitrator by High Court rejecting plea of appellant that levy of liquidated damages on respondent being an excepted matter is not arbitrable. From a bare reading of clause 16.2 of Section III of the tender document, it is clear that if the tenderer fails to deliver the goods and services on turnkey basis within the period prescribed, the purchaser shall be entitled to recover liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier. On facts, quantification of liquidated damages may be an excepted matter, under clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. Since, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent it cannot be accepted that the appointment of arbitrator by High Court was unwarranted in this case. Even if the quantification was excepted under clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Further, clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages. Apart from this the provision under clause 16.2 that quantification of liquidated damages shall be final and cannot be challenged by the supplier is clearly in restraint of legal proceedings under Section 28 of Contract Act. So the provision to this effect has to be held bad. Impugned judgment of High Court therefore, justified and need no interference. Appeal to be dismissed. **[Bharat Sanchar Nigam Ltd. and anr. – vs- Motorola India Pvt. Ltd. 2008(4) RAJ 326(SC)]**

The arbitrator was of the view that if the sum was adjusted against the amounts due by the employer, there was no need for the mortgage of the plant to continue, and, therefore, the employer should release the documents of title deposited by way of equitable mortgage, within 30 days from the date of award and that if the employer failed to do so, the employer should pay to the contractor Rs. 12,072/- per day from the date of the award till the date of release of the mortgage. Therefore, the said award under claim 37-A was made, not on account of any breach committed by the employer, but in respect a breach if made in future after the date of the award. There was no such claim and the award was, therefore, beyond the reference. Further, the reasoning is very strange and is a classic case of an error apparent on the face of the award and a legal misconduct. The arbitrator rejected the claim No. 37-A for payment of Rs. 12,072/- as compensation for loss of production from 13.1.1992, which was the subject matter of claim, on the ground that the plant had been mortgaged in favour of the employer, and, therefore, there was no justification for the contractor to claim that it should be permitted to remove and take away the plant when the mortgage subsisted. Having rejected the claim, the arbitrator evolved a strange reasoning that though there was a subsisting valid mortgage in respect of the mobilization advance with interest in favour of the employer, because he had made an award in favour of the employer for Rs. 59,42,275 plus interest, the mortgage came to an end and the employer became liable to return the documents and if it failed to return the documents the contractor was entitled to damages of Rs. 12,072/- per day from the date of award. The arbitrator noticed the fact that the plant and machinery was mortgaged by deposit of title deeds in favour of the employer and that the contract was that the original documents will remaining deposit with the employer till the amount of advance is repaid with full interest. The arbitrator in fact makes an award for return of Rs. 59,42,276/- in favour of the employer with interest at 18% per annum from 1.9.1990 to 17.9.1990 and interest at 18% per annum on Rs.59,42,275/- from 18.9.1990 till date of decree or payment whichever was earlier. Therefore, evidently until the amount of Rs.59,42,275/- with interest was paid by the contractor to the employer, the mortgage would continue. If the mortgage

continued, there was no obligation on the part of the employer to return the documents and if there was no obligation on the part of the employer to return the documents the contractor could not complain that the documents were wrongly held by the employer nor could it claim loss of production as a result of employer wrongly withholding the documents. The mobilization advance amount was an ascertained sum due to the employer from the contractor, with a specific provision for interest. There was a specific contract for continuation of the mortgage until the said amount was paid. On the other hand the amounts that allegedly became due to the contractor under the award were mostly towards damages and escalation in prices validity of which were under challenge and there was no provision in the contract for payment of interest thereon. As noticed above at best the arbitrator could have directed return of the documents of title to the contractor and could not have directed payment of damages at the rate of Rs. 12,072/- per day. The Court, therefore, held that viewed from any angle, awarding Rs. 12,072/- per day as damages, from the date of award under claim 37-A cannot be sustained and the same is liable to be set aside. **[State of Rajasthan & anr. –vs- M/s. Ferro Concrete Construction Pvt. Ltd. 2009(3) RAJ 270(SC)]**

Claim of appellant of entitlement for deduction in bills on account of inferior quality of workmanship dismissed by arbitrator. Plea of appellant that under the contract this was an issue which was left to sole discretion of Managing Director of appellant and, therefore, was not within the jurisdiction of arbitrator to arbitrate upon. Single Judge as well as Division bench, after examining the clauses held that these Clauses did not include within their purview bad workmanship and, therefore, it was beyond the jurisdiction of arbitrator to decide it. In respect of Clause 10[c], Court has rightly rejected argument of appellant that negligence or lack of proper care was synonymous to bad workmanship. No ground to interfere with findings of High Court in rejecting submissions of appellant. It was next contended by the senior counsel for the appellant that there was inferior quality of workmanship as a result of which it was entitled to make deduction from the bills. The Arbitrator had refused to accept this submission from the side of the appellant that under the contract the respondent was obliged to use local materials including local bricks, that the bricks in the Bombay region were of inferior quality and further that all the bills presented had been passed by the Architect of the appellant without any objection, therefore, the appellant was estopped from raising the issue and no recovery could be allowed. The Court did not find any infirmity in the aforesaid findings of the Arbitrator as well as the findings arrived at by the High Court. Mr. Dwivedi had drawn our attention to the fact that under the contract this was an issue which was left to the sole discretion of the Managing Director of the appellant and, therefore, was not within the jurisdiction of the arbitrator to arbitrate upon. In this connection, Mr. Dwivedi placed reliance on Clause 10 (b), (c) and (f) and clause 11 of the articles of agreement. The single Judge as well as the Division bench, after examining the clauses, as indicated hereinabove, held that these clauses did not include within their purview bad workmanship and, therefore, it was beyond the jurisdiction of the Arbitrator to decide it. In respect of clause 10[c] the Court, in the Court's view, has rightly rejected the argument of the appellant that negligence or lack of proper care was synonymous to bad workmanship. Accordingly, we do not find any ground to interfere with the findings of the High Court in rejecting the submissions of the counsel for the appellant on this ground. **[U.P. Co-Operative Federation Ltd. –vs- M/s. Three Circles. 2009(4) RAJ 205(SC)]**

Interference with award by High Court ignoring factual findings recorded by arbitrator and without holding those findings to be perverse, held, not tenable. Clear finding of arbitrator that procedure prescribed for bringing those claims under the purview of the 'excepted matters' was not scrupulously followed. No disagreement expressed by High Court in relation to the same. In such a case, High Court's finding that the said claims were excepted matters and hence not arbitrable, could not be sustained. Judgment of High Court set aside. Award by arbitrator holding these claims to be arbitrable restored. **[Madnani Construction Corporation Private Limited –vs- Union of India 2010 (1) UJ SC 0042 = Manu/SC/1869/2009 =2010 (1) SCC 549(SC)]**

Delay in completion of works contract. Quantification of liquidated damages for delay / breach of contract were falling within excepted clause. But question as to who was responsible for delay was arbitrable. Right to levy liquidated damages would arise only when contractor was responsible for delay. Arbitrator holding that contractor was not responsible for delay and quashing levy of liquidated damages, not improper. Award not liable to be set aside. In the instant case what was made final and conclusive by

clauses of agreement was not the decision of any authority on issue whether contractor was responsible for delay or department was responsible for delay or on question whether termination/rescission was valid or illegal but decision on consequential issues relating to quantification, if there was no dispute as to who committed breach. That is, if contractor admitted that he was in breach, or if Arbitrator found that contractor was in breach by being responsible for the delay, the decision of Superintending Engineer was to be final in regard to two issues. The first was the percentage (whether it should be 1% or less) of value of work that was to be levied as liquidated damages per day. The second was determination of actual excess cost in getting the work completed through an alternative agency. The decision as to who was responsible for delay in execution and who committed breach was not made subject to any decision of respondents or its officers, nor excepted from arbitration under any provision of the contract. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a Court or an Arbitral Tribunal. Thus the question whether contractor was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of work and contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to rate of liquidated damages and decision as to what was actual excess cost in getting work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims as right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for delay and was in breach. In view of finding of arbitrator that contractor was not responsible for delay, the question of respondents levying liquidated damages or claiming the excess cost in getting work completed as damages, does not arise. It follows that provisions which make the decision of Superintending engineer or the Engineer-in-charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all claims of contractor as also the claims of respondent. Consequently, the award of Arbitrator on said claims has to be upheld and conclusion of High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained. A Civil Court examining the validity of an arbitral award exercises supervisory and not appellate jurisdiction. Section 34 read with clauses 2 and 3 of the contract. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract Arbitrator competent to make an award in this regard. The question whether the other party committed breach cannot be decided by the party alleging breach A contract cannot provide that one party will be the arbiter to decide who committed breach Even in case of quantification of liquidated damages being excepted from arbitration, the question of delay and breach of contract can only be decided by an Arbitral Tribunal. **[J.G. Engineers Pvt. Ltd. –vs- Union of India [2011] 4 Supreme 531 = [2011] 5 SCC 758 = AIR 2011 SC (Civil) 1349(SC)]**

Award in respect of item nos. 1 to 3 and 5 to 8 set aside by High Court holding to be excepted matters and non-arbitrable. Finding of High Court completely ignoring the factual finding by Arbitrator and without holding that these findings are perverse. Finding of High Court holding those items as non-arbitrable is unjustified and unsustainable. The Arbitrator in his award after perusal of the level Book No. 1, Graph Sheets, Logbook No. 1A and Logbook No. 4 came to a clear finding that there were manipulations/alterations/over writing by the railways and as a result of which the volume of work done by the contractor has been reduced. It appears that in the instant case, the High Court has come to the aforesaid finding that the items mentioned above are excepted matters and non-arbitrable by completely ignoring the factual finding by the Arbitrator and without holding that those findings are perverse. The clear finding of the Arbitrator is that procedure prescribed has not been followed and the High Court has not expressed any dis-agreement on that. Therefore, the finding of the High Court that those items are non-arbitrable cannot be sustained. In order to deny the claims of the contractor as covered under excepted matters, procedure prescribed for bringing those claims under excepted matters must be scrupulously followed. **[M/s. Madnai Construction Corporation (P) Ltd. –vs- Union of India & Others. 2012(1) RAJ 655(SC)]**



In the impugned judgment and order the designate of the Chief Justice of the High Court of Chhattisgarh in an Arbitration Application while dealing with an application preferred under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (Act) repelled the submission of the Appellant that the disputes raised by the applicant, being excepted matters, were squarely covered within the ambit of relevant clause of the agreement and hence, it was only to be referred to an expert for resolution and not to an arbitrator and, further opined that as the disputes were not covered under the subject matter of billing disputes that find place in said relevant clause of the agreement, the parties were not under obligation to refer the matter to the expert, and, accordingly, called for the names from both the parties and taking note of the inability expressed by the counsel for the Respondents therein, appointed an arbitrator to adjudicate the disputes. It is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. Under certain circumstances the Chief Justice or his designate is also required to see whether a long barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection. Designated Judge, as perceived from the impugned order, while dealing with an application under Section 11(6) of the Act, on an issue raised with regard to the excepted matters, was not justified in addressing the same on merits whether it is a dispute relating to excepted matters under the agreement in question or not and has fallen into error by opining that the disputes raised were not billing disputes, for the same should have been left to be adjudicated by the learned Arbitrator - Part of the order impugned reflected the expression of opinion by the designate of the Chief Justice on the merits of the disputes which was accordingly set aside. Appeal allowed in part. **[Arasmeta Captive Power Company Private Limited and Anr. –vs- Lafarge India Private Limited MANU/SC/1289/2013 = AIR 2014 SC 525 = 2014 (2) ALD 89 = 2014 (102) ALR 680 = 2013 (4) ALR 439 (SC) = 2014 (2) AWC 1441 SC = 2014 (2) CDR 328 (SC) = [2014] 118 CLA 328 (SC) = [2014] 182 Comp Cas 115 (SC) = (2014) 1 Comp LJ 209 (SC) = 2014 (1) CTC 415 = 2013 (15) SCALE 209 = 2014 (1) Shim LC 539(SC)]**

### **Conclusion:**

Whenever any dispute is referred to adjudication by the arbitral tribunal, first aspect that can be contested, if exists, is that of the jurisdiction of the arbitral tribunal. One of the aspects touching the jurisdiction of arbitral tribunal is that in the agreement between the parties to the contract there exists a clause dealing with arbitration and in most of the contracts it may be stated as : 'In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration...' or the arbitration clause commenced with the words "except where otherwise provided in the contract" or "The Superintending Engineer's / Engineer's decision shall be final" or with similar words attaching finality to the decisions of the concerned authorities.' Unless a decision on the issue of 'excepted matters' is finalized, if the arbitral tribunal goes with adjudication of the disputes, it will be a futile exercise and ultimately in respect of those claims that come under excepted matters, the award passed by the arbitral tribunal will be set aside.

In that view of the matter, the author is trying to bring the following points emerged from the aforesaid decisions of the Supreme Court of India, for immediate reference.

(i) When each of the clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railway", or "no claim will/shall be entertained". These are 'no claim', 'no damage', or 'no liability' clauses. The other category of claims is where the dispute or difference has to determine by an authority of Railways as provided in the relevant clause. The first category is an 'excepted matter' because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within 'excepted matters' because the claim is liable to be adjudicated upon by an authority of the organization 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'.

(ii) Clause in the contract stipulated that in case of dispute relating to rates and time for completion of work and proportion that additional work bears to the original contract work, the decision of Superintending Engineer shall be final. Claim for extra work made by the contractor and award for lump sum payment to the contractor made, held, arbitrator's adjudication not covered by the exception clause in the contract.

(iii) The expression in clause 2 in parenthesis that 'The Superintending Engineer's decision shall be final' as referring only to a finality in the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. Clause 25, which is the arbitration clause, starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words can have only reference to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words 'except where otherwise' provided in the contract would become meaningless. The opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the department. The question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator

(iv) Clause containing the arbitration agreement had no application to the dispute in question which fell under clause 13-A and, therefore, the arbitrator had no jurisdiction in the matter. He held that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void.

(v) Arbitration clause in the agreement opening with the words 'Except where otherwise provided in contract'. Clause relating to extra work provided that in respect of the rates for such work done before determination of the rates, decision of Superintending Engineer would be final. When it was not the case that extra work was done before determination of rates for such work, held, there was no bar to the dispute relating to the rates for extra work being referred to arbitration.

(vi) In the agreement between the parties, there is a specific bar to raising of claims. Hence the decision of arbitrator is without jurisdiction. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative, then, it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific terms in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of his jurisdiction.

(vii) The Engineer-in-Chief was to determine the rates for any additional works. The decision of the Superintending Engineer was final in the event of a dispute. When an arbitration clause specifically excluded from its purview disputes covered by clause of the contract, these Disputes would not be within the ambit of the arbitration clause.

(viii) In the usual Governmental contracts, there is exclusive of some matters from the purview of arbitration and Senior Officer of the department usually is given the authority and power to adjudicate the same. Clause itself records that the decision of the Senior Officer, being the adjudicator, shall be final and binding between the parties. This is called "excepted matter" in Government or Governmental agencies contract.. 'excepted matter's do not require any further adjudication since the agreement itself provides a named adjudicator. Question of assumption of jurisdiction of any arbitrator either with or without the intervention of the Court would not arise.

(ix) The arbitration clause in the agreement (clause 74) was very widely worded: '....all disputes and differences arising out of or in any way touching or concerning this contract whatsoever, except as to any

matter, the decision of which is expressly vested in any authority in this contract, shall be referred to the sole arbitration of....' While passing the award basic and fundamental terms of the agreement between the parties cannot be ignored. By doing so, it is apparent that he has exceeded his jurisdiction.

(x) An arbitrator cannot go beyond the terms of contract between parties. In the guise of doing Justice he cannot award contrary to the terms of contract. If he does so he will have misconducted himself.

(xi) The provision under clause 16.2 that quantification of liquidated damages shall be final and cannot be challenged by the supplier is clearly in restraint of legal proceedings under Section 28 of Contract Act. So the provision to this effect has to be held bad.

(xii) A contract cannot provide that one party will be the arbiter to decide who committed breach Even in case of quantification of liquidated damages being excepted from arbitration, the question of delay and breach of contract can only be decided by an Arbitral Tribunal.

(xiii) In order to deny the claims of the contractor as covered under excepted matters, procedure prescribed for bringing those claims under excepted matters must be scrupulously followed.

(xiv) for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator.