IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO. 688 OF 2025

M/s. Sowil Limited .....**APPLICANT**

: VERSUS :

Deputy Chief Engineer
(Construction) Bhusawal ....**RESPONDENT**

Mr. Shardul Singh with Mr. Smeet Savla & Ms. Priyal Gandhi i/b M/s. SHS Chambers, for Applicant

Mr. Narayan Bubna with Ms. Pooja Malik, for Respondent

CORAM : SANDEEP V. MARNE, J.

Reserved On :14 January 2026.

Pronounced On : 28 January 2026.

Judgment:

1) This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 **(Arbitration Act)** for appointment of arbitrator for adjudication of disputes and differences between the parties arising out of contract dated 7 May 2018. While there is no dispute between the parties about existence of arbitration agreement, the clause contains a restrictive condition for arbitration. The relevant clause in the contract provides for resolution of disputes by arbitration only to the extent of 20% of the value of the contract. The value of the contract was Rs.84,52,157.61/- whereas the estimated claim amount is Rs.3 crores and accordingly Railways have opposed appointment of arbitrator.

2) A tender notice was issued by the Respondent-Central Railways on 10 November 2017 for execution of work of preparation of design and structural drawings for major and important bridges for the upcoming Manmad- Jalgaon 3rd line project. The Applicant participated in the tender process and was a successful bidder. Letter of Acceptance dated 12 February 2018 was issued in favour of the Applicant which indicated that the total value of the contract as Rs.84,52,157.61/-. Under the contract, the Applicant was supposed to complete the entire scope of work by provision of detailed designs and drawings for 22 bridges within 9 months. Various extensions were granted in favour of the Applicant for completion of the work. The contract has been terminated by the Respondent on 23 December 2021 and the Applicant was debarred from executing the remaining scope of work. Applicant challenged termination by filing Writ Petition No.2887/2023, which was disposed of on 11 June 2025 granting liberty to the Applicant to file application under Section 11 of the Arbitration Act. Accordingly, the Applicant has filed the present Application under Section 11 of the Arbitration Act.

3) Mr. Singh, the learned counsel appearing for the Applicant submits that the parties have agreed to resolve the disputes and differences by arbitration and that the contract contains Clause-39 providing that the stipulations under Clauses-63 and 64 of the General Conditions of Contract (GCC) would be applicable for settlement of claims of the contractor. He would therefore submit that unreasonable condition is put in Clause 39 of the contract that provisions of Clauses 63 and 64 of the GCC are applicable only for settlement of claims of disputes between the parties for value less than or equal to 20% of the value of the contract. He submits that imposition of this condition is both

arbitrary, as well as discriminatory. That there is no cap for the Respondent-Railways to have its claims/counterclaims decided through arbitration and the maximum cap is arbitrarily and selectively applied to the Applicant. He would then take me through Clause-64 of the GCC in support of his contention that no restriction is imposed for decision of counterclaims by the Railways.

4) Mr. Singh further submits that the restriction of non-arbitrability of claims exceeding 20% of the value of contract is aimed at discouraging the Contractors from raising full claims and to restrict them within the limit of 20%. That such unfair bargain between the parties cannot be permitted to operate and that therefore the restriction of 20% claim value is required to be invalidated while preserving the balance part of arbitration agreement.

5) Mr. Singh would submit that while deciding application under Section 11 of the Arbitration Act, this Court is empowered to decide on validity or reasonableness of condition stipulated in the arbitration clause. In support, he relies on judgment of the Apex Court in ***Lombard Engineering Limited Versus. Uttarakhand Jal Vidyut Nigam Limited*** [1]. He relies on judgment of the Apex Court in ***ICOMM Tele Limited Versus. Punjab State Water Supply and Sewerage Board and Another*** [2] in support of his contention that when an arbitration clause provides for unfair bargaining strength between the parties, the same can be declared invalid by the Court. That in ***ICOMM Tele Limited*** though the restriction for deposit of 10% claim amount is applied equally to both the parties, the Apex Court still declared the clause to be invalid as being arbitrary to Article 14 of the Constitution of India. Relying on Constitution bench

1 2024 4 SCC 341
2 2019 4 SCC 401

judgment of ***Central Organisation for Railway Electrification Versus ECI SMO MCML JV A Joint Venture Company*** [3] (***CORE***), Mr. Singh submits that the principle of equality applies even at the stage of appointment of arbitrator. He would submit that in the present case, the arbitration clause creates inequality by restricting the claims of the Contractor at 20% while not imposing similar restriction on the Railways. He relies upon judgment of the Apex Court in ***Shin Satellite Public Company Limited Versus Jain Studios Limited*** [4] where stipulation in the arbitration clause for waiver of right of appeal is held to be invalid. He submits that the Apex Court has recognized the principle in ***Shin Satellite Public Company Limited*** (supra) that if the contract is in severed parts, some of which are legal and unenforceable, lawful parts can be enforced provided they are severable.

6) Mr. Singh further submits that under Section 11 Court can make appointment of arbitrator and leave the issue of jurisdiction in the form of financial cap to be decided by the arbitrator. He relies on judgment of Rajasthan High Court in ***Jai Salasar Balaji Construction Company Versus. Union of India*** [5]. Mr. Singh would accordingly pray for constitution of Arbitral Tribunal in the light of express agreement between the parties to resolve the disputes and differences by arbitration.

7) Mr. Bubna the learned counsel appearing for the Respondent-Railways would oppose the Application submitting that the parties have expressly agreed to resolve the disputes and differences between them by arbitration only if the claim is below 20% of the contract value. That Clause 39 of the contract expressly provides that if claim is above 20% of the contract value, the same

3 2025 (4) SCC 641
4 2006 (2) SCC 628
5 SB Arbitration Application No. 52 of 2016 decided on 18 August 2017

would not be governed by arbitration. He submits that the clause is not aimed at discouraging the contractor from claiming more than 20% of the contract value and that the contractor is free to institute civil suit against Railways if he wants to prosecute claim in excess of 20% of the contract value. That in the present case, the Applicant has declared the estimated value of the claim at Rs.3 crores which is 400% more than the contract value of Rs.84,52,157.61/-.

8) Mr. Bubna relies on judgment of this Court in ***Railtech Infraven Pvt. Ltd. versus. Union of India and Another*** [6] in support of his contention that the condition restricting claim at 20% of the contract value is upheld by this Court. He also relies upon judgment of the Apex court in ***State of AP and another versus Obulu Reddy*** [7] in support of his contention that similar monetary restriction for references of disputes to arbitration is considered and applied by the Apex Court. He also relies upon judgment of Madhya Pradesh High Court in ***Seth Mohanlal Hiralal Construction Company Versus. Union of India and Another*** [8] and of the Apex Court in ***Deepak Kumar Bansal Versus union of India and Another*** [9] is referred to, in support of the contention that the condition of 20% value of contract is repeatedly applied by Courts. He would submit that the restriction of reference of claim of only 20% of the contract value to arbitration is provided considering peculiar practice followed by contractors to raise baseless and escalated claims after securing the amounts under the bills. He would pray for dismissal of the Application.

9) Rival contentions of the parties now fall for my consideration.

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6 2014 SCC Online Bom 1662
7 1999 (9) SCC 568
8 2018 SCC Online MP 847
9 2009 (3) SCC 293

10) The short issue that arises for consideration is whether the Arbitral Tribunal can be constituted by this Court in exercise of powers under Section 11(6) of the Arbitration Act in the light of estimated claim of the Applicant exceeding 20% of the value of contract. The total value of the contract awarded to the Applicant was Rs.84,52,157.61/- whereas in para-46 of the Application, the Applicant has declared that its estimated value of the claim is Rs. 3 crores towards losses suffered by it due to unlawful termination. Para 46 of the Application reads thus:

> 46. The Applicant claims an estimated amount of Rs.3,00,00,000/- (Rupees Three Crores) towards the losses suffered by the Applicant due to the illegal and unlawful to rescission /termination, illegal invocation of the Bank Guarantee, recovery of the amounts due to the Application by the Respondent, etc under the Contract. The Petitioner reserves its right to vary its claim at the time of submitting claims before the Arbitral Tribunal.

11) The contract executed between the parties contains arbitration Clause-39 which reads thus :-

> **39. ARBITRATION:**
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> **The provisions 63 and 64 of the GCC will be applicable only for settlement of claims of disputes between the Parties for values less than or equal to 20% of the value of the contract and when the claims or disputes are of value more than 20% of the value of contract, provision of clauses 63 & 64 and other relevant clauses of GCC will not be applicable and arbitration will not be a remedy for settlement of such disputes.**
>
> 39.1 The contractor shall not be entitled to ask for reference to arbitration before COMPLETION of the work assigned to him under this contract. The contractor shall seek reference to arbitration to settle disputes only ONCE within the ambit of condition 39.1 above.
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> 39.2 In terms of clause 63 of General Conditions of Contract-2014, the disputes and differences, for which provision has been made in "Special Conditions of Contract" included in tender documents as above, shall also be deemed as "Excepted matters' and decisions of the Railway authority thereon shall be final and binding on the contractor and these 'Excepted matter shall stand specifically excluded from the purview of the arbitration clause and not referred to arbitration.

39.3 Arbitrators to be appointed only by General Manager of Railways.

39.4 The Claimant Contractor shall seek reference to Arbitration to settle the disputes only within the ambit of conditions of mentioned above.

39.5 CLAIMS: As per Clause No.43 (1) & 43(2) of General condition of contract:-

Clause No:- 43(1):- Monthly statement of claims:- The contractor shall prepare and furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional expenses to which the contractor may consider himself entitled to and of all extra or additional works ordered by the Engineer which he has executed during the preceding month and no claim for payment for and such work will be considered which has not been included in such particulars.

Clause No 43(2)- Signing of "NO CLAIM Certificate: The contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the railway entertain or consider any such claim, if made by the contractor, after he shall have signed a "NO CLAIM" Certificate in favour of the railway in such form as shall be required by the railway after the works are finally measured up. The contractor shall be from disputing the correctness of the items covered by "NO CLAIM Certificate or demanding a clearance to Arbitration In respect thereof.

(emphasis added)

12) Thus, under Clause 39 of the contract, the provisions of Clauses 63 and 64 of the GCC applies only for settlement of claims between the parties for value less than or equal to 20% of the value of contract. Clause-39 further provides that when claims or disputes exceed 20% of the contract value, provisions of Clauses 63 and 64 and other relevant clauses of GCC would not be applicable and arbitration would not be a remedy for settlement of such disputes.

13) Since Clause 39 refers to Clauses 63 and 64 of the GCC, it would be necessary to refer to the said clauses as well:-

63. Matters Finally Determined By The Railway: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the

contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A,61(1), 61(2) and 62(1) to (xlll)(B) of Standard General Conditions of Contract or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' (matters not arbitrable)and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause.

64.(1) Demand For Arbitration:

64.(1) (1) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s)or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64.(1) (iii) (a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claims alongwith all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(C) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(d) Place of Arbitration: The place of arbitration would be within the geographical limits of the

Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

64.(1) (iv) No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in malding it.

64.(1) (v) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

64.(2) Obligation During Pendency Of Arbitration: Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and dedde whether or not such work should continue during arbitration proceedings.

64.(3) Appointment of Arbitrator:

64.(3) (a)(i) In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal, shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

64. (3) (a)(ii) In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal sh consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazett Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the names of retired railway officer empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator" from amongst

the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

64.(3) (a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

64.(3) (a)(iv) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

64.(3) (a)(v) While appointing arbitrator(s) under Sub-Clause (i), (ii) & (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be Invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64.(3) (b)(i) The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.

64.(3) (b)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

64(3) (b) (iii) A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims

presented in the arbitral proceedings but omitted from the arbitral award

64.(4) In case of the Tribunal, comprising of three Members, any ruling on award shell be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64.(5) Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

64.(6) The cost of arbitration shall be bome by the respective parties. The cost shall inter-alla include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time Irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

64.(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause.

14) Since the claim of the Applicant exceeds 20% value of the contract (it is approximately 400% of the value of contract) Railways have opposed constitution of Arbitral Tribunal contending that there is no arbitration agreement for adjudication of disputes and differences in respect of the claims raised by the Applicant. Existence of arbitration agreement under Section 7 of the Arbitration Act is a *sine-qua-non* for exercise of power by the Court under Section 11 for appointment of an arbitrator. In the present case, there is arbitration agreement between the parties. However, there is a restrictive covenant in the arbitration agreement and parties have agreed that the disputes only to the extent of claims upto 20% of the contract value would be resolved through private arbitration and disputes concerning claims exceeding 20% of the contract value would not be resolved by arbitration. There is positive as well as negative covenant in Clause 39 of the contract which not

only provides for dispute resolution mechanism by arbitration in respect of claims only upto and below 20% of the contract value but it specifically provides that any claim exceeding 20% of contract value shall not be adjudicated through arbitration. There is thus no agreement between the parties to resolve disputes relating to the claim of the Applicant, which is almost 400% of the contract value. Faced with the above situation, the Applicant has sought to challenge the restrictive stipulation of 20% of the contract value. Before considering the challenge of the Applicant, it must however be observed at the very outset that though oral challenge is raised to the said restrictive covenant, no specific ground in that regard is pleaded in the arbitration application. Ordinarily therefore this Court would have been justified in not permitting the Applicant to raise a challenge to the restrictive covenants in the Arbitration Agreement in absence of pleadings, however since parties have canvassed detailed submissions on enforceability of the restrictive covenant in the arbitration agreement, I proceed to decide the challenge raised by the Applicant.

15) According to the Applicant, restrictive covenant in the arbitration agreement providing for dispute resolution mechanism of claims upto 20% of the contract value is discriminatory since such restrictive covenant does not apply to Railways. In my view, the submission is not only misplaced but also speculative. Careful perusal of Clause 39 of the contract indicates that the same uses the expression 'only for settlement of claims of disputes between the parties for values less than or equal to 20% of the value of contract'. Thus use of the expression 'between the parties' does not seem to suggest that the restrictive covenant is applicable only *qua* the Applicant and not to Railways. In any case, it is not necessary to delve deeper into this aspect as the issue of appointment of

arbitrator is required to be decided before any counterclaim can be made by the Railways. The Court cannot speculate whether Railways would raise any counterclaim and what would be the value of such counterclaim. Clause 39.4 uses the words 'claimant contractor' who is required to seek reference to arbitration to settle the disputes only within the ambit of conditions mentioned in Clause 39.3. Clause 39.3 provides for appointment of arbitrator by the General Manager which now cannot be enforced in the light of development of law on the subject of unilateral appointment of arbitrator. However, when an application is made to the Court for appointment of Arbitrator, the Court would consider only the value of the claim of the Contractor and then constitute the Arbitral Tribunal. What would be the value of the counterclaim filed by the Railways would be in the realm of speculation at that point of time. Therefore, the value of counterclaim raised by the Railways cannot be a determinative factor for deciding whether the dispute can be referred to arbitration or not in the light of restrictive covenant in the arbitration agreement. I am therefore not impressed by the submission of Mr. Singh that the restrictive covenant in the arbitration agreement is discriminatory.

16) It is further sought to be contended that the restrictive covenant for arbitration in respect of the claims upto only 20% of the contract value is aimed at discouraging the contractors from raising claims in excess of 20% of the contract value against the railways. I am unable to agree. What parties have agreed under Clause 39 is that claims upto 20% of the contract value would be adjudicated through arbitration and that the claims exceeding 20% of the contract value can be adjudicated in other proceedings. Thus, Clause 39 does not seek to prevent the contractors from seeking adjudication of claims exceeding 20% of the contract value. In the

event the contractor decides to claim amount in excess of 20% of contract value from the Railways, he needs to file civil suit since such disputes are not agreed to be resolved by arbitration.

17) The principle of party autonomy would apply and the intention of parties in agreeing for resolution of disputes through arbitration must be appreciated. Party autonomy is the foundational principle granting parties the freedom to mutually define their dispute resolution process. Party autonomy would therefore also include freedom to mutually agree that only part of dispute would be resolved by arbitration. Once arbitration agreement is arrived at, it does not mean that every dispute has to be resolved only by arbitration. It is for parties to decide whether all or selective disputes are to be resolved by arbitration. Parties here have clearly intended that claims of only particular value would be adjudicated through arbitration while claims exceeding the agreed value would be resolved through other remedies. It is for the parties to agree as to whether the disputes would be resolved through arbitration or not and the Court cannot force the parties to have the disputes resolved through the mechanism of private arbitration. If there was no arbitration agreement at all, could Applicant have insisted for appointment of arbitrator? The answer is obviously in the negative. Therefore, since parties have expressly agreed that disputes exceeding 20% of the contract value would not be resolved through arbitration, the Court cannot force parties to resolve their disputes through arbitration. The Court would have no jurisdiction to appoint an arbitrator under Section 11 of the Arbitration Act if there is no arbitration agreement between the parties to decide the claim of a particular value.

18) Imposition of restriction of reference of dispute for arbitration only in respect of the claims upto 20% of the contract

value is sought to be justified by Railways by contending that the same is imposed essentially to curb tendency on behalf of the Contractors to first receive certified bill amount and thereafter raise baseless and escalated claims against the Railways. It is contended that therefore only genuine claims upto 20% of the contract value can be permitted leaving open remedy for contractors to adopt other civil remedies if claims exceed 20% of the contract value. In my view, it is not really necessary to go into validity of reasons as to why the restriction is imposed in the arbitration agreement. As observed above, arbitration is essentially governed by the principle of 'party autonomy'. The Applicant has agreed that only claims upto 20% of contract value would be adjudicated through arbitration and that the remedy of arbitration would not be available if claim amount exceeds 20% of contract value. Once there is agreement between the parties for adjudication of only certain disputes, it is not for the Court to overstep its jurisdiction and direct that even those disputes which are not covered by arbitration agreement must also be referred to arbitration. The stated objective of the Railways behind the restrictive covenant is to curb raising of baseless and inflated claims by the contractors. However, the restriction still does not prevent or restrict the contractor from raising claims above 20% of contract value. The parties have agreed that if claim is below 20% of contract value, the same can be adjudicated in an informal manner through private arbitration and if claim exceeds 20% of contract value, the Contractor will adopt usual civil remedy of filing a suit. In my view, therefore a restrictive covenant in the arbitration agreement cannot be unreasonable for putting an embargo on right to sue of the Contractor. It does not violate the provisions of Section 28 fo the Contract Act in any manner.

19) Now I proceed to examine the challenge raised by the Applicant to the restrictive covenant in the arbitration agreement, which does not permit adjudication of disputes exceeding 20% of the contract value through the mechanism of arbitration. It is contended by the Applicant that the restrictive covenant is both discriminatory, as well as arbitrary and causes violence to equality clause enshrined in Article 14 of the Constitution.

20) Before proceeding to examine Applicant's challenge to the restrictive covenant in the arbitration agreement, it is first required to be considered as to whether this Court, while exercising power of appointment of arbitrator under Section 11(6) of the Arbitration Act, can consider validity of condition in the arbitration agreement. The law in this regard is now settled by the three Judge Bench judgment of the Apex Court in ***Lombardi Engineering Limited*** (supra). It Is held that while considering an application under Section 11(6) of the Arbitration Act for appointment of arbitrator, the Court can also test the validity or reasonableness of condition stipulated in the arbitration clause on the touchstone or anvil of Article 14 of the Constitution of India. The Apex Court held in ***Lombardi Engineering Limited*** paras-70 to 72, 75 ,78, 80, 81 and 83 as under :-

> **70. The vociferous submission on the part of the learned counsel appearing for the respondent, that this Court while considering an application under Section 11(6) of the 1996 Act for the appointment of arbitrator should not test the validity reasonableness of the conditions stipulated in the arbitration clause on the touchstone or anvil of Article 14 of the Constitution, is without any merit or substance.**
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> 71. It would be too much for the respondent to say that it is only the writ court in a petition under Article 226 of the Constitution that can consider whether a particular condition in the arbitration clause is arbitrary.
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> 72. It is not for the first time that this Court is looking into the arbitration clause falling foul of Article 14 of the Constitution while deciding Section 11(6) application.

75. What is relevant to note in all the above referred decisions of this Court is the phrase "operation of law". This phrase is of wider connotation and covers the 1996 Act as well as the Constitution of India and any other Central or State law.

78. Our Constitution is the paramount source of law in our country. All other laws assume validity because they are in conformity with the Constitution. The Constitution itself contains provisions that clearly provide that any law which is in violation of its provisions is unlawful and is liable to be struck down. As contained in Article 13, which provides that all laws which were made either before the commencement of the Constitution, or are made after it, by any competent authority, which are inconsistent with the fundamental rights enshrined in the Constitution, are, to the extent of inconsistency, void. This again unveils the principle of Grundnorm which says there has to be a basic rule. The Constitution is the basic and the ultimate source of law.

80. Thus, in the context of the arbitration agreement, the layers of the Grundnorm as per Kelsen's theory would be in the following hierarchy:

(i) Constitution of India, 1950;

(ii) Arbitration and Conciliation Act, 1996 & any other Central/State law;

(iii) Arbitration agreement entered into by the parties in light of Section 7 of the Arbitration and Conciliation Act, 1996.

81. Thus, the arbitration agreement, has to comply with the requirements of the following and cannot fall foul of:

(i) Section 7 of the Arbitration and Conciliation Act;

(ii) any other provisions of the Arbitration and Conciliation Act, 1996 & Central/State Law;

(iii) Constitution of India, 1950.

83. The concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. **The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the Court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit.**

(emphasis added)

21) Thus, Court exercising power of appointing arbitrator under Section 11 of the Arbitration Act can also determine validity of condition in the arbitration agreement. Now I proceed to examine whether the restrictive covenant in the arbitration agreement is discriminatory or arbitrary or causes violence to Article 14 of the Constitution of India.

22) I have already held that the restrictive covenant not providing for arbitration in respect of claims above 20% of contract value is not discriminatory. For holding the clause to be discriminatory, the Applicant first needs to establish that the same puts any unreasonable restriction on legal action to be initiated by it. Thereafter it needs to be demonstrated that such unreasonable restriction is not applicable to the Railways. In the present case however the Applicant is unable to demonstrate that the restrictive covenant is unreasonable or it prevents it from exercising legal remedies in respect of its claims. Therefore it is not even necessary to examine the second aspect of applicability of the said restriction to Railways. The plea of discrimination is sought to be raised in a speculative manner that Railways can file a counterclaim exceeding 20% of the contract value. The parties have agreed that when the claim is to be raised by the contractor, arbitration would be available only in respect of claims upto 20% of the contract value. In my view therefore it cannot be contended that the clause is discriminatory. Having failed to demonstrate that the restrictive covenant in the arbitration agreement is discriminatory, it is sought to be suggested that the restriction is arbitrary.

23) Applicant has relied upon judgment of the Apex Court in ***ICOMM Tele Limited*** (supra) in which the arbitration clause provided for deposit of 10% of the claim amount by the claimant

with further covenant for forfeiture of the deposited 10% amount. Such condition in the arbitration agreement was challenged as being unfair bargain between the contractor and the principal. The condition was justified by the Principal by contending that the same applied equally to both parties. The Apex Court held that the condition was not discriminatory as it applied equally to both the parties. The Apex Court however held that arbitrariness is a separate and distinct facet of Article 14 and found that the said condition in the arbitration agreement was arbitrary and violative of Article 14 of the Constitution of India. Referring to the judgment in ***ABL International limited Versus. Export Credit Guarantee Corporation*** [10], the Apex Court held that even within the contractual spheres, the requirement of Article 14 to act fairly, justly and reasonably by persons, who are State authorities or instrumentalities, continues. The Apex Court held that the condition of deposit of 10% claim amount was unjust to a party losing in the arbitration on account of provision for forfeiture of the same. The Apex Court further held that such condition for deposit amounted to a clog on the process of alternate dispute resolution process through arbitration. It is held that deterring a party to arbitration from invoking the alternate dispute resolution process by condition of pre-deposit of 10% claim amount would discourage arbitration contrary to the object of declogging the Court system. The Apex Court held in paras-16, 17, 19, 23 to 27 as under :-

> 16. Thus, it must be seen as to whether the aforesaid Clause 25(viii) can be said to be arbitrary or discriminatory and violative of Article 14 of the Constitution of India.
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> 17. We agree with the learned counsel for the respondents that the aforesaid clause cannot be said to be discriminatory in that it applies equally to both However, Respondent 2 and the appellant. arbitrariness is a separate and distinct facet of Article 14.

10 2004 3 SCC 553

19. We have thus to see whether Clause 25(viii) can be said to be arbitrary and violative of Article 14 of the Constitution of India.

23. The important principle established by this case is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a "deposit-at-call" of 10 per cent of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. A 10 per cent deposit has to be made before any determination that a claim made by the party invoking arbitration is frivolous. This is also one important aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant. Take for example a claim based on a termination of a contract being illegal and consequent damages thereto. If the claim succeeds and the termination is set aside as being illegal and a damages claim of Rupees One crore is finally granted by the learned arbitrator at only ten lakhs, only one-tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration proceedings will be entitled to forfeit nine-tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed.

24. Further, it is also settled law that arbitration is an important alternative dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation. Any requirement as to deposit would certainly amount to a clog on this process. Also, it is easy to visualise that often a deposit of 10 per cent of a huge claim would be even greater than court fees that may be charged for filing a suit in a civil court. This Court in State of J&K v. Dev Dutt Pandit 16, has held: (SCC pp. 349-50, para 23)

> "23. Arbitration is considered to be an important alternative disputes redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process. What happened in the present case is certainly a paradoxical

> situation which should be avoided. Total contract is for Rs 12,23,500. When the contractor has done less than 50 per cent of the work the contract is terminated. He has been paid Rs 5,71,900. In a Section 20 petition he makes a claim of Rs 39,47,000 and before the arbitrator the claim is inflated to Rs 63,61,000. He gets away with Rs 20,08,000 with interest at the rate of 10 per cent per annum and penal interest at the rate of 18 per cent per annum. Such type of arbitration becomes subject of witticism and do not help the institution of arbitration. Rather it brings a bad name to the arbitration process as a whole. When claims are inflated out of all proportions not only that heavy costs should be awarded to the other party but the party making such inflated claims should be deprived of the costs. We, therefore, set aside the award of costs of Rs 7500 given in favour of the contractor and against the State of Jammu and Kashmir."

25. Several judgments of this Court have also reiterated that the primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious manner. Thus, in Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd. 12, this Court held: (SCC p. 250, para 39)

> "39. In Union of India v. U.P. State Bridge Corpn. Ltd. 18 this Court accepted the view 19 that the A&C Act has four foundational pillars and then observed in para 16 of the Report that: (SCC p. 64)
>
> '16. First and paramount principle of the first pillar is 'fair, speedy and inexpensive trial by an Arbitral Tribunal'. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to."
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> (emphasis in original)

26. Similarly, in Union of India v. Varindera Constructions Ltd. 20, this Court held: (SCC p. 797, para 12)

> "12. The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as the Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In

> other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject-matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties."
>
> 27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10 per cent would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive.

24) In my view, the judgment of the Apex Court in ***ICOMM TELE Limited*** (supra)would have no application to the peculiar facts and circumstances of the case. In ***ICOMM Tele Limited,*** there was no option left to the contractor/claimant but to deposit 10% of the claim amount as a precondition for arbitration. Since there was an arbitration clause, filing of suit by a party not willing to deposit 10% of claim value, was not an option. Thus, the contractor/claimant incapable of depositing 10% of claim value was debarred from exercising any remedy to enforce the claim. The clause did not provide that if 10% deposit of claim value was not made, the contractor/claimant was free to exercise remedy before Civil Court. Furthermore, the clause provided for forfeiture of 10% deposit in the event of the claimant losing in the claim. Thus, as against well-established principles governing award of costs of arbitration against the losing party, the contract provided for forfeiture of entire 10% of deposited amount. It is in the light of these peculiar circumstances where the condition in the arbitration clause discouraged the contractor/claimant from raising any claim that the condition is held to be violative of Article 14 of the Constitution by the Apex Court. In the present case, however, the arbitration clause does not put any restriction on the claimant from exercising the remedies in respect of the claim. So long as the claim is below 20% of

the contract value, the disputes can be resolved through arbitration. It is only when the claim exceeds 20% of the contract value, that the arbitration clause does not apply and the contractor is free to file a Civil Suit to enforce the claim. In my view, therefore the arbitration clause does not impose any embargo on the contractor in enforcing the entire claim against the Railways. Therefore, the judgment in ***ICOMM Tele Limited*** is clearly distinguishable and the principles discussed therein would have no application to the peculiar facts of the present case.

25) The judgment of the Constitution Bench in ***CORE*** (supra) is relied upon in support of the contention that the concept of equality applies right since the stage of appointment of arbitrator. The Apex Court has held in pars-67, 68, 70 and 71 as under:

> 67. Section 18 contains the principle of natural justice to give full opportunity to parties to present their case. In Union of India v. Vedanta Ltd. , Indu Malhotra, J., writing for a three-Judge Bench, observed that the "[f]air and equal treatment of the parties is a non-derogable and mandatory provision, on which the entire edifice of the alternative dispute resolution mechanism is based". The purpose of Section 18 is to give the arbitral process a semblance of judicial proceedings by infusing the principles of equality and fairness. The theoretical basis for this understanding stems from the fact that arbitrators are authorities vested with powers to resolve disputes under the law.
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> 68. The first part of Section 18 provides that "parties shall be treated with equality". The broad nature of the prescription has to be complied with not only by the Arbitral Tribunals, but also by the parties while giving expression to party autonomy. The principle has to be followed in all procedural contexts of arbitral proceedings, including the stage of appointment of arbitrators. According to Peter Binder, the principle of equal treatment of parties "means that no party may be given preference in the arbitrator-selection process regardless of how strong its bargaining power may be". Countries such as Germany, the Netherlands, Spain, and Estonia allow the party that has been disadvantaged by an asymmetric appointment clause to request courts to appoint an arbitrator or arbitrators. The underlying principle is that the courts should not recognise and enforce agreements that are unfair and biased.
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> 70. The concept of equality under Article 14 enshrines the principle of equality of treatment. The basic principle underlying Article 14 is that the law must operate equally on all persons under like

> circumstances. The implication of equal treatment in the context of judicial adjudication is that "all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination" . In Union of India v. Madras Bar Assn., a Constitution Bench held that the right to equality before the law and equal protection of laws guaranteed by Article 14 of the Constitution includes a right to have a person's rights adjudicated by a forum which exercises judicial power impartially and independently. Thus, the constitutional norm of procedural equality is a necessary concomitant to a fair and impartial adjudicatory process.
>
> 71. Arbitration is an adversarial system. It relies on the parties to produce facts and evidence before the Arbitral Tribunal to render a decision. Procedural equality is generally considered to contain the following indicia (1) equal capability of parties to produce facts and legal arguments; (ii) equal opportunities to parties to present their case; and (iii) neutrality of the adjudicator. In an adversarial process, formal equality is important because it helps secure legitimate adjudicative outcomes and create a level playing field between parties.

26) In ***CORE***, (supra) the Apex Court has dealt with the issue of unilateral appointment of arbitrator and has accordingly highlighted the issue of equal treatment to both the parties to arbitration. The observations are made in the Apex Court in the light of power conferred on one party to arbitration to choose the arbitrator. While there can be no dispute about the principle that equality would apply even at the stage of appointment of arbitrator, in the present case, the restrictive covenant in the arbitration agreement does not suffer from the vice of discrimination nor it causes violence to the principle of equality enshrined in Article 14 of the Constitution.

27) Judgment of the Apex Court in ***Shin Satellite Public Company Limited*** (supra) is relied upon by the Applicant, in which the arbitration clause provided for a condition that the arbitrator's determination shall be final and binding between the parties and that parties waive all rights of appeal or objection in any jurisdiction. Since the arbitration agreement sought to give finality to the award

and prevented parties from exercising remedies under Sections 34 and 37 of the Arbitration Act, the Apex Court held such condition to be invalid. The judgment is relied on to highlight the principle that a Court can severe legal and enforceable part of the contract from unenforceable and invalid part. The Apex Court held in paras-15 and 27 as under:-

> 15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.
>
> 27. The proper test for deciding validity or otherwise of an agreement or order is "substantial severability" and not "textual divisibility". It is the duty of the court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be
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> > "to expose the covenanter to the almost inevitable risk of litigation which in nine cases out of ten he is very ill-able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenanter is unable to face litigation".

28) Thus, in ***Shin Satellite Public Company Limited,*** (supra) the Apex Court has recognized the principle of severance of unenforceable and invalid part of contract from valid and enforceable part. Ordinarily, therefore if a condition in the arbitration agreement is found to be unconstitutional, invalid or unenforceable, the entire arbitration agreement would not be rendered invalid and can be severed and preserved. However, in the

present case, the condition of adjudication of disputes only upto 20% of the contract value by arbitration is not found to be unconstitutional, invalid or unenforceable and therefore there is no occasion to apply the principle of severance.

29) Mr. Singh has relied upon judgment of Single Judge of Rajasthan High Court in ***Jai Shankar Balaji Construction Company*** (supra) which involved similar arbitration clause of applicability of Clauses 63 and 64 of GCC only in respect of claims less than or equal to 20% of the contract value. The other issue before the Rajasthan High Court was about validity of Clauses 64(i) to 64(iv) of GCC, which prevented the party from raising any claims beyond the period of 90 days after receiving intimation from Railways that final bill was ready for payment, which clause in the GCC is held to be invalid and unenforceable in the light of provisions of Section 28 of the Indian Contract (Amendment) Act, 1996. So far as the validity of condition of arbitrability of claims only upto 20% of the contract value, the judgment of Rajasthan High Court is inconclusive. Though the issue of validity of the said condition was raised before the Rajasthan High Court, it was ultimately found that several work orders were issued to the contractor and the Court held that value of all work orders was required to be taken into consideration for determining the total value of contract. The Rajasthan High Court held as under:

> Adverting now to the argument that wherever the claim is more than 20% of the contract value, Clause 64 of the GCC would not be applicable. Reliance in this connection is placed by the respondent – the Railways on Clause 86 of the GCC, which reads as under:-
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> > "The provision of Clause 63 & 64 of General Conditions of Contract will be applicable only for settlement of claims or disputes between the parties for value less than or equal to 20% of the value of contract and when claims and disputes are of value more than 20% of the value of the contract,provision of clause 63 & 64 and other clause of the General

> Conditions of Contract will not be applicable and arbitration will not b e a remedy for settlement of such disputes."

The Railways in this regard has relied on two judgments of a coordinate bench of this court, namely, M/s. Sisram Bir Singh and Others Vs. Union of India and Another – 2006 (3) WLC (Raj.574 and M/s. Trimurti Constructions Vs. Union of India and Another – 2006 (3) WLC (Raj.) 680. Opposing this argument,learned counsel for the petitioner has relied on the judgment of the Supreme Court in Deepak Kumar Bansal Vs. Union of India and Another – (2009) 3 SCC 223. In that case, the High Court refused to appoint Arbitrator on the ground that the Circular of respondent Union of India dated 11.06.2003, inserting Clause 18 in the original contract, debarred reference to arbitration if the claim amount was in excess of 20% of the total contract value. It was canvassed before the Supreme Court that in addition to the value of the work originally awarded, three additional work orders were subsequently issued and if they are all added together, the total value of the contract cannot be said to be in excess of 20% of the contract value. The Supreme Court reversed the judgment of the High Court and remitted the matter for appointment of arbitrator. The judgment of the Supreme Court in Deepak Kumar Bansal, supra, was followed by a coordinate bench of this Court in Sh. Shyam Construction Vs. Union of India and Another – 2013 (2) CDR 1046 (Raj).

The petitioner has also canvassed and in my view rightly, that the respondents would not be justified in refusing to make a reference by relying on the value of the original contract of the work awarded. Subsequently issued work orders also ought to be considered for assessing the total value of the work vis-a-vis the extent of the claim to decide whether or not it exceeds 20% of the contract value. Besides, the claimant/contractor can also demand the refund of the earnest money, and the security deposit and can also claim interest, if not the damages, all of which have to be treated as part of the claim. The Supreme Court in a recent judgment in Hyder Consulting (UK) Ltd. Vs. State of Orissa – (2015) 2 SCC 189, while interpreting the word "sum" mentioned in Section 31(7) of the Act of 1996, vis-a-vis 'claim" in the context of the grant of pre-award interest under Section 31(7)(a) and post-award interest under Section 31(7)(b) of the Act of 1996, held that under Section 31(7)(a) of the Act of 1996 the arbitral tribunal is empowered to include pre-award interest in the sum for which award is made, which then becomes part and parcel of the same award. It would however be always open to the Railways to raise such objection before the Arbitrator, who is, as per Section 16 of the Act, competent to rule on his own jurisdiction whether the claim, being less than 20% of the total value of the work is arbitrable or not but denying reference to arbitrator on this count would neither be just nor lawful.

30) Mr. Singh has submitted that the Rajasthan High Court in ***Jai Salaskar Balaji Construction Company*** has left it to the

Arbitrator to decide the objection of application of 20% limit to the claim of the contractor under Section 16 of the Arbitration Act. Though what Mr. Singh contends is not entirely wrong, the said course of action is adopted by the Rajasthan High Court considering the fact that there were multiple work orders/contracts and upon consideration of cumulative value of all work orders/contracts, the claim was not breaching the 20% ceiling. Thus what is left to be decided by the Arbitral Tribunal is whether the claim exceeds 20% of the value of all work orders or not. Also, the following quoted part of the judgment of Rajasthan High Court in ***Jai Salasar Balaji Construction Company*** seeks to create confusion as if the Court has declared restrictive covenant for arbitration of only claims upto 20% of the contract value as void :-

> In view of the above analysis of law and facts, the condition contained in Clause 64(1)(iv) of the GCC, which assumes waiver of the claim by the contractor and discharge and release of the Railways of all its liabilities under contract in respect of the claims, is held to be void in view of Section 28(b) of the Indian Contract Act.

31) However, what is declared void under Section 28(b) of the Contract Act is Clause 64.1(iv) of the GCC which restricted the contractor from raising any dispute after expiry of period of 90 days from the date of receipt of intimation from Railways about final bill being ready for payment. It is well established principle of law that a judgment is an authority for what it decides and not for what can be decided therefrom. (SEE: ***Commissioner Of Customs (Port), Chennai Versus. Toyata Kirloskar Motor Pvt. Ltd.***[11] and ***Secundrabad Club and Others Versus. CIT-V and Another***[12]) Therefore, the judgment of the Rajasthan High Court in ***Jai Salasar Balaji Construction Company*** is not an authority on the issue of validity of condition in

11 2007(5) SCC 371

12 2024 (18) SCC 310

the arbitration agreement for resolution of disputes in respect of only those claims which do not exceed 20% of the contract value.

32) On the other hand, a learned Single Judge of this Court in ***Railtech Infraventure Pvt Ltd*** (supra) has considered enforceability of condition of 20% ceiling for arbitrability. In case before the learned Single Judge, there was similar arbitration clause which is quoted in para-5 of the judgment as under :-

> 5. The Respondents have filed their Affidavit-in-Reply dated 22 nd September, 2014, wherein it is contended that the above Application filed by the Applicant is not maintainable as the Applicant has deliberately suppressed clause 31.1 of the tender document. It is submitted that the said Clause 31.1 restricts the operation of Clauses 63 and 64 of the GCC. The said clause 31.1 of the tender conditions is reproduced hereunder:
>
> > "31.1 The provision of clauses 63 and 64 of General Conditions of contract will be applicable only for settlement of claims of disputes between the parties for value less than or equal to 20% of the value of the contract and when the claims or disputes are of value more than 20% of the value of contract, provision of clause 63 and 64 and other relevant clauses of the General Conditions of Contract will not be applicable and arbitration will not be a remedy for settlement of such disputes."

33) It was sought to be contended before the learned Single Judge in ***Railtech Infraventure Pvt Ltd*** that the issue of arbitrability of claim exceeding 20% of the value of contract needs to be left open to be decided by the arbitrator. This Court, however rejected the contention and held in para-11 as under :-

> 11. In the present case, the Applicant has not contended that Clause No. 31.1 of the tender document is not applicable, or that the same should not be read with Clauses 63 and 64 of the GCC. The Learned Advocate for the Applicant has informed the Court that though the claim of the Applicant exceeds more than 20 per cent of the value of the Contract, the issue as to whether the same is arbitrable or not has to be decided by the learned Arbitrator. In my view, this submission cannot be accepted. The issue as to whether there exists an Arbitration Agreement between the Parties has to be decided by the Court, once the same is raised in an Application

> under Section 11 of the Act by the Respondent. Reading of Clauses 63 and 64 along with Clause 31.1 of the tender document, leaves no doubt that the Parties have agreed to refer their disputes to arbitration only if the claim between the parties is for a value less than or equal to 20 per cent of the value of the Contract, and it is further agreed that when the claims or dispute are of a value more than 20 per cent of the value of the Contract, the provision of Clauses 63 and 64 and other relevant Clauses of the GCC will not be applicable, and arbitration will not be a remedy for settlement of such disputes. In view thereof and more so since the Applicant has admitted before this Court that the value of its claim before the Arbitrator exceeds 20 per cent of the value of the contract, there exists no Arbitration Agreement between the parties to refer their disputes to arbitration. The issue involved in the present case cannot be compared with the issues raised by the parties before the Hon'ble Supreme Court in the case of National Insurance Company Ltd. (supra) and Arasmeta Captive Power Company Pvt. Ltd. (supra), and therefore the ratio of the said Judgment is not applicable to the present case. The same is the case with the decision of the learned Single Judge of this Court in the case of Sanjay B. Jawlekar (supra). In view thereof, the above Arbitration Application is dismissed.

34) It also appears that in ***Deepak Kumar Bansal***, (supra) the Apex court has taken note of similar restrictive covenant in the arbitration agreement wherein claims exceeding 20% of the total costs of the work were not agreed to be resolved through arbitration. The Apex Court did not hold such restrictive covenant to be unenforceable but held that the supplementary work orders were also required to be taken into consideration while determining the entire contract value for application of 20% limit. It would be apposite to quote paras-11, 12 and 13 which reads thus :-

> 11. The respondents, in their objection to the application under Section 11(6) of the Act, raised a plea that question of appointment of an arbitrator, in the facts and circumstances of the present case, could not arise in view of the fact that the claim, as put forward by the appellant, was an amount being an excess of 20% of total cost of the work, which is prohibited in terms of the Circular issued on 11-6-2003. The High Court accepted this plea of the respondent and rejected the application on the grounds mentioned hereinearlier.
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> 12. In our view, the High Court has misdirected itself in holding that the claim was in excess of 20% of the total cost of the work. Admittedly, the work was for a sum of Rs 32,17,641.29 (original) and three additions viz. Rs 4,99,471.36, Rs 3,25,865.02 and Rs 2,17,748.63 totalling Rs 42,60,726.30, which cannot be in excess of 20% of the total cost of the work.

13. The High Court has only considered the original work order that was for Rs 32,17,641.29, which, in our view, must be taken into account along with three supplementary work orders of Rs 4,99,471.36, Rs 3,25,865.02 and Rs 2,17,748.63 as mentioned hereinearlier. Therefore, the High Court was wrong in holding that since the value of the claim of the appellant was more than 20% of the value of the work and in view of the circular issued by the respondent, the claim must be held to be more than 20% of the value of the work and, therefore, disputes could not be referred to arbitration. Even assuming that the claim was in excess of 20% of the total cost of the work, even then, the Circular, which came into effect from 11-6-2003 would not be applicable in the case of the appellant.

35) The judgment in ***Deepak Kumar Bansal*** is followed by Madhya Pradesh High Court in ***Seth Mohanlal Hiralal Construction Company*** in which it is held in paras-9, 10, 11 as under :-

9. This Court in the matter of Diamond Agencies v. Union of India, 2014 (3) MPLJ 137 considering the general conditions of contract 63 and 64 and also taking note of the special condition II in a case where the similar controversy was involved has held as under:-

> "5. However, it is pertinent to mention here that at the stage of consideration of application under section 11(6) of the Act the Court may not be able to decide whether the particular dispute can be referred to the arbitration, but the Court can examine whether a particular dispute falls within the purview of the arbitration clause on admitted facts and in such a case as it is not necessary to record evidence. In case of Deepak Kumar Bansal v. Union of India, 2010 (2) MPLJ (SC) 516 = (2009) 3 SCC 223 2009 Arb. W.L.J. 252(SC), the supreme Court dealt with pan materia clause, which prohibited the reference of dispute to an Arbitrator, in case the claim was more than 20% of the value of contract and, therefore, it was held that dispute can be referred to the Arbitrator. In other words, if the claim is more than 20% of the value of contract the dispute cannot be referred for arbitration.
>
> 6. In the backdrop of well-settled legal proposition, the facts of the case may be seen. Admittedly, the value of the contract is Rs. 1,24,12,320/-. The petitioner has, admittedly, submitted the claim to the tune of Rs. 32,24,472/-, which is 25.98% of the contract value.

Clauses 63 and 64 of the General Conditions of Contract provide for reference of the dispute between the parties to the arbitration. The relevant extract annexed by the petitioner himself Page 58 of the application, reads as under:-

> "11. Arbitration. The provisions of Clauses 63 and 64 of the General Conditions of Contract will be applicable only for settlement of claims or disputes between the parties for values less than or equal to 20% of the value of the contract."
>
> 7.- Thus, in view of the preceding analysis, on admitted acts of the case, the dispute raised by the petitioner falls beyond the purview of Clauses 63 and 64 of the General Conditions of Contract, which provide for arbitration. Therefore, the dispute cannot be referred for arbitration and the respondents have rightly rejected the claim of the petitioner for referring the dispute to the arbitration."

10. In the present case also the record reflects that the claim of the petitioner is of about a sum of Rs. 253.77 lakhs which is more than 20% of the total contract value ie. Rs. 5,55,34,728.73. Hence, no arbitration agreement exists in respect of dispute in question.

11. Counsel for applicant has placed reliance upon the order dated 14/7/2017 passed by the Rajasthan High Court in SB Arbitration Application No. 15/16, but in view of the judgment of this court in the matter of Diamond Agencies (supra), the applicant is not entitled to the benefit of the single bench order of Rajasthan High Court.

36) In ***State of AP Versus Obulu Reddy***, (supra) the issue before the Apex Court was about interpretation of certain GOMs issued by the State Government. GOM No.403 dated 4 October 1983, which governed the contract in question, provided for arbitration by the panel as per valuation of amount. Arbitration was provided in respect of the claims only upto Rs.50,000/- and for claims above Rs.50,000/- the Court of competent jurisdiction was to decide the disputes. The claim in question raised by the Respondent therein was for Rs.83 lakhs and accordingly the reference was denied. The Respondent filed application under Section 8 of the Arbitration Act, 1940 which was allowed and the disputes were referred to sole arbitrator. The State Government challenged the appointment of arbitrator before the High Court which dismissed the Government's Revision. During pendency of Appeal before the Division Bench of the High Court, another GOM No. 160 dated 1 June 1987 was issued by the State Government clarifying that if claims were over

Rs.50,000/-, the same could be decided by the Arbitrator or by a Civil Court. It appears that there were two conflicting decisions in ***State of Andhra Pradesh Versus. I Devendra Reddy*** [13] it was held that GOM dated 1 June 1987 was only prospective and did not apply to cases where claims arose out of contracts prior to issuance of the said GOM. On the other hand, in ***Vishakhapatnam Urban Development Authority Versus V. Narayana Raju*** [14], the Apex Court held that the subsequent GOM was clarificatory in nature. The dispute has been referred to large Bench as to whether the GOM No.160 dated 1 June 1987 is clarificatory or prospective in nature. Though we are concerned with the said dispute about the nature of GOM dated 1 June 1987, what Mr. Bubna wants this Court to note is the fact that the Apex Court has given effect to the clause in the arbitration agreement which restricted arbitration only in respect of the claims upto particular value. Though judgment of the Apex Court in ***State of AP Versus. Obulu Reddy*** cannot be cited as an authority in support of an abstract principle that a condition specified in arbitration agreement restricting arbitration only to claim for specified value is constitutional or enforceable, this Court does take note of the fact that the Apex Court in three decisions in ***I. Devendra Reddy, Vishakapatnam Urban Development Authority and State of AP Versus Obulu Reddy*** did not strike down the restrictive covenant in the arbitration agreement providing for arbitration only in respect of the claim of specified value. Far from setting aside the said clauses as unconstitutional or unenforceable, the Apex Court has interpreted the same.

37) The conspectus of the above discussion is that parties have specifically agreed for resolution of disputes and differences in respect of the claims upto 20% of the contract value. The restrictive

13 1999 (9) SCC 571
14 1999 (9) SCC 572

covenant in the arbitration agreement does not defeat the remedy of the Applicant in any manner. All that it does is to restrict the mechanism of dispute resolution through private arbitration to claims upto 20% of the contract value. Applicant is free to pursue the remedy in respect of the claim exceeding 20% of the contract value and Clause 39 of the contract or Clauses 63 and 64 of the GCC do not restrict such remedy of the Applicant in any manner. All that the Applicant will have to do is to pursue remedy before Civil Court and not before the Arbitrator.

38) No doubt, the dispute resolution mechanism through private arbitrations is increasingly encouraged. The mechanism of dispute resolution through arbitration has de-clogged the pressure on conventional courts to a large extent. However, the dispute resolution mechanism through arbitration still continues to be a matter of agreement between the parties. Parties are free to agree whether to resolve the disputes through arbitration or not. When they have the freedom to choose the dispute resolution mechanism, what must necessarily be recognized is also the freedom to choose arbitration as dispute resolution mechanism only in respect of the agreed claims. It cannot be that once there is an arbitration agreement, every claim under the contract must be resolved through such arbitration especially when parties specifically agree for exclusion of certain nature of claims. A classic illustration in this regard is to be found in the insurance contracts. Many times, the dispute resolution mechanism by arbitration is agreed by the parties in an insurance contract only in respect of quantum of claim and not disputes relating to repudiation of the claim. In such contracts, disputes relating to repudiation cannot be subject to private arbitration. In several judgments, this restrictive covenant has been enforced. In ***Oriental Insurance Company Limited Versus.***

Narbheram Power and Steel Private Limited [15] the Apex Court has held as under :-

> 23. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

39) In insurance contracts, the restrictive covenant not providing for arbitration for resolution of disputes relating to repudiation has been enforced by the Courts in ***Vulcan Insurance Co. Ltd. Versus Maharaj Singh and another*** [16] and ***M/s. Mallak Specialities Pvt. Ltd. Versus. The New India Assurance Co. Ltd*** [17].

40) Applying the above principles to the present case, in my view, Railways cannot be forced to go for arbitration when it has not agreed for resolution of disputes relating to claims exceeding 20% of the contract value by arbitration.

41) In my view, therefore there is no agreement between the parties for arbitration in respect of the Applicant's claim which it has quantified at Rs.3 crores in the light of contract value merely being Rs.84,52,157.61/-. In absence of arbitration agreement, this Court is unable to exercise jurisdiction under Section 11 of the Arbitration Act.

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15 (2018) 6 SCC 534
16 (1976) 1 SCC 943
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42) Consequently, the Application fails. It is accordingly **dismissed**. Considering the facts and circumstances of the case, there shall be no order as to costs.

[SANDEEP V. MARNE, J.]