

DELHI HIGH COURT

Jagan Nath Phool Chand, M/s.

Vs.

Union of India, (Delhi)

F.A.O. (OS). No. 22 of 1976

(Rajinder Sachar and J. D. Jain, JJ.)

6.4.1981

JUDGEMENT

J. D. JAIN, J.

1. This appeal arises out of order of the learned single Judge dated 15th April., 1976, whereby he held that only a couple of disputes between the parties were referable to arbitration under Clause 64 of the General Conditions of Contract Regulations and Instructions (for short General Conditions) while the rest of the disputes fall within "excepted matters" and as such beyond the scope of the arbitration. Thus, he has referred only two disputes out of many for adjudication to an arbitrator to be appointed by the respondent in accordance with the arbitration clause within two months from the date of the said order.

2. The appellant-firm entered into a contract with the respondent-Union of India (Northern Railway) for execution of "earth work in left guide bund and approach bank of 2nd Yamuna Bridge etc." vide Accepted Tender dated 17th/21st Nov., 1961 and followed up agreement No.6/GAL dated 22nd Aug., 1962. The work was commenced on 28th Nov., 1961 and was completed by 20th Aug., 1962. Even measurements were taken by 24th Aug., 1962. However, certain disputes arose between the parties and the petitioner-appellant called upon the General Manager (Northern Railway)-respondent No.2 to appoint an arbitrator in terms of the General Conditions vide letter dated 27th Apr., 1966 (Ex. P-1) and some correspondence ensued between the parties to which We shall presently advert and a counter-claim was made by the respondent against the petitioner-appellant. Since the respondent took up the stand that as most of the matters in dispute fell within the ambit of the term "accepted matters" as described in Clause 63, the same could not be referred to arbitration. Under the

circumstances, the petitioner-appellant moved an application under Sections 8 and 20 of the Arbitration Act (hereinafter referred to as the Act) with the prayer that the arbitration agreement be directed to be filed in Court and the disputes between the parties be referred to the arbitrator to be appointed in terms of the reference clause.

3. The principal controversy between the parties centers round the contention as to whether the disputes enumerated by the appellant in his letter dated 27th Apr., 1966, Ex. P-1, as well as in legal notice dated 27th July, 1970, Ex. P-3, are covered by the expression "excepted matters". The submission made by the learned counsel for the appellant is twofold. In the first instance, he has made a valiant effort before us to bring home the point that notwithstanding the use of aforesaid expression in Clause 63, the arbitration clause viz. Clause 64 of the General Conditions is couched in very wide and comprehensive language So as to cover all kinds of disputes arising between the parties in relation to or concerning the contract in question especially when the term "excepted matters" has nowhere been defined and there is no decision as such by the Railway Authorities on any of the disputes listed by the appellant. In order to provide a perspective for proper appreciation of the points raised, it would be necessary to set down the said clauses:

"64(1). Demand for arbitration- In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties, on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such case, but except in any of the excepted matters referred to in Clause 63 of these conditions the Contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference, and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration."

(emphasis supplied)

4. No doubt the words of this clause are wide enough to encompass the disputes

which have arisen between the parties but for clear exclusion of what has been termed as "excepted matters" from the purview of arbitration. The words underlined above clearly underscore the importance of "excepted matters" as referred to in Clause 63. That takes us back to Clause 63.

"63. Matters finally determined by the Railway- All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions, classification, measurements, drawings and certificates with respect to any matters the decision of which is specially provided for by these or other special conditions, given and made by the Railway, or by the Engineer on behalf of the Railway, are matters which are referred to hereinafter as "Excepted Matters" and shall be final and binding upon the contractor and shall not be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without Appeal."

5. On a plain reading of this clause, it is manifest that it is composed of two parts. Under its first part, all disputes and differences of any kind whatsoever have to be referred by the contractor to the Railway and the latter is supposed to decide and notify his decisions thereon in writing within a reasonable time. However, having regard to the phraseology of its second part, all such decisions are not binding and they can be challenged before the arbitrator on demand for arbitration being made in terms of Clause 64(i) (supra). As the language of the second part of this clause goes, only those decisions, directions, classifications, measurements, drawings and certificates with respect to any in, matter the decision of which is specially provided for either in the General Conditions or in the Special Conditions of Contract etc. have been called "excepted matters" and have excluded from the jurisdiction of the arbitrator. Further, the second part of this clause clearly confers finality to such decisions and the same cannot be called in question or set aside on any ground whatsoever, even no appeal is provided for against the same. Hence, the arbitration clause despite its being very widely worded and comprehensive enough to embrace all kinds of disputes which may arise between the parties out of or in relation to. the contract in

question does exclude "excepted matters" and by no stretch of reasoning, the same can be said to be covered by the arbitration clause. As a necessary corollary it would follow that the disputes falling within the ambit of "expected matters" are not referable to arbitration and even if the same are referred for any reason, say, oversight or inadvertence on the part of the parties etc. the arbitrator will not be vested with any jurisdiction to adjudicate upon the same. Needless to say that the Jurisdiction of an arbitrator to hear and decide the disputes springs from and is circumscribed by the agreement of arbitration itself and he cannot assume jurisdiction which does not vest in him there under.

6. The proposition of law as enunciated in Halsbury's Laws of England, 4th Edn., Vol. IV. in various paras, may be called at under:

Para 1209

"Conclusiveness of a final certificate - Except in cases where there is an arbitration clause entitling an arbitrator to review the decisions of the architect as to the amount due or as to whether the works are in accordance with the contract, or where the architect is disqualified from certifying or where the certificate may otherwise be dispensed with, the final certificate will be conclusive.Where the certificate has been given within the jurisdiction conferred on the architect or engineer it cannot be attacked on the ground that the certifier was mistaken or that the certificate is unreasonable." Para 1215

"In certain case, despite as arbitration clause, on the proper construction of the contract to the decisions of a certifier will not be subject to review. Thus where matters left by the contract to the decision or determination of the engineer were excepted from the arbitration clause, it was held that an engineer's certificate of completion and satisfaction was binding."

(emphasis supplied)

Again in para 1298, the learned author states;

"Where the arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters except by agreement, and, in the absence of an allegation of fraud, neither the Court nor the arbitrator has jurisdiction to review the determination of the architect as to those matters.

On the other hand, where there is no express restriction of the scope of the arbitration clause, the jurisdiction of the arbitrator does not apparently extend, to review the correctness of measurements and valuations where they are made conclusive between the parties, or conditions precedent to a right payment,"

7. The position has been further explained in para 1328 in the following words:

"Whilst acting as a quasi-arbitrator the architect must act fairly. When he is certifying the architect is acting in an independent capacity, but in an administrative rather than a judicial capacity."

8. In re: Meadows and Kenworthy, (1897) Hudson BC Vol. 2, 265 H.L., the contract provided that disputes touching any matter or thing arising out of a contract "unless provided for in the foregoing clauses" should be referred to arbitrator. The previous clause provided that extra work should be measured and valued and certified for by the architect and the amount added to or deducted from the Contract sum. The contractor was dissatisfied with the architect's valuation of the extras and sought to refer the matter to arbitration. It was held that the dispute was one of the matters excepted from the arbitration clause. (See Hudson's Building and Engineering Contracts. 9th Edn.. page 324).

9. Similarly in *Borough of Stratford v. J.H. Ashman Ltd.*, the arbitration clause provided reference of all disputes and differences to arbitration "if not otherwise distinctly provided for by any of the foregoing conditions". It was held that the final certificate was conclusive as to the sufficiency of the works.

10. Only recently a Division Bench of this Court to which one of us (Sachar J.) was a party has taken the same view. (See F.A.O. (OS) No.106/80 decided on 31st Oct., 1980). Reference may be also made with advantage to *the Chief Administrator. Dandakaranya Project v. Prabartak Commercial Corporation Ltd.*, which deals with subject fairly exhaustively. Adverting to Clauses 13(a) and 14 of the contract in the said case, the learned Judges observed (at p.162):

"On the proper construction of the contract, the matters left to the decision of the Superintending Engineer under Clause 13-A, were not subject to review, despite the arbitration clause. Clause 14. The matters left by the contract to the decision or determination of the Superintending Engineer were expressly excepted from the arbitration clause. The reference of the alleged dispute, when there was none to the arbitrator under Section 20 of the Arbitration Act, was,

therefore, clearly invalid."

11. We are in respectful agreement with the view expressed in these cases. Indeed the rationale behind the exclusion of certain decisions and measurements etc. made by the Engineer or the Railway from the arbitration clause and conferring finality and conclusive-ness on the same is clearly discernible, it is that in matters like these special skill and knowledge of technical nature is involved. Moreover, these measurements and classifications etc. must be carried out while the work is still in progress or has been just completed so as to ensure authenticity and accuracy about the same. Surely, the primary evidence of the same may well be destroyed and may not survive ravages of time after the forces of nature have their unbridled play over a long period. That certainly explains why the decisions of the Railway on certain matters have been kept out of the scrutiny by the arbitrator who may come into picture much after the disputes have arisen.

12. The learned counsel for the appellant has placed reliance on *M.A. Mistry's v. Union of India*.⁴ *Shalimar Paints Limited v. Om Parkash Singhania*. and two Bench decisions, of this Court in *Union of India v. M/s. Hazari Lal Sushil Kumar*, decided⁵ on 12th March, 1980 and *Mrs., Sushila Seth v. State of Madhya Pradesh*,⁶ However, even a cursory glance through the same will leave no room for doubt that they are of no assistance to the appellant. Apart from the fact that all these cases are distinguishable on peculiar fact's of each case they hardly have any bearing on the point in issue. In *M.A. Mistry's* case (supra), the learned Judge (T.P.S. Chawla. J.) found that the warranty clause construction of which was involved in the whole controversy between the parties did not provide for a decision as envisaged in the main arbitration clause as no disputes were decided. Of course, the learned Judge rightly observed that:

"From the context in which the word occurs in that clause, it would seem that the decision contemplated is in respect of "any question, dispute or difference". Those are the "events" which activate the clause: so, also the exception. If the exception were not made, the matter which is the subject of the exception would be capable of reference to the arbitrator."

13. Hence, this authority far from helping the appellant supports the view we are inclined to take.

14. In Calcutta case it was found by the learned Judge that the arbitration clause

was very wide and no such exception in respect of any dispute was contained therein, As for Hazari Lal's case (supra) it was observed by the learned single Judge that the appellants had failed to show what were those "excepted matter" which had been provided specifically in the Special Conditions of the Contract so as to bar a claim for arbitration. Further their Lordships found that "there are no adjudicative facts placed on the record which can enable us to come to the conclusion whether all or any of the claims referred to arbitration are with regard to excepted matters". Mrs. Sushila Seth's case (supra) too has no relevance to the case in hand and the only question there was as to whether on the peculiar wording of Clause 25, which was said to be the reference clause, it amounted to an agreement of arbitration or not. Thus the decisions in all these cases turn on their peculiar facts and circumstances and are of no avail to the appellant.

15. To sum up, therefore, we are of the firm opinion that on a conjoint reading of Clauses 63 and 64 of the General Conditions, "excepted matters" as defined in Clause 63 fall outside the domain of the arbitrator's jurisdiction because in respect of such matters there does not exist any arbitration agreement.

16. The next submission made by the learned counsel for the appellant is that the learned single Judge has strayed into grave error by assuming the jurisdiction to decide as to whether the various disputes raised by the appellant fell within the ambit of "excepted matters". According to him, having regard to the phraseology of Clause 64 of the General Conditions of Contract which it of wide amplitude the arbitrator alone is vested with the power to decide any controversy between the parties with regard to the construction or operation of the contract and as such the jurisdiction of the Court to decide what matters fall within the domain of jurisdiction of the arbitrator is impliedly, if not expressly, excluded. Adverting to *Union of India v. Salween Timber and Construction Company*, he has urged that if it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute it must be held that the matter is within the scope of arbitration clause and the arbitrator have jurisdiction to decide that dispute. However, this argument is simply fallacious. The arbitrator by his own finding cannot clothe himself with jurisdiction and in an application under Section 20 of the Arbitration Act, the Court has to see whether there is an arbitration agreement as between the parties and whether the dispute disclosed by the parties is covered by such arbitration agreement. It is

trite that the arbitrator derives his power from the reference which furnishes the source and prescribes the limit of his authority. He cannot enlarge the scope of the reference by construing the agreement in a particular manner. Says Russel in his book 'On The Law of Arbitration', 19th Edn. at page 99:

"It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. It has indeed several times been said bluntly that an arbitrator has no power to decide his own jurisdiction ..."

17. This legal proposition is couched almost in identical words in para 577 of Halsbury's Laws of England, 4th Edition, Vol. II. It is as under:

"As an arbitrator (and subsequently any umpire) obtains his jurisdiction solely from the agreement for his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitations placed on his authority, as for example, a limitation on his right to appoint an umpire. Nor can he confer jurisdiction upon himself by deciding in his own favour some preliminary point upon which his jurisdiction depends. Nevertheless he is entitled to consider the question whether or not he has jurisdiction to act in order to satisfy himself that it is worthwhile to proceed, and an award which expressly or impliedly refers to such a finding is not thereby invalidated."

18. Similarly in *May v. Mills*,⁸ it was observed by Coleridge, J. that:

".... It had always been held that no Court of limited jurisdiction could give itself jurisdiction by a wrong decision, collateral to the merits of the case as to facts upon which the limit to its jurisdiction depended"

19. In *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft chaft Mit Beschränkter Haftung*,⁹ Lord Devlin enunciated the same principle in the following words:

"The arbitrator cannot determine their own jurisdiction. The question which has arisen is: What is the position if the dispute embraced not merely the question whether the contract was validly made or not, which would be in excess of the jurisdiction of the arbitrators to determine, but also other questions which they could properly determine? I think that the answer to that question becomes clear if one bear in mind the fundamental principles which govern the acts of

arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to cease to act, and to refuse to act, until their jurisdiction has been determined by some Court which has power to determine it finally, Nor is it the law that they are bound to go on without investigating the merits of the challenge and determine the matter in dispute leaving the question of their jurisdiction to be held over until it is determined by some Court which had power to determine it. They might then be merely waiting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not. If it became abundantly clear to them that they had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of the sort, then they might well decide not to proceed with the hearing. They are entitled, in short, to make their own inquiries in order to determine their own course of action, but the result of that inquiry has no effect whatsoever on the rights of the parties. That is plain, I think, from the burden that is put on a plaintiff who is suing on an award. He is obliged to prove not only the making of the award but that the arbitrators had jurisdiction to make the award. The principle *omnia praesumuntur* does not apply to proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made that, therefore, it is a valid award. It has to be proved by the party who sues on it that it was made by the arbitrators within the terms of their authority, that it, with jurisdiction. Jurisdiction has to be proved affirmatively."

20. Reference in this context may be also made with advantage to *Smith v. Martin*¹⁰ and *Prem Nath v. Union of India*.¹¹ a Bench decision of Punjab High Court. *Vulcan Insurance Company Limited v. Maharaj Singh*,¹² on which reliance had been placed by the appellant's counsel is of no help to him. It simply says:-

".. ... if the difference which had arisen between the parties was the one to

which the arbitration clause in question applied then the application under Section 20 could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law. The matter was to be left for the decision of the arbitrator."

21. In a way it lends support to the view expressed by us above. Hence, the learned single Judge was perfectly right in holding that the final decision on the question of jurisdiction rests with the law Court and not with the arbitrator. This contention, therefore, is absolutely devoid of any substance.

22. Lastly, the learned counsel for the appellant made a feeble attempt to canvass that the expression "excepted matters" not having been defined in Clause 63 of the General Conditions, it remains quite vague and indefinite. Hence, for all intents and purposes, it is rendered superfluous. However, this argument again ignores the words "the decision of which is specially provided for by these or other special conditions" which are of vital importance and make it abundantly clear that a reference shall have to be made to certain conditions contained in the General Conditions or in the special conditions attaching to a particular contract which provide for a decision by the Railway or by the Engineer on behalf of the Railway and bestow finality and binding nature on the same. So, the mere fact that excepted matters have not been separately catalogued is of no consequence and as shall be presently seen certain conditions of the contract do provide for final decision by the Railway or its Engineer. We shall advert to the same at the appropriate stage while dealing with the various claims lodged by the appellant, one by one.

23. Dispute No.1- This dispute revolves round non-refund of security deposit amounting to Rs. 33,000/- by the appellant. The contention of the respondent-Union of India is that the security amount has already been refunded. Evidently, this gives rise to a dispute regarding the liability of respondent *qua* this amount and the learned single Judge has rightly held that it is clearly referable to arbitration.

Dispute No.2- Payment for earthwork done in the left approach bank and guide bund has been calculated with the shrinkage allowance at 6%, whereas according to the agreement the shrinkage allowance should have been only 4%. This has resulted in extra deduction of earth without any justification. (Vide letter dated 27th Apr., 1966, Ex. P-1, written by the appellant to the General

Manager, Northern Railway)

24. In reply dated 26th Aug., 1967, to the aforesaid letter (Ex. P-1) of the appellant, the respondent took the stand that this was an "excepted matter" as envisaged in Clause 63 (supra). The learned single Judge has upheld this contention and we think rightly so. Clause 45 of the General Conditions provides that the measurements of the works whether in progress or otherwise shall be taken by the Engineer after intimating, date and time on which "on account" of final measurements are to be made, to the Contractor who shall be present at the site and shall sign the results of the measurements to be recorded in the official measurement book as an acknowledgment of his acceptance of the accuracy of the measurement. However, failing the Contractor's attendance the work may be measured up in his absence and such measurements shall, notwithstanding such absence, be binding upon the Contractor whether or not he shall have signed the measurement book; provided always that any objection made by him to any measurement shall be duly investigated and considered in the manner set out below:

Clause 45

"(a). It shall be open to the Contractor to take specific objection to any recorded measurement or classification on any ground within seven days of the date of such measurements. Any re-measurements taken by the Engineer or the Engineer's Representative in the presence of the Contractor or in his absence after due notice has been given to him in consequence of objection made by the Contractor shall be final and binding on the Contractor and no claim whatsoever shall thereafter be entertained regarding the accuracy and classification of the measurement,"

(Emphasis (here underline) Supplied)

25. It is thus manifest that this clause provides for settlement of a dispute between the parties with regard to accuracy and classification of the measurement, in case any specific objection is raised by the Contractor to any recorded measurement or classification and it confers finality on the re-measurements taken by the Engineer in consequence of the objection made by the Contractor. Similarly Clause 22(5) attaches finality to the decision of the Engineer (subject however to appeal to the Chief Engineer). It opens with the words:-

"If any ambiguity arises as to the meaning and intent of any portion of the specifications and drawings or as to execution or quality of any work or material or as to the measurements of the works."

26. A combined reading of these two clauses leaves no room for doubt that the decision of the Engineer or the Chief Engineer in appeal, as the case may be, is final and binding upon the Contractor with respect to the above mentioned disputes.

27. The question for consideration, therefore, is as to whether the instant dispute falls within, any of these categories. The submission of the appellant's counsel is that he is not disputing the accuracy of the measurements of the earth work done and he is simply challenging the percentage allowed for calculating shrinkage. According to the appellant, shrinkage allowance should have been only 4% under the contract and not 6% as calculated by the respondent. On the contrary, the learned counsel for the Union of India has urged that this dispute essentially centers round the measurements and classification of soil inasmuch as shrinkage allowance has to be given keeping in view both these factors. In this context he has invited our attention to Clause 17 of "Standard Specifications" formulated by the respondent and printed in the form of a booklet which are admittedly applicable to the contract in question:

Clause 17

"Allowance for settlement- Profiles for banks will be set out at every 100 feet to provide for wastage and settlement on the under mentioned scale:-

In height of formation-allowance for settlement should be made as follows:-

Bank made of rocky fill	3 per cent of the height.
Bank made of sandy material	4 per cent of the height.
Bank made of fills with considerable clay contents	8 per cent of the height.

28. It further provides that the Engineer will decide on what scale allowance for

settlement shall be set out and shall be at liberty to vary the same during the progress of the work to suit the material met with in the borrow-pits.

29. It is thus crystal clear that the decision has to be taken by the Engineer on the spot after taking into consideration all relevant facts and while determining the quantum of settlement allowance, he has to take into account classification of the soil. In the instant case there is really speaking no doubt as regards the measurements of earth work done in the bank and guide bund and the controversy between the parties clearly centres round the percentage of shrinkage allowance. According to counsel for the appellant it could have been either 4% of the height or 8% of the height but strangely enough the Engineer chose to make an allowance at 6% giving the to a dispute referable to the arbitrator. However, we do not find any merit in this contention. It is for the simple reason that settlement allowance primarily depends upon classification of the soil and it is precisely for the Engineer to determine the same. The earth work was completed at far back as 1966, and it is almost impossible for the arbitrator to adjudicate upon a dispute like this after lapse of nearly 15 year. Indeed that explains why finality has been given in the decision of the Engineer with regard to matters like measurements, classification and quality of work etc. So, we are in agreement with the learned single Judge that this dispute falls within the purview of "excepted matter*" and consequently it is beyond the scope of reference. Surely, it was open to the appellant to challenge the measurement/classification of the soil in accordance with the above mentioned Clauses 45 and 22 and if he has failed to do so, he has to blame himself and none else.

Dispute No.3 - Work was carried out according to the profiles and levels given by the Railway Administration, but the quantities paid to us are much less than recorded in the MBs. approximate quantity of earth work less paid is about 10 lakhs cft. and the amount involved about Rs. 40,000.00.

30. The learned counsel for the appellant stressed that this claim does not call for any fresh measurements and his grievance simply is that he has been paid much less than the quantities recorded in the measurement book of the respondent. If that be so, it is not intelligible how it can be termed as an "excepted matter". Surely, the Department cannot arbitrarily choose to pay for less quantity than that recorded. In case they have any sound reason for doing so, it will be certainly open to the arbitrator to look into the same and adjudicate

upon the dispute. We do not with respect agree with the finding of the learned single Judge that it is an "excepted matter".

Dispute No.4 - According to the specifications, the appellant had to fill the voids with smaller size stones and spawls. The percentage of spawls used in the stone work is about 9% and the quantity of spawls so used is approximately about 2.25 lakhs cft. The appellant should have been paid extra for using spawls as the same involved extra labor but the appellant has not been paid extra on this account.

31. The Department described this item as an "excepted matter" in its letter dated 26th Aug., 1967, Ext.R 4. However, they have not indicated how it is so. The learned counsel for the respondent has urged that essentially it is a matter of measurement with regard to the quantity of spawls used. However, we find that the appellant is not apparently challenging the quantity of spawls used and recorded in the measurement book. Surely if the dispute centres round the percentage or the quantity of the spawls used in the stone work, it would be an "excepted matter", but if the claim merely is that he has not been paid extra for the spawls used, the matter can be examined by the arbitrator. The learned counsel for the appellant has stated at the Bar that he does not challenge the quantities recorded in the measurement books with regard to the same and the only controversy is about non-payment for extra labor involved in using spawls. In this view of the matter, therefore, this will not be an "excepted matter".

Dispute No.5 - There was delay in the acceptance of appellant's tender due to which the working period left at the appellant's disposal was very much reduced. The result was that the appellant had to construct pile bridge twice with a view to facilitating the construction of the work. This has resulted in extra expenditure of Rupees 65,000.00 and the appellant claims the same from the N.R. Administration.

Dispute No.6- If the work had been awarded to the appellant earlier, the necessity of constructing the pile bridge would not have arisen even once and the appellant would not have been forced to install the pile bridge at all. The appellant has suffered a loss of Rs. 1,00,000/- (one lakh) on the construction of the pile bridge and the appellant claims the same from the N.R. Administration.

Dispute No.7- The work was stopped by the cultivators who had cultivated crops in the Nazul land between the river Yamuna and the marginal bund. The

work remained suspended for a week and the appellant had suffered a loss of Rs. 50,000.00 on our labor and establishment. The work was stopped by the cultivators as the land had not been acquired by the N.R. Administration.

32. Claims embodied in disputes 5 and 6 stem from the alleged delay on the part of the respondent in accepting the tender and consequent delay in commencing the work. It is contended that as an inevitable consequence of delay, the appellant had to construct pile bridge twice with a view to facilitate the completion of the work in time. However, the necessity for constructing the pile bridge would not have arisen even once had the vacant site been provided to the appellant in time. As for dispute No.7, the contention is that the appellant was precluded from executing the work by the cultivators who had cultivated crops in the Nazul land between river Yamuna and the marginal bund. The stand taken by the respondent-Union of India is that all these disputes are "excepted matters" inasmuch as decision thereof has been provided for in the conditions of contract. Moreover, it is urged that no claim for damages on the ground of delay is even tenable. Reliance in this context has been placed on Clause 17(3) of the General Conditions which runs as follows:

Clause 17(3)

"Extension of time on Railway Account-In the event of any failure or delay by the Railway to hand over to the Contractor possession of the land necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions of any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefore but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable."

33. On a plain reading, it is manifest that the aforesaid sub-clause simply confers discretion on the Railway to grant such extension or extensions of the completion date, as may be reasonable. So, if at all the decision of the Railway in this respect may be binding. As for the claim for damages resulting from the alleged delay, it is evidently for the arbitrator to adjudicate upon it on a proper construction of the aforesaid clause. It is not for the Court to find as to whether the claim for damages is sustainable or not on the language of the aforesaid sub-

clause. Hence, with respect we do not find ourselves in agreement with the view of the learned single judge.

Dispute No.8 - The appellant had used quarry chips on the slopes of the bank for which no payment has been made to the appellant even as earth work. The appellant is entitled for payment either for earth work or for stone quarry chips and the payment amounts to Rs. 60,000.00. In this connection, it is submitted that as per instructions the appellant had provided stone ballast on the slopes of the bank instead of filling the bank with debris and the appellant is entitled for extra payment-on that account.

34. This dispute too has been held by the learned single judge to be amply covered by Clauses 22(5) and 45 of the General Conditions on the ground that the claim preferred relates to measurements and specifications of the works, but we are not persuaded to accept the reasoning of the learned single Judge, It is for the simple reason that the grievance of the appellant appears to be that he has not been paid either for earth work or for stone quarry chips although he had used quarry chips on the slopes of the banks as per instructions. The claim evidently does not spring from short payment because of controversy regarding measurements etc., it is grounded on non-payment for certain work allegedly done by the appellant. There appears to be no challenge to the measurement of the work done as such. So, both the above-mentioned clause are not attracted in terms to the instant dispute.

Dispute No.9 - The appellant had to bring earth-work from outside the apron for guide bank and the appellant should be paid for the extra lead involved.

35. This dispute too has been held to be an "excepted matter" because it relates to extra work involved in executing the contract which in term involves measurements. However, we with respect do not agree with this interpretation of the claim. As explained by the learned counsel for the appellant, the earth was to be dumped at site after it had been excavated from places called 'borrow-areas' beyond the distance envisaged in the contract. This involved horizontal movement of the loose earth over a longer distance which is styled as 'extra lead'. It is not the contention of the appellant that the measurements recorded in the measurement books are incorrect. He simply states that his claim for extra lead has been altogether ignored. So. it is for the arbitrator to decide whether this is so or not. Strangely the respondent has not even spelt out what the real

nature of the dispute is. Hence, this dispute cannot be treated as an "excepted matter".

36. As a result, we allow this appeal and direct that in addition to the matters already referred to arbitration by the learned single Judge, the disputes 3 to 9 be also referred to the arbitrator for adjudication. The respondent is, however, given three months' time from today to appoint the arbitrator in accordance with the reference clause.

Appeal allowed.

Cases Referred.

1. (1960) NZLR 503,
2. AIR 1975 Madhya Pradesh 152,
3. ILR (1973) 2 Delhi 916,
4. AIR 1967 Calcutta 372
5. F.A.O. (OS) No.26/73.
6. AIR 1980 Delhi 244,
7. AIR 1969 Supreme Court 488,
8. (1913-14) 30 TLR 287,
9. (1953) 2 All England Reporter 1039,
10. (1925) 1 KB 745
11. AIR 1958 Punjab 340,
12. AIR 1976 Supreme Court 287,