(2007) 12 CAL CK 0002

Calcutta High Court

Case No: AP No. 375 of 2004

Union of India (UOI)	APPELLANT
Vs	
Builders Corporation Pvt. Ltd.	RESPONDENT

Date of Decision: Dec. 18, 2007

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 10, 11, 11(2), 11(6), 11(8)
- Constitution of India, 1950 - Article 226

Citation: 112 CWN 1121

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: P.K. Dutta and R.N. Mukherjee, for the Appellant; Deepak Kumar Basu and Ranjana Guho, for the Respondent

Judgement

Sanjib Banerjee, J.
The petitioner challenges the award as being without jurisdiction in view of Clause 63(3)(a)(iii) of the General Conditions that governs railway contracts. The petitioner urges that even if such impressive ground does not found favour with court, the award should be set aside for being perverse and having transgressed into matters that are excepted by agreement between the parties.

2. Before going into the matter, it may be noticed that there is substantial confusion created by the petitioner in its reliance on certain Clauses of the General Conditions. Several Clauses of the General Conditions that have been referred to in the counter-statement before the arbitrator appear to be completely inapposite, even on the basis of the book containing General Conditions that has been made over by the petitioner to court. It does not appear that some of the Clauses referred to bear any typographical mistake as the same reference is found in the minutes of the proceedings held before the arbitrator and in the award.

3. The contractor applied for the appointment of an arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996 and an engineer was appointed sole arbitrator by an order of September 26, 2002. In the counterstatement filed by the petitioner herein it challenged the jurisdiction of the arbitrator on the following lines:

Para A-1: Arbitral jurisdiction is governed by arbitral agreement as per Section 28 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") and such agreement exists in the present case as per the contract. The General Condition of Contract of Eastern Railway of 1969, subsequently updated and published during 2001 (hereinafter referred to as the "GCC") forms integral part of the contract. The arbitral agreement is detailed under Clause 63 and 64 of the said GCC. The Claimant was required to submit details of his disputes/claims for consideration of the Respondent within 120 days of such submission before formally demanding appointment of arbitrator from the General Manager of the Eastern Railway as per Clause 64(1)(i) of the said GCC. However, the Claimant approached the Hon"ble Calcutta High Court for appointment of arbitrator u/s 11 of the said Act. Consequently, you, the Learned Arbitrator, were appointed as the Sole Arbitrator by the Court in contravention of the arbitral agreement and in contravention of Sections 11(2), 11(6)(a) and 8 of the said Act. Moreover, since the claim amount in the present case is more than Rs. 10 lakh, a panel of arbitrators should have been appointed as per Clause 64(3)(a)(ii) of the said GCC and Section 10 of the said Act. However, you have been appointed as the Sole Arbitrator in contravention to the above. Similarly, the arbitral agreement provides for qualification of arbitrator as per Clause 64(3)(a)(ii) of the said GCC but you do not posses such qualification. The Court did not consider this in contravention of Section 11(8) of the said Act, while appointing you, the Learned Arbitrator. In view of above, your appointment is illegal and you are, therefore, requested to adjudicate on the above issues u/s 12 of the said Act.

4. It is significant that the railways referred to the updated version of the 1969 edition of the GCC and cited Clauses 64(1)((i) and 64(3)(a)(ii) of the GCC in objecting to the arbitrator appointed by the Chief Justice taking up the reference. It also appears from some of the minutes of the proceedings before the arbitrator, that it was Clause 64(3)(a)(ii) that was pressed. There is a serious departure from the clause referred to in the counter-statement and the clause now relied upon at paragraph 43 of the petition which reads as follows:

43. Your petitioner states that contends that composition of the purported Arbitral Trial was not in accordance with the Arbitration Agreement of the parties. The Arbitration Agreement incorporated in Clause 63 of the General Conditions of Contract expressly provides, inter alia, as follows:

3. (a)(iii) It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all." "(It is of some

significance that there is an overwriting in the petition and what was originally printed as Clause 64 has later been corrected by hand to Clause 63.)

5. Following a recent Supreme Court judgment, the effect of Clause 63(3)(a)(iii) is no longer open to debate. In an unreported judgment of this Court rendered in A.P. No. 397 of 1997 (Union of India v. Krishna Kumar) on July 5, 2002, such clause was noticed. A learned Single Judge of this Court held that where on an application u/s 11, the Chief Justice appointed an arbitrator not being a gazetted railway officer, and the railways urged before the arbitrator that he had no authority to receive the reference, an award rendered on merits by such arbitrator would be liable to be set aside. The learned Single Judge held:

This is a question of competence of the forum. If the forum is incompetent than it has no jurisdiction to decide the matter and this will go to the root of the matter. It is well settled that "even a right decision by a "wrong" forum is no decision

6. Such order of July 5, 2002 was carried in an appeal which was allowed after a detailed discussion of the law on the point with the following order:

With regard to the other contention as regards the meaning of the word qualification, we find that anything which qualifies a person is his qualification. In view of the factual background of the present case in the agreement between the parties when it is stated that the arbitrator must be a gazetted railway officer, it appears to be a qualification of the Arbitrator which was agreed to between the parties. We do not find any reason for accepting the contention of the appellant that the word qualification restricted only to the academic or professional qualification. A designation also can be a qualification of an Arbitrator. The same is the position with regard to pay scale. We also find that in a given case there can be reason for prescribing a designation of the Arbitrator particularly when dispute required to be resolved by such Arbitrator and involves an authority of the same organisation and it is required to ensure that the Arbitrator should be a higher authority. We also take note of the fact that dictionary meaning of the word "qualification" includes a standard necessary to do a job. Designation being one of such standard also come within the qualification. Therefore, the expression gazetted railway officer, in our opinion, is a qualification which the parties agreed to, as a requirement for an arbitrator. In view of such findings, the appellant's contention is not accepted.
But as we have already held hereinabove that the Hon"ble Chief Justice is not bound strictly to appoint an Arbitrator who must have a qualification as agreed to between the parties, and therefore, the learned Arbitrator appointed by the Hon"ble Chief Justice though is not having the said qualification, but his appointment has not been rendered invalid thereby.

7. The Division Bench judgment of this Court was assailed before the Supreme Court where relying on a passage from the judgment reported at (2004) 10 SCC 504 (Union of India and Anr. v. M.P. Gupta), a challenge to an appointment at a pre-reference

stage, the Supreme Court held that the matter was covered by the dictum in the M.P. Gupta case. The order passed by the Division Bench was set aside, the order of the learned Single Judge was restored and the railways were directed to appoint an arbitrator in terms of the relevant clause.

8. The yet unreported Supreme Court judgment in the Krishna Kumar case (Civil Appeal No. 6324 of 2004 passed on July 19, 2007) was placed before this Court in course of the final hearing of Union of India v. Pam Development Pvt. Ltd. (AP No. 196 of 2003, judgment rendered on September 11, 2007). In such case it was held by this Court, on facts, that the challenge as to the authority of the arbitrator was not ultimately pressed and as such the point was no longer available to the railways to be canvassed in the setting aside proceedings. The following passage from that judgment is relevant:

In the Mohammed Yunus and Krishna Kumar cases, the objections as to the authority of the arbitrator were taken at the earliest stage and the subsequent conduct of the parties challenging the award were viewed in such light. When a party is unwilling to proceed before a forum on such party's understanding of the lack of authority of the forum, the party records its protest and proceeds thereafter, a defence of waiver in such party's subsequent challenge of the authority of the forum may not be accepted. But where a party does not protest at the outset or within any reasonable time thereafter, he may then be found guilty of 'taking a chance' within the meaning of the Tarapore dictum. A party cannot give up its all upon its initial ground being rejected. In the Krishna Kumar case, the Railways could not have walked out of the reference on the strength of their conviction that the arbitrator lacked authority and, thereafter, challenge the award which they had not resisted on merits. Though the Krishna Kumar judgment would show that the Railways would have been justified in walking out of the reference upon the arbitrator not 'taking cognizance' of their objection as to jurisdiction, their conduct cannot be flawed for their later contest on merits, or even an invitation to adjudicate upon the counter-claim which, effectively, is a tool of defence. Whether or not the Railways participated in the reference without prejudice, it is the contractor in the Krishna Kumar case who took a chance and proceeded despite being made aware of the Railways' significant objection as to the authority of the forum.
In the present case, there is unequivocal submission of the Railways in the authority of the arbitrator and the unreserved invitation to the arbitrator to take up their counter-claim. One ought to infer from the Railways' conduct that there was conscious, intentional relinquishment of the Railways' right under the relevant clause and there is implicit consent to the authority upon Railways' unequivocal submission thereto.

Arbitration jurisdiction is consensual; the authority of a court to receive an action, is not. A court derives its authority from the statute and its jurisdiction depends on the subject-matter and territorial and pecuniary considerations. Parties cannot confer

jurisdiction on a court by consent. But parties give jurisdiction to the arbitrator and that is recognised by statute. The Railways here consented to the reference being taken up by the arbitrator. The clause that the Railways rely on was there at the beginning and was not introduced by the Krishna Kumar order of July 5, 2002 for the Railways to suddenly wake up to it. By such time, at the 39th sitting and two years into the reference, it was no longer the original clause that gave the arbitrator the authority, it was the Railways' consent to and acquiescence therein, that did.

Even thereafter, there was an abandonment of the challenge, however late and however misconceived the challenge was in the first place. The arbitrator records that the application by which the challenge was made 'was thereafter not pressed'. It is possible that the Railways fairly thought that upon the order of July 5, 2002 in the Krishna Kumar case being stayed in appeal, the challenge was unworthy of being carried further. But there was no legal bar on the Railways to pursue the challenge notwithstanding the stay of the Krishna Kumar order of July 5, 2002. It would have been a consideration in the argument and may have influenced the decision upon the challenge, but there was no legal embargo on the Railways to pursue the challenge, the stay in the Krishna Kumar appeal notwithstanding.

The recording in the award that the challenge was not pressed is not questioned as to the correctness thereof, but the Railways merely rely on the fact that they had made a challenge on the ground of jurisdiction before a decision on merits was rendered in the reference. Again, the merit of the ground of lack of jurisdiction of the arbitrator urged by the Railways is tempered by the Railways having abandoned such challenge.

9. The petitioner submits that inasmuch as the challenge was taken at the earliest stage before the arbitrator, the claimant's insistence on inviting the arbitrator to adjudicate on the merits of the claim was at the claimant's peril and it should not weigh with court now that a challenge to the appointment of arbitrator would render the entire reference irrelevant and cause prejudice to the claimant. The petitioner suggests that it is not open to a party challenging the authority of the arbitrator to question the arbitrator's decision thereon immediately as, the Act requires such party to await the outcome of the reference before the challenge can be renewed in setting aside proceedings. The petitioner has relied on Section 16 of the Act in the context:

16. Competence of arbitral tribunal to rule on its jurisdiction. - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose.--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the submission clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

10. The respondent submits that the petitioner ought to have made an application u/s 16 and not indicated the challenge as to the arbitrator's authority to receive the matter in its counter-statement. In support of such argument, the respondent places the judgments reported at Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., and S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . Though the Rani Construction judgment is no longer good law in view of the Patel Engineering case, the respondent has relied on paragraph 21 of the Rani Construction and paragraph 47(x) of the Patel Engineering case to suggest that for a challenge of such nature, it is imperative that the challenger makes an independent application u/s 16 of the Act before the arbitral tribunal. The respondent has emphasised on the expression 'left to be decided u/s 16' appearing in the Patel Engineering case. There is no merit in such contention urged by the respondent. Section 16 requires a party questioning the arbitrator's authority to make the challenge at the earliest stage and not later than the filling of its counter-statement. Section 16 also contemplates a situation where a challenge may be made even after a counter-statement is served, but gives the arbitrator the discretion to decide whether such question may subsequently be raised. Section 16 does not prescribe that a challenge may be made only by a separate application. If the arbitrator's authority is questioned in the counter-statement, that would suffice for Section 16, for the challenge would be contained in the counter-statement and would be made simultaneously with the counter-statement and not later than the filing of the counter-statement.

11. But it is not such trivial point which is in issue. The larger question is whether upon the challenge made by the petitioner herein in the opening paragraph of its counter-statement, the arbitrator ought to have continued with the reference. The petitioner has referred to the earlier judgment of the Supreme Court in the A. Mohammed Yunus (Dead) by LRs. v. Food Corporation of India and Anr. 2002 (2) Arb. LR 2 (SC) case. It may be noticed that in both the Mohammed Yunus and the M.P. Gupta case, the Supreme Court arrested a reference at the initial stage, for it was the order of appointment that was challenged in either case. In the Krishna Kumar case, the Supreme Court applied the M.P. Gupta test for entertaining a challenge as to the authority of the arbitrator after an award was rendered on merits. But as has been observed in the Pam Development case, there was a clear challenge in the Krishna Kumar case of the arbitrator's authority at the initial stage that the arbitrator brushed aside without any reason. The respondent relies on a judgment reported at J.G. Engineer''s Pvt. Ltd. Vs. Calcutta Improvement Trust and Another, and places paragraphs 12 and 13 thereof. The respondent cites such principle both to resist the challenge as to the arbitrator's authority launched at this stage and to counter the challenge on merits that the award entered into excepted matters. At paragraphs 12 and 13 of the J.G. Engineer's case, it is observed that the challenge has to be specific and a vague statement would not suffice.

12. It is first required to appreciate the nature of the challenge made by the petitioner before the arbitrator. The first assertion in paragraph A-1 of the counter-statement is the expression of a legal principle and is irrelevant. The next assertion is that the GCC of 1969 was updated in 2001 and contained the arbitration agreement, and the procedure to be followed, in Clauses 63 and 64 of the updated GCC. The petitioner then suggested that the contractor was required to submit its claims to the railways and wait for a period of 120 days before seeking the appointment of an arbitrator from the general manager of the Eastern Railway. The railways urged that the contractor approached the High Court for appointment of an arbitrator u/s 11 without following the procedure laid down in Clauses 63 and 64, as a consequence whereof, the appointment of the arbitrator in such proceedings was in contravention of Sections 11(2), 11(6)(a) and 8 of the Act. The next ground of protest was that since the claim exceeded Rs. 10 lakh, a panel of arbitrators should have been appointed in terms of Clause 64(3)(a)(ii) of the GCC and Section 10 of the Act. The final ground of challenge was that the arbitral agreement provided for the qualification of an arbitrator in terms of Clause 64(3)(a)(ii) but the Court was unmindful of Section 11(8) of the Act in making the appointment. On such grounds it was urged that the appointment was illegal and the arbitrator was requested to adjudicate on the above issues u/s 12 of the Act.

13. The principal challenge now put forth is under Clause 63(3)(a)(iii) which did not find mention in the counter-statement at all. Even if the technicality is overlooked, it is evident from the counter-statement that the ground of challenge now being canvassed was not urged before the arbitrator. It is one thing to suggest that the

procedure under the arbitration agreement was not followed and that the arbitrator did not possess the desired qualification, but quite another to suggest that upon agreed procedure not being adhered to, the arbitration agreement stood extinguished altogether. A challenge on such ground as the arbitration agreement being extinguished, is quite distinct from a challenge as to the arbitrator not possessing the requisite qualification and the agreed procedure not being followed. In the first case it is an assertion of complete lack of jurisdiction, in the other cases it is one of irregular assumption of jurisdiction.

14. The point as to complete lack of jurisdiction was not urged and, in spite of the challenge to the arbitrator's authority on the grounds of irregularity, the railways unreservedly pressed a counter-claim.

15. The arbitrator noticed the railway's contention that his appointment had been made in contravention of the arbitration agreement and in derogation of the provisions of the Act. The arbitrator recorded the railway's assertion that the arbitrator did not possess such qualification as required in terms of Clause 64 (3)(a)(ii) of the GCC. But the arbitrator held "that in making appointment, the Honible Chief Justice had to keep into consideration, the fundamental aspect of independent and impartial arbitrator and that apart the description of the person as gazetted railway officer is not a qualification." It does not appear from the award that a challenge of the kind now pressed, was made before the arbitrator. If, indeed, the arbitrator's authority was questioned on such fundamental ground, the petitioner's subsequent participation in the reference may have been irrelevant. But in the challenge on such score not being presented and the subsequent participation, including the making of a counter-claim, would have the effect of conferring subsequent authority to the tribunal that it lacked initially. Even though the issue is one of complete lack of jurisdiction, since arbitration jurisdiction is consensual, the initial lack can subsequently be made good by conduct amounting to acceptance or acquiescence. In not urging such ground, while urging others, the petitioner's conduct can be interpreted to be a waiver of that part of the clause that provides that if a gazetted railway officer is not appointed arbitrator, the matter is not to be referred to arbitration at all.

16. The matter has to be viewed slightly differently from how inherent lack of jurisdiction is otherwise treated. Such clause notwithstanding, it is open to the railways to go to arbitration before a non-gazetted railway officer by consent or by waiver. In the petitioner not pressing such part of the clause, the petitioner consented to the arbitration subject to its objection as to qualification. The objection as to qualification would not go to the root of the arbitrator's authority and the arbitrator has rightly held that being a gazetted railway officer is not a qualification of the kind covered by Section 12(3)(b) of the Act.

17. While it is true that at the time the Chief Justice's order of appointment was made, such a matter was considered to be a purely administrative function, the Rani

Construction judgment permitted a challenge thereto under Article 226 of the Constitution. Though a failure to a challenge what was then considered to be an administrative order would not have robbed the petitioner of a right to challenge the arbitrator's authority in the reference, paragraph A-1 of the counter-statement shows that the challenge was only u/s 12 and not as to the existence of the arbitration agreement u/s 16. The petitioner's present challenge to the award on such new found ground is, thus, not acceptable.

18. It may be profitable to refer to Section 7(4)(c) of the Act. An arbitration agreement would be said to be in existence if an assertion as to its existence is made in a statement of claim and such assertion is not denied in the statement of defence. Inter alia, at paragraph 20 of the statement of claim, an arbitration agreement between the parties has been referred to. Paragraph 20 of the statement of claim is dealt with at paragraph C-20 of the counter-statement wherein procedural irregularities have been referred to but the vanishing, so to say, of the arbitration agreement upon the procedure not being complied with, does not find any mention. That the arbitration agreement stood extinguished, is not an assertion that can be culled out from the counter-statement even if it were to be generously read.

19. The petitioner has referred to the judgment reported at Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, in support of its argument that if an objection u/s 16 of the Act relating to the arbitral tribunal not having jurisdiction, is not raised before the arbitrator, such plea can be raised u/s 34 before court for setting aside the award. But it would appear from the judgment that the Supreme Court noticed the question but found it unnecessary to answer it as, on facts, the Supreme Court concluded that there was no substance to the challenge on such ground even if the challenge could be looked into at the Section 34 stage. The petitioner has also relied on the judgment of a Single Judge of this Court reported at Sarkar Enterprise Vs. Garden Reach Shipbulders and Engineers Ltd., . It was held in such matter that where the petitioner did not challenge the authority of the arbitrator before the arbitrator, such plea may not be available at the setting aside stage. But if the challenge went to the root of the arbitrator's authority, it could be allowed to be taken at the setting aside stage. The petitioner relies on paragraph 7 of the report where it is held by Lala, J. as follows:

...It is further correct to say that law of acquiescence will be squarely applicable in this case since no question is raised before the Arbitrator about his jurisdiction and for the first time it is taken before the Court under an application for setting aside the award. Even going against my analysis I say that the question of jurisdiction may be taken up at any point of time if it inherently lacks but the question of jurisdiction based on factual matrix cannot be decided at any point of time since the same is not a question of inherent lacking of jurisdiction. Therefore such part cannot prevail over principles of waiver or acquiescence at this stage. Both the questions of

jurisdiction and waiver/estoppel/acquiescence are the questions of law but based on factual matrix....

20. His Lordship did not specify as to what would be inherent lack of jurisdiction in an arbitration reference. The passage would also imply that acquiescence or waiver would be a question of fact. Inherent lack of jurisdiction would ordinarily be such matter that would be incapable of correction by a party. An objection as to the authority of arbitral tribunal to receive a reference would go to the very root of the matter but would not be an inherent lack of jurisdiction in the sense that the expression is ordinarily used as the parties by consent or conduct could confer jurisdiction on the arbitral tribunal and undo its initial lack of authority.

21. The petitioner's next substantive challenge is for the arbitrator having transgressed beyond the bounds of his authority. Paragraphs A-2, A-3 and A-4 of the counter-statement referred to Clauses 43(1), 45, 45A and 60(1) of the GCC and suggested that the claim of the contractor ran into the areas closed to the arbitrator as being excepted matters. Paragraph A-5 of the counter-statement relied on Clauses 16(2) and 64(5) of the GCC to suggest that no claim on account of interest could be entertained.

22. Clause 43(1) of the GCC requires a contractor to prepare and furnish to the engineer monthly statements of claims for any additional expenses to which the contractor may consider himself entitled; and, in the absence of such statement being furnished, no claim for payment for any additional work would be considered. Clause 45 provides for measurements made by the contractor to be final and for such measurement, or re-measurement at the contractor's invitation, to be not open to any challenge. There is no Clause 45A in the GCC though it has been referred to in paragraph A-3 of the counter-statement. There is Clause 45(a) which is part of Clause 45 and the effect thereof has been already noticed. Clause 17(2) permits a contractor to seek extension of the time fixed for execution on account of any act of the railways or any other contractor employed by the railways or for other reasons beyond the contractor's control. Such clause does not place any embargo on a claim for escalation being made for the period of extension granted upon a request thereunder being entertained. Clause 17(3) of the GCC provides for extension of the time for execution being granted where the contractor would not be entitled to damages or compensation during the extended period.

23. Clause 16 (2) prohibits the payment of interest on earnest money or security deposit or amounts payable to the contractor under the contract. Clause 64(5) prohibits the payment of interest on the quantum awarded by an arbitrator till the date of the award.

24. Clause 60(1) permits the railways to determine and terminate a contract at any time should, in the railway's opinion, the cessation of work become necessary owing to paucity of funds or for any other cause whatsoever and a notice in writing

from the railways of such determination and the reasons therefore shall be conclusive evidence thereof.

25. The arbitrator allowed the first head of claim in its entirety for non-payment of a scheduled item of work for Rs. 65,041/-; under the second head he provided for an extra item not recorded to the extent of Rs. 79,674/- against a claim of Rs. 1,48,356/-. The arbitrator awarded refund of security deposit of Rs. 45,737/- as claimed under the third head; for idle resources under the sixth head of claim for Rs. 37,700/- against a claim of Rs. 1,72,505/-; for establishment charge due to stoppage of work under the seventh head of Rs. 72,000/- against a claim of Rs. 2,57,183/-; for loss of profit at 15 per cent of the value of the unexecuted work of Rs. 2,18,438/- against a claim of Rs. 3,39,608/- under the eighth head and a sum of Rs. 1,95,000/- under the ninth head towards permanent loss in business, destruction of goodwill against a claim of Rs. 15 lakh. In addition, the arbitrator awarded interest at the rate of 18 per cent per annum on the blocked capital from June 20, 2001 till payment and cost of arbitration assessed at Rs. 68,000/-.

26. The award in respect of the first head of claim is justified by the arbitrator on the basis of the petitioner's endorsement in the measurement book and the same can neither be an excepted matter nor can it otherwise be challenged. The second head of claim was divided into four components. The arbitrator has disregarded the contractor's claim for the first and second components but has found a sum of Rs. 20,490/- to be due on account of labour charges for loading and unloading and a sum of Rs. 59,184/- for guarding arrangement of rail. The arbitrator has reasoned that the contract required transportation of materials by road and provided for rates therefor. Though similar other items of work provided for loading and unloading charges, transportation of P. Way materials did not take into account any labour charge which was actually incurred by the contractor. The arbitrator has found in favour of the contractor for engaging three guards at Rs. 68.50 per guard per day for 288 days for protecting the arrangement of rails as the railways did not provide any security therefor. Neither the third nor the fourth component of the second head of claim has been shown to be an excepted matter and there is nothing untoward found in the reasons given by the arbitrator.

27. The contract was terminated by the railways. The petitioner suggested that the closure was on account of default on the part of the contractor. The arbitrator has recorded that the closure was not at the risk or cost of the claimant and upon the petitioner's insistence to the contrary, the letter of termination of February 25, 2002 has been looked into though ordinarily the court in proceedings of such nature would not reappraise the evidence. It appears from the letter of termination that the contract was closed under Clause 60 (1) of the GCC (at paragraph 2 of the letter) but 'at your risk and cost'. Clause 60 (1) contemplates a closure on account of reasons other than the default of a contractor since determination of contract owing to default of contractor is exclusively covered by Clause 61(1). Once the railways had

invoked Clause 60(1) of the GCC for the closure, the expression ‘at your risk and cost’ became meaningless. The award and the arbitrator’s specific finding in favour of the contractor for refund of the security deposit under the third head of claim, is, therefore, not open to question.

28. The awards made under the sixth and seventh heads are by way of damages on account of escalation and idling. Though the railways have relied on Clause 17(3) of the GCC, it does not appear from the award that any letter of extension issued by the railways under Clause 17(3) was relied upon. No such letter is referred to in course of the present proceedings. Clause 17 (3) undoubtedly places an embargo on the contractor demanding damages or compensation for an extension granted in terms thereof, but if an extension is granted otherwise [say, under Clause 17(2)], such extension is not accompanied by a cap on the contract price. The assessment of the quantum awarded is not to be easily interfered with in proceedings of such nature as such assessment will always involve a subjective component. To be fair to the petitioner, the amounts awarded under the sixth and seventh heads are criticised more for the arbitrator entertaining the claim than for an erroneous assessment being made upon the heads of claim being found maintainable. The eighth head of claim is on account of loss of profit due to non-execution of the contract upon the railways’ termination thereof. There is no bar which has been shown by the railways to an award under such head and it has now come to be accepted that if a contract is terminated for no breach on the part of the contractor, such contractor would be entitled to reasonable compensation for loss of profit relatable to the unexecuted part of the contract. As a corollary, an assessment of loss of profit ranging between 10 and 20 per cent of the value of the unexecuted work is considered to be reasonable. The arbitrator in this case has assessed loss of profit at 15 per cent of the value of the unexecuted work and has committed no error that needs correction at this stage.

29. At first flush it may appear that the partial acceptance of the ninth head of claim would run foul for duplication as loss of profits has already been awarded under the eighth head. But the arbitrator has broken down the ninth head under three sub-heads, disallowed the components for loss of goodwill and reputation and loss suffered due to motivated impediment in the work. The arbitrator has allowed a sum of Rs. 1,95,000/- for prolongation of the period of execution beyond the agreed period of six months. Again, the arbitrator has reasoned that the entire period of delay before the termination cannot be ascribed to one party exclusively and has thus computed the award under such sub- head by recognising that a part of the delay was attributable to the contractor. The basis indicated is not contrary to the law of the land nor has it travelled into any of the ‘excepted matters’ indicated by the petitioner.

30. The petitioner has relied on the judgment reported at General Manager Northern Railways and Another Vs. Sarvesh Chopra, for the principle that an

objection relating to excepted matters can be considered at any stage including in proceedings of the present nature. But in view of the finding that the arbitrator in this case did not stray into the zone covered by excepted matters, the reliance on such case does further the petitioner's challenge.

31. Once the arbitrator has found the contractor to be entitled to receive payment, the award for costs is justified. It is, however, the award of interest that is somewhat doubtful. Clause 16(2) of the GCC prohibits interest being paid to the contractor for any payment due to him but such clause by itself would not rob the arbitrator of his authority to award interest for the period after the contractor had sought a reference for, in the absence of an arbitration agreement, such would be the date on which the contractor could have filed a suit. The effect of Clause 64(5) has greater reach than Clause 16(2) of the GCC and the respondent here has not been able to justify the award of interest which is in apparent derogation of Clause 64(5). In view of the unambiguous embargo on the arbitrator to award interest till the date of the award, which the contractor in this case has not attempted to question, the award of interest till the date of the award cannot be sustained. However, the award of interest at 15 per cent per annum from June 30, 2004, which is the date of the award, will remain. Such rate of interest will operate on the principal sum awarded by the arbitrator in respect of the first, second, sixth, seventh, eighth and ninth heads of claim till payment.

32. Since the principal ground of challenge has been found to be unmeritorious, but the petitioner has been successful in its challenge to the award of interest, the petitioner will pay reduced costs assessed at 500 GMs for these proceedings.

33. Urgent photostat certified copies of this judgment, if applied for, be issued to the parties upon compliance with requisite formalities.

Later:

A prayer for stay of operation of the order is made on behalf of the petitioner, which is opposed by the respondent. The order will remain stayed for a period of two weeks of reopening of Court after the Christmas vacation.