UNION OF INDIA & ORS.

v.

M/S. BHARAT ENTERPRISE

(Civil Appeal Nos. 3441-3442 of 2015)

MARCH 23, 2023

**[K. M. JOSEPH, KRISHNA MURARI AND B. V. NAGARATHNA, JJ.]**

*Arbitration and Conciliation Act, 1996 – Arbitrator passed an award allowing claims which were submitted after the submission of the final bill (containing No Claims Certificate) by the Respondent-Contractor – During the arbitration, the appellant filed an application u/s.16 invoking clauses 65 and 65A of the Contract which interdicted the submission of a new claim after the submission of the final bill – Application rejected – Petition filed by the appellant u/s.34 challenging the award, allowed – Order set aside by High Court in appeal u/s.37 – Held: When a contractor seeks to wriggle out of a final bill or a 'no claims due certificate' which he has submitted, he must establish a case that a final bill or a certificate of no further claims was the result of any of the vitiating factors under the law – Sans such finding, the final bill would stand – If the final bill cannot be overridden by any factors known to law then the clauses relied upon by the appellants in this case would operate – There was no finding by the Arbitrator that the final bill and the no claims certificate were vitiated – The clauses in the contract were binding not only on the parties but also on the Arbitrator – Going against the terms of clauses 65 and 65A would indeed render the Award illegal being contrary to the contract and, therefore, without jurisdiction – If the clauses operate, the inevitable result is the arbitrator could not have traveled outside of the contractual prohibition and passed an award allowing claims submitted after the submission of the final bill – While, the reasoning adopted by the High Court cannot be subscribed to, it cannot also be lost sight of that the amounts in question are fairly meagre and the final bill was settled only after long delay of over an year – It was apparently the long delay in the payment of the final bill amount which led to the raising of the new claims – Perhaps, if the final bill itself was not kept pending for such a long time, the entire dispute*

*may not have arisen at all – Impugned order set aside – Appellants to pay Rs.3 lakhs to the respondent in full and final settlement of its claims – Constitution of India – Art. 136.*

*Arbitration and Conciliation Act, 1996 – ss.16(2), (3), 34, 37 – Plea of the respondent that the order dtd. 04.03.2009 passed by the Arbitrator u/s.16 had attained finality as the same was not impugned u/s.37 – Held: Under s.37(2)(a), an appeal lies to the Court from an order of the Arbitral Tribunal accepting the plea referred to in sub-sections (2) and (3) of s.16 – This means that an appeal can be preferred against the order of the Arbitral Tribunal allowing the plea that the Arbitral Tribunal does not have jurisdiction – Similar is the case with reference to an order which is rendered appealable u/s.16(3) – Thereunder also, it is the plea that the Arbitral Tribunal is exceeding the scope of its authority which is allowed which is rendered appealable – In the present case, by order dtd.04.03.2009, the Arbitral Tribunal did not allow the plea be it u/s.16(2) or u/s.16(3) – On the other hand, the Tribunal rejected the plea of the appellants – Therefore, no appeal could have been filed u/s.37 against the order dtd.04.03.2009 – An order passed by the Arbitral Tribunal rejecting the plea u/s.16(2) or 16(3) being part of the Award itself, it is open to the parties to challenge the same when a petition is filed u/s.34 challenging the Award.*

*Arbitration – Arbitrator is a creature of the parties and the contract – As Arbitrator he cannot stray outside the contours of the contract – He is bound to act within its confines – A disregard of the specific provisions of the contract would incur the wrath of the Award being imperiled.*

**Allowing the appeals, the Court**

**HELD: 1.1 The clauses which have been relied upon by the appellants are clear and unambiguous. What they interdict is the submission of a new claim after the submission of the final bill. If there are any claims left after the submission of the final bill, the parties have agreed that they shall stand waived. These are the clauses which are binding not only on the parties but also on the Arbitrator. Going against the terms of clauses 65 and 65A would indeed render the Award vulnerable on the basis that it is illegal being contrary to the contract and, therefore, without jurisdiction. There may be cases where a final bill may be submitted**

**and the contention is taken that the final bill was submitted under duress. In such a case, it may be open to the claimants to urge and the Arbitrator to find that the final bill was itself vitiated on account of the fact that it was brought about by duress or any other vitiating factors under law. If such an event had taken place then that may have been sufficient to non-suit the appellants. In other words, if under the terms of the agreement, there is an embargo against the Arbitrator embarking upon and attempting to find merit in any claim which is not part of the final bill, an award so countenancing a claim would be illegal. However, on the other hand, if the case is that the final bill itself should not be given life as it was born out of coercion or any other vitiating factor and the Arbitrator renders a finding on material as is sufficient in law then the Award of the Arbitrator may not be attacked on the ground that he travels beyond the contractual provisions. [Paras 17, 18][822-G-H; 823-A-D]**

**1.2 On 13.02.2002, the respondent has indeed submitted a final bill. It is a year thereafter on 25.02.2003, that the respondent sent a letter *inter alia* urging that the final bill dated 13.02.2002 was not paid and is signed under protest. Subsequently, it would appear that the respondent has filed an affidavit on 24.05.2003. It is ignoring all this that notice was sent for referring the matter to arbitration. By order dated 12.11.2007, the High Court proceeding under Section 11 of the Act appointed an Arbitrator. During the course of the arbitration, on 03.08.2008, the appellants filed an application under Section 16 of the Act invoking clauses 65 and 65A of the Contract. The said application came to be rejected on 04.03.2009. The Arbitrator has proceeded to reject the application filed by the appellants under Section 16 on the basis of the order dated 12.11.2007 passed by the High Court. The Arbitrator further draws inspiration from the fact that the application seeking modification of the order dated 12.11.2007 was dismissed on 04.12.2007. The Arbitrator further found that the agreement entered into between the parties subsequent to the order dated 12.11.2007 would indicate that disputes indeed exist. What is, however, conspicuous by its absence is any finding by the Arbitrator, that the final bill dated 13.02.2002 was the result of duress or any other vitiating factors. [Paras 19, 20][823-E-H]**

A **1.3 An appeal lies to the Court from an order of the Arbitral Tribunal accepting the plea referred to in sub-sections (2) and (3) of Section 16. This means that an appeal can be preferred against the order of the Arbitral Tribunal allowing the plea that the Arbitral Tribunal does not have jurisdiction. Similar is the case with reference to an order which is rendered appealable under Section 16(3) of the Act. Thereunder also, it is the plea that the Arbitral Tribunal is exceeding the scope of its authority which is allowed which is rendered appealable. In this case, by order dated 04.03.2009, the Arbitral Tribunal has not allowed the plea be it under section 16(2) or under Section 16(3). On the other hand, the Tribunal has rejected admittedly the plea of the appellants. Therefore, no appeal could have been filed under Section 37 against the order dated 04.03.2009. An order passed by the Arbitral Tribunal rejecting the plea under Section 16(2) or 16(3) being part of the Award itself, it is open to the parties to challenge the same when a petition is filed under Section 34 of the Act challenging the Award. This is the scheme of the Act. This is apparently to confine a right to appeal to those cases where accepting a plea of a party would bring the arbitration to a halt. In fact, the order dated 04.03.2009 has been referred to in the Award and it has been treated as part of the Award. It is thereafter that in a proceeding that the District Court has allowed the petition filed under Section 34 by the appellants. It is no doubt true that the salutary principle which has been enunciated by this Court in *Central Inland Water Transport Corporation* being in accord with constitutional principles must receive due consideration. However, it cannot be torn out of context. More importantly, as already noticed when a contractor seeks to wriggle out of a final bill or a 'no claims due certificate' which he has submitted, as in a civil Court so before the Arbitrator, he must establish a case that a final bill or a certificate of no further claims was the result of any of the vitiating factors under the law. Sans such finding, the final bill would stand. If the final bill cannot be overridden by any factors known to law then the clauses relied upon by the appellants in this case would operate. There is no finding by the Arbitrator that the final bill and the no claims certificate were vitiated. The clauses in the contract were binding on the**

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**respondent. It cannot be departed from invoking the principle in *Central Inland Water Transport Corporation*. It is not the case of the contractor that when the contract was entered into, it was in circumstances which attracted the principles laid down therein. If the clauses operate, the inevitable result is the arbitrator could not have traveled outside of the contractual prohibition and passed an award allowing claims which were submitted after the submission of the final bill. [Paras 22, 23, 25 and 26][824-F-H; 825-A-B; 826-A-D]**

*Central Inland Water Transport Corporation & Anr. v. Brojo Nath Ganguly* **AIR 1986 SC 1571 : [1986] 2 SCR 278 – referred to.**

**1.4 While this Court cannot subscribe to the reasoning adopted by the High Court, it cannot also be lost sight of that the amounts in question are fairly meagre and the final bill remained unpaid for long period of time. It was apparently the long delay in the payment of the final bill amount which led to the raising of the new claims. Perhaps, if the final bill itself was not kept pending for such a long time, the entire dispute may not have arisen at all. Having regard to all the facts and circumstances, while this Court is inclined to set aside the impugned order, the interests of justice would require that the respondent is paid a lumpsum amount in full and final satisfaction of all his claims. The impugned judgment is set aside. However, the appellants will pay a sum of Rs.3 lakhs (Rupees Three Lakhs only) to the respondent which will be in full and final settlement of the claims of the respondent. [Paras 28, 29][826-G-H; 827-E]**

*Bharat Coking Coal Ltd. v. Annapurna Construction* **(2003) 8 SCC 154 : [2003] 3 Suppl. SCR 122;** *Union of India and Others v. Master Construction Company* **(2011) 12 SCC 349 : [2011] 5 SCR 853;** *Union of India v. Parmar Construction Company* **(2019) 15 SCC 682 : [2019] 5 SCR 1009;** *PSA SI CAL Terminate (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin* **2021 SCC Online SC 508;** *Union of India and Others v. Master Construction Company* **(2011) 12 SCC 349 : [2011] 5 SCR 853;** *National Insurance*

*Company Limited v. Boghara Polyfab Private Limited* **(2009) 1 SCC 267 : [2008] 13 SCR 638;** *SBP & Co. v. Patel Engineering Ltd. and Another* **(2005) 8 SCC 618 : [2005] 4 Suppl. SCR 688;** *Tahera Khatoon (D)By LRs. v. Salambin Mohammad* **(1999) 2 SCC 635 : [1999] 1 SCR 901 – referred to.**

**Case Law Reference**

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| **[2003] 3 Suppl. SCR 122** | **referred to** | **Para 4, 10** |
| **[2011] 5 SCR 853** | **referred to** | **Para 6** |
| **[2019] 5 SCR 1009** | **referred to** | **Para 6** |
| **[2011] 5 SCR 853** | **referred to** | **Para 11** |
| **[2008] 13 SCR 638** | **referred to** | **Para 12, 13** |
| **[2005] 4 Suppl. SCR 688** | **referred to** | **Para 14** |
| **[1986] 2 SCR 278** | **referred to** | **Para 24, 25** |
| **[1999] 1 SCR 901** | **referred to** | **Para 28** |

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3441-3442 of 2015.

From the Judgment and Order dated 11.02.2014 and 23.04.2014 of the High Court of Punjab & Haryana at Chandigarh in FAO No. 4290 of 2013 and RA No. 66-CII of 2014 in FAO No. 4290 of 2013.

K. M. Nataraj, ASG, R. Bala, Sr. Adv., Ms. Vishakha, Mrs. Swarupama Chaturvedi, Sharath Nambiar, Shlok Chandra, Arvind Kumar Sharma, Advs. for the Appellants.

Ms. Praveena Gautam, Pawan Shukla, Ms. Indira Goswami, Aman Sharma, Ms. Akanksha Tyagi, Advs. for the Respondents.

The Judgment of the Court was delivered by

**K. M. JOSEPH, J.**

1. A contract was entered into between the parties for the repair of bathrooms and other allied works on 02.07.2001. It would appear that time was extended up to 19.01.2002. The respondent-Contractor submitted final bill on 13.02.2002. It contained a No Claims Certificate. The said amount claimed by the respondent apparently was not paid immediately. The respondent it would appear made several reminders regarding the non-payment of the final bill for a period of one year. Following many reminders by the respondent regarding the non payment of the final bill, according to the respondent, it sent a list of additional claims on 25.02.2003 and in the said letter, claimed that the letter and the Final bill should be considered as under protest. The respondent signed affidavit dated 24.05.2003 which according to the respondent was prepared by the appellant and which provided for the withdrawal of the letter dated 25.02.2003. An undertaking was also got signed from the respondent on 12.09.2003. Thereafter, respondent on 14.11.2003 revoked the affidavit and undertaking on account of non payment of the bill and purported to give the final notice invoking the arbitration clause contained in the contract for the non payment of claims due. It is, thereafter, on 25.11.2003, that the appellant made payment of Rs.100358/-. This was followed by letter dated 08.09.2004 by which the respondent sought to invoke the arbitration clause and appointment of arbitrator. Later, on 12.11.2007, a petition was moved under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act' for brevity) for appointment of an arbitrator. The same was allowed. A fresh agreement for arbitration was entered into on 22.11.2007 providing for appointment of a new Arbitrator. Suffice it to notice that a former District and Sessions Judge came to be appointed as sole arbitrator. The appellant filed an application under Section 16 for dismissal of the claims. The appellant invoked clauses 65 and 65A of the contract. This application, no doubt, was rejected on 04.03.2009 by the Arbitrator. Thereafter, the Arbitrator entered upon the merits of the matter and passed Award dated 16.07.2009. There were a total of 10 claims. The Arbitrator disallowed seven out of the ten claims while it allowed three claims. The claims were allowed with rate of interest which we need not notice at this stage. The petition filed by the appellant under Section 34 of the Act came to be allowed by the District Judge. It is this order passed by the

A District Judge under Section 34 which stands overturned by the impugned order in an appeal under Section 37 of the Act.

2. We have heard Col. R. Balasubramanium, learned senior counsel for the appellants, and Ms. Praveena Gautam, learned counsel for the respondent.

B 3. The only controversy which we are called upon to resolve is whether the impugned order is sustainable having regard to clauses 65 and 65A of the Contract.

4. The contention of the learned senior counsel for the appellants is that the impugned order is in the teeth of law laid down by this Court C in *Bharat Coking Coal Ltd. vs. Annapurna Construction* (2003) 8 SCC 154. He also points out that the said view has been followed in *PSA SI CAL Terminate (P) Ltd.* v. *Board of Trustees of V.O. Chidambranar Port Trust Tuticorin* 2021 SCC Online SC 508. In a nutshell, the argument is as follows:

D 5. He contends that the Arbitrator cannot travel outside the boundaries of the contact. In fact, he is fully bound by the terms of the contract. In the terms of the contract which are apposite in the context of the dispute before us, there is a prohibition against the Contractor supplementing the claims in the final bill by including claims which are E not found in the final bill. In the facts of this case, he would submit that this is precisely what has happened by pointing out the final bill which was submitted on 13.02.2002 and the claims allowed are later raised. He would submit that the High Court was clearly in error in tiding over this insuperable barrier in law and granting relief. The reasoning which has weighed with the High court is sought to be brought under a cloud as F being unsustainable in the teeth of the judgments rendered by this Court referred to hereinbefore.

*6. Per contra*, Ms. Praveena Gautam, learned counsel for the respondent, lays store by the law laid down by this Court in *Union of India and Others* v. *Master Construction Company* (2011) 12 SCC G 349 and the judgment in *Union of India* v. *Parmar Construction Company* (2019) 15 SCC 682. She would point out that there was a long delay in signing the final bill and the Arbitrator has only awarded the amounts which were found due. It is further contended that an attempt made under Section 16(2) of the Act to shake the premise of the Arbitrator's jurisdiction failed. It is pointed out that the said decision has H

not been challenged under Section 37 of the Act. It is also pointed out that in the facts of this case, at any rate, the Court may not exercise its jurisdiction based on an appeal generated by the State filed under Article 136 of the Constitution.

**ANALYSIS**

7. Clauses 65 and 65A of the Contract read as follows:

"CONDITION NO."65.

Final Bill (Applicable only to Measurement and LumpSum Contracts).- The Final Bills shall be submitted by the Contractor on I.A.F.W.-2262 in duplicate within three months of physical completion of the Works to the satisfaction of the Engineer-in-Charge.

It shall be accompanied by all abstracts, vouchers,etc., supporting it and shall be prepared in the manner prescribed by the G.E.

No further claims shall be made by Contractor after submission of the Final Bill and these shall be deemed to have been waived and extinguished.

The Contractor shall be entitled to be paid the final sum less the value of payments already made on account, subject to the certification of the final bill by the G.E.

No charges shall be allowed to the Contractor on account of the preparation of the final bill."

CONDITION NO."65-A.

Final Bill (Applicable only to Term Contracts). - The Final Bill shall be submitted by the Contractor on I.A.F.W.2262 in duplicate, accompanied by all supporting abstracts, vouchers, etc., except I.A.F.W.- 2158 and 1833 prepared in the manner prescribed by the G.E. within three months of physical completion of the Works to the satisfaction of the Engineer-in-Charge. In respect of works orders arising out of unit requisitions or M.E.S. inspections for maintenance and repairs, any portion of such an order which remains uncompleted at the date of the next subsequent requisition or inspection may, purely to facilitate payment of completed Work and without

A prejudice to any other right or remedy of Government in respect of any such delay, be deleted and the Works Order, as so amended forthwith, billed for final payment.

No further claims shall be made by the Contractor after submission of a Final Bill and these shall be deemed to have B been waived and extinguished. The Contractor shall be entitled to be paid the full measured value of the Works Order, less the value of payments made on account and of any charges properly preferred under the Conditions of Contracts for Government Stores, etc. supplied on repayment, subject to the certification of the final bill by the G.E.

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When fractions of a rupee occur in the totals of bills, fractions less than half a rupee shall be disregarded and half a rupee and over taken as a rupee.

No charges shall be allowed to the Contractor on D account of the preparation of a final bill."

8. The Arbitrator comes on the scene as a result of the agreement between the parties. Not unnaturally, the fundamental and primary foundation for the Arbitrator to settle the dispute is the contract between the parties. An Arbitrator is a creature, in other words, of the parties and E the contract. It is elementary that as Arbitrator he cannot stray outside the contours of the contract. He is bound to act within its confines. A disregard of the specific provisions of the contract would incur the wrath of the Award being imperiled. This position cannot be in the region of dispute.

F 9. There is another scenario. This relates to a claim that there is accord and satisfaction. On the one hand, it is sought to be rebuffed by the case of the contractor that the accord and satisfaction was brought about by vitiating factors which are contemplated essentially in sections 15 to 18 of the Indian Contract Act, 1872. In other words, where the case of the contractor that a No Claim Certificate is given under duress G or coercion, this may be the subject matter of inquiry by the Arbitrator. It may be open to the Arbitrator to find merit in the complaint of the contractor and to reject the case of accord and satisfaction and to proceed to examine the merits of the claim of the contractor and to award compensation in accordance with law in a given case. These distinct streams of cases and therefore differences in the judicial approach is H what essentially arise for our consideration.

10. In *Bharat Coking Coal Ltd.* v. A*nnapurna Construction* (2003) 8 SCC 154, this Court considered *inter alia* the effect of an Arbitrator failing to consider the relevant clauses of the contract. It is on the said premise that the Court proceeded to hold *inter alia* as follows:

> *"Findings*
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> 9. Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim. We, therefore, do not find any merit in the said submission of Mr Sinha.
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> 40. However, as noticed hereinbefore, this case stands on a different footing, namely, that the arbitrator while passing the award in relation to some items failed and/or neglected to take into consideration the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct fact. Such an order would amount to misdirection in law."

In the same vein is the judgment of this Court reported in *PSA SICAL Terminate (P) Ltd.*[1]

11. On the other hand, is the decision reported in *Master Construction Company*[2].

12. We must notice the following facts:

Firstly, the case arose under Section 11 of the Act.

Upon completion of the work in question, the completion certificate was issued and this was followed by the contractor furnishing a No Claim Certificate. The final bill was signed. Thereafter, the payment of the final bill was made within a period of little over a month. Thereafter, it would appear that the contractor wrote to the appellant withdrawing the No Claim Certificate. The employer (the appellant) declined to entertain the claims on the ground that the final bill was accepted by the

[1] PSA SI CAL Terminate (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin 2021 SCC Online SC 508.

[2] Union of India and Others v. Master Construction Company (2011) 12 SCC 349.

A contractor after furnishing the No Claim Certificate. It was in the context of the said facts that this Court after an exhaustive review of earlier case law which we must notice included the judgment of this Court reported in *National Insurance Company Limited* v. *Boghara Polyfab Private Limited* (2009) 1 SCC 267 went on to hold as follows:

B "23. The present, in our opinion, appears to be a case falling in the category of exception noted in *Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 177] (p. 284, para 25). As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being C anything more to suggest that, does not lead to an arbitrable dispute. The conduct of the contractor clearly shows that "no-claim certificates" were given by it voluntarily; the contractor accepted the amount voluntarily and the contract was discharged voluntarily."

D 13. In *National Insurance Company Limited*[3] this Court *inter alia* held as follows:

"*The questions for consideration*

15. In this case existence of an arbitration clause in the contract of insurance is not in dispute. It provides that "if any dispute or E difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall, independently to all other questions be referred to the decision of a sole arbitrator". The rival contentions give rise to the following question for our consideration:

F In what circumstances, a court will refuse to refer a dispute relating to quantum to arbitration, when the contract specifically provides for reference of disputes and differences relating to the quantum to arbitration? In particular, what is the position when a respondent in an application under Section 11 of the Act, resists reference to arbitration on the ground that the petitioner has issued G a full and final settlement discharge voucher and the petitioner contends that he was constrained to issue it due to coercion, undue influence and economic compulsion?

17. The decision in *Kishorilal Gupta* [AIR 1959 SC 1362 : (1960) 1 SCR 493] was followed and reiterated in several decisions H including *Naihati Jute Mills Ltd.* v. *Khyaliram Jagannath* [AIR

1968 SC 522] , *Damodar Valley Corpn.* v. *K.K. Kar* [(1974) 1 SCC 141] and *Indian Drugs & Pharmaceuticals Ltd.* v. *Indo Swiss Synthetics Gem Mfg. Co. Ltd.* [(1996) 1 SCC 54] In *Damodar Valley Corpn.* [(1974) 1 SCC 141] this Court observed : (SCC p. 145, para 7)

"*7.* … A contract is the creature of an agreement between the parties and where the parties under the terms of the contract agree to incorporate an arbitration clause, that clause stands apart from the rights and obligations under that contract, as it has been incorporated with the object of providing a machinery for the settlement of disputes arising in relation to or in connection with that contract. The questions of unilateral repudiation of the rights and obligations under the contract or of a full and final settlement of the contract relate to the performance or discharge of the contract. Far from putting an end to the arbitration clause, they fall within the purview of it. A repudiation by one party alone does not terminate the contract. It takes two to end it, and hence it follows that as the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives. This is not a case where the plea is that the contract is void, illegal or fraudulent, etc. in which case, the entire contract along with the arbitration clause is non est, or voidable. As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree to bring it to an end or to treat it as if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to, the arbitration clause, which is a part of it, also perishes along with it."

18. Section 16 of the Act bestows upon the Arbitral Tribunal, the competence to rule on its own jurisdiction. Sub-section (1) of the section reads thus:

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

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

(*b*) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

B 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 C of the Act into three categories, that is, (*i*) issues which the Chief Justice or his designate is bound to decide; (*ii*) issues which he can also decide, that is, issues which he may choose to decide; and (*iii*) issues which should be left to the Arbitral Tribunal to decide.

D 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(*a*) Whether the party making the application has approached the appropriate High Court.

(*b*) Whether there is an arbitration agreement and whether the E party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

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(*a*) Whether the claim is a dead (long-barred) claim or a live claim.

(*b*) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

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22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(*i*) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a H departmental authority and excepted or excluded from arbitration).

(*ii*) Merits or any claim involved in the arbitration." A

14. We may notice that this is a judgment which was rendered in the regime which was put in place by the larger Bench decision of this Court reported in *SBP & Co.* v. *Patel Engineering Ltd. and Another* (2005) 8 SCC 618. In fact, it is also a case arising under Section 11 of the Act. The Court went on to deal with the question of non-arbitrability B of disputes. It categorises the cases broadly into three categories, as can be seen from paragraphs 22.1 to 22.3. We must notice that following the insertion of Section 11(6A) by the Arbitration and Conciliation (Amendment) Act, 2016, with effect from 2015, there has been a change in law but we need not be detained by the said aspect as that may not be fully apposite for the purposes of the case. We may notice the following C statements as well in *National Insurance* (supra):

> 49. Obtaining of undated receipts-in-advance in regard to regular/ routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting D upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging E the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually that the date is not filled even when payment F is made. Be that as it may. But what is of some concern is the routine insistence by some government departments, statutory corporations and government companies for issue of undated "no-dues certificates" or "full and final settlements vouchers" acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for G releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.

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A 50. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by the plaintiff, and the plaintiff alleges that it was obtained by fraud/coercion/undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud/ undue influence/coercion, it will ignore the same, examine whether the plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration."

15. Before we proceed to finally rule on the issues which have been raised, we must notice the rationale of the High Court in the impugned judgment. We deem it appropriate to set down the following reasoning in this regard. After referring to the clauses which we have already extracted viz., clauses 65 and 65A, we find the following:

"The contract terms and conditions require submission of the final bill within three months of physical completion of the works to the satisfaction of the Engineer-in-Charge. There is no dispute that the final bill was presented within the time prescribed. Clauses 65 and 65-A, though set a boundary on the Contractor to submit its bill, but does not speak of the time within which the final bill is to be discharged by the employer. Admittedly, when the dispute was referred to Arbitration, the Contractor made further claims before the arbitrator which were adjudicated in arbitral proceedings after hearing the employer and the claims were by and large allowed. If the final bill was presented on 13.2.2002, and payment of the same was made belatedly on 25.11.2003 to the pecuniary disadvantage of the Contractor, then it would appear not to lie in the mouth of the Engineer-in-Charge/employer to invoke an exclusionary clause as is found embedded in Clause 65-A. If such a clause were to operate, then it would even take away the Arbitrator's discretion and jurisdiction to award interest pendente lite and future interest etc. which the law permits and such a claim would also constitute a valid claim which can be awarded. In any case, such a clause I am inclined to think would be opposed

to public policy and operate unfairly, and should be understood in the light of what the Supreme Court enunciated in Central Inland Water Transport Corporation & Anr. vs. Brojo Nath Ganguly, AIR 1986 SC 1571, thus expanding the sphere of the law of contracts and subjecting it to the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Extracts from the judgment can be profitably quoted:-

> "Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. This principle is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract entered into between parties who are not equal in bargaining power. The above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creating of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair unreasonable or unconsionable a clause in that contract or form or rules may be. This principle will not apply when the bargaining power of the contracting parties is equal or almost equal. mis principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organisations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. The Court must judge each case on its own facts and circumstances when called upon to do so by a party under section 31(1) of the Specific Relief Act, 1963."

Then further;

> "In the vast majority of cases, however, such contracts with unconscionable term are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power, Such contracts will not fall within the four corners of the definition of "undue influence" as defined by section 16(1) of the Indian Contract Act. The majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable are injurious to the public interest. To say such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to Court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no Court should encourage and also would not be in public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void under section 23 of the Indian Contract Act, as opposed to public policy,"

And still further;

> "The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, such expressions are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts

have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. The principles governing public policy must be and are capable on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become abnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declares such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority Indian Courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

It is not the case that the payment of the final bill was made promptly and delay in payment alone should constitute a separate ground for submission of the bills by the Contractor on closer scrutiny of his claims to make fresh claims which may have escaped contractor's notice at the time of presentation of the final bill. In human affairs, such situations can and do arise and the courts can and should make an allowance for them to be accommodated for adjudication on the merits of such claims. Therefore, I find myself unable to subscribe to the reasoning adopted by the learned District Judge, Chandigarh in non-suiting the petitioner and shutting out his case for examination of the 'further claims' beyond those pressed in the original claim petition on the materials on record and that too only by virtue of oppressive exclusion in Clause 65-A. Delay in payment of dues would itself give rise to an actionable claim for interest accruing by virtue of default in payment of final bills, keeping money beyond reasonable time in the pocket of the employer."

16. Thereafter, the High Court also proceeds to refer to the subsequent agreement, the order by which the Arbitrator was appointed, the agreement which is entered into and finally, it is found as follows:

"Mr. Manohar Lall, learned counsel appearing for the appellant points out that the Arbitrator in the present case was appointed

A under Section 11 of the Act by the Chief Justice of this Court exercising jurisdiction under the Act by order dated 12.11.2007 after recognizing and identifying the dispute and difference which had arisen between the parties that demanded resolution through arbitration process in terms of the arbitration clause signed by the parties. This jurisdictional issue was pressed before the Arbitrator by the employer itself and a preliminary issue was accordingly framed and answered in favour of the appellant and Clause 65-A was duly noticed and interpreted in a manner which appeals to this court as a correct exposition of the law. Besides, the Arbitrator in his award dated 4.3.2009 (Annexure A-3) found from the agreement dated 22.11.2007 that dispute still exists between the parties, which is evident from the recitals in the agreement, which reads as follows:

> "The new arbitrator shall decide all the disputes between the parties"
>
> The award ought not to have been tinkered with by the Learned District Judge, Chandigarh for the reason that jurisdiction stood denuded by operation of the offending part of Clause 65 and 65-A cannot be read as waiver or extinguishment of right of a contractor, much less by deeming fiction as Clause 65-A does, to lay further claims after the presentation of the final bill if money or interest is demonstrably owed by the offer or of the contract to the contractor. Thus, these two clauses justly deserve to be read against the offer or of the works contract in the light of the well established doctrine of contra proferentum applicable to the law of contracts.
>
> For the foregoing reason, this appeal is allowed and the impugned judgment dated 10.7.2013 passed by the learned District Judge, Chandigarh is set aside."

17. The clauses which have been relied upon by the appellants are clear and unambiguous. What they interdict is the submission of a new claim after the submission of the final bill. If there are any claims left after the submission of the final bill, the parties have agreed that they shall stand waived. These are the clauses which are binding not only on the parties but also on the Arbitrator. Going against the terms of clauses 65 and 65A would indeed render the Award vulnerable on the

basis that it is illegal being contrary to the contract and, therefore, without jurisdiction. A

18. There may be cases where a final bill may be submitted and the contention is taken that the final bill was submitted under duress. In such a case, it may be open to the claimants to urge and the Arbitrator to find that the final bill was itself vitiated on account of the fact that it was brought about by duress or any other vitiating factors under law. If such an event had taken place then that may have been sufficient to non-suit the appellants. In other words, if under the terms of the agreement, there is an embargo against the Arbitrator embarking upon and attempting to find merit in any claim which is not part of the final bill, an award so countenancing a claim would be illegal. However, on the other hand, if the case is that the final bill itself should not be given life as it was born out of coercion or any other vitiating factor and the Arbitrator renders a finding on material as is sufficient in law then the Award of the Arbitrator may not be attacked on the ground that he travels beyond the contractual provisions. Bearing in mind these principles, we will examine the matter with reference to the facts which are not in dispute in this case. B C D

19. On 13.02.2002, the respondent has indeed submitted a final bill. It is a year thereafter on 25.02.2003, that the respondent sent a letter *inter alia* urging that the final bill dated 13.02.2002 was not paid and is signed under protest. Subsequently, it would appear that the respondent has filed an affidavit on 24.05.2003. It is ignoring all this that notice was sent for referring the matter to arbitration. By order dated 12.11.2007, the High Court proceeding under Section 11 of the Act appointed an Arbitrator. During the course of the arbitration, on 03.08.2008, the appellants filed an application under Section 16 of the Act invoking clauses 65 and 65A of the Contract. The said application came to be rejected on 04.03.2009. E F

20. We have scanned the contents of the said order. The Arbitrator has proceeded to reject the application filed by the appellants under Section 16 on the basis of the order dated 12.11.2007 passed by the High Court. The Arbitrator further draws inspiration from the fact that the application seeking modification of the order dated 12.11.2007 was dismissed on 04.12.2007. The Arbitrator further found that the agreement entered into between the parties subsequent to the order dated 12.11.2007 would indicate that disputes indeed exist. What is, however, conspicuous by its absence is any finding by the Arbitrator, that the final bill dated 13.02.2002 was the result of duress or any other vitiating factors. G H

21. Learned counsel for the respondent would point out that the order dated 04.03.2009 passed by the Arbitrator under Section 16 had attained finality as the same was not impugned under Section 37 of the Act. Section 37 of the Act reads as follows:

> "37.Appealable orders.—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
>
> (a) refusing to refer the parties to arbitration under section 8;
>
> (b) granting or refusing to grant any measure under section 9;
>
> (c) setting aside or refusing to set aside an arbitral award under section 34.]
>
> (2) Appeal shall also lie to a court from an order of the arbitral tribunal—
>
> (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
>
> (b) granting or refusing to grant an interim measure under section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

22. An appeal lies to the Court from an order of the Arbitral Tribunal accepting the plea referred to in sub-sections (2) and (3) of Section 16. This means that an appeal can be preferred against the order of the Arbitral Tribunal allowing the plea that the Arbitral Tribunal does not have jurisdiction. Similar is the case with reference to an order which is rendered appealable under Section 16(3) of the Act. Thereunder also, it is the plea that the Arbitral Tribunal is exceeding the scope of its authority which is allowed which is rendered appealable. In this case, by order dated 04.03.2009, the Arbitral Tribunal has not allowed the plea be it under section 16(2) or under Section 16(3). On the other hand, the Tribunal has rejected admittedly the plea of the appellants. Therefore, no appeal could have been filed under Section 37 against the order dated 04.03.2009. An order passed by the Arbitral Tribunal rejecting the plea under Section 16(2) or 16(3) being part of the Award itself, it is open to the parties to challenge the same when a petition is filed under Section 34 of the Act

challenging the Award. This is the scheme of the Act. This is apparently to confine a right to appeal to those cases where accepting a plea of a party would bring the arbitration to a halt. In fact, we notice that the order dated 04.03.2009 has been referred to in the Award and it has been treated as part of the Award.

23. It is thereafter that in a proceeding that the District Court has allowed the petition filed under Section 34 by the appellants. We may notice that the High Court, in the impugned order, while dealing with the plea under clauses in question has, *inter alia,* held as follows:

> "The contract terms and conditions require submission of the final bill within three months of physical completion of the works to the satisfaction of the Engineer-in-Charge. There is no dispute that the final bill was presented within the time prescribed. Clauses 65 and 65A, though set a boundary on the Contractor to submit its bill, but does not speak of the time within which the final bill is to be discharged by the employer. Admittedly, when the dispute was referred to Arbitration, the Contractor made further claims before the arbitrator which were adjudicated in arbitral proceedings after hearing the employer and the claims were by and allowed. If the final bill was presented on 13.02.2002, and payment of the same was made belatedly on 25.11.2003 to the pecuniary disadvantage of the Contractor, then it would appear not the lie in the mouth of the Engineer-in-Charge/employer to invoke an exclusionary clause as is found embedded in Clause 65-A. If such a clause were to operate, then it would even take away the Arbitrator's discretion and jurisdiction to award interest pendente lite and future interest etc. which the law permits and such a claim would also constitute a valid claim which can be awarded. In any case, such a clause I am inclined to think would be opposed to public policy and operate unfairly, and should be understood in the light of what the Supreme Court enunciated in Central Inland Water Transport Corporation & Anr. vs. Brojo Nath Ganguly & A1R1986 SC 1571, thus expanding the sphere of the law of contracts and subjecting it to the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power."

24. It is thereafter that the High Court has referred to the judgment of this Court in *Central Inland Water Transport Corporation & Anr.* v. *Brojo Nath Ganguly* AIR 1986 SC 1571 as noticed by us.

A 25. It is no doubt true that the salutary principle which has been enunciated by this Court in *Central Inland Water Transport Corporation*[4] being in accord with constitutional principles must receive due consideration. However, it cannot be torn out of context. More importantly, as we have already noticed when a contractor seeks to wriggle out of a final bill or a 'no claims due certificate' which he has B submitted, as in a civil Court so before the Arbitrator, he must establish a case that a final bill or a certificate of no further claims was the result of any of the vitiating factors under the law. Sans such finding, the final bill would stand. If the final bill cannot be overridden by any factors known to law then the clauses relied upon by the appellants in this case C would operate. There is no finding by the Arbitrator that the final bill and the no claims certificate were vitiated. The clauses in the contract were binding on the respondent. It cannot be departed from invoking the principle in *Central Inland Water Transport Corporation*[5]. It is not the case of the contractor that when the contract was entered into, it was in circumstances which attracted the principles laid down therein. D

26. If the clauses operate, the inevitable result is the arbitrator could not have traveled outside of the contractual prohibition and passed an award allowing claims which were submitted after the submission of the final bill.

E 27. We cannot be entirely unmindful, however, of the fact that after submission of the final bill on 13.02.2002, the said bill was settled only after long delay of over an year. While it may be true that there is no finding that the final bill was the product of any duress or coercion, the respondent did have a case that the final bill was the result of the pressure on account of non-payment of her claims and therefore, the F respondent agreed to receive the undisputed amounts. But at the same time, there is no finding as such.

28. While we cannot subscribe to the reasoning adopted by the High Court, we cannot also lose sight of the fact that the amounts in question are fairly meagre and the final bill remained unpaid for long G period of time. It was apparently the long delay in the payment of the final bill amount which led to the raising of the new claims. Perhaps, if the final bill itself was not kept pending for such a long time, the entire dispute may not have arisen at all. We cannot lose sight of another aspect also. This Court has, in the judgment reported in *Tahera Khatoon (D)By LRs.* v. *Salambin Mohammad* (1999) 2 SCC 635 laid down the guiding H

principles for the exercise of jurisdiction in an appeal generated under Article 136 of the Constitution even after the grant of leave under Article 136. We may notice in this regard, the following paragraphs:

> 19. We may in this connection also refer to *Municipal Board, Pratabgarh* v. *Mahendra Singh Chawla* [(1982) 3 SCC 331 : 1983 SCC (L&S) 19] wherein it was observed that in such cases, *after declaring the correct legal position*, this Court might still say that it would not exercise discretion to decide the case on merits and that it would decide on the basis of equitable considerations in the fact situation of the case and "*mould the final order*".
>
> 20. In view of the above decisions, even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error — still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion."

29. Having regard to all the facts and circumstances, while we are inclined to set aside the impugned order, we also feel that the interests of justice would require that the respondent is paid a lumpsum amount in full and final satisfaction of all his claims. Accordingly, the appeals are allowed. The impugned judgment is set aside. However, we direct that the appellants will pay a global sum of Rs.3 lakhs (Rupees Three Lakhs only) to the respondent which will be in full and final settlement of the claims of the respondent. The said payment of the amount of Rs.3 lakhs shall be effected within a period of six weeks from today.

No orders as to costs.

Divya Pandey
(Assisted by : Roopanshi Virang, LCRA)

Appeals allowed.