

State of West Bengal Vs. Pam Developments Private Limited

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Court : Kolkata

Decided On : Sep-21-2017

Judge : Sanjib Banerjee

Appellant : State of West Bengal

Respondent : Pam Developments Private Limited

Judgement :

IN THE HIGH COURT AT CALCUTTA CIVIL APPELLATE JURISDICTION ORIGINAL SIDE The Honble JUSTICE SANJIB BANERJEE And The Honble JUSTICE SIDDHARTHA CHATTOPADHYAY APO No.63 of 2017 GA No.834 of 2017 With OCO No.1 of 2017 In AP No.736 of 2011 STATE OF WEST BENGAL - VERSUS PAM DEVELOPMENTS PRIVATE LIMITED For the Appellant: Mr Jishnu Chowdhury, Adv., Mr Paritosh Sinha, Adv., Ms Manali Ali, Adv., Mr Arindam Mondal, Adv. For the Respondent: Mr Tilok Bose, Sr Adv., Mr Suman Dutt, Adv., Mr Priyankar Saha, Adv., Mr Amritam Mandal, Adv. Hearing concluded on: September 14, 2017. Date: September 21, 2017. SANJIB BANERJEE, J.

: The treatment of no damage. clauses in a works contract falls for consideration in this matter. There has been considerable industry on either side in an attempt to bring some clarity on the legal issue in the backdrop of there being no apparent uniformity on the jurisprudential principles governing such aspect in this country.

2. The immediate lis is an appeal from an order passed on a challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996. The State-employer seeks to whittle down the award by attacking the several heads of claim that have been awarded in part or in full by the arbitrator and which passed muster in the first court. The respondent-contractor is a veteran in the field of road construction and a regular litigant. It has a counter-claim for the amounts shaved off from the award by the judgment and order impugned.

3. The appellant issued a work order in favour of the contractor on November 26, 2002 for the widening and strengthening of the Nilganj Santoshpur Duttapukur Golabari Aminpur Road for a stretch of 28.85 km under the Barasat Highway Division of the Public Works (Roads) Department of the State. The work order called upon the contractor to take up the work in consultation with the executive engineer and specified that the time for completion of the job was 12 months beginning December 2, 2002.

4. The completion of the work was delayed by about five months after the stipulated period. Disputes and differences arose between the parties as to the payments due to the contractor, particularly for the extended period of the work.

5. In terms of the arbitration agreement between the parties, such disputes were referred to a retired judge of this court who resigned after 13 sittings, whereupon the reference was taken up by another former judge of this court. After 121 sittings before the second arbitrator, the award was made and published on April 6, 2011. The reference before the second arbitrator had commenced pursuant to an order of this court of April 6, 2006.

6. Apart from the claims of the contractor on account of unpaid bills and security deposit not refunded by the appellant, the contractor claimed damages under several heads on account of, inter alia, loss of profit, idle labour, idle cost of machinery, price escalation and the like. Apart from the nitty-gritties of the arithmetic that the arbitrator was required to work out, the principal legal issue in the reference was whether the clauses of restriction in the agreement between the parties stipulating that there would be no payment on account of price escalation or idle labour or idle machinery or the like, prohibited even the consideration of

such heads of claim or stood in the way of the arbitrator making any award in respect thereof.

7. The arbitrators view on such aspect was somewhat novel. But what is more important is that the sentiment expressed in such view is backed by years of training and experience as a judge and, in effect, is a commentary on the inequitable operation of the restrictive clauses in the backdrop of the conduct of the parties. The arbitrator was persuaded to hold that upon the expiry of the contractual period, a new agreement would be deemed to have been entered into by the parties covering the period of completion and during which period the restrictive covenants in the agreement would not be attracted. Even if there may not be any legal basis to such finding as a whole, what cannot be missed is that the inequity of the situation that presented itself prompted the arbitrator to bypass the formal agreement between the parties altogether.

8. However, the arbitrators view in such regard cannot be accepted and, to such extent, the first court was right in interdicting the award on such count. The most obvious reason why the finding of the arbitrator, that the parties are deemed to have entered into a new contract after the expiry of the contractual period for the purpose of completing the work thereunder, does not appeal is that the disputes pertaining to such period, if they were not covered by the agreement, would also fall beyond the purview of the arbitration agreement contained therein and the entire exercise of the arbitrator would be reduced to a nullity. There are other reasons to disagree with the arbitrator on such score, but, again, the sentiment must be appreciated.

9. It may be profitable at this point to notice the several heads of claim carried by the contractor to the arbitral reference, the amounts awarded under such several heads by the arbitrator and the extent of the surgery on awarded amounts performed by the first court:

SL	Description	No.	Claimed by Contractor	Awarded by the order Arbitrator	Impugned (Amounts in rupees)	Passed by
01.	Loss of business due to the irregular payments/cash flow from the department.	4,24,534	4,24,534	Nil	82,00,000	36,08,000
02.	Hire charges of private land	50,000	Nil	Nil	2,57,000	2,57,000
03.	Reimbursement of cost for	10,500	Nil	Nil	2,57,000	2,57,000

2,69,000 1,18,360 1,18,360 preparing the job mix formulae 04. Cost on account of repair and rectification work on executed W.B.M. work 05. Losses due to Idle Charges a Hot mix plant and other machineries b Crews of the plant and the machineries c Idle labour d Idle on site establishment 06. Losses due to price 3,86,000 88,000 88,000 11,39,770 36,400 36,400 5,17,998 5,17,998 5,17,998 1,76,674 Nil Nil 4,03,106 2,00,000 2,00,000 11,27,342 11,27,342 11,27,342 3,77,826 Nil Nil escalation on the work executed beyond the initial contractual period 07. Work done but measurement not recorded and not paid for 08. Payment due against the 5th R/A & Final Bill 09. Refund of security deposit 10. Interest due from the department for delayed payment 11. Interest from April 10, 2004 18% pa till payment 12% p.a. 12% p.a. till award throughout 18% pa except 10% post pa for award security deposit and final bill paid off before judgment.

12. Costs 11,43,800 5,00,000 3,00,000 10. The arbitrator framed 16 issues, but in course of the discussion on the somewhat inappropriately worded third issue the arbitrator rendered his answer on the legal question pertaining to the restrictive or no-damage clauses in the agreement. The parties did not adduce any oral evidence and invited the arbitrator to deal with the matter on the basis of the documentary evidence exhibited during the reference. The third issue framed by the arbitrator was as follows: Did the claimant execute the project work in terms of the contract signed by the parties?.

11. It may also be noticed that at the 98th sitting (out of the total of 121 sittings), the appellant herein contended for the first time that the arbitral reference was incompetent since the appointment of the arbitrator was illegal. Some time appears to have been expended on such mindless and belated objection but, thankfully, the issue does not appear to have been pressed before the first court and it is not pursued in course of this appeal.

12. In dealing with the third issue, the arbitrator observed that he was required to consider not only the execution of the work but also the consequences arising for admitted non-completion of work within the contractual period and also for work done after that period till completion.

. Accordingly, the arbitrator divided the claims under two broad heads: those arising out of alleged breach of contractual obligation by the respondent within the existence of the contractual period and those arising after the conclusion of the contractual period.

13. The arbitrator noticed that it was a time-bound contract that began on December 2, 2002 and the work thereunder should have been completed by December 1, 2003. He referred to the clause providing for liquidated damages to be imposed on the contractor for every days delay in the completion of the work. He referred to the case of the contractor that by withholding the monthly payments due in terms of clause 8 of the contract the appellant herein had committed a breach. He construed the relevant clause to imply that the engineer-in-charge was obliged to fix a date for the submission of the bills for all the work executed by the contractor in the previous month; for such engineer being responsible to verify the measurement submitted by the contractor; and, for such engineer to adjust the admissible claim within 10 days of the presentation of the bills.

14. On the basis of the material presented in course of the reference, the arbitrator concluded that the appellant herein was clearly in breach by not paying the monthly bills on time. The arbitrator noticed that though time was said to be of the essence of the contract and the contractor was liable to be penalised for his failure to perform the proportionate work within the milestones, no penalty was sought to be levied and no action was taken against the contractor. The arbitrator concluded that there was clear breach of the contract in respect of the payment . The arbitrator went on to observe as follows on the question of the delay in the completion of the work: Since the claimant was prevented from executing the project work in terms of the contract signed by the parties for no fault of its own within the stipulated time it shall be entitled to compensation for the loss sustained by it due to breach of terms of the contract by the respondent (the appellant herein) as shown above. Admittedly, the work was completed about five months after the stipulated period. It is accordingly necessary to decide in what capacity the claimant performed the work after the cessation of the contractual period.

15. Though the finding rendered on the above question posed by the arbitrator may not be the correct position in law that the parties entered into a new contract for the completion of the work such finding does not detract from what the arbitrator earlier held on facts, that it was the appellant herein which was to blame for the work not being completed within the scheduled period.

16. Since the contractor did not challenge the arbitral award in respect of the several heads of claim disallowed by the arbitrator, it is only the heads of claim allowed by the arbitrator that need to be considered here. The four major heads of claim allowed by the arbitrator were on account of loss of business, cost of water bound macadam (WBM), idle charges and price escalation. In addition, the arbitrator made an award for the final bill, for refund of the security deposit, for interest and costs. The security deposit of Rs.11,27,342 has already been refunded and the payment of the amount awarded in respect of the last R/A bill of Rs.2,00,000 has also been simultaneously made by the appellant to the contractor. The sums of Rs.4,24,534 on account of loss of business and Rs.2,57,000 on account of repair of WBM awarded by the arbitrator have been set aside by the judgment and order impugned. The amounts awarded by the arbitrator under the four sub-heads in respect of the claim of idle charges and the amount awarded on account of price escalation on the work executed beyond the contract period by the arbitrator have been left untouched by the judgment and order impugned.

17. Interest at the rate of 12% per annum was provided for by the arbitrator on the principal sum awarded from April, 2004 till the date of the award. The award was made on April 6, 2011. The arbitrator also provided for interest at the rate of 18% per annum on the principal sum awarded till the date of payment. The award of interest at the rate of 12% per annum has not been interfered with in the order impugned. Interest has been awarded by the order impugned on the sum of Rs.13,27,342 (Rs.11,27,342 on account of refund of security deposit and Rs.2,00,000 on account of the final bill that have been paid off) at the rate of 10% per annum from the date of the award till March, 2015. On the remaining amount

as modified, interest has been awarded at 12% per annum till the date of payment by the court of the first instance.

18. Costs awarded of Rs.5,00,000 for the entire arbitral reference for lasting 134 sittings have been reduced to Rs.3,00,000 by the order impugned.

19. In addition to the appellant seeking to support the reduction of the quantum awarded under several heads by the order impugned, the appellant contends that the amounts awarded on account of idle labour and price escalation were without jurisdiction.

20. The parties have referred to several clauses in the contract which apparently prohibit damages to be awarded in respect of certain matters. The appellant asserts that since the arbitrator derives his authority from the agreement between the parties and he is a creature of such agreement, so to say, he could not have overridden the terms of the agreement, insofar as they prohibited certain claims, to either consider the same or make any monetary award in respect thereof.

21. The agreement between the parties is contained in several documents as specified, in their order of precedence, in clause 2 of the special terms and conditions governing the contract. The no-damage clauses and some of the other clauses from the agreement that are relevant for the present discussion are set out: NOTICE INVITING TENDER²⁵ Time/cost over-run and consequent cost escalation for any material, labour, POL etc. will not be allowed.

43. Escalation Payment for Escalation on prices will not be paid. SPECIAL TERMS AND CONDITIONS⁷ Conditions of extended period As per Clause 4 of WBF No.2908 or Clause 5 of WBF No.2911 (ii), as the case may be when an extension of time for completion of work is authorised by the Engineer-in-charge it will be taken for granted that the validity of the contract is extended automatically upto the extended period with all its terms and conditions, rate etc. remaining unaltered, i.e. the tender is revalidated upto the extended period.

13. Extension of time - No claim whatsoever for idle labour, additional establishments, cost of hire and labour charges of tools and plants etc. would be

entertained under any circumstances. The contractor should consider the above factor while quoting his rate.

29. Idle labour No claim whatsoever for idle labour, additional establishment, cost of hire and labour charges of Tools & Plants etc. would be entertained under any circumstances.

39. Timely completion of work Time for completion as specified in the tender shall be deemed to be the essence of the contract.

22. The appellant submits that in the wake of the restrictive clauses as above, the arbitrator could not have made any award on account of loss of business or repair of WBM or idle charges or price escalation.

23. The arbitration agreement between the parties provides as follows: Except where otherwise provided in the contract all questions and dispute relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claimant, claim right, matter or thing whatsoever, in any way arising out of or relating to the contracts designs, drawings, specifications estimates, instructions, orders or these condition or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall referred to the sole arbitration, of the Chief Engineer of the Deptt. should the Chief Engineer for any reason unwilling or unable to act as such arbitrator, such questions and disputes shall be referred to an arbitration to be appointed by the Chief Engineer. The award of the arbitration shall be final, conclusive and binding on all parties to his contract.

24. The appellant refers to a revered text, Hudsons Building and Engineering Contracts (11th ed.) for the recognition therein of how the restrictive covenants prohibiting any claim on damages on certain heads under a works contract have come to be known as no damage clauses. in American legal parlance. Paragraphs

8-217 to 8-219 of the text are placed by the appellant. The following excerpts from such paragraphs may be relevant in this context: (b) No damage. clauses This American expression has been used to describe a type of clause which classically grants extensions of time for completion (so of course negating any liquidated or other damages liability of the contractor) for variously defined delays. including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, that damages or compensation are not to be recoverable therefor.

. a very substantial jurisprudence on the subject has arisen since early times in the United States. Broadly speaking, the American jurisprudence has avoided the effect of these clauses and permitted the contractor to claim in four situations; namely where the delay is of a different kind from that contemplated by the clause, including extreme delay; where the delay amounts to abandonment; where the delay is a result of positive acts of interference by the owner; and bad faith.

25. The appellant refers to three of the judgments noticed in the context in Hudson. In the judgment reported at 117 N.W.2d 46 (Cunningham Brothers, Inc. v. City of Waterloo), it was held that a no-damage clause may be valid but, due to the often harsh results induced thereby, will be strictly construed.. Some of the exceptions to the general rule as to a no-damage clause as noticed in Hudson were also enunciated. In the judgment reported at 274 N.W.2d 304 (Owen Construction Company, Inc. v. Iowa State Department of Transportation), the Supreme Court of Iowa recognised the exceptions to the applicability of a nodamage clause as later reproduced in Hudson. The same exceptions were noticed in a subsequent judgment reported at 300 N.W.2d 112 (Dickinson Co. v. Iowa State Department of Transportation).

26. The appellant refers next to a judgment reported at (2002) 4 SCC45(Northern Railway v. Sarvesh Chopra). At paragraph 14 of the report the Supreme Court noticed the same passage from Hudson as quoted above, including the

recognised American exceptions to the applicability of a no-damage clause. The appellant places paragraph 15 of the report to suggest that the law in this country on such aspect is found therein:

15. In our country question of delay in performance of 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.

27. In that case before the Supreme Court clause 63 of the general conditions governing railway contracts and some of the restrictive clauses contained in the special conditions of the contract fell for consideration. Clause 63 of the general conditions reserved certain matters for the exclusive consideration of the employer and the finality of the decisions thereon by the employer. The relevant restrictive covenants pertained to price and wage escalation, including in force majeure situations, delay in the supply of drawings and designs, claims on account of idle labour and machinery and the like. Such restrictive covenants were categorised in the judgment as no claim, no damage, or no liability clauses.. The matter before the Supreme Court pertained to a petition under Section 20 of the Arbitration Act, 1940. In the relevant petition filed before the Delhi High Court by the contractor, six heads of claim were set out for being referred to an arbitrator for adjudication. A single bench of the Delhi High Court directed only two of the claims to be referred to arbitration as the four others fell within excepted matters. within the meaning of clause 63 of the general conditions. In the appeal arising out of such order, the Division Bench opined that the reference should be on all the heads of claim indicated by the contractor as the four disallowed heads did not fall within the excepted matters.

. In the resultant appeal by special leave, the Supreme Court observed that while deciding a petition under Section 20 of the said Act the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. It was further held that if a matter is excepted from the arbitration agreement, it ought to be excluded from the disputes referred to arbitration. The judgment appears to be the sheet-anchor of the appellants argument.

28. The appellant also refers to the scope of the inquiry and assessment under Section 34 of the Act as recognised in the judgment reported at (2015) 3 SCC49(Associate Builders v. Delhi Development Authority). Paragraph 42 of the report and the various sub-paragraphs thereunder have been placed on behalf of the appellant for the proposition that a contravention of the substantive law of India

would result in the death knell of an arbitral award. and the reference to Section 28(a) of the Act in such context, which mandates that where the place of arbitration is situated in India, the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India.

29. A recent judgment of this bench reported at AIR2017 Cal 110 (Gopal Chandra Mukherjee v. Food Corporation of India) has also been placed by the appellant where the grounds for setting aside an arbitral award under Section 34 of the Act have been summarised in the light of the recent Supreme Court pronouncements thereon.

30. The appellant asserts that in view of the dictum in Sarvesh Chopra, it is only under the three specific situations as enumerated at paragraph 15 of the judgment that a contractor may claim damages on account of any matter which is covered by a no-damage clause in the relevant contract. Thus, the appellant argues, that though, ordinarily, it will be impermissible for an arbitrator to consider a claim in respect of a matter covered by a no-damage clause, but such rule will stand diluted in exceptional cases and any award in respect thereof may only be made if any of the conditions enumerated at paragraph 15 of Sarvesh Chopra is complied with.

31. In the same vein, the appellant suggests that since the very head of claim covered by a no-damage clause would be a prohibited area for the arbitrator to visit, the arbitral award must specifically assign reasons how the prohibition under the agreement between the parties is overcome in a particular situation. The appellant reiterates that the bar cannot be undone unless any of the situations covered by the dictum at paragraph 15 of Sarvesh Chopra is fulfilled.

32. In such light, the appellant proceeds to read the relevant parts of the award that deal with the heads of claim otherwise prohibited by the no-damage clauses. To begin with, the appellant says that the first of the three situations envisaged in the Sarvesh Chopra dictum does not apply in the present case, since the contractor did not repudiate the contract. The appellant claims that the appellant did not grant an extension of time for the contractor to complete the work beyond

the stipulated period or enter into any supplemental agreement in such regard, far less specify that any of the no-damage clauses would be inoperative for the completion of the work during the extended period. The appellant says that the arbitrator does not refer to any evidence of the contractor making it clear to the appellant that the no-damage clauses would not apply for the extended period of the work beyond the stipulated time while completing the work. In short, the appellant assails the award, to the extent that it goes against the no-damage clauses in the contract, as jurisdictional errors committed by the arbitrator, particularly in the absence of the arbitrator justifying any of the claims on the basis of the second or third exceptions of the dictum in Sarvesh Chopra or referring to any evidence in such regard. The argument of the appellant on such score, it may bear repetition, is that before considering the heads of the prohibited claims, the arbitrator had to be satisfied that the situations envisaged by the exceptions as recognised by the dictum in Sarvesh Chopra existed and the arbitrator rendered a finding in such regard. In the absence of such finding, the appellant argues, particularly as the issue goes to the root of the arbitrator's authority to adjudicate on a particular matter, the award in such regard has plainly to be seen as perverse, patently illegal, beyond the bounds of the arbitrator's authority, contrary to the substantive law in this country and, as such, opposed to public policy and liable to be struck down.

33. The discussion in the award on the perceived prohibited heads or the no-damage clauses has been placed by the appellant. The fourth issue framed by the arbitrator pertained to the claim on account of loss of business due to irregular payment/cash flow from the appellant. In the statement of claim, the contractor averred that to keep the project alive the contractor obtained financial assistance and suffered loss of business during the extended period of the contract. The arbitrator, however, perceived the claim in respect of such head to be one for loss of profit. It is now judicially accepted that loss of profit can be seen to be anything between 10% and 15% of the value of the work that could have accrued to a contractor as the contractor's income from the contract which the contractor was prevented from earning as a consequence of the breach by the employer. In keeping with such judicially acknowledged principle, the arbitrator referred to the value of the work executed during the extended period of the work and assessed

10% of the work done during such extended period to be the quantum of profit that the contractor was entitled to for the relevant period. There is no dispute as to the figures and the amount awarded on account of loss of profit was Rs.4,24,534.

34. In respect of the claim on account of repair of WBM work, the arbitrator reasoned that the bituminous work was required to be done long after the WBM work had been completed and, as a consequence, the WBM work had to be redone or repaired before the bitumen could be laid thereon. An award of Rs.2,57,000 was made under such head.

35. The eighth issue in the reference pertained to the claim for idle charges. The arbitrator noticed the four parts to it, referred to the no-damage clauses in such regard in the agreement between the parties and observed that the contractor worked during this period (the extended period) on the request of the employer and he will be entitled to compensation for the damages sustained . The arbitrator proceeded to deal with every sub-head and awarded much lesser sums than claimed by the contractor. The combined claim on account of idle charges was in excess of Rs.98 lakh but the arbitrator awarded a total amount of less than Rs.39 lakh on such score.

36. In respect of price escalation for the work done beyond the contractual period, the arbitrator noticed clauses 25 and 43 of the notice inviting tender and opined that since the escalation had occurred and the consequences thereof suffered by the contractor due to the breach on the part of the appellant, the contractor was entitled to the amount claimed.

37. The respondent cross-appellant is critical of the system and the manner in which arbitration is conducted in the country or the State. The contractor reminds the court that the work was supposed to be completed by December 1, 2002 and it was completed by the middle of 2003, but the contractor still remains out of pocket for the better part of two decades thereafter. The contractor laments that courts are conservative in awarding interest and costs and may not always possess the commercial sense to understand the importance of timely payment and the consequence of the delay therein. The contractor bitterly complains of the so called rough and ready justice. or such utterly flawed methodology applied by

courts in commercial matters to bring about a completely inequitable result.

38. The contractor relies on the first principles and says that it is fundamental to the rule of law that a party cannot take advantage of its own wrong. The contractor suggests that once an employer in a works contract is found to be in breach and the period of completion of work has to be extended as a result thereof, there cannot be any embargo on either the contractor claiming, or any adjudicatory body awarding, damages commensurate with the additional costs or loss incurred by the contractor. The contractor says that though the law of contracts is codified to a large extent in this country, its interpretation is not; and the interpretation depends on the nature of the contract, the wording or the clauses, the conduct of the parties and the circumstances in which a claim arises, to name only a few. The contractor reasons that if it ultimately boils down to the interpretation of the contract in the light of the surrounding circumstances and the conduct of the parties, any reasonable or plausible interpretation rendered by an arbitrator should pass muster, given the limited power of interference that is conferred on a court while assessing a challenge to an arbitral award.

39. On the proposition that a party cannot take advantage of its own wrong, the contractor refers to the judgments reported at (1919) AC1 (New Zealand Shipping Company Limited v. Societe des Ateliers et Chantiers de France) and (1817) 6 M & S 121 (Rede v. Farr). In such judgments it was observed that it was an universal principle of law that a party can never take advantage of its own wrong. In a more recent judgment of the Court of Appeal in England reported online at (2000) WL66439 (Association of British Travel Agents Limited v. British Airways Plc), the *contra proferentem* rule was referred to and discussed. Though such matter pertained to a contract between an airline and a passenger and the fine print of the contract therein, the contractor places the following passage from paragraphs 75 and 76 of the report:

75. I would, however, for my part, be disposed to place more weight upon the principle that any doubt and for an individual reading the texts without the bright beam of analysis which has been shone upon in this court some doubt is probably inevitable should be resolved against the airlines. This is a principle not only of law

but of justice.

76. The central feature of the circumstances forming the background to these contracts is that they are unilaterally dictated by the airlines. Although the contra proferentem rule tends to feature more frequently in arguments on exclusion clauses, its origin and first purpose is to limit the power of a dominant contractor who is able to deal on his own take-it-or-leave-it terms with others: The proferens., properly so called, is the party whose form of contract it is.

40. The contractor next refers to the reasons indicated in a Division Bench judgment of this court reported at (2002) 1 CHN288 (Board of Trustees for the Port of Calcutta v. Mahalakshmi Constructions) while holding that the restrictive clauses in a contract would be irrelevant for consideration in proceedings for challenging an arbitral award. The primary contention in the appeal before the Division Bench was that since the arbitrator was a creature of the contract and the contract itself contained prohibitory clauses, the arbitrator had no jurisdiction to travel outside the prohibitory clauses and grant sums under various heads against the spirit and letter of such clauses. The court observed that though such argument was backed up by authorities, and even high authorities, the court was greatly troubled and disturbed to hear those submissions are wholly contrary to long and well-settled principles followed by the Arbitration Court.

. The Division Bench went on to pronounce, apropos the ground of jurisdictional error urged by the appellant, If a commercial contract with prohibitory clauses like escalation prohibition were to become a subject matter of a suit, before an ordinary court of law, nobody would dream of arguing that a decree passed allowing escalation is a decree without jurisdiction.

. The court then made a distinction between the extent of the inquiry that a court sitting in appeal over a decree may indulge in and the limited scope of judicial review on the ground of perversity available to an arbitration court in seisin of a challenge to an arbitral award.

41. The contractor next refers to a Division Bench judgment reported at AIR2013 Cal 45 (State of West Bengal v. M/s. N. Bhakat and Co.) where, even after noticing the tests as laid down in respect of prohibitory clauses at paragraph 15 of Sarvesh Chopra, it was held that in the absence of the award falling under the exceptional category being amenable to judicial review, would be outside the scope of scrutiny.

42. A single bench judgment of this court reported at (2013) 3 CHN521(The Indian Iron & Steel Company Limited v. M/s. J.

G. Engineers Private Limited) has been placed by the contractor for the view taken therein in similar or comparable circumstances. The contract in that case was also for a specified duration, but the work was completed several months after the scheduled date. The arbitral tribunal found that there was a delay of about 20 months occasioned by reason of the default or laches on the part of the employer. There were comparable clauses in that case, too, as in the present matter which prohibited any claim on account of escalation and the like. The arbitrators interpretation of such prohibitory clauses was that their operation was limited to the duration to the contract and they did not cover the period beyond the contemplated tenure of the agreement. The single bench held that since the arbitral tribunal found that the delay was solely on account of the employer, it stood to reason that the arbitral tribunal found that the no-damage clauses did not preclude the claims on account of escalation and the like beyond this stipulated period. Despite the employers challenge to the award on the ground of it being patently illegal and opposed to public policy, the court held that it was a matter within the exclusive domain of the arbitrator and there was no ground to upset the award.

43. The judgment was carried in appeal. The contention in such appeal was that when there was a specific bar on certain heads of claim like escalation for price of material or idle labour charges, the arbitrator could not ignore such prohibition in the contract to entertain claims on such account, far less award damages therefor. In the appellate judgment reported online at (2013) SCC Online Cal 9851 (The

Indian Iron & Steel Company Limited v. M/s. J.

G. Engineers Private Limited), the Division Bench posed four questions, quoted from the judgment in N. Bhakat and Co., and answered all of them in the negative to hold that in such a situation the court was not competent to interfere with the award. The questions posed were as follows: Have we found it (the award) absurd?. Did the award shock our conscience?. Was the award based on no evidence?. Did the reasons assigned by the Arbitrator have a direct conflict with the laws of the land?.

44. The contractor says that the Division Bench judgment was carried to the Supreme Court by way of a special leave petition, which stood rejected.

45. Another Division Bench judgment of this court reported at (2013) 2 CHN641(Board of Trustees for the Port of Calcutta v. Royal Construction) has been cited by the contractor where the challenge to the arbitral award was again on account of the no-damage clauses in the contract. The award-holder in that case asserted that the relevant prohibitory clauses could not be applied after the expiry of the time stipulated in the contract. The Division Bench held, at paragraph 12 of the report, that if the completion of the work is delayed on account of lapses on the part of the employer and owing to such delay if there is escalation of price in respect of the cost for the works obviously such a prohibitory clause of escalation would be absolutely hardship and it cannot be mitigated under any circumstances.

46. A Supreme Court judgment reported at (2008) 16 SCC128(Associated Construction v. Pawanhans Helicopters Limited) has been carried by the contractor for the proposition that prohibitory clauses may operate during the stipulated period of the contract, but they may not govern the period of extension. On similar lines, the judgments reported at (2009) 10 SCC354(Asian Techs Limited v. Union of India) and (2009) 16 SCC705(Bharat Drilling and Foundation Treatment Private Limited v. State of Jharkhand) delivered by the same bench have been relied upon by the contractor qua the applicability of the prohibitory or

no-damage clauses during the extended period of the contract when the delay was held by the arbitral tribunal to be on account of the employer. In the first of such judgments, the Supreme Court found that the award of damages in respect of the claims prohibited under the contract was justified as it is apparent that the delay in the execution of the contract was solely due to the default of the respondents.

. However, the no-damage clauses in the relevant agreement covering the excepted matters. were equated with clauses in some contracts prohibiting any payment on account of interest in the court referring to the judgment reported at (1996) 1 SCC516(Port of Calcutta v. Engineers-De-Space-Age). The other judgment of the same bench covered an arbitral award that awarded substantial amounts in respect of the claims for idle labour, business loss and delay in communicating drawings and specifications despite prohibitory clauses in the contract governing such heads of damages. The argument on behalf of the award-holder in that case was that such prohibitory clauses amount to only a bar on the Department and not a bar on the arbitrator in respect of the matters mentioned therein.

. In support of such contention, the judgment in Engineers-De-Space-Age was also cited on behalf of the award-holder in such case. The employer in that case, on the other hand, referred to a judgment reported at (2009) 12 SCC26(Sayeed Ahmed and Co. v. State of Uttar Pradesh). The court held that the decision in Sayeed Ahmed and Co. was distinguishable because it relates to interest under the Arbitration and Conciliation Act, 1996 and was not in respect of a claim for the principal amount.

. The court then noticed Section 31(7) of the 1996 Act that permits the parties to an arbitration agreement to agree otherwise to the awarding of interest by the Arbitral Tribunal..

47. The contractor has also referred to a recent judgment reported online at AIR 2017 SC3336(Assam State Electricity Board v. Buildworth Private Limited) where a prohibitory clause on account of escalation was cited to challenge the award of damages on such head. A three-judge bench of the Supreme Court in that case referred with approval to the enunciation the law in such regard in the judgment

reported at (2007) 13 SCC43(K. N. Sathyapalan (dead) by LRs v. State of Kerala), that the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations.

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48. More importantly, the three-judge bench in Buildworth Private Limited read down the dictum in Sarvesh Chopra in the following words at paragraph 19 of the report.

19. The High Court has also adverted to the decision of this Court in General Manager, Northern Railway v. Sarvesh Chopra 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, 1872 and accepts the belated performance of reciprocal obligations, the other party would be entitled to make a claim for damages.

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49. On how a prohibitory clause pertaining to the award of interest would impede the arbitrators authority to award interest, the contractor refers to a another recent judgment reported at AIR 2017 SC2586(M/s. Ambica Construction v. Union of India). The court noticed the answers rendered on a reference as to the authority of an arbitrator to award pendente lite interest in a situation where the agreement prohibits the payment of any interest. The answer to the reference was that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator.

. In the following sentence of the answer in the reference, it was also clarified that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal . In keeping with the legal issue decided in the reference, the later bench upheld the award of

pendente lite interest by the arbitrator on the ground that the bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest.

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50. Finally, the contractor says that the judgment impugned contradicts itself and is not based on any judicially acknowledged principle, but more on a rough and ready methodology which has been severely criticised in Associate Builders. On the two major heads of claim allowed by the arbitrator on account of loss of profit and additional costs for repair of WBM, the contractor places the following three sentences from page 69 of the impugned judgment where the conclusion in the third sentence appears to be completely at variance with the two preceding sentences: In any event, unless there is specific prohibition in the contract any claims for works done beyond the contractual period the original terms of the contract cannot be made applicable unless the parties have agreed to the contrary. It cannot be said that beyond the contractual period, the claimant had agreed to work gratuitously. However, insofar as the claim on account of repair and rectification, the arbitrator has completely misdirected its (sic, his) mind in allowing such claim which is expressly barred under clause 16 as alluded to above.

. (Emphasis supplied) 51. Again, on the claim on account of loss of business which the arbitrator perceived to be a claim for loss of profit and awarded an amount of 10 per cent on such account by referring to the quantum of the work executed by the contractor during the extended period, the judgment impugned is criticised by the contractor in how the amount awarded was set aside on the following reasoning at page 75 thereof: The arbitrator, however, could not have allowed loss of business separately when claims for escalation and other claims under Claim No.5 were allowed. There was no evidence to allow such claim.

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52. The contractor refers to the discussion at page 73 of the impugned judgment on loss of profit and the dictum in the judgment reported at (1984) 4 SCC59(A. T.

Brij Pal Singh v. State of Gujarat) that

15. of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

. The contractor claims to have been unfairly dealt with by the court of the first instance in costs awarded of Rs.5 lakh being reduced on the virtual ipse dixit to Rs. 3 lacs on a realistic assessment and having regard to the fact that the petitioner has defence against some of the claims.

. On the reduction of the rate of interest by the order impugned, the contractor demonstrates that no reason is proffered therein, whether for the reduction of the rate from 18 per cent per annum to 12 per cent per annum on the awarded heads of damages for the post-award period or for the reduction from 18 per cent per annum to 10 per cent per annum on account of the refund of security deposit and the payment under the final R/A bill.

53. In such context, the contractor refers to paragraph 56 of the report in Associate Builders and submits that the so called realistic assessment., evident from the judgment and order impugned is no different from rough and ready justice. which came for severe criticism in Associate Builders:

56. The formula then applied by the Division Bench was that it would itself do rough and ready justice.. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression justice. when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrators view and does what it considers to be justice.. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. .

54. The contractor here has hinted at the prohibitory or no-damage clauses being in contravention of Section 28(b) of the Contract Act, but has not furthered the

argument since the ground was not urged either before the arbitrator or before the single bench.

55. The appellant employer maintains that the law in this country on arbitral awards passed in derogation of prohibitory or no-damage clauses contained in the relevant contract is as declared by the Supreme Court in Sarvesh Chopra and anything contrary thereto, including the several judgments of this court not interfering with arbitral awards on such count, have to be disregarded as bad law as they are contrary to the constitutional command under Article 141. As to the Supreme Court judgments on the effect of prohibitory clauses as cited on behalf of the contractor, the appellant asserts that at least two of such judgments are either based on erroneous principles by misreading the dictum in previous judgments or cannot be regarded as authoritative pronouncements on the law on the subject but may only be regarded as judgments in exercise of the special jurisdiction of the Supreme Court under Article 142 of the Constitution. The appellant says that in at least two of the Supreme Court judgments cited by the contractor on this aspect of the law, the tests applied fall within the dictum found at paragraph 15 of the judgment in Sarvesh Chopra. As to how to treat a challenge to an award on the ground that it is in derogation of the prohibitory clauses contained in the contract, the appellant submits that the old principle referred to in Mahalakshmi Construction by a Division Bench of this court is no longer good law; not only on the basis of the law as declared in Sarvesh Chopra, but also on the permissible extent of inquiry recognised under Section 34 of the 1996 Act read with Section 28 thereof.

56. As to the Supreme Court judgments in Asian Techs Limited and Bharat Drilling, the appellant says that the law on the subject is not discussed therein except the submission on behalf of the award-holders that a prohibitory clause would operate on the employer but not on the arbitrator while assessing a claim under an apparently prohibited head. In both the judgments, according to the appellant, insofar as the decision therein is based on the principle enunciated in Engineers-De-Space-Age the same cannot be regarded as good law. In such context, the appellant refers to the relevant clause prohibiting interest in Engineers-De-Space-Age and suggests that the reliance on the principle in the

subsequent Supreme Court judgments which did not notice the special clause that fell for consideration in Engineers-De-Space-Age, may not have resulted in the correct legal conclusion. Further, in Bharat Drilling, the Supreme Court made a distinction between a prohibitory clause governing the payment of interest and a prohibitory clause governing a claim in damages other than interest; yet, the same bench in Asian Techs Limited relied on the dictum in Engineers-De-Space-Age, where the clause prohibited interest, to not interfere with an award in respect of a prohibited field of damages other than interest.

57. In Engineers-De-Space-Age, the prohibitory clause in respect of interest that was interpreted by the Supreme Court ran thus: No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.

58. The appellant here emphasises that the clause was such that the prohibition was on the employer to pay interest, but not on the arbitral tribunal to award interest in course of a reference. Indeed, the court held in Engineers-DeSpace-Age that a restrictive clause had to be strictly construed since a person who has a legitimate claim is entitled to payment within a reasonable time and, if the payment is delayed beyond a reasonable time, he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. Applying the strict construction principle, the court found that the relevant clause merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified.

59. Apropos Buildworth Private Limited and Pawanhans Helicopters Limited, the appellant refers to the facts as recorded in the judgments to suggest that in both cases, the third exception to the general rule as noticed in the dictum in Sarvesh Chopra at paragraph 15 of such judgment was invoked. In both the cases, according to the appellant, the contractor made it clear that escalation of rates or compensation for delay would have to be made by the employer and the employer accepted the performance by the contractor in spite of the delay and such notice by the contractor putting the employer on terms. In Buildworth Private Limited such aspect of the matter is noticed in the quotation from the High Court judgment at paragraph 21 of the report. In Pawanhans Helicopters Limited, paragraph 3 of the report recognises the fact that the contractor agreed to take up the balance work subject to the waiver of a discount that had been given to the employer.

60. 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 recognised in such dictum.

61. No discussion on the primary issue herein would be complete without reference to the extent of the authority available to the court under the challenge provision of Section 34 of the 1996 Act. On the face of it, there are three species of faults that can render an arbitral award or the relevant part thereof susceptible to annulment under Section 34 of the 1996 Act as it now stands. Section 34(2)(a) of the Act in its first and third limbs, broadly speaking, covers the principles of natural justice. The fifth limb pertains to the composition of the arbitral tribunal. The second sub-clause of the provision pertains to the validity of the arbitration agreement and the fourth sub-clause is in respect of disputes not falling within the terms of the submission to arbitration or decision on matters beyond the scope of

the submission to arbitration. The extent of the burden that a challenger has to discharge is accentuated by the words only if. in the sub-section and the words furnishes proof that. in the clause. Though Section 34(2)(b) of the Act is governed by the words only if. that are contained in the sub-section, but the extent of the burden on the challenger is substantially diluted. The third species, as introduced by an amendment with effect from October 23, 2015 to sub-section (2-A) of Section 34 of the Act, may not be applicable in the present case; but the ground of patent illegality as introduced thereby had already been judicially read into Section 34 of the Act as it originally stood. Such position will be evident from, inter alia, the judgments reported at Associate Builders and Gopal Chandra Mukherjee and the previous judgments noticed therein. The tests under Section 28 of the Act were deemed to be included in the grounds of challenge available under Section 34 thereof in the judgment reported at (2003) 5 SCC705(ONGC v. Saw Pipes Limited), which is referred to in great detail both in Associate Builders and Gopal Chandra Mukherjee.

62. Though the underlying philosophy in arbitration law in this country has undergone a sea-change from what it was under the Arbitration Act, 1940 to what it is now under the 1996 Act and several Supreme Court judgments caution against interpreting the provisions of the 1996 Act by referring to the 1940 Act, the fundamental basis in dealing with a challenge to an arbitral award remains unaltered. In the most traditional approach, the court would not step in to correct every perceived wrong complained of by a challenger simply on the ground that since the challenger was a party to an agreement that took the assessment away from the sovereign forum to a private forum, the challenger had to live with the decision of the forum of its choice. The same proposition, put in a different form, is simply this: when there is a proper submission, whether of fact or of law, to arbitration, it is not for the court to sit as an ordinary court of appeal over an arbitral award because the arbitrator has taken a view of law or of fact which a court of law may not have taken if such court were trying the dispute. The everlasting principle, unaffected by the paradigm shift in the arbitration law in this country, is that except to the extent expressly or by necessary implication permitted by the governing statute, the court will not revise, remit or set aside an arbitral award.

63. It is necessary to preface the further discussion with the caveat that while reading the dictum in the various cases cited and discerning the ratio decidendi therein, a judgment must be regarded only as an authority for what it actually decides and not be quoted for a proposition that may seem to logically follow therefrom. The dictum in Sarvesh Chopra has, thus, to be read in such light.

64. The parties herein, and the submission on their behalf based on considerable industry, may be somewhat justified in their suggestion that there is a lack of clarity in several of the judgments on the primary issue that has arisen herein, particularly as to the jurisprudence in the approach. Without referring to any of the cited judgments in particular, the parties suggest with the appropriate degree of reverence and seriousness that the effect of a no-damage clause in an agreement on the assessment of a prohibited head in the arbitral reference remains unclear: if in a particular matter it satisfies the subjective tools of assessment of a judge or a bench in this country, it would stand; or, on like grounds of subjectivity, it would fail. The appellant exhorts that in such context the clear tests as laid down in Sarvesh Chopra should be embraced and seen to be the jurisprudential foundation for assessing the challenge on such ground.

65. It is too late in the day to regard law as what is contained in statutes or legislation as passed by the Parliament or the Assemblies; judge-made law is law of equal force, though the Constitutional mandate in such regard is confined to the Supreme Court under Article 141 of the Constitution. A statute or a statutory provision is not merely what it says, but what it is judicially interpreted or understood to have said. Courts are sometimes constrained to resort to judicial engineering by interpreting statutory provisions beyond their ordinary meaning or confining the apparently wider import to smaller bounds, depending on the purpose of the provision, the mischief that it seeks to arrest or the benefit that it seeks to confer. And all this judicial engineering is done under the overarching principle of furthering the cause of justice and upholding the rule of law.

66. Experience in the present branch of law would reveal that many an apparently appropriately worded award may be perverse in the sense of being corrupt or improperly procured. Whether it is judicial decorum or it is the degree of

circumspection that an office of a judge demands, many an arbitral award is set aside on the ground of patent illegality or perversity or being opposed to public policy or shocking the conscience since the grounds of corruption or improperly procuring the award may neither be apparent nor may it be possible to establish. It is, thus, that the strict lines sometimes get smudged and the thin divide between the white and the black is seen to be a larger penumbra of gray than may be statutorily ordained. But again, that is the role of a judge as distinct from an automaton; or else the facts and the law may be fed into a computer and the cold print of an unemotional judgment obtained. A ground of patent illegality has to be apparent on the face of the award and should be one that does not involve much inquiry beyond the surface of the award. An actionable ground of perversity or shocking to the conscience of the court would arise when it is apparent that no honest person in his proper senses could have made such an award. Again, what is in conflict with the public policy of India, within the meaning of the relevant expression in Section 34(2)(b)(ii) of the 1996 Act, is governed by the Explanations thereto and has to be of a kind that goes to the root of the matter as recognised in *Saw Pipes*. The judicially recognised grounds of perversity or shocking the conscience of the court are not expressly included in Section 34 of the 1996 Act, though the already judicially recognised ground of patent illegality has been incorporated by the amendment retrospectively effected from October, 2015 nuanced by the proviso thereto. Loosely speaking, the express grounds of conflict with the public policy in India and patent illegality come with the statutory checks of the court not being permitted to reappraise the matter. In other words, the impugned award has to be one that cries out to be set aside on such ground rather than one where the court reappraises the matter and uses such grounds as the excuse for setting it aside. The award, or such part of it, which can be regarded to be in conflict with the public policy in India or patently illegal must be apparent.

67. Two aspects evident from some of the successful challenges to arbitral awards made against public bodies may be dwelt upon; with a degree of trepidation, but in all honesty and sincerity. When an arbitral award in favour of a contractor and against a public body is perceived to be corrupt or improperly procured, whether in full or in part, the reasons proffered for setting aside the award or a part thereof perceived to be corrupt swing between the grounds of in conflict with the public

policy of India. and patent illegality., but refer more to perversity and shocking to the conscience. Again, in all humility, the subjective perception may not always be reflected in the objective grounds indicated in support of the order upholding the challenge. Conversely, when an award appears to be just and fair, the challenge thereto is not always repelled with the degree of jurisprudential reasoning that the circumstances may demand. It is in such context that the parties here find the law in such regard as laid down in some of the judgments to be somewhat unclear and confusing. The perceived lack of clarity or confusion may be the shortfall in the objective reasoning matching up to the subjective perception. The other aspect of the matter is the somewhat misplaced loyalty, at times, of judges to public bodies in their otherwise salutary endeavour to protect public funds. Private contractors, oftentimes, find themselves on the leeward side of interpretation and as virtual pariahs, not necessarily because of the conduct of their character but merely for their status as private contractors.

68. The appellant in this case has attempted to give a legal twist to this matter in harping endlessly on the sanctity of the written contract and the limitation of the arbitrators authority to interpret the same. But the focus in this matter has more to do with the general authority of an arbitrator to interpret a contract and the clauses thereof in the light of the conduct of the parties; and, more importantly, on the limited authority of the court to sit in judgment over an arbitral award with a fine toothcomb.

69. Before coming to the dictum in Sarvesh Chopra pertaining to prohibitory or no-damage clauses in a contract, a distinction needs to be made between a clause prohibiting payment or award of interest and a clause prohibiting any head of claim of damages other than interest. The basis of the distinction, as noticed in the judgment in Bharat Drilling, can be traced to Section 31(7) of the 1996 Act. Section 31(7) of the Act has undergone a change pursuant to the 2016 Amendment which has been given retrospective operation from October 23, 2015. The amended provision is not applicable in this case. Under the original Section 31(7) of the Act the statute conferred specific authority on the arbitral tribunal to award interest at such rate as it deems reasonable, but such authority of the arbitrator was subject to an agreement to the contrary between the parties. It is, thus, that the judgments

in *Ambica Construction* read the authority of the arbitral tribunal to be unfettered unless there was an express agreement to the contrary curbing the power of the arbitrator to award interest. Thus, a clause simpliciter in the agreement prohibiting the payment of interest without expressly referring to the authority of the arbitrator in such regard may not be regarded as impeding the statutory authority of the arbitrator to award interest. Such is not the case in respect of any other prohibitory or no-damage clause covering heads of damages other than interest. As a consequence, the legal reasoning pertaining to the arbitrators authority to award interest notwithstanding a general prohibition in such regard in the agreement between the parties cannot guide the treatment or interpretation of a prohibitory clause pertaining to other heads of damages than interest. Accordingly, whether or not the dictum in *Engineers-De-Space-Age* has been misread in some of the later judgments without noticing the peculiar clause in that case, is irrelevant in the present context.

70. Hence, at last, to the dictum in *Sarvesh Chopra*. As noticed above, the judgment was rendered in a situation covered by Section 20 of the 1940 Act. Such provision required a petition to be made for the filing of an arbitration agreement and the enumeration of the disputes proposed to be submitted to arbitration for the court to call upon the respondent to show cause why the agreement should not be filed. The necessity for enumerating the disputes was as a consequence of the expression where a difference has arisen to which the agreement applies. in Section 20(1) of the 1940 Act. As a result, each head of dispute had to be assessed by the court prior to referring the matter to arbitration as to whether it was covered by the arbitration agreement. Apart from the fact that the ethos of the 1940 Act was more court-centric, the limited extent of intervention as circumscribed by Section 5 of the 1996 Act did not govern the reigning statute. Indeed, the fundamental approach to arbitration law in this country and the philosophy governing the same have been completely altered from what they were under the 1940 Act to what they are under the successor statute. In the arbitration law regime under the previous enactment, the court retained the residuary authority to deal with such ancillary aspects that were not expressly provided for in the statute; under the 1996 Act, the court now has only so much authority as has been provided in the statute and nothing beyond it. The arbitrability of the disputes

raised by a petitioner in proceedings under Section 20 of the 1940 Act had to be adjudicated by the court and only the merits of the referred disputes adjudicated by the arbitrator. That is no longer the case under the 1996 Act, much less the scenario in an arbitral reference with the intervention of the Chief Justice or his delegate under Section 11 of the present statute.

71. Notwithstanding the present recognition, in view of the Constitution Bench judgment reported at (2005) 8 SCC618(SBP and Co. v. Patel Engineering Limited) that the exercise undertaken by a Chief Justice or his delegate under Section 11 of the 1996 Act is judicial in nature and not merely administrative in quality, in view of Section 16 of the 1996 Act and extent of the authority conferred on an arbitral tribunal thereunder to decide on its own jurisdiction, the scope or degree of the judicial inquiry conducted by a Chief Justice or his delegate under Section 11 of the 1996 Act is very limited. Unless the very physical existence of an arbitration agreement is called into question by the respondent upon a request being made under Section 11 of the 1996 Act, if the challenge is as to the efficacy or the ambit of the arbitration agreement, only a prima facie view as to the permissibility of the arbitral reference has to be taken by a Chief Justice or his delegate and the more protracted adjudication on such score left to the arbitral tribunal. But when the physical existence of an arbitration agreement is challenged, that must be completely answered by the Chief Justice or his delegate in course of the request under Section 11 of the 1996 Act and such aspect of the matter attains finality.

72. Thus, the dictum at paragraph 15 of the report in Sarvesh Chopra has to be read in the context of the duty of the court under Section 20 of the 1940 Act. The court interpreted the facts, as it was obliged to do under the previous regime, and found that several of the disputes enumerated by the petitioner in the proceedings under Section 20 of the 1940 Act were not capable of being referred to arbitration. 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 sense 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 recognised 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 public 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.

73. Indeed, the dictum in Sarvesh Chopra has been expressly read down in the most recent Supreme Court pronouncement considered herein in Buildworth Private Limited as evident from paragraph 19 of the report as quoted above.

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 a 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.

75. However, in the present case the amounts awarded under the four principal heads of claim despite the prohibitory clauses in respect of such heads, do not

appear to be unconscionable, far less shocking. Cogent and acceptable reasons were furnished by the arbitrator in respect of every head of claim awarded in favour of the contractor and it did not call for any interference under any permissible ground in Section 34 of the 1996 Act read with Section 28 thereof. In particular, the tinkering with the costs awarded by the arbitrator and the rate of interest appear to be the unkindest cuts of all. Much more than a sum of Rs.5 lakh must have been expended by the contractor in course of the 134 sittings and no realistic assessment. on the same lines as the condemned rough and ready justice. methodology could have prompted even a paisa to be knocked off from the costs. The award of interest was, again, within the exclusive domain of the arbitrator and subject to his discretion as recognised in original Section 31(7) of the 1996 Act and could not have been interfered with, without an express finding of perversity in the exercise of the discretion by the arbitrator.

76. The judgment and order impugned dated November 3, 2016 insofar as they interfere with the award dated April 6, 2011 are set aside and the award of April 6, 2011 restored. It is, however, recorded that the principal sums of Rs.2 lakh and Rs.11,27,342 awarded by the arbitrator on account of the final R/A bill and security deposit, respectively, have been paid; though the appellant herein will be liable for interest thereon in terms of the award.

77. APO63of 2017 with GA834of 2017 and OCO1of 2017 are disposed of by dismissing the appeal and allowing the cross-appeal as indicated above. The respondent contractor will also be entitled to costs assessed at Rs.3 lakh for the proceedings in the court of the first instance and in this appeal.

78. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities. (Sanjib Banerjee, J.) I agree. (Siddhartha Chattopadhyay, J.)

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