Chairman & M.D., N.T.P.C. Ltd vs M/S. Reshmi Constructions, Builders & ... on 5 January, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1330, 2004 (2) SCC 663, 2004 AIR SCW 198, 2004 CRI LJ (NOC) 354, 2004 (1) ARBI LR 156, 2004 (1) SCALE 70, 2004 (1) ACE 16, (2004) 15 ALLINDCAS 262 (SC), 2004 (15) ALLINDCAS 262, 2004 (1) SLT 790, (2004) 1 KHCACJ 288 (SC), (2004) 1 CTC 445 (SC), 2004 (3) SRJ 136, 2004 (2) ALL CJ 871, ILR(KER) 2004 (3) SC 67, (2004) 1 JT 1 (SC), (2005) 1 ALLCRILR 680, (2004) 2 CAL LJ 20, (2004) 2 HINDULR 414, (2004) 20 ALLINDCAS 696 (CAL), (2004) 4 CAL HN 96, (2004) 1 KER LT 1065, (2004) 1 SUPREME 307, (2004) 1 RECCIVR 713, (2004) 3 ICC 207, (2004) 2 DMC 319, (2004) 2 CALLT 1, (2004) 1 SCALE 70, (2004) 1 WLC(SC)CVL 246, (2004) 1 CIVLJ 919, (2004) 1 CURCC 313, (2004) 2 CURLJ(CCR) 303, (2004) 2 ANDHLD 1, (2004) 1 ARBILR 156, (2004) 14 INDLD 451

Author: V.N. Khare

Bench: Chief Justice, S.B. Sinha

CASE NO.:
Appeal (civil) 2754 of 2002

PETITIONER:
Chairman & M.D., N.T.P.C. Ltd.

RESPONDENT:
M/s. Reshmi Constructions, Builders & Contractors

DATE OF JUDGMENT: 05/01/2004

BENCH:
CJI & S.B. Sinha.

JUDGMENT:

J U D G M E N T V.N. KHARE, CJI.

This appeal which arises out of a judgment and order dated 23-11-2001 passed by the High Court of Kerala at Ernakulam revolves round the question as to whether an arbitration clause in a contract agreement survives despite purported satisfaction thereof.

The parties to this appeal entered into an agreement for a project at Kayamkulam. Upon completion of the work the respondent herein submitted final bill which was allegedly not accepted by the appellant, whereafter they themselves prepared the final bill and forwarded the same along with a printed format being a "No Demand Certificate". The said "No Demand Certificate" was signed by the respondent herein which is in the following terms:

> NO DEMAND CERTIFICATE Name of package : Earth filling in Temporary Township Part II Letter of award : LOA No. KYM/CS/89/022/NIT- 005/LOA-065 dated 19.3.90 Name of the Contractor : Reshmi Construction, T.C. 4/1298, Keston Road, Kowdiar, P.O. Trivandrum 3
>
> 1. This is to certify that we have received all payment in full and final settlement of the supplied and services rendered and/ or all work performed by us in respect of the above referred LOA/ Contract and we have no other claims whatsoever final or otherwise outstanding against NTPC. We further confirm that we shall have no claim/ demands in future in respect of this contract of whatsoever nature, final or otherwise."
>
> 2. We would now request you to please release our security deposit/ contract performance Guarantee."

However, on the same day a letter dated 20-12-1990 was written by the respondent to the appellant stating:

> "We have completed the aforementioned work in the Kayamkulam Super Thermal Power Project's temporary township area at Nangiarkulangara by the end of November 1990 itself. We had submitted a pre-final bill in November itself but the authorities denied the bill and insisted final bill. But when the alleged final bill was prepared the authorities insisted that a "No Demand Certificate" should be executed by us in favour of the Corporation. They served us with a printed specimen of the document and insisted that it should be typed in our own letterhead and submitted to the N.T.P.C. We refused to submit such a document.
>
> But the authorities of N.T.P.C. threatened that unless and until we execute the said document in favour of the Corporation, the N.T.P.C. would not effect payment of our bill. More than six lakhs of Rupees is pending for payment vide the alleged final bill. We have incurred huge losses in the execution of the work purely due to the latches and lapses of the corporation. More over lakhs and lakhs of rupees has to be paid to our Bankers, creditors suppliers, workers, truck owners etc. etc. Under such a situation we have no other way other than budging to the coercion of the authorities of N.T.P.C. ltd. to get whatever they give merely for the necessity of our survival. We have to comply with the instructions of authorities of N.T.P.C. Ltd. out of our helplessness in order to receive payment. Hence this letter.

> The certificates, undertakings, etc. as aforesaid have been executed without prejudice to our rights and claims whatsoever on account of the alleged final bill.
>
> The money invested in the work comprises loans from the Federal Bank Ltd., private financiers, etc. as well the Firm's own funds. Those additional sums raised by loans have to be paid to the Bank, financiers, etc. hence under duress, coerction and under undue influence we are signing the bill and execute such documents as aforesaid to receive payment. Under such coercive circumstances the alleged final bill cannot be constructed as final bill. We are signing the alleged final bill under coerction, under undue influence and under protest only without prejudice to our rights and claims whatsoever. There is no accord and satisfaction between the contracting parties.
>
> You are therefore requested to kindly pass the final bill incorporating all the measurements of the items such as sinkage, in and under water execution of works, compensation for suspension of works, reimbursement of cost escalation due to price hike of petroleum products, cost of idling, enhanced rates for quantities executed beyond the contractual period, market rate for excess quantities, extra additional items etc. besides the losses and damages by way of idling of tools and plants, workmen, staff, establishment costs, capital outlay, interest etc. as per actuals. We hope and request that your goodself may do the needful in the matter."

[Emphasis supplied] The respondent thereafter invoked the arbitration clause by reason of a letter through his advocate dated 21.12.91 wherein the claims under several heads as enumerated in clause (a) to (p) thereof. Therein a request was made to refer all the disputes and differences to a sole arbitrator for adjudication with a direction to make and publish the award within the statutory period.

The appellant herein thereafter discussed the matter at the company level and in its proceedings it was recorded:

> "4.0 In case of M/s. Reshmi Constructions, Trivandrum Kerala (1(c) above) and M/s. C.S. Prakash, (1(d) above) of Perumbavoor, Kerala, the total payment for the works done were effected, the final bills have been settled without protest and the no-dues certificate in the standard proforma have been submitted by the contractors. 5.0 To seek legal opinion in the matter, we have approached Mr. B.S. Krishnan, a leading advocate from Cochin. On detailed study of the claims of the agencies and considering legal conditions, the advocate has advised us to appoint arbitrator/s nominated by CMD of NTPC, immediately. Accordingly our advocate has written suitable replies to the contractor's advocate Shri NT John, of Trivandrum, informing them that they will hear from NTPC regarding appointment of an arbitrator in terms of the contract conditions.
>
> 6.0 Submitted to appoint arbitrator/s for the four contract packages at para 1.0 above, please."

The appellant thereafter by its letter dated 13th February, 1992 replied thereto stating:

> "My client acting upon the notice, though defective, takes it that all your claims are disputed ones and hence are to be resolved by Arbitration. Please note that the reference to arbitration does not mean that there is admission that the disputes are arbitrable. Many of the claims raised are beyond the terms of the contract and the Arbitrator will have not jurisidiction to deal with them. This is a matter which has to be taken up later and not at the stage of appointment of an Arbitrator.
>
> As appointing authority, my client refrains from commenting upon in any manner, on the merits or otherwise of the disputes which your notice has set out.
>
> It may be noticed that your client has already taken the final bill and has issued 'no dues' certificate. This is not merely accord and satisfaction, but bringing the contract to an end.
>
> Your client will hear from my client as regards the appointment of the Arbitrator in terms of the contract conditions shortly."

[Emphasis supplied] A purported correction in the said notice was issued by the advocate of the appellant stating:

> "Sub: Correction in the notice is issued by way of Reply notice is signed on behalf of M/s. Rashmi Constructions, Trivandrum reg.
>
> Ref: My Regd. Notice No. P3-G1/92/582 dt. 13.2.92.
>
> Under instructions from my clients, the Chairman & Managing Director, National Thermal Power Corporation Ltd. NTPC Bhavan, New Delhi 110 003, I issue the following notice:
>
> In the reply notice issued by me under reference number cited above, it was stated that the notice issued by you on behalf of your clients M/s. Rashmi Constructions, Trivandrum was returned since it was not signed by you and that the notice is sent back as the same was signed on your behalf by your client. On scrutiny I find that the notice is returned by you after the same is signed by you and not by your client on your behalf. In paragraph 2 of the reply notice, I stated that the notice is defective. It was so stated because of the mistaken impression that the notice is signed by your client and not by you. I stated that the mistake is in advert at and the same is regretted. I would like to bring to your notice one more fact which was omitted to be stated in the reply notice sent earlier. I have already stated that your client has issued 'no dues' certificate. The final bill is accepted by your client without any protest. This is further followed up by your client receiving the security deposit released on 21.1.92; that is after the expiry of the stipulated period reckoned from the date when

the contract came to an end.

In all other respects the reply notice earlier sent stands."

The respondent herein filed an application under Section 20 of the Arbitration Act, 1940 before the Hon'ble Subordinate Judge's Court Mavelikkara and in terms of a judgment and order dated 30.6.1994 the said application was dismissed. Aggrieved, the respondent herein preferred an appeal before the High Court of Kerala which was allowed by reason of the impugned order. Mr. Bhatt, the learned counsel appearing on behalf of the appellant urged that as the contract itself came to an end upon execution of the "No Demand Certificate" and together with the same the arbitration clause also perished. In support of the said contention, reliance has been placed on M/s. P.K. Ramaiah and Company Vs. Chairman & Managing Director, National Thermal Power Corpn. [1994 Supp (3) SCC 126] and Nathani Steels Ltd. Vs. Associated Constructions [1995 Supp (3) SCC 324].

Mr. Bhatt further urged that as in its application under Section 20 of the Arbitration Act, the respondent did not raise a plea that they had been coerced to submit the "No Demand Certificate", the High Court committed a manifest error in passing the impugned judgment.

The learned counsel appearing on behalf of the respondent, on the other hand, submitted that in the facts and circumstances of the case neither any new contract has come into being nor there was any accord and satisfaction of the contract agreement.

The learned counsel appearing on behalf of the respondent also contended that despite coming to an end of the contract, the arbitration clause survives and all questions arising out of or in relation to the execution of the contract are referable to arbitration. Reliance in this connection has been placed on Damodar Valley Vs. K.K. Kar [(1974) 1 SCC 141], M/s. Bharat Heavy Electricals Limited Vs. M/s. Amar Nath Bhan Prakash [(1982) 1 SCC 625], Union of India and Another Vs. M/s. L.K. Ahuja and Co. [(1988) 3 SCC 76] and Jayesh Engineering Works Vs. New India Assurance Co. Ltd. [(2000) 10 SCC 178].

On the arguments of learned counsel for the parties, the questions that arise for our consideration are:

(i) Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuing a No Demand Certificate by the contractor, can any party to the contract raise any dispute for reference to arbitration?

(ii) Whether in view of letter dated 20.12.1990 sent by the respondent contractor the arbitration clause contained in the agreement can be invoked ?

(iii) Whether the arbitration clause in the agreement has perished with the contract?

In this context it is relevant to refer the arbitration clause contained in the agreement which runs as under:

> "56. Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawing 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 works; or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of National Thermal Power Corporation Ltd.; and if the General Manager is unable or unwilling to act: to the sole arbitration of some other person appointed by the Chairman and Managing Director; National Thermal Power Corporation Ltd. willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of National Thermal Power Corporation Ltd. and that he had to deal with the matters to which the contract relates and that in the course his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid should act as arbitrator and if for any reason, that is not possible; the matter is not to be referred to arbitration at all.
>
> Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.
>
> It is a term of the contract that the party invoking arbitration shall specify the disputes or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.
>
> The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.
>
> The work under the Contract shall, if reasonable possible, continue during the arbitration proceedings and no payment due or payable to the Contractor shall be withheld on account of such proceedings.
>
> The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.
>
> The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

> The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.
>
> The award of the arbitrator shall be final, conclusive and binding on the all parties to this contract.
>
> The cost of arbitration shall be borne by the parties to the dispute, as may be decided by the arbitrator (s).
>
> In the event of disputes or differences arising between one public sector enterprise and a Govt. Department or between two public sector enterprises the above stipulations shall not apply, the provisions of B.P.E. Office Memorandum No. BPE/GL-001/76/MAN/2 (110-75-BPE(GM-1) dated 1st January 1976 or its amendments for arbitration shall be applicable."

Clause 52 of the agreement reads as follows:

> "52. The final bill shall be submitted by the contractor within three months of physical completion of the works. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payment of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and at rates as approved by Engineer-in-Charge, shall be made within the period specified hereunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge:
>
> (a) Contract amount not exceeding Rs. 5 lakhs Four months.
>
> (b) Contract Amount exceeding Rs. 5 lakhs Six months.

After payment of the amount of the final bills payable as aforesaid has been made, the Contractor may if he so desires, reconsider his position in respect of the disputed portion of the final bill and if he fails to do so within 90 days, his disputed claim shall be dealt with as provided in contract."

[Emphasis supplied] The issues are required to be determined having regard to the facts as which arise for consideration whether by reason of the act of the parties the old contract was substituted by a new contract. Only in the event a new contract came into being, the arbitration agreement cannot be invoked.

In Damodar Valley Corporation vs. K.K. Kar [(1974) 1 SCC 141],this Court held:

> "It appears to us that the question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. These words are wide enough to cover the dispute sought to be referred."

Normally, an accord and satisfaction by itself would not affect the arbitration clause but if the dispute is that the contract itself does not subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that the contract survives, recourse to the arbitration clause may be taken. [See Union of India Vs. Kishorilal Gupta (AIR 1959 SC 1362) and Majhati Jute Mills Vs. Khvalirsa (AIR 1968 SC 522).

In Bharat Heavy Electricals Limited (supra) this Court observed that whether there was discharge of the contract by accord and satisfaction or not is a dispute arising out of a contract and is liable to be referred to arbitration.

Yet again in L.K. Ahuja (supra) Sabyasachi Mukharji, J., as the learned Chief Justice then was, laid down the ingredients of Section 20 of the Arbitration Act stating:

> 6. It appears that these questions were discussed in the decision of the Calcutta High Court in Jiwnani Engineering Works Pvt.

Ltd. v. Union of India [AIR 1978 Cal 228] where one of us (Sabyasachi Mukharji, J.) was a party and which held after discussing all these authorities that the question whether the claim sought to be raised was barred by limitation or not, was not relevant for an order under Section 20 of the Act. Therefore, there are to aspects.

One is whether the claim made in the arbitration is barred by limitation under the relevant provisions of the Limitation Act and secondly, whether the claim made for application under Section 20 is barred. In order to be a valid claim for reference under Section 20 of the Arbitration Act, 1940, it is necessary that there should be an arbitration agreement and secondly differences must arise to which the agreement in question applied and, thirdly, that must be within time as stipulated in Section 20 of the Act.

It was held that having regard to the fact that the existence of an arbitration agreement was not denied and there had been an assertion of claim and denial thereof, the matter would be arbitrable. It was observed:

> In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment get weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable.
>
> [Emphasis supplied] This aspect of the matter has also been considered in Jayesh Engineerng Works (supra) wherein following L.K. Ahuja (supra) it was held:
>
> "Whether any amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the arbitrator. In fact, whether the contract

> has been fully worked out and whether the payments have been made in full and final settlement are questions to be considered by the arbitrator when there is a dispute regarding the same."

In M/s. P.K. Ramaiah and Company (supra) the amount was received unconditionally. The full and final satisfaction was acknowledged by a separate receipt in writing. In that situation the following finding was recorded :

> "Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given."

We, however, may observe that the quotation from Russell on Arbitration may not be apt inasmuch as at the stage of reference what would be a good defence is not a matter to be taken into consideration.

Yet again in Nathani Steels Ltd. (supra) the disputes and differences were amicably settled by and between the parties and in that view of the matter it was held that unless and until the statement is set aside, the arbitration clause cannot be invoked. Such is not the position here.

The appellant herein did not raise a question that there has been a novation of contract. The conduct of the parties as evidenced in their letters, as noticed hereinbefore, clearly go to show that not only the final bill submitted by the respondent was rejected but another final bill was prepared with a printed format that a "No Demand Certificate" has been executed as other final bill would not be paid. The respondent herein, as noticed hereinbefore, categorically stated in its letter dated 20.12.1990 that as to under what circumstances they were compelled to sign the said printed letter. It appears from the appendix appended to the judgment of the learned Trial Judge that the said letter was filed even before the trial court. It is, therefore, not a case whether the respondent's assertion of "under influence or coercion"

> can be said to have been taken by way of an afterthought.

> Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

> Further, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position.
>
> We may, however, hasten to add that such a case has to be made out and proved before the Arbitrator for obtaining an award.
>
> At this stage, the Court, however, will only be concerned with the question whether triable issues have been raised which are required to be determined by the Arbitrators.
>
> Circumstances leading to passing an order by the courts of law directing the parties to get their disputes determined by domestic tribunal selected by them having regard to the correspondences exchanged between the solicitors came up for consideration in Goodman Vs. Winchester and Alton Rly [(1984) 3 All ER 594] wherein it was held:
>
> "As I have already recounted, the plaintiff's solicitor may have had in mind that if there were an arbitration clause various matters could be sorted out cheaply and quickly under it. There is no evidence, in my judgment, that when he drafted the terms of the arbitration clause he had in mind that it would not apply to a repudiation of the contract by the defendants. He is a solicitor; he is clearly an experienced solicitor; and he should have appreciated (and I feel certain he did) that the arbitration clause which he drafted, and which was accepted by the defendants, would cover every aspect of the contract, including repudiation. But, apart altogether from what the plaintiff's solicitor had in mind, there is no evidence at all as to what the defendant company had in mind when it agreed to accept the arbitration clause, and it was wrong, in my judgment, for the Judge to say that neither party had in mind that it would apply to the summary dismissal of the plaintiff. It follows, therefore, that at the very beginning of his judgment the judge misdirected himself as to the construction of the arbitration clause and what it was mended to deal with."

Even correspondences marked as without prejudice may have to be interpreted differently in different situations.

What would be the effect of without prejudice offer has been considered in Cutts Vs. Head and Another [(1984) 2 WLR 349] wherein Oliver L.J. speaking for the Court of Appeals held:

> "In the end, I think that the question of what meaning is given to the words "without prejudice" is a matter of interpretation which is capable of variation according to usage in the profession. It seems to be that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which isimmutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in Walker v. Wilsher, 23 Q.B.D. 335, and the court did not deal with it. I think that the wide body of practice which undoubtedly

> exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs."

Yet again in Rush & Tompkins Ltd. Vs. Greater London Council and Another [(1988) 1 All ER 549]:

> "The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy, namely the need to facilitate compromise, and partly on 'implied agreement' as Parker LJ stated in South Shropshire DC v Amos [1987] 1 All ER 340 at 343, [1986] 1 WLR 1271 at 1277. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'. The classic definition of the phrase is contained in the judgment of Lindley LJ in Walker v. Wilsher (1889) 23 QBD 335 at 337:
>
> 'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.' Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this court in Tomlin v Standard Telephones and Cables Ltd. [1969] 3 All ER 201 at 204, 205, [1969] 1 WLR 1378 at 1383, 1385 per Danckwerts LJ and Ormrod J. (Although he dissented in the result, on this point Ormrod J agreed with the majority.) The definition was further cited with approval by both Oliver and Fox LJJ in this court in Cutts v. Head [1984] 1 All ER 597 at 603, 610, [1984] Ch. 290 at 303, 313.

In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning, e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (See Cutts v. Head) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particular, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will cease if and when the negotiations 'without prejudice' come to fruition in a concluded agreement."

Meaning the words "without prejudice" come up for consideration before this Court in Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur and Others Vs. Pratap Rai [(1978) 3 SCC 113] wherein it has been held:

> "The Appellate Collector has clearly used the words "without prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term "without prejduce" has been defined in Black's Law Dictionary as follows:

> Where an offer or admission is made 'without prejduce', or a motion is defined or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also Dismissal Without Prejudice.
>
> Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows:
>
> The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.
>
> The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs . The word is also frequently used without the foregoing implications in statutes and inter partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'.
>
> In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred."

The appellant has in its letter dated 20th December, 1990 has used the term 'without prejudice'. It has explained the situation under which the amount under the 'No Demand Certificate' had to be signed. The question may have to be considered from that angle. Furthermore, the question as to whether the respondent has waived its contractual right to receive the amount or is otherwise estoppel from pleading otherwise will itself be a fact which has to be determined by the arbitral tribunal.

In Halsbury's Laws of England, 4th Edition, Vol.16 (Reissue) para 957 at page 844 it is stated:

> "On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions:
>
> (1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
>
> (2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

In American Jurisprudence, 2nd Edition, Volume 28, 1966, Page 677-680 it is stated:

> "Estoppel by the acceptance of benefits:
>
> Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.
>
> As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.
>
> This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience."

The fact situation in the present case, would lead to the conclusion that the arbitration agreement subsists because:

> (i) Disputes as regard final bill arose prior to its acceptance thereof in view the fact that the same was prepared by the respondent but was not agreed upon in its entirety by the appellant herein;
>
> (ii) The appellant has not pleaded that upon submission of the final bill by the respondent herein any negotiation or settlement took place as a result whereof the final bill, as prepared by the appellant, was accepted by the respondent unequivocally and without any reservation therefor;
>
> (iii) The respondent herein immediately after receiving the payment of the final bill, lodged its protest and reiterated its claims.
>
> (iv) Interpretation and/or application of clause 52 of the agreement would constitute a dispute which would fall for consideration of the arbitrator.
>
> (v) The effect of the correspondences between the parties would have to be determined by the arbitrator, particularly as regard the claim of the respondent that the final bill was accepted by it without prejudice.
>
> (vi) The appellant never made out a case that any novation of the contract agreement took place or the the contract agreement was substituted by a new agreement. Only in the event, a case of creation of new agreement is made out the question of challenging the same by the respondent would have arisen.

(vii) The conduct of the appellant would show that on receipt of the notice of the respondent through its advocate dated 21.12.1991 the same was not rejected outright but existence of disputes was accepted and the matter was sought to be referred to the arbitration.

(viii) Only when the clarificatory letter was issued the plea of settlement of final bill was raised.

(ix) The finding of the High Court that a prima facie in the sense that there are triable issues before the Arbitrator so as to invoke the provisions of Section 20 of the Arbitration Act, 1940 cannot be said to be perverse or unreasonable so as to warrant interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India.

(x) The jurisdiction of the arbitrator under the 1940 Act although emanates from the reference, it is trite, that in a given situation the arbitrator can determine all questions of law and fact including the construction of the contract agreement. (See Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission reported in 2003 (8) SCALE 553).

(xi) The cases cited by the learned counsel for the appellant [P.K. Ramaiah and Company (supra) and Nathani Steels (supra)] would show that the decisions therein were rendered having regard to the finding of fact that the contract agreement containing the arbitrator clause was substituted by another agreement. Such a question has to be considered and determined in each individual case having regard to the fact situation obtaining therein.

For the reasons aforementioned, we are of the opinion that there is no infirmity in the impugned judgment. This appeal is, therefore, dismissed. No Costs.