* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO(OS) No.135/2010 & CM No.3552/2010

NTPC Ltd. .....Appellant through
Mr. R.K. Joshi, Adv.

versus

Deconar Services Pvt. Ltd. .....Respondent through
Mr. J.P. Gupta, Adv.

WITH

FAO(OS) No.136/2010 & CM No.3562/2010

NTPC Ltd. .....Appellant through
Mr. R.K. Joshi, Adv.

versus

Deconar Services Pvt. Ltd. .....Respondent through
Mr. J.P. Gupta, Adv.

% Date of Hearing: February 24, 2010

Date of Decision: April 09, 2010

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

1. The Appellant assails the Order of the learned Single Judge dated 16.12.2009 in terms of which the Appellant's Objections to a composite Award passed in respect of the two contracts came to be dismissed. The first contract was executed on 12.10.1987 and was

with regard to the construction of 100 ‘A’ and ‘B’ type quarters; the second contract was executed on 23.11.1987 with regard to 68 ‘B’, ‘C’ and ‘D’ type quarters. Learned counsel for the Appellant clarifies that the Appellant was not desirous of entering into a contract with the third party who was L-1 because of some previous unsatisfactory transactions. Since the Bid of this third party was lower than that of the Respondent before us, the Respondent agreed to give a sixteen per cent rebate, ostensibly to match the third party/L-1. The finding in the Award to the effect that the Appellant was responsible for a delay of six months, out of a total delay of thirty two months, has not been controverted before us. The contention of the Appellant is that the Arbitrator had no jurisdiction to pass any Award in respect of the delayed period in view of Clause-6 of the First Agreement, which reads as follows:-

> 6.0 The total contract value and the unit rates shall remain firm during the execution of the contract and no variation on whatsoever account shall be accepted by NTPC. However, the total contract price is subject to change due to quantity variation based on the unit rates indicated in Appendix D in accordance with the provisions contained in general conditions of contract for Civil works.

2. Reliance has also been placed on an amendment to the General Conditions of Contract in which the parties have agreed to substitute Clause 53/53A with the following:-

> The quoted price shall remain firm during the currency of the contract.

Predicated on the above Clauses, the contention before us, as well as before the Arbitrator and the learned Single Judge, is that the contractor's claim for damages due to delay in the Project was 'an excepted matter', and in the alternative, even if it was adjudicable despite the presence of the above extracted Clauses, damages could not have been granted.

3. On the first question, the learned Single Judge has pithily observed that the arbitration did not commence through a petition under Section 20 of the Arbitration Act, 1940 ('Act' for short); on the contrary, the Arbitrator was chosen by the Appellant itself and accordingly claims had been referred to the Arbitrator by the Appellant. If it was the case of the Appellant that these claims were 'excepted matters', at that initial stage itself the Appellant should have declined to refer the claims to the Arbitrator. It is a matter of regret that the Terms of Reference to the Arbitrator have not been filed by the Appellant either before us or before the learned Single Judge. The question that arises is whether, regardless of the reference of these claims to the Arbitrator, the Appellant can nevertheless contend that the claims were not arbitrable as they fell in the genre of 'excepted matters'. Reliance has been placed by Mr. R.K. Joshi, learned counsel for the Appellant, on the following observations of the Division Bench in *Delhi Development*

Authority -vs- Jagan Nath Ashok Kumar, 89(2001) DLT 668, with which we respectfully concur:-

> 14. A perusal of the judgment of *Bhagat Construction* (supra), which was also a case relating to DDA, would show that the same question arose for consideration on almost identical facts. Notwithstanding Clause 25 of the Agreement relating to arbitration, counter claim No. 2 of similar nature, which was an "excepted matter" was referred for adjudication. When the award was filed in the Court various objections were raised. However, there was no specific objection in respect of counter claim No. 2 that Arbitrator did not have jurisdiction to deal with the same as it was an "excepted matter". This objection was raised at the time of arguments and it was not opposed on the ground that it could not be raised at the stage of arguments inasmuch as, under Section 30 of the Arbitration Act, 1940 objections to the award could be filed by the parties within 30 days of the receipt of the notice of filing of the award failing which the Court had no other option but to make the Award rule of the Court and pass decree in terms thereof. On the other hand, it was contended on behalf of the DDA that since the Arbitrator did not have jurisdiction to deal with an "excepted matter" the same goes to the root of the matter and therefore such an objection could be raised at any time and in support of this contention reliance was placed on the decision of the Supreme Court in the case of *Prabartak Commercial Corporation Ltd.* v. *The Chief Administrator, Dandakaranya Project and Another,* AIR 1991 SC 957. Learned Single Judge, keeping in view the importance of the question involved, made reference to

> the Division Bench and that is how this question came to be dealt with by the Division Bench. After hearing both the parties at length, detailed judgment is given holding that objections with regard to lack of inherent jurisdiction on the part of the Arbitrator to pass an award in respect of counter claim No. 2 could be taken at any time as it was not an objection under Section 30 of the Arbitration Act, 1940 but amounted to an objection raised under Section 33 of the Arbitration Act, 1940 for which law of limitation had no application. It was further held that the said counter claim did not fall within the jurisdiction of the Arbitrator and the question was one of lack of inherent jurisdiction of the Arbitrator to deal with the matter and the award in respect of such counter claim was a nullity and could be set up wherever it was sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. This judgment in fact applies with all force as far as present case is concerned and, therefore, relying upon the aforesaid judgment, we are of the view that Arbitrator lacked inherent jurisdiction to deal with the counter claim No. 1. Award on counter claim No. 1 is accordingly set aside.

4. We must, therefore, proceed to decide whether the Arbitrator was foreclosed and prevented from pronouncing on the claim for escalation for the extended period of the contract. Both the Arbitrator as well as the learned Single Judge has concurrently concluded that since the Appellant was responsible for the initial delay of six months, it would become liable for damages. It is noteworthy that the Arbitrator has not granted damages for the

total period of delay, viz., thirty two months. Instead, he has meticulously calculated the escalation which had been occasioned in the initial six months period in respect of which the Appellant indubitably was responsible for the delay. It seems to us that it is certainly arguable that since the Appellant was responsible for the initial delay, it could also have been found liable for the entire remainder; or at least that the Respondent would stand insulated for all the resultant or consequent damages. It is in this context that learned counsel for the Appellant has drawn our attention to *New India* ***Civil Erectors*** *(P) Ltd. v. Oil & Natural Gas Corpn.*, AIR 1997 SC 980, the relevant paragraph of which is extracted below:-

> 8. Claim 9: The appellant claimed an amount of Rs 32,21,099.89p under this head, against which the arbitrators have awarded a sum of Rs 16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-Corporation with reference to and on the basis of the stipulation in the Corporation's acceptance letter dated 10-1-1985 which stated clearly that "the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work". The Division Bench has held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract

> period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned Single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this count as well (claim 9).

5. Mr. J.P. Gupta, learned counsel for the Respondents, is quick to point out that the words in the contract between the parties speaks of the period "during the currency of the contract" in contradistinction to the clause in ***Civil Erectors*** which contemplates "till the completion of the work". According to learned counsel for the Respondents, there is a material difference in the clauses inasmuch as so far as the present parties are

concerned, the rates were to remain firm only during the currency of the period envisaged in the Contract.

6. In this regard, we can do no better than to reproduce the relevant observations of the Supreme Court in *General Manager, Northern Railway –vs- Sarvesh Chopra*, 2002(4) SCC 45:-

> 14. In *Hudson's Building and Engineering Contracts* (11th Edn., pp. 1098-99) there is reference to "no-damage" clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined "delays" including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, these damages or compensation are not to be recoverable therefor. These "no-damage" clauses appear to have been primarily designed to protect the owner from late start or coordination claims due to other contractor delays, which would otherwise arise. Such clauses originated in the federal government contracts but are now adopted by private owners and expanded to cover wider categories of breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result

of positive acts of interference by the owner, and (iv) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and the Commonwealth. Not dissimilar principles have enabled some Commonwealth courts to avoid the effect of "no-damage" clauses. (See *Hudson*, *ibid.*).

15. In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, *Chitty on Contracts* (28th Edn., 1999, at p. 1106, para 22-015) states

> "a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')".

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss

occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

16. Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of “excepted matters”. While dealing with a petition under Section 20 of the Arbitration Act, the court will look at the nature of the claim as preferred and decide whether it falls within the category of “excepted matters”. If so, the claim preferred would be a difference to which the arbitration agreement does not apply, and therefore, the court shall not refer the same to the arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the

arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator. Russell on Arbitration (21st Edn., 1997) states vide para 1-027 (at p. 15):

> "Arbitrability.—The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the Tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the Tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement. The New York Convention, for example, refers to non-arbitrability as a ground for a court refusing to recognize and enforce an award."

17. To sum up, our conclusions are: (*i*) while deciding a petition under Section 20 of the Arbitration Act, 1940, the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (*ii*) to be an excepted matter it is not necessary that a departmental or an "in-house" remedy for settlement of claim must be

> provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, and (*iii*) an issue as to arbitrability of claim is available for determination at all the three stages — while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the court.

7. In this conspectus of the legal position, it is apparent that on the expiry of the period within which the contract had to be completed, the parties would have to agree to an extension, conditionally or unconditionally. If the required extension of time is not mutually agreed upon, a cause of action for a claim for damages on either side would arise. Unfortunately, more often than not, work continues without the terms being expressly reduced to writing, and in this nebulous and amorphous state there is ample scope for both parties to lay claims for damages at the stage they calculate to be opportune to them. No doubt, it is arguable that it is for the performing party to clarify that even if an extension is granted, the principal would remain liable for damages or escalation in rates which the contractor is constrained to incur in the extended period. But there is no justifiable reason to absolve the principal from the duty to make explicit that work executed in the continued period would be on a 'no damage' basis or on any other variant. It is in these obscure circumstances that claims invariably arise which have to be adjudicated upon unless the terms of the contract explicitly and unequivocally bar any

adjudication. We are mindful that the present claims had arisen prior to the amendment in Section 28 of the Indian Contract Act, 1872 ('Contract Act' for short). It is one thing to say that the adjudicating authority may, on an interpretation of the contract between the parties, deny or decline to grant the claim for damages. It is quite another thing to say that the adjudicating authority is barred altogether from even considering the veracity and validity of the claims. It is generally assumed that time is usually not of the essence, and this is especially so in the case of construction contracts. Therefore, an explicit and unambiguous clause in the contract must exist for an assumption to the contrary to be drawn. One possible interpretation of an agreement containing an 'exclusion of liability' or 'excepted matter' clause is to infer that the parties have agreed that time is not of the essence and, therefore, neither party can claim damages. In such cases, these clauses would work to the advantage of one and the detriment of the other. Nevertheless, claims would have to be adjudicated by some forum; if the Arbitrator has not been empowered to do so, then a decision would have to be prayed for from the Civil Court. This must perforce be so since 'exclusion of liability' or 'excepted matter' clauses would otherwise become susceptible to being declared void as that would be contrary to public policy. Since by an exclusion clause excepted matters are expressly taken out of the purview of adjudication before the

Arbitrator, there is no embargo in Arbitration jurisprudence to prevent these matters from being raised before the Civil Courts separately.

8. In *Ganga Bai –vs- Vijay Kumar*, AIR 1974 SC 1126, their Lordships held thus:-

> There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.

9. Reiterating the same persuasion, recently in *Abdul Gafur –vs- State of Uttarakhand*, (2008) 10 SCC 97, the Hon'ble Supreme Court held thus:-

> 16. Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.

10. By holding this, Courts are only upholding the age old principle of the law, viz. *ubi jus ibi remedium*, that is, where there is a right there is a remedy. Where a party to an arbitration agreement has a right which cannot be adjudicated by the Arbitral Tribunal in light of it partaking of the nature of an 'excepted matter' or "exclusion clause", the same cannot be held to have been extinguished completely; there is an inherent right of the party to get its grievances adjudicated by bringing a suit on these claims. If the claim is idle, untenable or contrary to the contract, it would eventually be dismissed.

11. The right to legal redress cannot be obliterated altogether. This conclusion does not completely whittle down or annihilate the ambit of exclusion clauses; the Adjudicating Authority would have to articulate the reasons for its conclusions while deciding the existence or absence of liability. A clause which states that no claims for damages would be entertainable even in the face of delay by one party would arguably be interpreted by the Adjudicating Authority to mean that the parties had specifically agreed that no period had been stipulated within which the contract had to be performed and that the price would remain steadfast till the completion of the contract. Every party to a contract has a right to terminate the contract. The Adjudicating Authority would be called upon to determine whether such termination would attract or be immune to apportionment or

determination of damages. *Wildlife Institute of India, Dehradun –vs- Vijay Kumar Garg*, (1997) 10 SCC 528 is of no avail to the Appellant for the simple reason that their Lordships have taken trouble to go into the conduct of the parties before as well as at the time of signing a receipt acknowledging that the payment was received in full and final settlement of all claims. It seems to us that it is most convenient and appropriate that the Arbitrator should complete the exercise; multitude of forums is anathema to law. Section 19 of the Contract Act proclaims that agreements without free consent, that is, by coercion, fraud or misrepresentation may not be enforceable. Standard form contracts which are drafted on the initiative or instance of the party enjoying dominance over the other fall in this species and have been frowned upon by Courts across the globe. A detailed discussion is available for the study of the specialist in the Constitution Bench decision reported as *DTC –vs- DTC Mazdoor Congress*, AIR 1991 SC 101 in these words:

> 281. The trinity of the Constitution assure to every citizen social and economic justice, equality of status and of opportunity with dignity of the person. The State is to strive to minimise the inequality in income and eliminate inequality in status between individuals or groups of people. The State has intervened with the freedom of contract and interposed by making statutory law like Rent Acts, Debt Relief Acts, Tenancy Acts, Social Welfare and Industrial Laws and Statutory Rules prescribing

conditions of service and a host of other laws. All these Acts and Rules are made to further the social solidarity and as a step towards establishing an egalitarian socialist order. This Court, as a court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a court of constitutional functionary exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions when the citizen is really unable to meet on equal terms with the State. It is to find whether the citizen, when entering into contracts of service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position of either to "take it or leave it" and if it finds to be so, this Court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions. (Emphasis Supplied)

…

292. From this perspective, it must be held that in the absence of specific head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest invent new public policy and declare such practice or rules that are derogatory to the Constitution to be opposed to public policy. The rules which stem from the public policy must of necessity be laid to further the progress of the society in particular when social change is to bring about an egalitarian social order through rule of

> law. In deciding a case which may not be covered by authority courts have before them the beacon light of the trinity of the Constitution and the play of legal light and shade must lead on the path of justice, social, economic and political. Lacking precedent, the court can always be guided by that light and the guidance thus shed by the trinity of our Constitution.

12. After considering various Judgments and rules of interpretation adopted by the Courts around the globe for interpreting Standard Form Contracts, the Supreme Court in the Judgment of *LIC of India –vs- Consumer Education & Research Centre, (1995) 5 SCC 482* made the following observation:

> 47. It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.

13. We may also mention *Suisse Atlantique Societe d' Armement Maritime S.A. –vs- N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361; *A Schroeder Music Publishing Company Ltd. –vs-*

Macaulay, [1974] 1 WLR 1308; *Clifford Davis Management Ltd. –vs- W.E.A. Records Ltd.*, [1975] 1 WLR 61 and *Photo Production. Ltd. –vs- Securicor Transport Ltd.*, [1980] AC 827.

14. There are some exclusion clauses which stipulate that the decision of a particular person/officer would be final in connection with certain claims. As we see it, even then the Adjudicating Authority, whether the Arbitral Tribunal or the Civil Court, would possess jurisdiction to examine that decision; but only in cases of perversity would it be competent to interfere with the decision. We are also mindful of the fact that there is a plethora of precedents to the effect that if the arbitrator travels beyond the powers bestowed upon it by the Arbitration Clause, the Award would be liable to be set aside on the ground that it ventured beyond its competency. This principle has now metamorphosed into statutory force in the form of Section 28(3) of Arbitration & Conciliation Act, 1996 ('A&C Act' for short). Keeping that in mind, assuming that there are ten claims, two of which are covered by 'exclusion clauses', we are of the view that these two clauses would have to be adjudicated before a Civil Court; otherwise the Clauses, being contrary to public policy, would have to be struck down altogether. Section 28 of the Contract Act makes it clear that every agreement by which a party is barred from enforcing its rights is void. This brings to the fore an aspect which does not arise for consideration in these proceedings, namely, whether segregation of the two claims must

be made by the Court or can also be made by the Arbitral Tribunal. It seems to us that the A&C Act bestows jurisdiction even on the arbitrator to do so. Since the Supreme Court has held in *SBP & Co. –vs-* ***Patel Engineering Limited,*** (2005) 8 SCC 618 that the appointment of the Arbitral Tribunal is not an administrative act, such a decision would have to be taken by the Court. The Court would have the option of either deciding the jurisdictional question definitively or to refer all claims to the Arbitral Tribunal with a direction that it should exercise powers under Section 16 of the Act and decide which claims are arbitrable.

15. The discussion stands concluded by the decision in *National Insurance Company Limited –vs- Boghra Polyfab Private Limited*, (2009) 1 SCC 267 where, in the context of Section 11 of the A&C Act, their Lordships had clarified that it is always open to the Chief Justice or his designate to decide or leave the decision to the Arbitral Tribunal with regard to whether the claim is – "(a)dead/long barred/stale or (b) whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection". Their Lordships went further to say that questions pertaining to whether claims filed within the Arbitration Clause is – "(i) whether a claim made falls within the arbitration clause (as for example a matter which is reserved for final decision of a departmental authority and excepted or excluded from

arbitration) and (ii) merits or any claim involved in the arbitration must be left exclusively to the Arbitral Tribunal". This is exactly the task that has been performed, and with diligence, by the Arbitrator. It, therefore, cannot be contended that the Arbitrator has travelled beyond the scope of appointment.

16. This discussion discloses the legal expediency of mandating upon either party, whether seeking or granting an extension, to state whether the extension is on terms or is not susceptible to any claims or demands on either side. This would obviate claims being preferred after the contract has been completed or even after full and final settlement has ostensibly been reached.

17. Section 28 of the Contract Act needs to be mentioned. Certain amendments have been incorporated thereto with effect from 1.8.1997 as would be manifest from the Table below:-

Existing Provision	**Prior Provision**
28.Agreements in restraint of legal proceedings void.— Every agreement,—	**Section 28- Agreements in restraint of legal proceedings void**. –
(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or	(Unchanged)
(b) *which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent*.	(Absent)
Exception 1.—**Saving of contract to refer to arbitration dispute that may arise.**— This section shall not render illegal a contract,	**Exception 1**- (Unchanged)

by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.	
Suits barred by such contracts.— *When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.*	(Absent)
Exception 2.—**Saving of contract to refer questions that have already arisen.**—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.	**Exception-2** Unchanged.

18. Prior to its amendment, Section 28 of the Contract Act did not explicitly permit extinguishment of claims in the event that clauses in a contract prescribe so. As in the case of 'exclusion clauses', the Arbitral Tribunal or the Civil Court would have to construe the terms of the contract in order to arrive at the intention of the parties. It seems to us that if there is a clause which requires claims to be raised within a certain period, those raised thereafter would so perilously suffer from probative value as eventually not to be allowed. In several instances, the Adjudicating

Authority can discern and determine liability on the basis of documents. Where this task is left to oral testimony, vagaries are inevitable. This is why it becomes imperative for the contractor to articulate its claims within the period prescribed in the contract since otherwise it could easily be held that its claim was a figment or fiction which had not been adequately proved. We find it difficult to hold the opinion that prior to the amendment in Section 28 of the Contract Act terms of a contract providing prescription for claims would be legally permissible. This would necessarily mean that only that which is permitted is claimable; it is equally logical to maintain that what is not prohibited is permissible. We are supported in this view by a recent pronouncement of the Hon'ble Supreme Court titled *Asian Techs Limited –vs- Union of India*, (2009) 10 SCC 354 wherein a clause excluded damages or escalation beyond the period stipulated in the contract. The Arbitrator, however, granted damages for the extended period as well. Their Lordships while upholding the Award enunciated the law in these perspicuous words:-

> 16. In the present case it is apparent that the delay in the execution of the contract was solely due to the default of the respondents.
>
> ....
>
> All the above facts show the repeated defaults by the respondents due to which the contract could not be completed in time.

> 17. The letter dated 24-11-1988 makes it clear that the appellant was not ready to carry out the work beyond the contracted period otherwise than on separate work orders, and the subsequent correspondence like the letter dated 11-10-1989 makes it clear that it was on the specific assurance given by the respondent to the appellant to continue the work and that the rates would be decided across the table that the appellant went ahead with the work. Hence, in our opinion it is now not open to the respondent to contend that no claim for further amount can be made due to Clause 11(C) and that the arbitrator would have no jurisdiction to award the same.

19. In ***M.L. Mahajan*** *–vs- Delhi Development Authority,* 2002(63) DRJ 57 the Court was confronted with a substantially similar question as in this case *viz.*, whether Clause 10C foreclosed any adjudication of a claim for damages allegedly suffered by the Contractor resulting from delays attributable to the Delhi Development Authority. The Division Bench opined that the clause "does not exclude or prohibit claims for increase in prices of material and wages of labour after the stipulated period within which the work is to be completed. If this is not to be so, the opening words would be rendered wholly otiose. It is, therefore, plainly obvious that where a contract stretches beyond the stipulated period i.e. the schedule time plus 50% thereof, the claim for escalation in prices is not excluded or barred under clause 10C". Special Leave Petition against this decision was dismissed vide Order dated 16.9.2002. Reliance on

this decision has been placed recently by another Division Bench of this Court in *M.L.Mahajan –vs- Delhi Development Authority*, 160 (2009) DLT 583.

20. From this analysis of the law, it becomes apparent that reliance by learned counsel for the Appellant on *Union of India –vs- Onkar Nath Bhalla*, (2009) 7 SCC 350 is misplaced and out of context. Their Lordships concluded that the High Court had erred in appointing a Retired High Court Judge as the Sole Arbitrator without first answering the Objection that the Claims raised by the Contractor were not arbitrable at all. It was for this purpose that their Lordships had referred to ***Patel Engineering Limited***. So far as *Ramaih–vs- NTPC*, (1994) 3 SCC 126 is concerned, it is vital to note that there was a finding that full and final satisfaction had been acknowledged by a receipt, and subsequent allegation of coercion was a device since payment and receipt were voluntarily given (see paragraph 8; underlining added).

21. We shall now return to the two Appeals before us. The learned Single Judge has noted the contents of the detailed Award and found that there was no room for taking the view that the findings of fact or of law exemplified perversity. Sections 30 and 33 of the Act and Section 34 of A&C Act proscribes Courts from wearing the mantle of Appellate Forum. Objections would be sustained if they disclose that the Award was contrary to public

policy or, as the case pleaded by learned counsel for the Appellant before us, that the Arbitrator proceeded beyond the parameters of his appointment. Briefly stated, the Arbitrator has returned a finding of fact that the prices were firm only for a period of fifteen months and since the initial delay was attributable to the Appellant, the latter was liable proportionately for the extra expenditure incurred by the Respondents. We may reiterate that it is certainly arguable in such like situations that once delay is caused, it inexorably has a cascading effect resulting into further delay. *Prima facie*, there may be no justification for granting only proportionate damages. However, since this matter has not been argued by the Respondents, at any stage of adjudication, we shall not pronounce thereon. It has been held that 'exception clause' did not operate so far as the present parties are concerned, for the period of delay. In this regard, we are in respectful agreement with the decision of a Coordinate Division Bench in ***M.L. Mahajan.*** So far as operation of Clause 52 of the Contract is concerned, two factors are indeed relevant. In the first place, this Clause has obviously not been relied upon by the Appellant inasmuch as the Claims conceivably contrary thereto had been raised by the Respondents and had been referred by the Appellant to the Arbitration without demur. As has been highlighted, reference to Arbitration was not made through the aegis of the Court. On the contrary, it is the Appellant who had referred all these Claims to

Arbitration. They will now not be allowed to raise Objections merely because the Arbitrator as well as the learned Single Judge has held against them. Furthermore, it appears that during the arbitration proceedings only Running Bills were available. In these circumstances, in the absence of a Final Bill thereto, we cannot but detect coercion on the part of Appellant in demanding a Full and Final Receipt, evidencing Full and Final Settlement as a precondition or *sine qua non* for releasing payments. This is the Finding of both the Adjudicating Forums below. ***Patel Engineering Limited*** has no role to play in the present case since the Reference was made directly by the Appellant.

22. Appeals are devoid of merit and are dismissed with costs of Rupees Ten Thousand. Pending applications are also dismissed.

(VIKRAMAJIT SEN)
JUDGE

(MANMOHAN SINGH)
JUDGE

April 09, 2010
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