IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF MAY, 2025

PRESENT

THE HON'BLE MR JUSTICE V KAMESWAR RAO

AND

THE HON'BLE MR JUSTICE S RACHAIAH

COMAP NO. 526 OF 2022

BETWEEN

M/S LARSEN AND TOUBRO LIMITED,
HAVING OFFICE AT L AND T HOUSE,
BALLARD ESTATE,
NAROTTAM MORARJI MARG, MUMBAI-400 001,
REPRESENTED BY ITS AUTHORIZED SIGNATORY
MR C.A.VENKATESH.

…APPELLANT

(BY SRI. ANIRUDH KRISHNAN,
SRI. RAMKRISHORE KARANAM AND
SMT. GARIMA KIRTI, ADVOCATES FOR
SRI. NISCHAL DEV B R, ADVOCATE)

AND

M/S BANGALORE METRO RAIL CORPORATION LIMITED,
HAVING OFFICE AT:
III FLOOR, BMTC COMPLEX,
K.H.ROAD, SHANTINAGAR,
BANGALORE-560 027.

…RESPONDENT

(BY SRI. K ARAVIND KAMATH, SENIOR COUNSEL FOR
SRI. BALA NIKIT AND
SRI. K N NAGARAJ, ADVOCATES)

THIS COMAP IS FILED UNDER SECTION 13(1A) OF THE COMMERCIAL COURTS ACT, 2015 READ WITH SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996, PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 28.10.2022 PASSED BY THE COURT OF THE LXXXIII ADDL. CITY CIVIL AND

SESSIONS JUDGE, BENGALURU IN COM.A.S.NO.141/2018 AND ALSO THE ARBITRAL AWARD DATED 30.04.2018 PASSED BY THE ARBITRAL TRIBUNAL, ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 25.01.2025, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **V KAMESWAR RAO J**., DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR JUSTICE V KAMESWAR RAO
AND
THE HON'BLE MR JUSTICE S RACHAIAH

CAV JUDGMENT

(PER: THE HON'BLE MR JUSTICE V KAMESWAR RAO)

This is an appeal filed under Section 13(1A) of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 ('Act of 1996' in short) challenging the order dated 28.10.2022 in Com.A.S.No.141/2018 passed by the Court of LXXXIII Additional City Civil and Sessions Judge, Bengaluru, ('Sessions Judge' in short) whereby the learned Sessions Judge has allowed the suit partially, which was filed under Section 34 of the Act of 1996.

2. The said suit under Section 34 of the Act of 1996 was filed by the respondent herein challenging the

Arbitration Award dated 30.04.2018, whereby the learned Sessions Judge has stated as under:

> *"ORDER*
>
> *Arbitration Suit filed under Section 34 of the Arbitration & Conciliation Act by the plaintiff employer is partly allowed on following terms.*
>
> *The award of the learned Arbitral Tribunal dated 30/4/2018, as regards awarding of Rs.28,74,82,181/- on the basis of its finding on issue No.1(d) towards loss suffered by the contractor on account of delay is set aside.*
>
> *Arbitration suit challenging award with regard to other findings and award on other claims and counter claims is dismissed."*

3. Suffice to state, that the suit filed under Section 34 of the Act of 1996 was partially allowed and the award of the Arbitral Tribunal dated 30.04.2018 as regards grant of Rs.28,74,82,181/- on the basis of its finding on Issue No.1(d) towards the loss suffered by the appellant herein on account of delay, is set aside.

4. The subject matter of the appeal is primarily a contract entered between the parties for construction of

three elevated Metro Stations at Yeshwanthpur, Soap Factory and Mahalaxmi Stations. The respondent herein accepted the tender vide Letter of Acceptance dated 05.06.2009. An agreement was also entered on 21.12.2009 for the execution of the works. The contract period was for 22 months. The execution of the project is governed by various contracts entered into between the parties including the General Conditions of Contract (in short 'GCC') and the Special Conditions of Contract.

5. The relevant facts for the purpose of this appeal shall also include the stipulations that, when the respondent shall consider grant of extension at the end of 22 months, it would not pay any compensation and that despite any grant of extension of time, the contractor should always treat that time is the essence and should take all steps to complete the contract works at the earliest. It was also a contractual condition that, not all drawings would be issued at once and that it would be issued depending upon the actual progress of work at site well in time before commencement of the activity. The

land was also to be given progressively depending on the issues of demolition of structures.

6. After the execution of the agreement, the lands were handed over to the appellant as specified in the Letter of Acceptance dated 05.06.2009. The majority of the portion of construction of the three elevated stations came up on the median portion of the road and the land in that regard was handed over progressively. It was the case of the respondent that the remaining 15% of the land at the Soap Factory Station was handed over late due to litigation pending in this Court and thereafter in the Hon'ble Supreme Court till 10.05.2012. The General Consultant conducted meetings at regular intervals and recorded the minutes of the meetings, which were signed by their representatives. It was also the case of the respondent that, the appellant had prepared and submitted the base line program showing plans to complete the project in time. It is a conceded position that five extensions of time were granted by the respondent herein. First extension of time was from 05.04.2011 to 30.11.2011 without liquidated damages

and with price variation. The next extension was between 01.11.2011 to 31.05.2012 and the same was without liquidated damages, but price variation frozen as on 30.11.2011. The second extension of time granted was up to 30.04.2013 without liquidated damages and with price variation in continuation from 30.11.2011. The third extension of time was up to 30.09.2013 without liquidated damages, with price variation for Yeshwanthpur and Mahalaxmi Metro Stations upto 30.06.2013 and for Soap Factory station was upto 30.09.2013. The fourth extension time was up to 31.01.2014 without penalty, but price variation frozen for Yeshwanthpur and Mahalaxmi Metro stations upto 30.06.2013 and for Soap Factory, the extension of time was granted upto 30.09.2013. The fifth extension of time was from 01.12.2013 to 31.03.2014 without penalty, but price variation frozen for Yeshwanthpur and Mahalaxmi stations up to 30.06.2013 and for Soap Factory up to 30.09.2013.

7. The Arbitral Tribunal has partially allowed the claims of the appellant and rejected the counter claims of the respondent. It was in this background the aforesaid

suit was filed by the respondent. The challenge of the respondent was to the entire award granted in favour of the appellant herein.

8. The issue No.1(d) is relatable to the loss suffered on account of delay by the respondent.

Submissions:

9. The submission of Sri. Anirudh Krishnan, learned counsel for the appellant is primarily that, (i) though there is an exclusion clause, the same is void and (ii) the reliance placed by the appellant on the judgment of the Hon'ble Supreme Court in the case of ***General Manager, Northern Railways and Another Vs. Sarvesh Chopra [(2002) 4 SCC 45]*** in relation to exclusion clauses is obiter and the findings in ***ONGC Vs. Wig Brothers Builders and Engineers Private Limited [(2010) 13 SCC 377]*** case is *ratio decidendi* and to reject the award granting damages to the appellant, is untenable. According to him, even the manner of reference by the learned Sessions Judge to the judgment of ***Assam State Electricity Board and Others Vs. Buildworth (P)***

Limited [(2017) 8 SCC 146] is misplaced, as the three-Judge Bench judgment deals only with bar on escalation clause. It does not deal with bar on delay damages clause and hence the decision in ***Wig Brothers Builders (P) Ltd.*** (supra) is binding precedent, is untenable. Even in respect of the judgment in the case of the ***State of West Bengal Vs. Pam Developments Private Limited [MANU/WB/1044/2016]***, the conclusion of the learned Sessions Judge that the said judgment is not a binding precedent, because, the Hon'ble Supreme Court has disposed of the appeal in that case with the consent of the parties, and leaving all the questions of law open, is also untenable. It was the submission that, even the Sessions Judge has erred in Paragraph 62 of the impugned order to reject the argument of the appellant on exclusion clauses being void on the ground that it was raised for the first time at the stage of Section 34. In fact, it is his submission that the Sessions Judge has re-assessed the entire evidence and held that the requirement of notice contemplated in

Sarvesh Chopra's case (supra) was not met by the appellant.

10. He also stated, the learned Sessions Judge could not have substituted the view of the Arbitral Tribunal with its view under Section 34 application. In as much as the Arbitral Tribunal has held that the decision of the ***Sarvesh Chopra*** (supra) is applicable to the present case, as the requirement of notice was not considered in the case of ***Wig Brothers Builders (P) Ltd.*** (supra). According to him, the Arbitral Tribunal reconciled the conflict between the cases of ***Sarvesh Chopra*** (supra) and ***Wig Brothers Builders (P) Ltd.*** (supra), on the basis of the facts in the present case. He stated that, the learned Sessions Judge ignoring the scope of Section 34, held that ***Wig Brothers Builders (P) Ltd.***'s case (supra) is applicable to the present case on the basis that the finding in the ***Sarvesh Chopra*** (supra) is *ratio decidendi,* is untenable. In support of his submission, he has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Atlanta Limited Vs. Union of India [(2022) 3 SCC 739],*** wherein according to him, it is held that is

well-settled principle of law that challenge cannot be laid to the award only on the ground that the Arbitral Tribunal has drawn its own conclusion or failed to appreciate the relevant facts. Nor can the court substitute its own view on the conclusion on law or on facts as drawn by the Arbitral Tribunal, as if it is sitting in appeal. He stated, in the present case, the learned Sessions Judge substituted the Arbitral Tribunal's view with his view on the question of law and on facts, which is not permitted under Section 34 of the Act of 1996. According to him, the grounds pertaining either to a question of fact or an issue of interpretation of the contract are within the exclusive domain of the Arbitral Tribunal. Moreover, even the issue which has been canvassed as an issue of law by the respondent is in essence a question of fact.

11. He stated, the case of the respondent is based on Clauses 2.2 and 8.3 of the GCC, which prevents the Arbitral Tribunal from granting damages in the light of the decisions of the Hon'ble Supreme Court in the case of ***Wig Brothers Builders (P) Ltd.*** (supra), ***Ramnath International Vs. Unition of India [(2007) 2 SCC***

453] and ***Rajasthan State Mines and Minerals Vs. Eastern Engineering Enterprises [(1999) 9 SCC 283].*** He stated that the issue is not as to whether the Arbitral Tribunal has erred in law, but whether the facts before the Arbitral Tribunal fit within the four corners of ***Sarvesh Chopra***'s case (supra), which is essentially a question of fact.

12. He also stated that, the decision of Arbitral Tribunal is not opposed to the fundamental policy of Indian Law as it does not violate the law prevalent in India. In fact, according to him, the Arbitral Tribunal had considered the decisions submitted by the respondent herein and held that the said decision were inapplicable to the present facts of the case. He lays stress on the fact that the Arbitral Tribunal having analyzed the decisions of the ***Wig Brothers Builders (P) Ltd.*** (supra) and ***Sarvesh Chopra*** (supra) to hold that the findings in the Sarvesh Chopra are applicable to the present case, it was not open to the learned Sessions Judge to re-assess the findings in that regard. He has heavily relied on the Explanation to Section 34(2)(b)(ii), to contend that the

challenge shall not entail review on the merits of the dispute. Further, the proviso to Section 34(2A) states that the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. It is his submission that the learned Sessions Judge, contrary to the provisions has undertaken an in depth analysis of the merits of the case as is evident from the impugned order.

13. Even otherwise, it is his submission, assuming without admitting that, there is an error in the application of law by the Arbitral Tribunal it is at best of erroneous application of law, which cannot be interfered with at the stage of Section 34 of the Act of 1996. Therefore, the impugned order is liable to be set aside on this ground.

14. The submission of Sri. Krishnan is also that, the decision in ***Wig Brothers Builders (P) Ltd.*** (supra) is not the latest decision on the applicability of the exclusion clause. In this regard, he has referred to three-Judge Bench decision in the case of ***Assam State Electricity Board*** (supra). According to him, in the said decision, the

Hon'ble Supreme Court quoted with approval the validity of the principles laid down in the case of ***Sarvesh Chopra*** (supra) and ***K.N. Sathyapalan Vs. State of Kerala [(2007) 13 SCC 439]***. It was his submission that, the judgment in the case of ***Assam State Electricity Board*** (supra) and ***Sarvesh Chopra*** (supra) have been applied by various Courts, such as a decision of the Calcutta Court in the case of ***Pam Developments Private Limited*** *[MANU/WB/1044/2016]* and ***Mintoolal Brijmohandas Vs. State of Madhya Pradesh [AIR 2005 MP 205]*** and ***T.A. Choudhary Vs. State of A.P [2003 SCC Online A.P 494].*** He stated that, the Arbitral Tribunal has applied the principles laid down in the case of ***Sarvesh Chopra*** (supra) since it was quoted with approval in ***Assam State Electricity Board*** (supra), which is three-Judge Bench judgment. Hence, the decision of the three-Judge Bench in ***Assam State Electricity Board*** (supra) prevails over the decision of the Hon'ble Supreme Court in ***Wig Brothers Builders*** (supra). Moreover, the decision of the ***Wig Brothers Builders*** (supra) does not deal with the

enforceability of the exclusion clauses which is evident from paragraphs No.5 and 6 of the judgment.

15. He stated that in ***Wig Brothers Builders*** (supra), the award of the Arbitrator was set aside only on the basis that the Arbitrator ignored the provision which barred contractor to claim compensation in place of delay attributed to the employer. Whereas in the present case, the Arbitral Tribunal discussed the applicability of Clauses 2.2 and 8.3 of GCC and concluded that the same are not applicable to the facts of the present case in paragraph No.28.23 of the award. According to him, the decision in ***Wig Brothers Builders*** (supra) is silent on the aspect of whether clauses which bar compensation are applicable even when the contractor puts employer on notice. Hence, the decision of ***Wig Brothers Builders*** (supra) is not applicable to the present case.

16. He stated that, the escalation is one of the heads of delay damages and hence the finding of the learned Sessions Judge is contrary to settled principles of construction law. He stated that, it is settled law that the

contractor due to the breach of the employer will be entitled to the loss of over head and profit, direct losses on account of idle labour and of the reduced productivity from machinery and equipment, increase cost of materials and labours claim for enhancement. He had also relied upon the work on Building and Engineering Contract by Sri. B.S. Patil under the heading of *'Assessment of Damages Payable to the Contractor'*. He has also referred to the relevant portion from 'Keating on Construction Contracts' under the heading *'Possible Heads on Claim for Delay'*. He stated, even if the judgment of Calcutta High Court in the ***Pam Developments Private Limited*** (supra) was distinguished by the learned Sessions Judge, the appellant has also relied upon the judgment in the case of ***Mintoolal Brijmohandas*** (supra) and ***T.C. Chowdhary*** (supra), where damages were granted relying on the principles set out in ***Sarvesh Chopra*** (supra) despite existence of no damages clause in the contract. However, the learned Sessions Judge chose to ignore the aforesaid judgments and relied upon the case of ***Pam Developments Private Limited*** (supra), which

is clearly erroneous. That apart, it is his submission that the appellant had relied upon the judgment in the case of ***Simplex Concrete Piles Limited Vs. Union of India [(2010) 115 DRJ 616]*** *and* ***All India Power Engineer Federation and Others Vs. Sasan Power Limited [(2017) 1 SCC 487]*** to argue that the contract barring claim for compensation is contrary to Sections 23, 55 and 73 of the Indian Contract Act, 1972 ('Contract Act' for short). Further, Section-73 cannot be waived by consent of the parties and hence clauses which bar the claim of compensation is contrary to public policy and void. Even the conclusion drawn by the learned Sessions Judge in Paragrah-16 of impugned order, re-assessing merits of the case to hold that the appellant failed to put the respondent on terms as per the findings in ***Sarvesh Chopra***'s case (supra) is untenable. In other words it is his submission that, the said findings are beyond the scope of Section 34 and the impugned order is liable to be set aside. He stated that the appellant while requesting at the time of first extension, informed the respondent that, it would claim all the financial implications in the extended

period of contract. Consequently, the appellant had submitted the claim for additional costs periodically from 17.08.2011 to 23.07.2012. The first denial from the respondent had come only on 25.09.2012. In fact, the appellant had duly responded to the letter vide its letter dated 11.10.2012, wherein the appellant clearly put the respondent on the terms that 'No Damage Clause' would not be applicable. He also stated that the Arbitral Tribunal had referred to various correspondences between the parties and on perusal thereof, the Arbitral Tribunal concluded that the appellant had put the respondent on notice. The respondent's silence for more than a year made the appellant to believe that it will not be entitled to the additional costs in the extended contract period. The respondent had a duty to speak on the relevant point and hence, the silence for more than a year amounts to acceptance. He has also relied upon the paragraphs No.27.6 to 27.16 of the arbitral award to contend that the Arbitral Tribunal has considered each of the correspondences relied upon by both the parties in relation to grant of EOTs and finally concluded in

paragraph No.28.23 of the award that the appellant had put the respondent on terms and consequently, Clauses 2.2 and 8.3 of GCC are not applicable.

17. He has also stated that, there are other exceptions carved out by the Courts against application of exclusion clauses like clauses- 2.2 and 8.3 of the GCC for the following reasons:-

(i) The Clauses-2.2 and 8.3 of the GCC are contrary to Section 73 of the Contract Act and hence, void in the light of Section 23 of the Act.

(ii) The application of Clauses-2.2 and 8.3 of the GCC is restricted only to the contract period.

(iii) The Clauses- 2.2 and 8.3 of the GCC would not apply to Judicial Forum such as the Arbitral Tribunal.

(iv) Clauses- 2.2 and 8.3 of the GCC would not come to the rescue of the respondent, as the respondent has fundamentally breached its obligation.

(v) Sections 54 and 55 of the Contract Act provides a right to claim compensation

independent of the contract clauses- 2.2 and 8.3, which restrain the contractor from claiming compensation.

(vi) Clauses- 2.2 and 8.3 of the GCC would not apply in light of Doctrine of Active Interference. In support of his submissions, he has relied upon the following judgments:

INDEX OF AUTHORITIES

Sl.No.	Particulars
Scope of challenge under Section 37 and Section 34 of the Arbitration and Conciliation Act, 1996	
1.	Atlanta Limited V. Union of India (2022) 3 SCC 739 Para 19
2.	Haryana Tourism Limited V. Kandhari Bevarages Limited (2022) 3 SCC 237 Para 9
3.	Associate Builders v. DDA, (2015) 3 SCC 49 Para 18, 27, 31, 33, 40
4.	Ssangyong Engineering & Construction Co. Ltd. V. National Highways Authority of India, 2019 (15) SCC 131 Para 34,35, 36, 37, 38, 39
5.	Union of India V. Warsaw Engineers and Ors, ILR 2022 Kar 251 Para 7 to 19
Putting on terms- Exception to Exclusion Clauses	
6.	General Manager, Northern Railways and another v. Sarvesh Chopra (2002) 4 SCC 45 Para 8 and 15
7.	Assam State Electricity Board and others v. Buildworth Private Limited, (2017) 8 SCC 146 Para 10, 11, 13, 16 to

	18, 20
8.	Mintoolal Brijmohandas v. State of Madhya Pradesh, AIR 2005 MP 205 Para 6, 12 to 70
9.	G.Ramachandra Reddy and Company v. Union of India and anr (2009) SCC Online SC 762 Para 36
10.	State of West Bengal V. Pam Developments Private Limited, MANU/WB/1044/2016 Para 108-111
11.	West Bengal v. Pam Developments Pvt. Ltd. (2017) 4 CALLT 366 (HC) Para 1, 61 to 73
12.	State of West Bengal V. Pam Developments Private Limited, order of the Supreme Court dated 22.01.2016 in Civil Appeal Nos. 1126-1127 of 2016 Para 2
Exclusion Clauses are violative of Section 55 and Section 73 of the Indian Contract Act and are void by virtue of Section 23 of Indian Contract Act	
13.	Simplex Concrete Piles (Ltd) v. Union of India, 2010 (115) DRJ 616 Para 10 to 19
14.	MBL Infrastructures Limited v. Delhi Metro Rail Corporation, 2023 SCC Online Del 8044 Para 38 to 40, 44 to 61
15.	All India Power Engineer Federation and Others v. Sasan Power Limited, (2017) 1 SCC 487 Para 17 to 19
Judgments Relied upon by the Respondent	
16.	ONGC V. Wig Brothers Builders and Engineers Private Limited (2010) 13 SCC 377 Para 6 to 11
17.	Ramnath International V. Union of India, (2007) 2 SCC 453 Para 11 to 20
18.	Rajasthan State Mines and Minerals v. Eastern Engineering Enterprises. (1999) 9 SCC 283 Para 21 to 23
Heads of damages arising out of delays	
19.	Videsh Sanchar Limited v. Shapoorji Pallonji and Company

	Limited, 2008 (1) CHM 721 Para 43
20.	Relevant Portion of Keating on Construction Contracts, 10th Edition
21.	Relevant Portion of Building and Engineering Contracts, by B.S.Patil
Each precedent must be looked into based on the context	
22.	Padma Sundara Rao (dead) and Ors. V. State of TN and Ors. (2003) 3 SCC 533 Para 9
Judgments on Exclusion Clauses	
23.	C.H.Ramalinga Reddy V. Superintending Engineer and Anr (1999) 9 SCC 610 Para 17 to 19
24.	Continental Constructions Co. Ltd v. State of M.P., (1988) 3 SCC 82 Para 5 and 8
ADDITIONAL INDEX OF AUTHORITIES	
Sl.No.	**Particulars**
1.	NTPC Ltd. V. Deconar Services Pvt. Ltd., (2021) 19 SCC 694 Para 18 to 22 and 26
2.	Daelim Industrial Company v. Numaligarh Refinary Ltd., 2006(4) GLT847 Para 144, 147, 176 and 177
3.	Numaligarh Refinery Ltd v. Daelim Industrial Company., 2007(3) ARBLR378(SC) Para 12, 13
4.	Njattumkalayil Construction Company v. State of Kerala., 2020 SCC Online Ker 7351 Para 12, 14, 17, 18, 22
5.	State of Kerala V. Mohammad Kunju 2008 SCC Online Ker 83 Para 5
6.	Union of India V. Vishva Shanti Builders (India) Pvt. Ltd., 2024 SCC Online Del 5018 Para 115 to 122, 125 to 127, 130 to 139
7.	Union of India V. Chiraj Stock & Security Pvt. Ltd., 2024: DHC:1581 Para 3,7,17,18,19 to 24, 28 to 30
8.	State of West Bengal V. Bright Construction., MANU/WB/0695/2005 Para 6 to 8

9.	K.N.Sathyapalan V.State of Kerala (2007) 13 SCC 43 Para 30,31

18. On the other hand, Sri. Aravind Kamath, the learned Additional Solicitor General of India for the respondent would justify the impugned order passed by the learned Sessions Judge, whereby the learned Sessions Judge has set aside the finding of the Arbitral Tribunal awarding an amount of Rs.28,74,82,181/- on Issue No.1(d) as loss suffered by the appellant on account of delay. According to him, the Arbitral Tribunal being a creature of the contract, is totally bound by the terms of the contract and as per Section 28(3), the Arbitral Tribunal should take into account the terms of contract while passing the award and also not following the judgment of the superior Courts would render the award as oppose to fundamental policy of Indian Law and is in conflict with the public policy of India. He stated that, the award is in conflict with the public policy of India on various grounds including disregarding binding principle of the judgment of the Hon'ble Supreme Court in the case of ***Wig Brothers Builders*** (supra) and for not following

Section 73 of the Contract Act and as well as Section 28(3) of the Act of 1996. He contended that, the Arbitral Tribunal recording a finding that Clauses 2.2 and 8.3 bars compensation as referred to in the judgment in ***Sarvesh Chopra*** (supra) and on an improper consideration of the said judgment has concluded that damage clause would not restrict the appellant from claiming compensation, as the appellant had issued notice claiming compensation, which finding of the Tribunal is per-se incorrect and amounts to mis-application of the provisions of the Contract Act. He stated that the decisions relied upon by the Arbitral Tribunal are not applicable to the present case. The Arbitral Tribunal has also ignored the vital evidence in arriving at a conclusion that there is notice issued by the appellant claiming compensation. That apart, it was his submission even in respect of the quantification of damages, the Tribunal has committed serious jurisdictional errors. It granted 50% of the compensation claimed on the untenable ground that the GCC contemplates that the delay on account of contractor and employee is 50:50 though such finding was in respect

of the EOT-I & 2 and for subsequent three extensions, there were no extension by 50:50 delay. But, the Tribunal has failed to note this fact. That apart, it was his submission that, even the grant of compensation on the basis of bald statements without producing any evidence to show actual loss suffered by the appellant, the Tribunal has committed a grave error. He heavily relied upon the various paragraphs of the impugned Judgment in support of his submissions.

19. He stated that, any judgment by the Court has to be seen what is the *ratio decidendi*, which shall prevail and not every observation found therein. In support of this proposition he stated, the judgment in the case of ***Sarvesh Chopra*** (supra) has no applicability. On a similar proposition, he has relied upon the decision in ***M.P. Gopalakrishnan Nair & Anr Vs. State of Kerala & Ors [2005] Insc 265 (20 April 2005).*** That apart, he stated that, one fact can make difference in conclusion in two cases, even when same principles are applied. In support of his submission, he has relied upon the decision in ***Regional Manager and Another Vs. Praveen Kumar***

Dubey [(1976) 3 SCC 334]. He seeks the dismissal of the appeal.

Analysis:

20. Having heard the learned counsel for the parties and perused the record, the only issue which arises for consideration is, whether the learned Sessions Judge is justified in setting aside the arbitral award qua Issue No.1(d), whereby the Arbitral Tribunal has granted an amount of Rs.28,74,82,181/- in favour of the appellant?

21. The above issue has to be decided by considering the effect of Clauses 2.2, and 8.3 of the GCC, which contemplate the appellant/contractor is entitled for only extension of time for executing the work in certain situations like delay in handing over of the site, etc., by the employer, but no compensation shall be payable. For the sake of convenience, we reproduce both the above clauses as under:

> *"2.2. The Employer shall grant the Contractor right of access to, and possession of, the Site progressively for the completion of Works. Such right and possession may not be exclusive to the Contractor.*

The Contractor will draw/modify the schedule for completion of Works according to progressive possession/ right of such sites.

If the Contractor suffers delay from failure on the part of the Employer to grant right of access to, or possession of the Site, the Contractor shall give notice to the Engineer in a period of 28 days of such occurrence. After receipt of such notice the Engineer shall proceed to determine any extension of time to which the Contractor is entitled and shall notify the Contractor accordingly.

For any such delay in handing over of site, Contractors will be entitled to only reasonable extension of time and no monetary claims whatsoever shall be paid or entertained on this account.

xx xx xx xx xx

8.3. In case of delay on the part of the Contractor, the Contractor shall be liable to pay liquidated damages and any other compensation for the damages suffered by the Employer as per Clause 8.5. This is without prejudice to the right of the Employer to rescind the Contract.

> *Failure or delay by the Employer or the Engineer, to hand over to the Contractor the Site necessary for execution of Works, or any part of the Works, or to give necessary notice to commence the Works, or to provide necessary Drawings or instructions or clarifications or to supply any material, plant or machinery, which under the Contract, is the responsibility of the Employer, shall in no way affect or vitiate the Contract or alter the character thereof, or entitle the Contractor to damages or compensation thereof but in any such case, the Engineer shall extend the time period for the completion of the Contract, as in his opinion is / are reasonable."*
>
> *(Emphasis supplied)*

22. The Arbitral Tribunal has decided the issue in paragraphs No.28.15 to 28.37 of the award, which we reproduce as under:

> *"xx xx xx xx xx*
>
> *28.15). After hearing the parties, we are of the view that we should first take up the issue with regard to the applicability or ron applicability of these two clauses to the case on hand. If the clauses*

are applicable, then the other legal questions including legality of the clauses being contrary to Section 73 of the Contract Act or other proposition raised by the learned Counsel for the Claimant would not arise. Therefore, we deem it proper to initially deal with these two clauses.

28.16). It is no doubt true that a plain reading of the two clauses would categorically show that no compensation in the case of delay by an Employer in terms of Contract. There can be no two opinion on this. At this stage we must notice certain case laws decided in some what identical circumstances as cited by the learned Counsel for the Respondent.

28.17). The 1 judgment is reported in (2010) 13 SCC 377 (Oil and Natural Gas Corporation -vs- Wig Brothers Builders & Engineers Pvt)td. A somewhat identical clause is seen in para 6 of the said judgment. The learned Judges after noticing the facts have ruled in para 7 reading as under:-

> *"7. In view of the above, in the event of the work being delayed for whatsoever reason, that is, even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs.9.5 lakhs. This aspect is covered by several decisions of this Court. We may refer to some of them".*

28.18). The next judgment is reported in (2007) 2 SCC 453 (Ramnath International -vs- Union of India). Here again some what similar clause came up for consideration and the Apex Court has ruled in para 12 reading as under:-

> *"12. Clause (C) provides that where extension have been granted by reason of delays enumerated in clause (A) which were beyond the control of the contractor, or on account of the delay on the part of the employer specified in clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of clause (A) specifically mentions delay on account of any other cause beyond the control of the contractor. The causes for delays specified in clause (A), thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11 (C)".*

28.19). Ultimately, the Apex Court in para 18 has held as under:-

> *"18. In spite of having held that both were responsible for the delay and having noticed the arguments based on clause 11 of the General Conditions of Contract, the arbitrator proceeded to award damages on the ground of delay on the reasoning that the contractor is entitled to compensation, unless the employer establishes that the contractor has consented to accept the extension of time alone in satisfaction of his claim for delay. As rightly held by the High Court, which decision we have affirmed while considering Question (i), clause © of the GCC is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. Clause 11 © amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation".*

28.20). The next decision cited by the learned Counsel for the Respondent is reported in (1999) 9 SCC 283 (Rajasthan State Mines & Minerals Limited -vs-Eastern Engineering Enterprises & Another). In this judgment the Court has considered again a similar ho compensation clause and the Apex Court has held in para 44 as under:-

> *"44. (f). To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a*

different ground from the error apparent on the face of the award.

(g). In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contractor to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h). The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement".

28.21). From these judgments what is clear to us is that when a Contract provides for no compensation clause, even in the event of delay on the part of the Employer that no compensation could be awarded by an Arbitrator on the ground of delay and any grant is beyond its power/jurisdiction.

28.22). Per contra the learned Counsel for the Claimant would say that the two Judgments in ONGC and Ramnath International are not applicable to the facts of this case since in those cases there was no notice issued by the Contractor as in the present case at the time of Extension of Time. In fact the learned Counsel would say that there is another judgment of the Supreme Court reported in (2002) 4 SCC 45 (Northern Railway -vs- Sarvesh Chopra). He also refers to the judgment. reported in (2009) 6 SCC 414 (Ramachandra Reddy -vs- Union of India). We have seen these two cases cited by the learned Counsel for the Claimant. In the case of Northern Railway the Apex Court in paras 14 and 15 has noticed the American Jurisprudence and also the effect of notice reading as under:-

> *"14. 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 enables some Coramonwealth courts to avoid the effect of 'no damage' clauses."*
>
> *15. 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 inspite of delay and such notice by the contractor putting the employer on terms."*

28.23). In the judgments relied upon by the learned Counsel for the Respondent, the Apex Court has no doubt earlier ruled that no compensation is payable in the event of a clause of no compensation in terms of the Contract. There can be no quarrel over this proposition. But a Court of law has to understand the principles laid down in a judgment in the light of the facts placed in that case. We see from the judgments cited by the learned Counsel for the Respondent that there was no notice as in the present case with regard to compensation in terms of the documents placed before us. However, the learned Counsel for the Respondent would argue that the Court has to read the judgment in the light of

documents available in the case on hand. We do not accept this contention. We cannot ignore the admitted facts while applying the legal principles to a case on hand. No where in those judgments there is a reference to any notice whatsoever issued by the contractor in those cases. In the present case, as mentioned earlier, there is a notice issued by the Claimant followed by several letters. In the light of noticing the notice, the judgment of Northern Railways, is applicable and law laid down therein. However, the learned Counsel for the Respondent would say that the latest judgment, namely ONGC and other cases are to be followed. There can be no two opinion on this. In fact, the Full Bench of the Karnataka High Court has ruled that in the case of judgments by two Judges. the latter judgment has to prevail. If those latest judgments are distinguishable on facts, certainly the Tribunal has to take into consideration the earlier judgment of the Supreme Court. Therefore, on facts we are satisfied that in the light of the notice in terms of the material available on record, we are of the view that the judgment cited by the learned Counsel for the Respondent are inapplicable and on the other hand the judgment of the Apex Court in Northern Railway case is applicable to the facts of this case. Therefore, respectfully following the law laid down in (2002) 4 SCC 45, we deem it proper to hold that the Claimant is entitled for a claim of compensation despite clauses 2.2 and 8.3 in the light of the claimant putting on notice the

Respondent with regard to claim of compensation in the case on hand.

28.24). At this stage we also notice the judgment of the Supreme Court in the case of G. Ramachandra Reddy wherein the Court has considered the interpretation of a contract. The Supreme Court has ruled in para 19 of the said judgment reading as under:-

> *"19. We may, at the outset notice the legal principles governing dispute between the parties. Interpretation of a contract may fall within the realm of the arbitrator. The Court while dealing with an award would not re-appreciate the evidence. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong proposition of law. If two views are possible, it is trite, the Court will refrain -itself from interfering".*

28.25). Therefore, we have interpreted clauses 2.2 and 8.3 of the GCC in the light of the admitted fact of notice to claim compensation at the time of accepting Extension of Time by the Claimant.

28.26). Having come to this conclusion, the next question is as to whether a complicated question of law with regard to clauses binding on the Tribunal; exclusion not applicable to the extended period; exclusion period not applicable when there is a fundamental breach; Doctrine of active interference; reciprocal promissory estoppels, and Sub-silentio are not required to be gone into in the

light of our accepting the notice contention and the applicability of Northern Railway case. Therefore, we deem it proper not to express any opinion on these contentions urged by the parties. Therefore, in terms of law and in terms of the facts available in this case, the Claimant is entitled to claim compensation and claim of compensation is certainly arbitrable by this Tribunal. We accept the contention of the learned Counsel for the Claimant.

28.27). The next question is with regard to quantum of Compensation. The Claimant has claimed an amount of Rs.57,49,64,363/- in the Claim Statement. The quantum is justified by the Claimant on the ground that the Claimant has suffered at the hands of the Respondent providing a right to claim damages. The Claimant has claimant has claimed a total amount of Rs.57,49,64,363/- under the following heads:-

Sl.No.	*Description*	*Amount*
1	*Overheads payable due to extended period of contract*	*20,30,20,630/-*
2	*Additional amount payable towards plant and machinery cost*	*4,08,83,578/-*
3	*Additional amount towards labour charges*	*16,01,44,127/-*
4	*Additional amount payable towards formwork cost due to extension of contract*	*2,61,39,435/-*

	period	
5	*Amount payable towards frozen price variation clause from 30.6.13 to YPR and MHL and 30.9.2013 for SOP*	*24,43,888/-*
6	*Amount payable on account of loss of profit*	*14,23,32,705/-*
	Total	*57,49,64,363/-*

28.28). Before we consider the quantum, we have to see the law on the subject. The Supreme Court has noticed the facts in the decision reported in AIR 2017 SC 3336 (Assam State Electricity Board & Ors -vs- Buldworth Private Limited). In the said case the Supreme Court has in para 13 has noticed its earlier judgment in P.M. Paul -vs- Union of India (1989 Supp (1) SCC 368). In the concluding paragraph of para 13 the Supreme Court has held as under:-

> *"13. This Court held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work. Once the arbitrator was held to have the jurisdiction to determine whether there was delay in the execution of the contract due to the Respondent, the latter was liable for the consequence of the delay; namely, an increase in price."*

28.29). The Court again in para 15 has held as follow:-

> *"15. The award comports with principles of law governing price escalation firmly established by decision of this Court. For these reasons, we find merit in the contention of learned Counsel appearing on behalf of the Claimant that the award does not suffer from any error apparent on the face of the record in so far as the aspect of price escalation is concerned".*

28.30). The Calcutta High Court in the decision reported in (2017) 4 CALLT 366 (HC) (State of West Bengal -vs- Pam Developments Private Limited), after noticing various judgments of the Supreme Court in para 74 has held as under:-

> *"74. On such tests as permissible, the award in the present case could scarcely have been touched. The arbitrator found that it was the appellant which was to blame for the delay in the completion of the work and that the appellant allowed the work to progress beyond the stipulated time and accepted the completion thereof. Once party accepts the belated performance of a reciprocal obligation, the other would be entitled to make a claim for damages and if the former party is found to be in breach, the prohibitory or no damage clauses in the contract for its benefit may be legitimately interpreted by the arbitrator to lose their applicability during the extended period of the work. If the arbitrator, on his appreciation of the circumstances leading to the extension of the period of completion of the work, finds the employer to be in breach which results in the work not being completed on time, the arbitrator's finding that the prohibitory clauses would not apply*

to the extended period would not be outlandish or per se perverse. However, even on such finding if the quantum of the amount awarded shocks the conscience of the court, the court can interfere with the quantum".

28.31). In the light of these case laws in the event of a breach the Claimant is entitled to claim damages against the Respondent. However, a plea of waiver was raised by the learned Counsel for the Respondent. We do not agree that the facts of the case would show that the Claimant has waived its right at the time of entering into contract or at the time of accepting the EOTs. Having come to the conclusion that the Claimant is entitled for compensation, the Claimant has chosen to claim damages under various heads as referred to above.

28.32). The learned Counsel for the Claimant in the Written Argument has given the details of quantification of losses suffered by the Claimant under 6 different headings. The total compensation claimed under these 6 different headings works out to Rs.57,49,64,363/-. The learned Counsel for the Claimant has given alternative quantification in the light of rulings of courts of law. The details are provided at pages 110 and 111 of the Written Argument. In terms of alternative quantification the Overhead and profit component is claimed @ 20% of the contract value which works out to Rs.32,34,38,049/- and Plant and Machinery

component is claimed @ 18% which works out to Rs.29,10,94,244/-.

28.33). The learned Counsel for the Claimant has placed before us the judgment of the Apex Court reported in (2006) 11 SCC 181 (Mc.Dermott International Inc. -vs- Burn Standard Co.Ltd., wherein the Apex Court has considered the Hudson Formula and also a judgment of the Apex Court in A.T. Brij Paul Singh & Ors-vs- State of Gujarat (AIR 1984 SC 1703) The Apex Court in the said case has ruled that different formula can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator. We have seen the case on hand. As mentioned earlier, there are breaches on either side and we have also considered the facts as placed before us. We also see that in so far as profit is concerned the Supreme Court has ruled in Brij Paul case that what would be the measure of profit would depend upon facts and circumstances of each case. But there shall be a reasonable expectation of profits is implicit in a works contract. In the case on hand the profit margin seems to be on the higher side to us.

28.34). In so far as the quantum is concerned, we find from the material on record that the claim is

supported by Ex.C297 and C285. Similarly, Head office Overheads is supported by Ex.C285 and C295. Additional amount payable is also supported by Ex.C297. At this stage we must notice that the Respondent was asked to inspect the bulky document and they have not chosen to do the same. In the circumstances, Ex.C297 requires to be accepted.

28.35). In so far as additional amount towards Plant and Machinery is concerned the same is supported by Ex.C285 and C297. The Labour Cost is supported by Ex.C297. The amount payable towards frozen account is justified in terms of Ex.C297. In so far as Loss of Profit is concerned, we have already ruled that in the light of law laid down by the Apex Court, the Claimant is entitled to claim the same.

28.36). From the material on record we have ruled that both parties have committed breach of the terms of the Contrast in terms of the Contract conditions. Compensation is payable in terms of the law aid down by Courts of law. Who has to be blamed for the delay and how much is to be apportioned is the question that requires our consideration. From the material on record it is been that a huge project is undertaken by the Claimant. The Claimant must have expected some unforeseen circumstances including court proceedings etc. Therefore, the Claimant must be aware that there may be delay due to some breaches on the peculiar

facts of the case. The Engineer while recommencing, has stated that the violation can be 50 50 on the peculiar facts of the case. We see a communication dated 27.4.2011 wherein the GC has noticed various factors and in the concluding paragraph he has stated GC has reviewed in detail various reasons of delay on account of BMRCL and contractor and it is concluded that the duration of delay is distributed approximately 50: 50 on BMRCL account and Contractor's account. In the communication addressed to the Chief Engineer dated 28.4.2017 the Manager Mr.Balakrishna has stated that considering the delay on account of Contractor and on account of delay in providing Drawings and site handing over EOT is considered approximately in the ratio of 50: 50 under clause 8.4.1. The Engineer is the person who is in the forefront of the works who has to assess the entire works. The delay and the breach has been assessed by him as 50: 50. Taking into consideration the breaches on either side and also the finding of the man in the field, we deem it proper to award only 50% of the claim of compensation to the Claimant in the case on hand.

28.37). We are of the view that the facts of the case do not warrant the calculation at Rs.20,30,20,630/- (towards Overheads) plus Rs.14,23,32,705/- plus Rs.4,08,83,578/- (towards Plant and Machinery in addition to other causes). We are not inclined to provide per centage basis as claimed in page no.111 of the Written Argument.

> *Therefore, our findings is that the Claimant is entitled for 50% of Rs.57,49,64,363/- which works out to Rs.28,74,82,181/-. In conclusion, the Claims of the Claimant on this head is partly accepted in terms of our earlier findings. The Claimant is entitled for Rs.28,74,82,181/-. Accordingly Issue No. 1 (d) is partly allowed."*

The conclusion of the Arbitral Tribunal is by interpreting clauses 2.2 and 8.3 of the GCC in the light of the fact of, notice to claim compensation at the time of accepting extension of time by the appellant. While coming to the said conclusion, the Arbitral Tribunal has followed the judgment of the Hon'ble Supreme Court in ***Sarvesh Chopra*** (supra). Whereas, the Sessions Judge while disagreeing with the conclusion drawn by the Arbitral Tribunal, has by giving finding in paragraphs No.53 to 63, set aside the award on that issue.

23. It is noted from the decision of the learned Sessions Judge that the learned Sessions Judge did not agree with the conclusion drawn by the Arbitral Tribunal by referring to the judgment of the Hon'ble Supreme Court in ***Sarvesh Chopra*** (supra) to hold that ***Sarvesh***

Chopra (supra) could not be applied to the present case and even requirements mentioned therein are not present in this case.

24. So it needs to be decided (as stated above) whether, in view of Clauses 2.2 and 8.3 of the GCC which bars monetary claims/damages on delay, the appellant is entitled to claim the same?

25. In the judgment of ***Sarvesh Chopra*** (supra), the Hon'ble Supreme Court has in paragraphs No.8 and 15, held as under:

> *"8. 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 the 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 Railways", 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 the 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 Clauses 2.4.2(b) and 12.1.2. The first category is an "excepted matter" because the claim as per the 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".

xx xx xx xx xx

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."*

The facts in the above case are, the respondent Sri. Sarvesh Chopra was granted work of construction of bored piles 500 mm dia by cast in-sutu method for widening and raising of Pul Mithai (S). A contract was entered into between the parties on 27.04.1985. The contract was subject to general conditions of the contract of the Railways read with special conditions. Disputes arose between the parties and the respondent moved a petition under Section 20 of the Arbitration Act, 1940 praying for the arbitration agreement be filed in the Court and six claims set out in the petition be referred to the arbitrator for adjudication. A learned Single Judge of the Delhi High Court directed two claims to be referred, but as to claims 3 to 6, he formed an opinion that the claims being 'excepted matters' within the meaning of clause 63

of the GCC, the same are not liable to be referred to arbitration. In an intra-court appeal, the Division Bench has set aside the order of the learned Single Judge and also directed the four claims be referred to the arbitration. The Hon'ble Supreme Court has also in paragraph No.18, stated as under:

> *"18. In the case before us, the claims in question as preferred are clearly covered by "excepted matters". The statement of claims, as set out in the petition under Section 20 of the Arbitration Act, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was, in our opinion, not right in directing the said four claims to be referred to arbitration."*

Be it noted the Hon'ble Supreme Court has *inter alia* justified clause 63 of the GCC. In other words, it held the clause is binding. The Hon'ble Supreme Court has also in paragraph No.10, while disagreeing with the plea urged by the counsel for the respondent, has stated as under:

"10. It was next submitted by the learned counsel for the respondent that if this Court was not inclined to agree with the submission of the learned counsel for the respondent and the interpretation sought to be placed by him on the meaning of "excepted matter" then whether or not the claim raised by the contractor is an "excepted matter" should be left to be determined by the arbitrator. It was submitted by him that while dealing with a petition under Section 20 of the Arbitration Act, 1940 the court should order the agreement to be filed and make an order of reference to the arbitrator appointed by the parties leaving it open for the arbitrator to adjudicate whether a claim should be held to be not entertainable or awardable, being an "excepted matter". With this submission too we find it difficult to agree. While dealing with a petition under Section 20, the court has to examine: (i) whether there is an arbitration agreement between the parties, (ii) whether the difference which has arisen is one to which the arbitration agreement applies, and (iii) whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. The word "agreement" finding place in the expression "where a difference has arisen to which the agreement applies", in sub-section (1) of Section 20 means "arbitration agreement". The reference to an arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or ministerially by the court; it is a consequence of

judicial determination, the court having applied its mind to the requirements of Section 20 and formed an opinion, that the difference sought to be referred to arbitral adjudication is one to which the arbitration agreement applies. In the case of Food Corpn. of India [(1999) 4 SCC 491] relied on by the learned counsel for the respondent, it has been held as the consistent view of this Court that in the event of the claims arising within the ambit of "excepted matters", the question of assumption of jurisdiction by any arbitrator either with or without the intervention of the court would not arise. In Union of India v. Popular Builders [(2000) 8 SCC 1] and Steel Authority of India Ltd. v. J.C. Budharaja, Govt. and Mining Contractor [(1999) 8 SCC 122] , Ch. Ramalinga Reddy v. Superintending Engineer [(1999) 9 SCC 610 : (1994) 5 Scale 67] (para 18) and Alopi Parshad and Sons Ltd. v. Union of India [AIR 1960 SC 588 : (1960) 2 SCR 793] SCR at p. 804 this Court has unequivocally expressed that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract entered into between the parties would be liable to be set aside. In Prabartak Commercial Corpn. Ltd. v. Chief Administrator, Dandakaranya Project [(1991) 1 SCC 498] a claim covered by "excepted matter" was referred to the arbitrator in spite of such reference having been objected to and the arbitrator gave an award. This Court held that the arbitrator had no jurisdiction in the matter and 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."

(Emphasis supplied)

In paragraphs No.11 to 13, the Hon'ble Supreme Court has also dealt with the three judgments, which we reproduce as under:

"11. In Continental Construction Co. Ltd. v. State of M.P. [(1988) 3 SCC 82] the contract provided for the work being completed by the contractor in spite of rise in prices of material and labour charges at the rates stipulated in the contract. It was held that on the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. An award given by the arbitrator for extra claim given by the contractor was held to be vitiated on the ground of misconduct of the arbitrator. There were specific clauses in the agreement which barred consideration of extra claims in the event of price escalation.

12. In Ch. Ramalinga Reddy v. Superintending Engineer [(1999) 9 SCC 610 : (1994) 5 Scale 67] claim was allowed by the arbitrator for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". Clause 59 of the A.P. Standard Specifications, which

applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim was found to be outside the defined exceptions. When extensions of time were granted to the appellant to complete the work the respondents made it clear that no claim for compensation would lie. For both these reasons, this Court held that it was impermissible to award such claim because the arbitrator was required to decide the claims referred to him having regard to the contract between the parties and, therefore, his jurisdiction was limited by the terms of the contract.

13. A Division Bench decision of the High Court of Andhra Pradesh in State of A.P. v. Associated Engineering Enterprises, Hyderabad [AIR 1990 AP 294 : (1989) 2 An LT 372] is of relevance. Jeevan Reddy, J. (as His Lordship then was), speaking for the Division Bench, held that where clause 59 of the standard terms and conditions of the contract provided that neither party to the contract shall claim compensation "on account of delays or hindrances to the work from any cause whatever", an award given by an arbitrator ignoring such express terms of the contract was bad. We find ourselves in agreement with the view so taken."

In the above paragraphs of the judgment in ***Sarvesh Chopra*** (supra), Hon'ble Supreme Court has quoted with

approval the aforesaid judgments, which are for the proposition that, when there are specific clauses in the agreement which barred consideration of extra claims, then the award overlooking the claims to that extent stands vitiated. If that be so, it is clear as a daylight the conclusion of the Hon'ble Supreme Court in ***Sarvesh Chopra*** (supra) is that, an Arbitrator has no jurisdiction to adjudicate a dispute which is not arbitrable.

26. The conclusion in paragraph No.15 on which much reliance has been placed by Sri. Krishnan, the Hon'ble Supreme Court has highlighted in what eventualities in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay, still a claim would be entertainable, in the following manner:

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 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.

27. It may be stated here, in ***Sarvesh Chopra*** (supra), the Hon'ble Supreme Court has accepted the appeal and set aside the order of the Division Bench of the High Court which had referred the four claims despite the same being 'excepted matters'. In other words, the Hon'ble Supreme Court held that, the agreement need to be given effect to.

28. We may state here, the conclusion of the learned Sessions Judge with regard to the judgment in the case of ***Sarvesh Chopra*** (supra) can be noted from paragraphs No.56 to 58, which we reproduce as under:

> *"56. On going through the entire decision, as rightly argued by the learned senior counsel for the plaintiff, decision in Sarvesh Chopra is not on the point as to whether inspite of having a clause barring payment of compensation or damages for the delay caused by the employer, Contractor is entilte for compensation. This decision is on the point as to,*

whether excepted matter could be referred to the arbitration and whether particular dispute is an excepted matter. The Hon'ble Supreme Court in this decision, has held for the reasons mentioned in the decision that particular dispute in claim 3,4 and 5 were excepted matters. The Hon'ble Supreme Court has upheld the decision of single judge of Hon'ble High Court of Delhi who has held that the claim No.3 to 6 which were excepted matters were not liable to be referred to arbitration. Therefore on looking to the facts of the case before the Hon'ble Supreme Court and finding of the Supreme Court, point as to, whether compensation could be claimed by the contractor, inspite of having a clause in the contract that employer is not liable to pay any damages or compensation to the contractor for the delay caused by employer, was not for consideration before Hon'ble supreme Court.

57. In Sarvesh Chopra decision, Hon'ble Supreme Court in para 15 has considered Section 55 and 56 of the Indian Contract Act which deal with contract in which, time is essence of the contract and held that, it appears that in Indian law though the contractor had 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 if the contractor had intimated the employer about such claim and employer accepts performance inspite of such notice by the contractor. This finding of the Hon'ble Supreme Court do not

appear to be ratio decidendi of the decision in Sarvesh Chopra, as this point as to whether contractor can claim delay compensation if he has put the employer to notice while seeking extension, was not the point involved in the case and is not the basis for decision in Sarvsh Chopra.

58. On the other hand, subsequent decision of the Hon'ble Supreme Court in Wig Brothers which is reported in 2010 is directly on the point. In Wig brothers, it is clearly held that in view of clause 5(a) of the contract barring claim for damages at the time of extension of time, if work is delayed for whatever reasons and including delay attributable to the ONGC i.e employer, contractor will not be entitle for any compensation or damages and will be entitle to extension of time only and that, the finding of the Arbitrator awarding compensation in violation of the bar contained in the contract is held to be beyond jurisdiction. This finding of the Hon'ble Supreme Court in the decision in Wig Brothers is ratio decidendi of the case and would be binding precedent. Apart from this, even in C.H.Ramalinga Reddy decision, referred above, which is decision of three Judges Bench of Hon'ble Supreme Court, is also on similar point wherein the Hon'ble Supreme Court has held that where the contract plainly barred the appellant from making any claim, it was impermissible to make an award in respect thereof. It is also held that the jurisdiction of the arbitrator is limited by the terms of the contract. Therefore, these

decisions relied by the plaintiff would make it very clear that no damage clause for the delay appearing in clause 2.2 and 8.3 are binding clauses of the contract and not a mere statement."

(Emphasis supplied)

29. The learned Sessions Judge is right in stating that the decision of the Hon'ble Supreme Court in paragraph No.15 do not appear to be *ratio decidendi* of the decision in ***Sarvesh Chopra*** (supra) that is, whether the contractor can claim delay compensation if he has put the employer to notice while seeking extension as the same was not the issue involved in the case.

30. Insofar as the judgment in the case of ***Assam State Electricity Board*** (supra) is concerned, in the said case, the Hon'ble Supreme Court has noted the fact that the High Court has adverted to the decision in the case of ***Sarvesh Chopra*** (supra) in support of the principle that if a party to a contract does not rescind it by invoking Sections 55 and 56 of the Contract Act and accepts the belated performance of reciprocal obligations, the other party would be entitled to make a claim for damages. In

any case, the Hon'ble Supreme Court by noting the fact that the High Court has given a finding that the appellant Board has not refuted the claim of the contractor/respondent of idle charges, etc., and at the same time, the bills of the contractor/respondent on account of idle charges, escalation prices, etc., were put up for consideration, the act of the respondent clearly indicates that the appellant has impliedly admitted the substance and justification of the claim of the contractor and has dismissed the appeal. The judgment is clearly distinguishable on facts as no such case has been set up by the appellant in this case.

31. In ***Mintoolal Brijmohandas*** (supra), which is a judgment of the Madhya Pradesh High Court, the relevant clause 2.1.22 of the contract was on the following terms:

> *"If the materials are not supplied in time, the contractor will not be allowed any claim for any loss which may be caused to him, but only extension of time will be given at the discretion of the Executive Engineer and Superintending Engineer if applied for by the Contractor before the expiry of the contract."*

The High Court has referred to the judgment of the Hon'ble Supreme Court in ***Sarvesh Chopra*** (supra) and finally in paragraphs No.16 to 20, stated as under:

> *"16. Vide Exhibit P-9 the contractor acknowledging the letter issued by the Department contractor had incorporated the following:*
>
> > *"We would have completed this work also and the canal system not opened for testing and Irrigation from 18/19 Nov. 1981. You will please appreciate the Earthwork could not be done due to constant flow of canal water through the structure and we had no other alternative but to disband the establishment.*
> >
> > *The canal waters is still flowing and lively to continue for another 2 months and it is practically impossible to retain the labourers without any work.*
> >
> > *We had requested for grant of extension upto 15-1-1982 and are not interested for any further extension of time. You are requested to finalise the contract and prepare our final (sic) failure is not allowing us to do the work upto 15-1-1982 by opening the canal earlier. We cannot wait for indefinite period to complete the work. In the past we have already suffered huge losses due to such stoppage".*
>
> *17. Vide Exhibit P-10, the compensation was also demanded. Vide Exhibit P-11, dated 18-3-1982 the Executive Engineer quoted clause 2.1.22 and indicated that no claim of delayed supply of material*

would be entertained. Vide Exhibit P-13, the Superintendent Engineer mentioned that the Department would not be responsible for any loss sustained by the Contractor. At this juncture we would also like to refer to Exhibit P-14 by which the Executive Engineer had written to the Superintendent Engineer. The two paragraphs which are relevant for the present purpose are as under:

> *"Your kind attention is invited to our letter dated 10-4-1982 wherein we had requested for your decision to our claims submitted by us vide our letter dated 5-2-1982.*
>
> *You will please appreciate that our huge amount is blocked and we shall be very much thankful if you will please decide the same early."*

18. There was recommendation vide Exhibit P-15, by the Executive Engineer. The question that arises for consideration is whether there has been performance by the contractor. We have referred to this document to show that the claimant had imposed terms and conditions but there has been no explanation by the owner. The owner allowed the claimant to carry on with the work. It is perceptible that the final bill inasmuch as he has been permitted to do the work. As performance has been accepted we are disposed to think the claim would be covered under the third para of Clause 2.1.22 would not be a impediment for entertaining his claim.

19. After the hearing was concluded the learned counsel for the respondent cited a few decisions by making a mention, wherein the view taken is that "interpretation of contract" is a matter for the arbitrator to decide and the court cannot substitute its own decision in place of the decision of the arbitrator. We do not think that the cited cases have any relevance for deciding the question arising for consideration in this appeal. None of the cases is an authority for the proposition that the question whether a claim is an "excepted matter" or not must be left to be decided by the arbitrator only and not adjudicated upon by the court while disposing of a petition under Section 20 of the Arbitration Act, 1940. We cannot subscribe to the view that interpretation of arbitration clause itself can be or should be left to be determined by the arbitrator and such determination cannot be done by the court at any stage.

20. In view of the aforesaid premises the award passed by the Tribunal need not be interfered with inasmuch the Tribunal has analyzed every claim in proper perspective and had quantified that on basis of material in record. There is no perversity of the approach. The main contention urged before us about the arbitrability of the claims. We are inclined to hold that the claims are based on the materials on record and there is no jurisdiction to interfere in this Civil Revision."

Suffice to state, the High Court has not interfered with the award though it held that Tribunal would have entertained the claim. The High Court on a finding that the Tribunal has analyzed every claim and also it held there is no perversity, it dismissed the appeal. The judgment shall not help the case of the appellant.

32. Similarly in the case of ***G.Ramachandra Reddy and Company*** (supra) on which reliance has been placed by Sri. Krishnan, the issue relevant for the purpose of the case was, whether the claim No.4 accepted by the High Court with regard to damages granted on a finding that the termination of the contract was illegal and *malafide,* it held that no such plea was raised by the respondent before the High Court. It is not such a case here and hence, the judgment is clearly distinguishable.

33. Similarly on the three cases of ***State of West Bengal -Vs.- Pam Developments Private Limited [MANU/WB/1044/2016, 2017 SCC OnLine Cal 13272 and Civil Appeal No.1126-1127/2019 dated 22.01.2019]***, the Sessions Judge has held as under:

"42. The learned counsel for the defendant has referred to a decision of the Hon'ble High Court of Calcutta reported in MANU/WB/1044/2016 (State of West Bengal v. Pam Developments Private Limited) in which the single judge of the Hon'ble High Court has considered the decision in Sarvesh Chopra. The learned counsel for the defendant has also relied on the decision of the Division Bench, between the same parties, reported in 2017 SCC Online Calcutta 13272. In this appeal Division Bench of Hon'ble High Court in para 61 has held under,

> *"... The moot question that arises is whether any amount awarded by an arbitrator on account of damages in respect of a head of claim covered by a prohibitory or no damage clause in the agreement would be liable to be set aside in a challenge under Section 34 of the 1996 Act as being contrary to the substantive law in force in India or as being in conflict with the public policy of India or on the ground of it being patently illegal or falling foul of the judicially acknowledged tests of perversity or shocking to the conscience. The ancillary issue which arises is whether the dictum at paragraph 15 of Sarvesh Chopra is relevant in assessing a challenge to an arbitral award under Section 34 of the 1996 Act and if so would there be no exception beyond the three as recognized in such dictum...."*

On this point the Hon'ble High Court in para 73 has held,

> *"... But the more important facet of the dictum in Sarvesh Chopra is that a no-*

damage clause is by no means the end of the matter in respect of a claim made under a prohibited head; there could be exceptions to the prohibition. Once so much is apparent from the dictum, the next aspect would be whether such dictum provides room for only such of the exceptions as noticed therein. Even if the dictum is read in such strict sence which it ought not to be, since a judgment is not read as a statute or an edict on stone - the essence of the dictum is that even a prohibitory clause and its application is open to interpretation. Once it is recognized that it may be permissible to interpret the efficacy of a prohibitory clause or its application or applicability in a particular situation, that would make such matter fall within the exclusive domain of the arbitrator. The arbitrator may make a mistake and may rule against the applicability of a prohibitory clause in a particular set of circumstances; but that, by itself, would not be amenable to correction by a court in a challenge under Section 34 of the 1996 Act, unless it is found to be in conflict with the pubic policy of India or, under the newly incorporated Section 34(2-A) on the ground of patent illegality or the judicially acknowledged strict grounds of perversity or shocking to the conscience of the court..."

43. On going through this decision, no doubt, it supports the contention of defendant and deals with awarding compensation inspite of contract having no damages clause. However, learned counsel for the plaintiff has referred to the decision of Hon'ble

Supreme Court in Civil Appeal No.1126-1127 of 2019 dated 22/1/2019 (State of West Bengal v. Pam Developments Private Limited) which is an appeal against the judgment of the Division Bench of the Hon'ble Calcutta High Court. In this decision the Hon'ble Supreme Court has disposed the matter by consent of both the parties and left all the questions of law open. On the basis of this decision, the learned counsel for the plaintiff has argued that the decision in Pam Developer is not a binding precedent, as all the questions of law are left open."

(Emphasis supplied)

We agree with the conclusion of the learned Sessions Judge to hold that the Hon'ble Supreme Court has left the question of law open. Hence, these judgments shall not help the case of the appellant.

34. On the other hand, the judgments which have been relied upon by Sri. Kamath are primarily as under:

34.1. In the case of ***Wig Brothers*** (supra) wherein reliance has been placed on paragraphs No.6 and 11, the same are reproduced as under:

"6. The arbitrator has observed that there is no provision in the contract by which the contractor can be estopped from raising a dispute in regard to the

said claim. But Clause 5-A of the contract pertains to extension of time for completion of work and specifically bars any claim for damages. The said clause is extracted below:

> *"In the event of delay by the Engineer-in-charge to hand over to the contractor possession of land/lands necessary for the execution of the work or to give the necessary notice to the contractor to commence work or to provide the necessary drawing or instructions or to do any act or thing which has the effect of delaying the execution of the work, then notwithstanding anything contained in the contract or alter the character thereof or entitle the contractor to any damages or compensation thereof but in all such cases the Engineer-in-charge may grant such extension or extensions of the completion date as may be deemed fair and reasonable by the Engineer-in-charge and such decision shall be final and binding."*
>
> *xx xx xx xx xx*

11. In view of the above, the award of the arbitrator in violation of the bar contained in the contract has to be held as one beyond his jurisdiction requiring interference. Consequently, this appeal is allowed in part, as follows:

> *(a) The judgment of the High Court and that of the civil court making the award the rule of the court is partly set aside insofar as it relates to the award of Rs. 9.5 lakhs under Claim 1 and the award of interest thereon.*

> *(b) The judgment of the civil court as affirmed by the High Court in regard to other items of the award is not disturbed."*
>
> *(Emphasis supplied)*

34.2. Similarly in the case of ***Ramnath International*** (supra), reliance has been placed on paragraphs No.11 to 20, wherein it is *inter alia* held clause 11(c) of the GCC is a clear bar to any claim for compensation for delay in respect of which extensions had been sought and obtained. The Hon'ble Supreme Court held that such a clause amounts to a specific consent by the contractor to accept extension of time alone and satisfaction of claims for delay and not to claim any compensation.

34.3. Similarly in the case of ***Rajasthan State Mines and Minerals*** (supra) wherein reliance was placed on paragraphs No.21 to 23, the same are reproduced as under:

> *"21. Despite the admission by the contractor, it is apparent that the arbitrator has ignored the aforesaid stipulations in the contract. In the award, the arbitrator has specifically mentioned that he has given due weightage to all the documents placed*

before him and has also considered the admissibility of each claim. However, while passing the award basic and fundamental terms of the agreement between the parties are ignored. By doing so, it is apparent that he has exceeded his jurisdiction.

22. Further, in the present case, there is no question of interpretation of clauses 17 and 18 as the said clauses are so clear and unambiguous that they do not require any interpretation. It is both, in positive and negative terms by providing that the contractor shall be paid rates as fixed and that he shall not be entitled to extra payment or further payment for any ground whatsoever except as mentioned therein. The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. It is true that arbitration clause 74 is very widely worded, therefore, the dispute was required to be referred to the arbitrator. Hence, the award passed by the arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibit entertaining of the claims made by the contractor. In the letter dated 5-2-1985 appointing the sole arbitrator, it has been specifically mentioned that agreement dated 14-5-1981 was executed by and between the parties and that the contractor has raised the claims as mentioned in the letter dated 7-9-1983 which was denied by the Company and at the request of the contractor, the sole arbitrator was appointed to adjudicate the claims made by the contractor vide his letter dated 7-9-1983. This reference to the arbitrator also clearly provides that reference was with regard to the dispute arising between the parties on the basis of the agreement dated 14-5-1981. It nowhere indicates that the arbitrator was empowered to adjudicate any other

claims beyond the agreement between the parties. No such issue was referred for adjudication. Even the arbitrator in his interim award has specifically stated that he was appointed to adjudicate the disputes between the parties arising out of the agreement dated 14-5-1981."

(Emphasis supplied)

35. The learned Sessions Judge has also referred to the judgment in the case of ***Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93]***, wherein in paragraph No.46 of the impugned order, he has held as under:

"46. In another decision reported in (1991) 4 SCC 93 (Associated Engineering Company v. Government of Andhra Pradesh and another) judgment of Hon'ble High Court was confirmed by the Hon'ble Supreme Court, in which the Hon'ble High Court had held that no compensation is payable when three is a specific bar in the contract. It is held in para 8 that

> *"...In the absence of any provision in the contract, the arbitrator had no jurisdiction to make an award for escalation. This contention of the government was accepted by the High Court..."*

and the same is upheld by the Hon'ble Supreme Court in para 24 and 25 as under:

> *"24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has traveled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.*
>
> *25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award..."*

36. In ***C.H.Ramalinga Reddy*** (supra), the Hon'ble Supreme Court has in paragraph No.18, held as under:

> *"18. The judgment in Sudarsan Trading Co. v. Govt. of Kerala [(1989) 2 SCC 38 : (1989) 1*

SCR 665] does not assist the appellant, if fully read. It was there observed that there are two different and distinct grounds involved in many cases concerning the setting aside of arbitration awards. One is that there is error apparent on the face of the award and the other is that the arbitrator exceeded his jurisdiction. In the latter case the court can look into the arbitration agreement but in the former it cannot. An award may be set aside on the ground that the arbitrator had exceeded his jurisdiction in making it. In the case before us, the arbitrator was required to decide the claims referred to him having regard to the contract between the parties. His jurisdiction, therefore, was limited by the terms of the contract. Where the contract plainly barred the appellant from making any claim, it was impermissible to make an award in respect thereof and the Court was entitled to intervene."

(Emphasis supplied)

37. In ***Steel Authority of India Ltd. v. J.C. Budharaja, Govt. and Mining Contractor [(1999) 8 SCC 122]***, the Hon'ble Supreme Court has in paragraphs No.15 and 17, stated as under:

"15. Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the Contractor is required to arrange his working programme

accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the Contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of the Government or other reasons beyond the control of either the Corporation or the Contractor. Obtaining permission from the Forest Department to carry out the work in the wildlife sanctuary depends on statutory regulations. Clause (vi) of the general conditions of the contract also provides that failure or delay by the Corporation to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation due to any other cause whatsoever would not entitle the Contractor to damage or compensation thereof; in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that the arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate

departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs 11 lakhs and more for the alleged lapses or delay in handing over the work site is, on the face of it, against the terms of the contract.

xx xx xx xx xx

17. It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For

this limited purpose reference to the terms of the contract is a must. Dealing with a similar question this Court in New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corpn. [(1997) 11 SCC 75] held thus: (SCC p. 79, para 9)

> *"It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account." "*
>
> *(Emphasis supplied)*

38. Same is the position in the judgment of ***Union of India v. Chandalavada Gopalakrishna Murthy and others [(2010) 14 SCC 633]***, wherein the following has been stated:

> *"7. A similar question raised before this Court was considered by a three-Judge Bench of this Court in Ch. Ramalinga Reddy v. Superintending Engineer [(1999) 9 SCC 610] . This Court held in that case that if the contract is extended under the terms of the contract, compensation cannot be awarded by the arbitrator. The aforesaid judgment has been followed in another decision of this Court*

in Northern Railway v. Sarvesh Chopra [(2002) 4 SCC 45]

39. The learned Sessions Judge was of the view that, the Hon'ble Supreme Court in paragraph No.15 of ***Sarvesh Chopra*** (supra) on which reliance has been placed by the learned counsel for the appellant, has considered Sections 55 and 56 of the Contract Act, which deals with contract in which time is the essence of the contract and held that it appears in Indian law, though the contractor had 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 if the contractor had intimated the employer about such a claim and employer accepts performance in spite of such notice by the contractor. The Sessions Judge's view is, this finding of the Hon'ble Supreme Court do not appear to be *ratio decidendi* of the decision in ***Sarvesh Chopra*** (supra) as the point was to whether contractor can claim delay compensation if he has put the employer to notice while seeking extension was not the point involved in the case and is not the basis for decision in ***Sarvesh Chopra***

(supra). In paragraph No.59, the Sessions Judge after referring to various judgments of those relied upon by Sri. Kamath, which we have reproduced above, held that the decision of ***Sarvesh Chopra*** (supra) will not entitle the contractor to claim compensation in violation of specific terms of the contract prohibiting such claim of the contractor:

> *"59. As per the decisions, starting from Continental Construction Company till Wig Brothers, relied by the plaintiff, when contract specifically bars payment of compensation to the contractor for delay caused by the employer, the contractor is not entitle for compensation and such clause in the contract cannot be ignored while passing the award and such award in violation of the terms of the contract, as held in Wig Brothers is beyond the jurisdiction of the arbitrator and it requires interference. The decision in Sarvesh Chopra is on different facts and is not on the point involved in the present case. Learned Arbitral Tribunal without going through the facts of the said decision, has erroneously applied the same to the present case, which is not permissible. As held in Wig Brothers, such finding of the learned Arbitral Tribunal by ignoring or violating terms of contract is a jurisdictional error which requires interference. Even I also do not permit such claim for compensation in the decision in Chandalavada*

Gopalakrishna, referred above, it is stated in para 7 that, in the decision in Ramachandra Reddy and even in Sarvesh Chopra it is held that compensation cannot be awarded by the Arbitrator if contract is extended under the terms of the contract. Therefore, decision in Sarvesh Chopra as considered in subsequent decisions by the Hon'ble Supreme Court, including decision in Nicholas Piramal India Limited, do not support such claim for compensation. Moreover, even in Sarvesh Chopra decision which is the basis for finding of the arbitrator, the decision in Ramalingareddy and also the decision in State of UP v. Associate Engineer and Continental Construction are all referred with approval. Therefore the decision in Sarvesh Chopra will not entitle the contractor to claim compensation in violation of specific terms of the contract prohibiting such claim for compensation."

40. We are in agreement with such a conclusion of the Sessions Judge. As stated above, the Hon'ble Supreme Court in ***Sarvesh Chopra*** (supra), has in paragraphs No.11 to 13, referred to judgments of the Hon'ble Supreme Court i.e., ***Continental Constructions Co. Ltd.*** (supra)***, C.H.Ramalinga Reddy*** (supra) and ***Associated Engg. Co. v. Govt. of A.P.*** of the Andhra Pradesh High Court on the identical issue in view of

specific clause in the contract disentitling the contractor from claiming damages and held, such a claim cannot be made.

41. In fact, in paragraph No.10 of ***Sarvesh Chopra*** (supra) also, reference has been made to various judgments on identical issue. It may be stated here that, the Hon'ble Supreme Court has referred to those judgments with approval on the proposition of law which arises therein and also in this case. Even otherwise, the conclusion of the Hon'ble Supreme Court in paragraph No.15 being an *obiter dicta* of the Hon'ble Supreme Court and binding on the Courts below including the Arbitral Tribunal, then also it needs to be seen, whether (iii) of the situation highlighted by the Hon'ble Supreme Court when a contractor can claim damages has been satisfied. We are of the view the said situation has not been satisfied in this case. Before we give our finding on the same, it is necessary to state that, the Arbitral Tribunal in paragraphs No.27.7 to 27.16 has dealt with the five extensions which were sought by the appellant and granted by the respondent. It may be stated here that in all the five

extensions granted, there was no claim for compensation. It was only for price variation. The respondent had in first extension, granted the extension without LD, but with price variation clause. It is also noted that subsequent to allowing the extension of time, the appellant in further communication(s), sought additional cost/compensation. This has been interpreted by the Arbitral Tribunal to mean that, it is an admitted fact notices have been given by the appellant to claim compensation at the time of accepting extension of time by the appellant and as such, the bar under clause 2.2 and 8.3 shall not be applicable. This finding according to us, is untenable. This we say so for the following reasons:

i. The appellant has, on each occasion, accepted the extension of time without compensation/damages.

ii. The appellant has acted upon the extension of time.

iii. Having acted on the extension of time, could not have submitted request for damages/compensation on a subsequent date.

iv. The respondent having accepted the performance by the appellant with no compensation/damages, further request for compensation/damages is not contemplated.

So it follows, the finding of the Arbitral Tribunal that the appellant has given notice to claim compensation at the time of accepting extensions, is clearly untenable for the above reasons. Further notice, which is contemplated is the notice for extension of time and not a notice after accepting the extension of time. This is for the simple reason, the employer i.e., the respondent must know on what grounds the extension is being sought. In this case the extensions having been granted without compensation/damages, any subsequent request for compensation/damages shall not be maintainable. Any inaction of the respondent on such request has no effect in law. It is the decision of the respondent to give extension of time with price variation, which will bind the parties. It follows, the clause (iii) of paragraph No.15 of ***Sarvesh Chopra***'s judgment (supra) for the appellant to claim damages/compensation has not been satisfied.

42. Sri. Krishnan has also relied upon the judgment of the Hon'ble Supreme Court in the case of ***NTPC Ltd.*** (supra) in support of his submissions by relying on the judgment in the case of ***Sarvesh Chopra*** (supra). Suffice

to state, the Hon'ble Supreme Court has, in paragraph No.25 of the judgment, has stated as under, as such the judgment shall not help the case of the appellant:

> *"25. In NorthernRailway v. Sarvesh Chopra [Northern Railway v. Sarvesh Chopra, (2002) 4 SCC 45] , the Court was seized of a matter pertaining to a reference to arbitration. The considerations of a court in such a matter are distinct from those of a court in appeal over the final award of an arbitrator. Be that as it may, in that case, a contractual clause between the parties specifically excluded any claims of the contractor arising out of delays attributable to the opposite party, which is not the case in the present matter.*

43. Similarly the judgment in the case of ***Njattumkalayil Construction Company*** (supra), specifically paragraphs No.12 and 13, is/are distinguishable on facts and in view of our findings above.

44. Even the judgment in the case of ***Mohammad Kunju*** (supra) is distinguishable on facts and in in view of our findings above.

45. Even the judgment in the case of ***Vishva Shanti Builders (India) Pvt. Ltd.*** (supra) is distinguishable on

facts as can be seen from paragraph No.135 of the judgment and in view of our findings above. We reproduce paragraph No.135 as under:

> *"135. In the present case, it has been held by the learned Arbitrator that majority of the delay was been caused by the petitioner. The reasoning for the same is borne out of the record, as recorded in paragraph 21.20.1-21.20.4 (which records the submissions of the parties) as well as the documents on record. It is further corroborated by the fact that UOI did not levy any compensation of VSB, despite the fact that the contract empowered it to do so. The extension was granted for reasons being "beyond the contractor's control". Before the Arbitrator, UOI was not able to justify why it did not levy compensation on VSB for extensions. Hence, the Arbitrator was of the view that majority of the fault for delay was attributed to UOI. Relying upon judicial precedents, he observed that where no fault could be attributed to the contractor, granting amount towards loss of profit and overhead could not be faulted with. The Arbitrator has also relied upon the reasoning under Claim No. 15 to state that since VSB had put UOI to notice that it would claim damages due to extension, and UOI had granted the extension and continued the work without replying to the said notice, the same would make the prohibitory clause redundant,*

especially in light of Sarvesh Chopra (supra). I find no infirmity in the said reasoning."

(Emphasis supplied)

46. Insofar as the judgment in the case of ***Chiraj Stock & Security Pvt. Ltd.*** (supra), the judgment is distinguishable on facts and in view of our findings above.

47. Similarly, the judgment in the case of ***Bright Construction*** (supra) is distinguishable on facts in view of paragraph No.8 of the judgment.

48. Insofar as reference to ***K.N. Sathyapalan*** (supra), is concerned, suffice to state, in view of our findings above, the judgment is distinguishable on facts.

49. At this stage, we may reproduce the findings of the learned Sessions Judge on extension sought, in paragraph No.60 as under:

"60. Apart from this, in the decision in Sarvesh Chopra in para 15 (iii) it is mentioned that, if 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 inspite of notice, then the contractor is entitle for compensation. Even if this observation is held to be applicable to present

case, same is not properly applied by the Arbitral Tribunal. On looking to EOT sought by claimant on 5 times, only in EOT-1, claimant contractor had stated that he is seeking extension of time and that cost implication would be submitted to the employer later. In application for second EOT dated 24/3/2012, contractor had requested for grant of EOT as per clause 8.4 of GCC with price variation clause. In EOT 3, 4 and 5 also no notice of reserving claim for compensation was given. Employer is not informed that contractor will be seeking EOT subject to payment of damages or compensation in EOT 2 to 5. Even first EOT application stating that the losses are not attributable to the contractor and they are beyond the control and only after BMRCL fulfilled the obligation, they will be seeking final extension along with financial implication, cannot be said to be a clear notice of the contractor seeking escalation of rate or compensation for delay. On reading request for EOT 1 to 5, none of them are putting specific condition that only if compensation for delay is given, they would proceed with the work and they are seeking extension of time with the condition that escalation of rate or compensation for delay would be made by the employer. Therefore, this requirement of putting the employer on notice about such claim for compensation itself is not clearly present in any of the applications given for EOT. Though there is some reference to the financial implication in EOT-1, EOT-2 to 5 do not contain any

such reservation of making claim for compensation. However, learned Arbitral Tribunal has mentioned that in EOT-2 also there is notice by the employer which is not found in the EOT application. Regarding EOT 3 to 5 even the Arbitral Tribunal has not mentioned in the award that there is such claim for compensation reserved by the contractor. Apart from this, after receiving request for EOT, GC and the plaintiff have considered the contention of the contractor and have given EOT, but while doing so, in none of the documents of EOT, employer had agreed to pay any compensation for the financial implication on the contractor and it is specifically mentioned that extension of time is given under clause 8.3 or that other conditions of contract continues to apply. Clause 8.3 do not permit compensation to the claimant. Even from this angle, even if the decision in Sarvesh Chopra is said to be applicable, requirement mentioned in the decision is not complied in. the present case. For all these reasons, decision in Sarvesh Chopra cannot be applied to the present case and even. requirement mentioned in that decision are not present, in this case."

(Emphasis supplied)

50. We agree with the conclusion of the learned Sessions Judge that, in none of the letters granting

extension of time, the respondent had agreed to pay the compensation.

51. Sri. Krishnan had raised an issue of clauses 2.2 and 8.3 are void, being in violation of Sections 23, 55 and 73 of the Contract Act. Though the said aspect had not been dealt with by the Arbitral Tribunal, the learned Sessions Judge did deal with the issue and held that such a plea was not raised before the Arbitral Tribunal. According to this Court, assuming such a plea was raised, the same would not be sustainable in law. This we say so because, the appellant having accepted the said clauses of the GCC without any demur and executed and contract and moreover it has not been shown to us that declaration that the clauses are void has been sought in the claim petition, the prayer to hold clauses 2.2 and 8.3 as void/unconscionable could not have been/cannot be considered, nor granted by the Arbitral Tribunal/Sessions Judge or by this Court. The reliance placed by Sri. Krishnan on the judgments of ***Simplex Concrete Piles Limited*** (supra), ***MBL Infrastructures Limited*** (supra) and ***All India Power Engineer Federation*** (supra) shall

have no applicability to the facts of this case. The paragraph No.62 of the Sessions Judge order dealing with this issue is reproduced as under:

> *"52. In one more decision of Hon'ble Supreme Court in Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited, reported in (2010) 13 SCC 377, Hon'ble Supreme Court in para 7 has held by considering the relevant clauses of the contract that,*
>
> > *"62. The learned counsel for the defendant by referring to the decision in All India Power Engineer Federation and others v. Sasan Power Limited reported in (2017) 1 SCC 487 has argued that Contract barring claim for compensation which is inconsistent with Section 73 of the Contract Act itself is not effective and is to be ignored. In this decision the Hon'ble Supreme Court in para 17 has held that the terms of an instrument of pledge, such as there is in this case, giving an unqualified power of sale, are inconsistent with the provisions of Section 176 of the Contract Act, and, therefore, by virtue of Section 1 of that Act must give place to the express provisions of the Act. The learned counsel has argued that when there is specific section in contract in providing compensation like Section 73, 63 and 55, clauses like 2.2 and 8.3 of the GCC barring contractor from claiming compensation are void. This point was not raised before the learned Arbitral Tribunal and cannot be permitted to be raised for the first time in this suit. Moreover in most of the decisions*

> *referred above, similar clauses of the contract were involved and in none of those decisions, including decision in Sarvesh Chopra, validity of such clauses are questioned and such clauses are not held to be void. Hence this contention of the learned counsel which is raised for the first time in the course of arguments cannot be accepted."*

52. Insofar as the plea of Sri. Krishnan by stating that once the Arbitrator has interpreted the clauses of contract by taking a plausible view, the interference by the Section 34 Court is uncalled for, by relying on the judgments of the Hon'ble Supreme Court in ***Atlanta Limited*** (supra)***, Haryana Tourism Limited*** (supra)***, Associated Builders*** (supra)***, Ssangyong Engineering & Construction Co. Ltd.*** (supra)***, Warsaw Engineers*** (supra) is concerned, there is no dispute on the proposition of law as advanced by Sri. Krishnan. But at the same time, it is also settled law that the Tribunal is required to decide the dispute in accordance with the terms of the contract. The above finding of ours clearly show that there is a departure from terms of the contract, which is a ground for interference. In this regard, we may

state, the learned Sessions Judge has held, the award in respect of Issue No.1(d) for an amount of Rs.28,74,82,181/- is against specific terms of contract and also binding decision of the Hon'ble Supreme Court and as such, a jurisdictional error has been committed by the Tribunal and is against the fundamental policy of Indian law and therefore against public policy and requires to be set aside. The said conclusion of the Sessions Judge is in conformity with the law laid down in ***Associate Builders v. DDA*** (supra) wherein, in paragraphs No.27 and 31, it is stated as under:

> *"27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*
>
> *xx xx xx xx xx*

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or
(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse."

53. We may also refer to paragraph No.36 of the judgment of the learned Sessions Judge, wherein he has stated as under:

"36. The learned counsel for the defendant has argued that the finding of the tribunal is by relying on the decision of Hon'ble Supreme Court and also is based on facts and the evidence placed before it and therefore as held. in this decision, same cannot be interfered. The learned counsel has also referred to Section 28(3) of the Arbitration & Conciliation Act which has been considered in para 32 of this judgment. As rightly submitted by the learned counsel, as per Section 28(3) as appearing earlier, the tribunal was to decide the matter in accordance with the terms of the contract, but after amendment, tribunal is obliged to take into account the terms of the contract. Therefore, there is a serious departure

> *from earlier requirement of deciding the matter in terms of the contract and now the tribunal is required to take into account the terms of the contract. This is so held in the decision of Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India, reported in (2019) 15 SCC 131."*
>
> *(Emphasis supplied)*

54. Though Sri. Krishnan has referred to the other judgments in the cases of ***Atlanta Limited*** (supra) and ***Haryana Tourism Limited*** (supra) on the proposition of scope of challenge under Sections 37 and 34 of the Act of 1996 is limited, in view of our conclusion above and also reference made to the judgment in the case of ***Associated Builders*** (supra), wherein the Hon'ble Supreme Court has reiterated the scope of Section 34 of the Act of 1996, need is not felt to deal with the said judgments. Sri. Krishnan has also referred to the judgment in the case of ***Videsh Sanchar Limited*** (supra) in respect of justification for grant of damages on the ground of delay. In view of our conclusion above, the issue does not fall for consideration and hence, the judgment has no relevance. Insofar as the judgment in

the case of ***Padma Sundara Rao*** (supra) is concerned, the same is relied upon by Sri. Krishnan to contend that each precedent must be looked into based on the context. There is no dispute on the proposition.

55. Insofar as the judgment in the case of ***Municipal Corporation of Delhi Vs. Gurnam Kaur [(1989) 1 SCC 101]*** is concerned, there is no dispute on the proposition laid down therein.

56. In view of our discussion above, we are of the view that the challenge by the appellant to the order dated 28.10.2022 passed by the learned Sessions Judge in Com.A.S.No.141/2018 is without merit.

The appeal is ***dismissed***.

No costs.

Sd/-
(V KAMESWAR RAO)
JUDGE

Sd/-
(S RACHAIAH)
JUDGE

KGR / PA