Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4933 OF 2011
[Arising out of SLP [C] No.20318/2008]

State of Orissa & Ors. … Appellants

Vs.

Bhagyadhar Dash … Respondent

WITH

With CA No. 4935 of 2011 (@ SLP [C] No.23251/2008)
With CA No. 4936 of 2011 (@ SLP [C] No.23252/2008)
With CA No. 4934 of 2011 (@ SLP [C] No.23346/2008)
With CA No. 4937 of 2011 (@ SLP [C] No.26639/2008)
With CA No. 4939 of 2011 (@ SLP [C] No.27116/2008)
With CA No. 4940 of 2011 (@ SLP [C] No.27386/2008)
With CA No. 4941 of 2011 (@ SLP [C] No.27387/2008)
With CA No. 4942 of 2011 (@ SLP [C] No.27388/2008)
With CA No. 4943 of 2011 (@ SLP [C] No.7099/2009)
With CA No. 4944 of 2011 (@ SLP [C] No.31702/2010)
With CA No. 4945 of 2011 (@ SLP [C] No.32048/2010)
With CA No. 4946 of 2011 (@ SLP [C] No.33798/2010)

J U D G M E N T

R.V.RAVEENDRAN, J.

Leave granted.

2. These appeals by special leave are by the State of Orissa aggrieved by the orders of the Chief Justice of Orissa High Court allowing the

applications filed under Section 11 of the Arbitration and Conciliation Act 1996 ('Act' for short) filed by contractors and appointing arbitrators to decide the disputes raised by them against the State Government. The learned Chief Justice held that the last sentence of the proviso to clause 10 of the conditions of contract (forming part of the agreements between the state and the contractors) is an arbitration agreement. The appellants challenge the said orders on the ground that there is no arbitration agreement and therefore the applications under section 11 of the Act filed by the contractors ought to have been dismissed. Therefore the short question that arises for our consideration in these appeals is whether the said clause is an arbitration agreement.

The essentials of an arbitration agreement

3. In *K K Modi vs. K N Modi* [1998 (3) SCC 573] this court enumerated the following attributes of a valid arbitration agreement :

> "(1) The arbitration agreement must contemplate that the decision of the Tribunal will be binding on the parties to the agreement,
>
> (2) that the jurisdiction of the Tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,
>
> (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

> (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner, with the tribunal owing an equal obligation of fairness towards both sides,
>
> (5) that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law, and lastly,
>
> (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the Tribunal."

Following *K.K. Modi* and other cases, *Bihar State Mineral Development Corporation v. Encon Builders (IP) Ltd.* - 2003 (7) SCC 418, this court listed the following as the essential elements of an arbitration agreement:

> "(i) There must be a present or a future difference in connection with some contemplated affair;
>
> (ii) There must be the intention of the parties to settle such difference by a private tribunal;
>
> (iii) The parties must agree in writing to be bound by the decision of such tribunal; and
>
> (iv) The parties must be *ad idem*."

4. In *Jagdish Chander vs. Ram Chandra* [2007 (5) SCC 719], this Court, after referring to the cases on the issue, set out the following principles in regard to what constitutes an arbitration agreement :

> "(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an

arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they *so desire*, refer their disputes to arbitration" or "in the event of any dispute, the parties *may* also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to

> have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

5. The following passage from *Russell on Arbitration* (19th Edn. Page 59) throws some light on this issue:

> "If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such case is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of setting them when they have arisen".

Cases where the tests were applied to different clauses to find out whether they could be termed as 'arbitration agreement'

6. In *K.K. Modi*, the clause that arose for consideration was as under :

> "9. Implementation will be done in consultation with the financial institutions. For all disputes, clarification etc., in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups".

This Court held that the said clause was not an arbitration agreement on the following reasoning:

> *"Therefore our Courts have laid emphasis on (1) existence of disputes as against intention to avoid future dispute; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and*

> *(3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive.*
>
> The purport of Clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. *This clause does not contemplate any judicial determination by the Chairman of the IFCI. . .* Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated…"
>
> *(emphasis supplied)*

7. In *State of Uttar Pradesh vs. Tipper Chand* - 1980 (2) SCC 341, the following clause fell for consideration:

> "Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, 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 of the contract by the Contractor, shall also be final, conclusive and binding on the Contractor".

The High Court held that the clause was not an arbitration agreement, as it merely conferred power on the Superintending Engineer to take a decision on his own and did not authorise parties to refer any matter to his decision. This court clarified that in the absence of a provision for reference of

disputes between parties for settlement, clause merely stating that the "decision of the Superintending Engineer shall be final" was not an arbitration agreement. This Court clarified that an arbitration agreement can either be in express terms or can be inferred or spelt out from the terms of the clause; and that if the purpose of the clause is only to vest in the named Authority, the power of supervision of the execution of the work and administrative control over it from time to time, it is not an arbitration agreement. It also held that the clause did not contain any express arbitration agreement, nor spelt out by implication any arbitration agreement *as it did not mention any dispute or reference of such dispute for decision.*

8. In *State of Orissa vs. Damodar Das* [1996 (2) SCC 216], a three Judge Bench of this court considered whether the following clause is an arbitration agreement:

> **"25. Decision of Public Health Engineer to be final**.--Except where otherwise specified in this contract, the decision of the public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material use on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution of failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract".

Following the decision in *Tipper Chand,* this Court held that the said clause did not amount to an arbitration agreement, on the following reasoning:

> "It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that *there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio*. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties."
>
> *(emphasis supplied)*

9. In *Bharat Bhushan Bansal vs. Uttar Pradesh Small Industries Corporation Ltd., Kanpur* [1999 (2) SCC 166], the following clauses fell for consideration of this Court:

> **"Decision of the Executive Engineer of the UPSIC to be final on certain matters**
>
> Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of for relating to the designs, drawings, specifications, estimates, instructions, orders 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 thereof or abandonment of the contract by the Contractor shall be final and conclusive and binding on the Contractor.
>
> **Decision of the MD of the UPSIC on all other matters shall be final**

> Except as provided in Clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the Contractor and in respect of all other matter arising out of this contract and not specifically mentioned herein".

This Court held that the said clauses did not amount to arbitration agreement on the following reasoning:

> "In the present case, reading Clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. *Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act*".
>
> (emphasis supplied)

This Court while noting the distinction between a 'Preventer of disputes' and an 'adjudicator of disputes', observed that the Managing Director under clause 24 of the agreement, was more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract and the object of his decision is to avoid disputes and not decide disputes in a quasi-judicial manner. This court also referred to an illustration given in *Hudson on 'Building and Engineering Contracts*' (11th Edition, Volume II, para 18.067) stating that the following clause was not an arbitration clause and that the duties of the Engineer mentioned therein were administrative and not judicial:

> "(E)ngineer shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender specifications, schedule and drawings of the Contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contract, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties".

10. We may next refer to the three decisions of this Court relied on by the respondents, where on interpretation, clauses though not described as 'arbitration clauses', were held to be arbitration clauses, by applying the tests as to what constitute an arbitration agreement. In *Rukmanibai Gupta v. Collector, Jabalpur* - 1980 (4) SCC 566, this Court considered whether the following clause amounted to an arbitration agreement :

> "15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the matter in difference shall be decided by the lessor whose decision shall be final".

This Court held that Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration; and if the answer was in the affirmative, then such an arrangement would spell out an arbitration agreement. Applying the said test, this court held that the aforesaid clause is an arbitration agreement, as it (a) made a provision for

referring any doubt, difference or dispute to a specified authority for decision and (b) it made the "decision" of such authority final. While we respectfully agree with the principle stated, we have our doubts as to whether the clause considered would be an arbitration agreement if the principles mentioned in the said decision and the tests mentioned in the subsequent decision of a larger bench in *Damodar Das* are applied. Be that as it may. In fact the larger bench in *Damodar Das* clearly held that the decision in *Rukmanibai Gupta* was decided on the special wording of the clause considered therein. "The ratio in *Rukmanibai Gupta vs. Collector* does not assist the respondent. From the language therein this court inferred, by implication, existence of a dispute or difference for arbitration."

11. In *Encon Builders* (supra), this court proceeded on the assumption that the following clause was an arbitration agreement, as that issue was not disputed:

> "In case of any dispute arising out of the agreement the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding."

The clause specifically provided for 'disputes being referred to the Managing Director' and made the said authority's decision not only final, but also binding on the parties. Therefore it can be said that it answers the tests of an arbitration agreement. The issue considered therein was whether

the High Court committed an error in refusing to refer the dispute to arbitration, even after finding the clause to be an arbitration agreement, by presuming bias in view of the fact that the named arbitrator was an employee of one of the parties to the dispute. This Court held that disputes were arbitrable in terms of the said clause. Be that as it may. A similar clause was also considered in *Punjab State Vs. Dina Nath* [2007 (5) SCC 28] and held to be arbitration agreement.

12. In *Mallikarjun v. Gulbarga University – 2004 (1) SCC 372,* this court held the following clause was a valid arbitration agreement :

> "The *decision* of the Superintending Engineer of the Gulbarga Circle for the time being *shall be final, conclusive, and binding* on all *parties to the contract* upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way *arising out of, or relating to the contract,* designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works of the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof *in case of dispute arising between the contractor and. Gulbarga University*."

This court after referring to the essentials of an arbitration agreement laid down in *Encon Builders* held that the above clause is an arbitration agreement as it answered the test of reference of dispute for decision and made the decision of the authority final and binding. This court held :

> "Applying the aforesaid principle to the present case, Clause 30 requires that the Superintending Engineer, Gulbarga Circle, Gulbarga, to give his decision on any dispute that may arise out of the contract. Further we also find that the agreement postulates present or future differences in connection with some contemplated affairs inasmuch as also there was an agreement between the parties to settle such difference by a private tribunal, namely, the Superintending Engineer, Gulbarga Circle, Gulbarga. It was also agreed between the parties that they would be bound by the decision of the tribunal. The parties were also *ad idem*."

The clause for consideration in this case

13. Clause 10 of the Conditions of Contract which is the subject of controversy reads thus:

> **"Clause 10:** The Engineer-in-Charge shall have power to make any alterations in or additions to the original specifications, drawings, designs and instructions that may appear to him necessary and advisable during the progress of work, and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge and such alterations shall not invalidate the contract, and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work bears to the original contract work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. And if the additional work includes any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the sanctioned schedule of rates of the locality during the period when the work is being carried on and if such last mentioned class of work is not entered in the schedule of rates of the district then the contractor shall within seven days of the date of the rate which it is his intention to charge for such class of work, and if the Engineer-in-Charge does not agree to this rate he shall be noticed in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable.
>
> No deviations from the specifications stipulated in the contract nor additional items of work shall ordinarily be carried out by the contractor,

> nor shall any altered, additional or substituted work be carried out by him, unless the rates of the substituted, altered or additional items have been approved and fixed in writing by the Engineer-in-Charge, the contractor shall be bound to submit his claim for any additional work done during any month on or before the 15th days of the following month accompanied by a copy of the order in writing of the Engineer-in-Charge for the additional work and that the contractor shall not be entitled of any payment in respect of such additional work if he fails to submit his claim within the aforesaid period.
>
> Provided always that if the contractor shall commence work or incur any expenditure in respect thereof before the rates shall have been determined as lastly hereinbefore mentioned, in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rates as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. *In the event of a dispute, the decision of the Superintending Engineer of the Circle will be final."*
>
> *(emphasis supplied)*

14. A reading of the said clause shows that it is a clause relating to power of the Engineer-in-Chief to make additions and alterations in the drawings and specifications and execution of non-tendered additional items of work (that is items of work which are not found in the bill of quantities or schedule of work). It provides for the following:

a) that the Engineer-in-charge could make additions and alterations in the drawings/specifications; and that such alterations and additions will not invalidate the contract, but will entitle the contractor to extension of time for completion of work proportionately;

b) that if the additional work be executed is an item for which the rate is not specified in the contract (or in the schedule of rates for the district), the contractor shall specify the rate and the Engineer-in-

charge may either accept the rate or cancel the order to execute that particular work;

c) that if the contractor commences the work with reference to an item for which there is no rate in the contract and there is no agreement in regard to the rate for execution of such work, he shall be paid at the rates fixed by the Engineer-in -Charge; and

d) that if the contractor disputes the rate fixed by the Engineer-in-Charge, the decision of the Superintending Engineer in regard to rate for such non-scheduled item shall be final.

15. We may next examine whether the last sentence of the proviso to clause 10 could be considered to be an arbitration agreement. It does not refer to arbitration as the mode of settlement of disputes. It does not provide for reference of disputes between the parties to arbitration. It does not make the decision of the Superintending Engineer binding on either party. It does not provide or refer to any procedure which would show that the Superintending Engineer is to act judicially after considering the submissions of both parties. It does not disclose any intention to make the Superintending Engineer an arbitrator in respect of disputes that may arise between the Engineer-in-Charge and the contractor. It does not make the decision of the Superintending Engineer final on any dispute, other than the

claim for increase in rates for non-tendered items. It operates in a limited sphere, that is, where in regard to a non-tendered additional work executed by the contractor, if the contractor is not satisfied with the unilateral determination of the rate therefor by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer. It is a provision made with the intention to avoid future disputes regarding rates for non-tendered item. It is not a provision for reference of future disputes or settlement of future disputes. The decision of superintending Engineer is not a judicial determination, but decision of one party which is open to challenge by the other party in a court of law. The said clause can by no stretch of imagination be considered to be an arbitration agreement. The said clause is not, and was never intended to be, a provision relating to settlement of disputes.

16. That clause 10 was never intended to be an arbitration agreement is evident from the contract itself. It is relevant to note the Standard Conditions of Contract of the state government, as originally formulated consisted a provision (Clause 23) relating to settlement of disputes by arbitration, which is extracted below :

> "Except where otherwise provided in the contract, all questions and disputes 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, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work, 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 be referred to the sole arbitration of* a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be refereed to the sole arbitration of Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. *The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this Contract."*

The said clause was deleted by the State Government from the Standard Conditions of Contract by official Memorandum dated 24.12.1981. Contracts entered by the State Government thereafter did not have the said arbitration clause, though the other Conditions of Contract remained the same. The contracts in all these cases are of a period subsequent to 24.12.1981 and the Conditions of Contract forming part of these contracts do not contain the arbitration clause. When the State Government has consciously and intentionally deleted the provision for arbitration from its contracts, it will be a travesty of justice to read another clause in the contract providing for execution of non-tendered items and the method of determination of the rates therefor, as a provision for arbitration.

17. In fact, i*n Executive Engineer RCO vs. Suresh Chandra Panda* [1999 (9) SCC 92], this Court considered the effect of the said clause relating to execution of non-tendered items, vis-à-vis clause 23 in a pre-1981 contract. This court held that the said clause (then numbered as clause 11, numbered as clause 10 in subsequent contracts) was a provision which excluded the issue relating to finality of rates, from the scope of arbitration agreement contained in clause 23 on the following reasoning :

> "Under Clause 11 of the contract, there is an elaborate provision dealing with the power of the Engineer-in Charge to make any alterations or additions to the original specifications, drawings, designs and instructions. It, inter alia, provides that if for such alterations or additions no rate is specified in the contract, then the rates which are entered in the sanctioned schedule of rates of the locality during the period when the work is being carried out, would be paid. However, if this class of work, not provided for in the sanctioned schedule of rates then the contractor has the right, in the manner specified in that clause, to inform the Engineer-in-Charge of the rate at which he intends to carry out that work. If the Engineer-in-Charge does not agree to this rate he is given the liberty to cancel his order and arrange to carry out such class of work in such manner as he may consider advisable. The clause further provides that if the contractor commences such additional work or incurs any expenditure in respect of it before the rate are determined as specified in that clause, then the rate or rates shall be as fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Superintendent Engineer of the circle will be final. Under Clause 23, except as otherwise provided in the contract, all disputes are arbitrable as set out in that clause. The finality of rates, therefore, under Clause 11 is a provision to the contrary in the contract which is excluded from Clause 23."

Thus, even when the Standard Conditions of Contract contained a provision for arbitration (vide clause 23), clause 10 was considered to be a provision dealing with a matter excepted from arbitration. Be that as it may. The proviso to clause 10, which provides that the decision of the Superintending

Engineer is 'final', merely discloses an intention to exclude the rates for extra items decided by the Superintending Engineer from the scope of arbitration, as an excepted matter, when there was an arbitration agreement (clause 23) in the contract. When the arbitration agreement was deleted, provision dealing with non-tendered items can not be described as an arbitration agreement. Be that as it may.

18. We therefore allow these appeals, set aside the orders of the High Court appointing the arbitrator and dismiss the applications for appointment of arbitrator.

…….J.
(R V Raveendran)

New Delhi;
July 4, 2011.

…….J.
(A K Patnaik)