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21st January, 2020

ARBITRATOR - CREATURE OF CONTRACT

1. Associated Engineering Co. v. Govt. of A.P., 15.07.1991, (1991) 4 SCC 93, Relevant Para 24, 25, 26 and 27

- An arbitrator who acts in manifest disregard of the contract acts without jurisdiction.
- The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract.
- His sole function is to arbitrate in terms of the contract.

A Copy of the judgment attached hereto at **page no. 2 to 14.**

2. State of U.P. vs. Ram Nath International Construction, 10.11.1995, 1996 (1) SCC 18, Relevant Para 7

- The arbitrator is a creature of the agreement.
- Arbitrator is duty bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement.

A Copy of the judgment attached hereto at **page no. 15 to 22.**

3. Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises, 20.09.1999, 1999 (9) SCC 283, Relevant Para 44 and 45

- Arbitrator exceeded its jurisdiction by ignoring the specific stipulations in the agreement which prohibits entertaining of the claims made by the contractor.
- The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable.
- The arbitrator is a tribunal selected by the parties to decide the disputes according to law.

A Copy of the judgment attached hereto at **page no. 23 to 51.**

4. ONGC vs. Saw Pipes, 17.04.2003, 2003 (5) SCC 705, Relevant Para 40, 41 and 65

- No Tribunal or court to act in an arbitrary, capricious or whimsical manner.
- Principles of natural justice to be followed and reasoned decisions to be made.
- No decision should be perverse such that no reasonable person would arrive at it.

A Copy of the judgment attached hereto at **page no. 52 to 92.**

5. Food Corporation of India vs. Chandu Construction, 10.04.2007, 2007 (4) SCC 697, Relevant Para 11 and 15

- Arbitrator being a creature of the agreement between the parties - has to operate within the four corners of the agreement.
- Ignorance of the specific terms of the contract by the Arbitrator - would be a question of jurisdictional error on the face of the award falling within the ambit of legal misconduct which could be corrected by the Court.

A Copy of the judgment attached hereto at **page no. 93 to 100.**

6. Satyanarayana Construction Co. v. Union of India, 12.10.2011, (2011) 15 SCC 101, Relevant Para 11 and 12

- Jurisdiction of arbitrator
- Award in excess of jurisdiction - Arbitrator awarding higher rate than rate agreed in contract was beyond the competency and authority of the Arbitrator.
- Arbitrator is not empowered to rewrite terms of contract.
- And award contractor a higher rate for the work for which rate was already fixed in contract.

A Copy of the judgment attached hereto at **page no. 101 to 105.**

ORDER

55. In the result this appeal fails, for the reasons stated by us in our separate but concurring judgments, and is accordingly dismissed. We further direct that the respondents shall be entitled to their cost throughout.

(1991) 4 Supreme Court Cases 93

(BEFORE T.K. THOMMEN AND R.M. SAHAI, JJ.)

ASSOCIATED ENGINEERING CO. .. Appellant;

Versus

GOVERNMENT OF ANDHRA PRADESH AND ANOTHER .. Respondents.

Civil Appeal Nos. 338-339 with 2692-93 of 1991†, decided on July 15, 1991

Arbitration Act, 1940 — Section 30 — Misconduct — Jurisdictional error — Award beyond limits of the contract — Arbitrator cannot act arbitrarily irrationally, capriciously or independent of the contract — Award deliberately departing from the contract, apart from constituting misconduct also constitutes mala fide action — Award made disregarding the contract goes to the root of the jurisdiction of the arbitrator — Such jurisdictional error can be proved by evidence extrinsic to the award

Arbitration Act, 1940 — Section 30 — Misconduct — Whether award beyond the limits of the contract — Claim relating to refund of excess hire charges of machinery and payment towards losses suffered as a result of poor performance of machinery supplied by government to the contractor — Under the contract government being bound to compensate the contractor for the excess charges paid due to poor performance of the machinery supplied by it, held, claim rightly allowed by the arbitrator — Award in this respect related to the contract and there was no jurisdictional error

Held :

The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. If he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. (Paras 24 and 25)

Halsbury's Laws of England, Vol. II, 4th edn., p. 622; Mustill and Boyd's *Commercial Arbitration*, 2nd edn., p. 641, *relied on*

If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and

† From the Judgment and Order dated December 28, 1985 of the Hyderabad High Court in OMA No. 456 of 1984 and CRP No. 2743 of 1984

deals with matters not allotted to him, he commits a jurisdictional error. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award. (Paras 27, 26 and 25)

A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. Therefore, evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself. (Para 26)

Attorney-General for Manitoba v. *Kelly,* (1922) 1 AC 268: 1922 All ER Rep 69; *Alopi Parshad and Sons, Ltd.* v. *Union of India,* (1960) 2 SCR 793: AIR 1960 SC 588; *Bunge & Co.* v. *Dewar & Webb,* (1921) 8 Ll L Rep 436; *Christopher Brown Ltd.* v. *Genossenschaft Oesterreichischer,* (1954) 1 QB 8: (1953) 3 WLR 689; *Rex* v. *Fulham,* (1951) 2 QB 1: (1951) 1 All ER 482; *Falkingham* v. *Victorian Railways Commission,* 1900 AC 452: 69 LJ PC 89; *Rex* v. *All Saints, Southampton,* (1828) 7 B&C 785: 1 Man & Ry KB 663; *Laing (James), Son & Co. (M/C) Ltd.* v. *Eastcheap Dried Fruit Co.,* (1961) 1 Ll L Rep 142; *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan,* (1978) 2 Ll L Rep 223; *Heyman* v. *Darwins Ltd.*, (1942) AC 356: (1942) 1 All ER 337; *Union of India* v. *Kishorilal,* (1960) 1 SCR 493: AIR 1959 SC 1362: (1960) 2 SCA 343; *Renusagar Power Co. Ltd.* v. *General Electric Company,* (1984) 4 SCC 679: (1985) 1 SCR 432; ; *D. Gobardhan Das* v. *Lachhmi Ram,* AIR 1954 SC 689; *Thawardas Pherumal* v. *Union of India,* AIR 1955 SC 468: (1955) 2 SCR 48; *Omanhene Kobina Foli* v. *Chief Obeng Akessee,* AIR 1934 PC 185: 40 MLW 138; *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society, Limited,* 1933 AC 592: (1933) All ER Rep 616; *M. Golodetz* v. *Schrier,* (1947) 80 Ll L Rep 647, *referred to*

In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. His error arose not by misreading or misconstruing or misunderstanding the contract, but it was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. He acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting *ultra fines compromissi.*

(Paras 28 and 29)

Jivarajbhai Ujamshi Sheth v. *Chintamanrao Balaji,* (1964) 5 SCR 480: AIR 1965 SC 214; *Anisminic Ltd.* v. *Foreign Compensation Commission,* (1969) 2 AC 147: (1969) 1 All ER 208; *Pearlman* v. *Keepers and Governors of Harrow School,* (1979) 1 QB 56:

(1979) 1 All ER 365; *Lee* v. *Showmen's Guild of Great Britain*, (1952) 2 QB 239: (1952) 1 All ER 1175; *M.L. Sethi* v. *R.P. Kapur*, (1972) 2 SCC 427: AIR 1972 SC 2379: (1973) 1 SCR 697; *Managing Director, J. and K. Handicrafts* v. *Good Luck Carpets*, (1990) 4 SCC 740: AIR 1990 SC 864; *State of A.P.* v. *R.V. Rayanim*, (1990) 1 SCC 433: AIR 1990 SC 626, *relied on*

However, the claim regarding 'Refund of excess hire charges of machinery and payment towards losses suffered as a result of poor performance of department machinery and also direction for the future' was rightly allowed by the arbitrator and his decision was rightly upheld by the High Court. The government was, in terms of the contract, bound to compensate the Contractor for the excess higher charges paid as a result of the poor performance of the machinery supplied by the government. Except this claim, all other claims were wrongly allowed by arbitrator and rightly rejected by the High Court. (Para 22)

Appeals dismissed R-M/T/10668/C

Advocates who appeared in this case :

K.R. Choudhary, Advocate, for the Appellant;
K. Madhava Reddy, Senior Advocate (G. Prabhakar and T.V.S.N. Chari, Advocates, with him) for the Respondents.

The Judgment of the Court was delivered by

THOMMEN, J.— Leave granted in SLP (C) Nos. 7071-72 of 1986.

2. These appeals are brought against the common judgment of the Andhra Pradesh High Court in C.M.A. No. 456 of 1984 and C.R.P. No. 2743 of 1984. The High Court set aside in part the common judgment of the First Additional Chief Judge, Civil Court at Hyderabad, in Original Suit No. 174 of 1983 and O.P. No. 49 of 1983 whereby he made the award of the umpire (hereinafter referred to as the 'umpire' or 'arbitrator') a rule of court and passed a decree in terms of the award together with interest on the principal amount awarded at the rate of 12 per cent per annum from the date of the decree. The High Court set aside the decree in respect of claim Nos. III, VI and IX and affirmed the decree for the other claims. The main Appeal Nos. 338 and 339 of 1991 arising from SLP (C) Nos. 1573 and 1574 of 1986 are by the Associated Engineering Co. (hereinafter referred to as 'the Contractor'). It challenges the judgment of the High Court setting aside the decree of the civil court in respect of claim Nos. III, VI and IX. The other appeals arising from SLP (C) Nos. 7071 and 7072 of 1986 are by the Government of Andhra Pradesh and they are against the judgment of the High Court confirming the decree of the civil court in respect of claim Nos. II, IV and VII(4).

3. The High Court set aside claim Nos. III, VI and IX on the ground that those claims were not supported by the agreement between parties and that the arbitrator travelled outside the contract in awarding those claims. While that portion of the judgment of the High Court is supported by the government, the Contractor submits that the High Court

exceeded its jurisdiction in interfering with a non-speaking award. The government challenges the judgment of the High Court insofar as it affirmed the findings of the civil court in respect of claim Nos. II, IV and VII(4) on the ground that the arbitrator awarded those claims totally unsupported by the contract.

4. Mr A.B. Dewan, appearing for the Contractor, submits that the umpire made a non-speaking award. He did not incorporate any document as a part of the award, notwithstanding his reference to the contract. In the circumstances, counsel submits, the law does not permit interference by the court with such an award.

5. Mr K. Madhava Reddy, appearing for the government, on the other hand, submits that the umpire made a speaking award with reference to the claims and he gave reasons for awarding those claims. It is true, counsel says, that the umpire made only brief reference to the provisions of the contract and his reasons for making the award. But notwithstanding the brevity of his reasoning, he has spoken sufficiently clearly as a result of which errors of law and fact have become apparent on the face of the award disclosing that the umpire acted contrary to, and unsupported by, contract, thereby exceeding his jurisdiction. He says that the umpire has referred to the contract not merely for the purpose of reciting or narrating his authority to hear the matter and resolve the dispute, but for incorporating it as a part of the award. In doing so, he exceeded the contract, not merely by misinterpreting it, but by travelling totally outside it, and by making an award without regard to and independent of the contract. A number of decisions have been cited on either side in support of the respective contentions.

6. The award was made in respect of disputes which arose between the government and the Contractor for the cement concrete lining under agreement dated January 20, 1981 (as supplemented subsequently) in connection with the construction of Nagarjunasagar Dam. The parties filed their pleadings and documents before the arbitrator/umpire. There were 15 claims apart from the general claim for cost and interest. As stated earlier, we are concerned only with claim Nos. III, VI and IX which are claims awarded by the umpire and decreed by the civil court, but set aside by the High Court, and with Claim Nos. II, IV and VII(4) which were awarded by the umpire and decreed by the civil court as well as by the High Court. The first set of claims respectively, are: 'Escalation on Napa Slabs'; 'Payment of extra Lead for water'; and, 'Extra expenditure incurred due to flattening of canal slopes and consequent reduction in top width of banks used as roadway'. The other set of claims relate respectively to 'Labour escalation'; 'Refund of excess hire charges of machinery'; and, 'Sand conveyance'.

7. The umpire after reciting the background of the dispute which led to his entering upon reference on December 16, 1982 to decide the dispute and the relevant agreement between the parties deals with the claims seriatim. As regards claim No. III, he says:

> "I hereby declare and award and direct the respondent to compensate the claimants towards escalation in the cost of napa slabs calculated at Rs 4.25 (Rupees four and paise twenty-five) per sq. m. of napa slab lining, under item 11 of schedule A of the agreement for the entire work and make payments accordingly."

8. The main criticism levelled by the government against this award is that there was no provision in the contract for escalation of the cost or price of napa slabs. The escalation provision in the contract related to labour, diesel oil, tyres and tubes, as provided in Item 35 thereof. There was no escalation provision in the contract as far as napa slabs were concerned. The price for these slabs had been determined in the contract at Rs 4.25 per sq. m. and there was no provision for increase or decrease of that price. Both the parties to the contract were bound by that price and the arbitrator, therefore, had no jurisdiction to award any escalation in the price of napa slabs. In the absence of any provision in the contract, the arbitrator had no jurisdiction to make an award for escalation. This contention of the government was accepted by the High Court.

9. Mr Dewan, appearing for the Contractor, is not in a position to refer to any provision of the contract allowing escalation for napa slabs. All that he is in a position to refer to is Item 35 of the contract which refers to price adjustment for increase or decrease in the cost. That item, as stated earlier, refers to various matters such as, diesel oil, labour, etc., but not to napa slabs. On the other hand, at the end of that item, it is specifically stated 'no claims for price adjustment other than those provided herein, shall be entertained'. Furthermore, it is specifically provided in the contract 'the contractor shall have to make his own arrangements to obtain the napa slabs as per standard specifications. The department does not accept any responsibility either in handing over the quarries or procuring the napa slabs or any other facilities. The contractor will not be entitled for any extra rate due to change in selection of quarries as above'. There is thus a specific prohibition against price adjustment or award for escalated cost in respect of any matter falling outside Item 35.

10. Mr Dewan, however, submits that being a non-speaking award, the court cannot examine the reasons. Mr Madhava Reddy, appearing for the government, submits that the award is not silent on the point. It speaks eloquently, though briefly. It is not merely in the recital or narrative portion of the award that the agreement is referred to, but in making

the award under claim No. III the agreement is specifically incorporated by directing payment for escalation on napa slabs under Item 11 of Schedule A of the agreement at the rate of Rs 4.25. The agreement is thus bodily incorporated into the award thereby disclosing an error apparent on its face and the total lack of the arbitrator's jurisdiction by reason of his going totally outside and opposed to the contract. This, counsel says, is revealed not by a construction of the contractual provisions, but by merely looking at the matters covered by the contract.

Claim No. VI — *Payment of extra lead for water*

This is what the arbitrator says—

> "I hereby declare and award and direct the respondent to pay extra towards additional lead for water i.e. 3 kms. over the specified lead of 2 kms. in the agreement for Items 4, 5, 6, 10 and 11 of Schedule A."

As regards this claim, Mr Dewan reiterates his contention that the award is silent as to the reasons and, therefore, the court should not interfere. Mr Madhava Reddy on the other hand submits that the award speaks as to the reasons for allowing the claim for extra amount towards additional lead for water i.e. for 3 kms. over and above the specified lead of 2 kms. But, counsel says, the agreement provides for no payment at all for any lead and much less for any additional lead. He refers to the specific provision of the agreement regarding water. He says that the Contractor had to make its own arrangements for supply of water at work site for all purposes including quarry. There is no provision in the contract for making any payment to the Contractor for the water brought by it to the site. In the absence of any such provision, counsel says, it is preposterous that the arbitrator should have awarded extra amount for additional lead for water. The contract specifically stated that it was the responsibility of the Contractor to make its own arrangements for the supply of water. The government gave no assurance to the Contractor regarding the availability of water or the prices payable therefor. The umpire, therefore, had no jurisdiction to allow claim No. VI. The High Court accepting the contention of the State reversed the civil court's decree as regards that claim and held "... In view of unequivocal agreement that the contractor should make his own arrangements for supply of water for the purpose of curing, the award of compensation is outside the purview of the agreement and is vitiated".

Claim No. IX — Extra expenditure incurred due to flattening of canal slopes and consequent reduction in top width of banks used as roadway.

Referring to this claim, this is what the award says—

"I hereby declare and award and direct the respondent to pay the claimant for 50 per cent of the work done on the napa slab lining on the left side slope of canal at the extra rate of Rs 4 per sq. m. of lining work."

11. Rejecting the contentions of the Contractor and accepting those of the government, the High Court held that the contract did not provide for any payment whatever for the maintenance of canal slopes and consequent deduction in top width of banks used as roadway. The High Court found that it was the responsibility of the Contractor to repair the banks and the contract contained no provision for payment of any amount towards the decrease in the width or otherwise. The High Court says '... the acceptance of claim on this score is beyond the purview of the agreement and as such vitiated'.

12. While counsel for the Contractor repeats his contentions regarding the award being silent as to reasons, Mr Madhava Reddy submits that the contract provides for no payment whatever under claim No. IX. On the other hand, it specifically states —

"8(A) *Site facilities.*— Haul roads from batching plant site to the work site in the first instance will be formed by the department as per site surveys per each batching plant site. These haul roads are fair weather roads only with hard passages at stream crossings. Formation of haul roads within the batching plant area, maintenance of all haul roads including those formed by the department shall be the responsibility of the contractors. Existing roads and roads under the control of N.S. Project can be made use of by the Contractor. Any other haul roads required by the Contractor and not specified in plan shall be carried out by the Contractor at his cost.

8(A)(1) *Widening of Banks.*— The canal banks will be widened to 5 metres and 3 metres width respectively by the department for right and left banks to facilitate transport of materials. The Contractor however has to maintain the haul roads."

13. In the absence of any provision to pay for extra expenditure and in the light of the specific provision placing the sole responsibility for the maintenance of the haul roads on the Contractor, the arbitrator had no jurisdiction to award 50 per cent at extra rate of Rs 4 per sq. m. The contract contains no provision for payment of any amount outside what is strictly specified under the clause. In the circumstances, Mr Madhava Reddy says, the High Court was perfectly justified in coming to the conclusion, which it did, as regards the arbitrator acting outside his jurisdiction.

14. We shall now deal with the other set of claims, namely, claim Nos. II, IV and VII(4) which had been awarded and decreed by both the courts below.

15. The arbitrator deals with claim No. II as follows:

"The claim is admitted.

I hereby declare and award and direct the respondents that due to the statutory revision of minimum rates of wages payable to various categories of workers, the claimant is to be paid compensation as per the following formula:

$$V2=\frac{P1}{100}x\frac{R(WSI-WSO)x0.10}{WSO}+\frac{(WSSI-WSSO)x0.10}{WSSO}-\frac{(WUSI-WUSO)x0.8}{WUSO}$$

Where

V2 — Compensation payable due to statutory increase in minimum wages of labour notified by the Government of A.P. after October 22, 1980 under the Minimum Wages Act, 1948.

P1 — Percentage labour component of each item of work as per Appendix 9 at page 139 of agreement.

R — Value of work done under each item of work during the period under review.

WSO — 11.15 (Daily minimum wage in force on the date of tender for skilled labour).

WSSO — 8.50 (Daily minimum wage in force on the date of tender for semi-skilled labour).

WUSO — 5.65 (Daily minimum wage in force on the date of tender for unskilled labour).

WSI — Revised daily minimum wage as fixed by Government of A.P. for skilled labour applicable for the period under review.

WSSI — Revised daily minimum wage as fixed by Government of A.P. for semi-skilled labour applicable for the period under review.

WUSI — Revised daily minimum wages as fixed by Government of A.P. for unskilled labour applicable for the period under review.

The above compensation is payable to the claimant for the work done after December 23, 1980, the date of publication of G.O. No. 835 dated December 18, 1980, till the completion of the work".

16. It is not seriously disputed that the observation "The claim is admitted" is only a reference to the arbitrator's decision to allow the claim and not as a concession or admission on the part of the government. In fact from the pleadings it is quite clear that the government had opposed every claim and there was no concession on its part.

17. Claim No. II has been, as seen above, elaborately dealt with by the arbitrator. On account of the statutory revision of minimum rates of wages payable to various categories of workers, the arbitrator made the award in respect of labour escalation. Escalation under this item is in fact, as stated above, provided for under the contract, but in terms thereof. The grievance of the government is not because the umpire awarded escalation for labour, but because he allowed escalation otherwise than as provided under the contract. The contract under Item 35 provides—

> "Increase or decrease in the cost due to labour shall be calculated quarterly in accordance with the following formula:
>
> $V1 = 0.75 \, {}^{P1}/_{100} \times {}^{R\,(I-i)}/_{10}$
>
> V1 — increase or decrease in the cost of work during the quarter under consideration due to changes in rates for labour.
>
> R — the value of the work done in rupees during the quarter under consideration.
>
> I — the average consumer price index for industrial workers (wholesale prices) for the quarter in which tenders were opened (as published in Nalgonda District by the Director of Bureau of Economics and Statistics, Andhra Pradesh).
>
> P1 — Percentage of labour components (specified in schedule in appendix 9 of the item).
>
> i — The average consumer price index for industrial workers (wholesale prices) for the quarter under consideration.
>
> Price adjustment clause shall be applicable only for the work that is carried out within the stipulated time or extensions thereof as are not attributable to the contractor. No claims for price adjustment other than those provided herein, shall be entertained."

18. The contention of the government is that the two formulae are totally different from each other as a result of which the arbitrator awarded very much more than what is warranted under the agreed formula. Mr Madhava Reddy submits that it is true that the Contractor was bound to pay minimum wages according to the relevant statutory provisions. In fact the contract contains a provision making it necessary for the Contractor to conform to all laws, regulations, bye-laws, ordinances, regulations, etc. But the fact that the Contractor necessarily had to pay enhanced rates of wages did not entitle it to claim any amount from the government in excess of what had been strictly provided under the contract. A specific formula had been prescribed under Item 35, as seen above, and the function of the umpire was to make an award in accordance with that formula. He had no jurisdiction to alter the formula, which he has done, as seen from the award.

19. It is not disputed on behalf of the Contractor that the formula followed by the arbitrator, as seen from the award under claim No. II, is different from the formula prescribed under the contract. But Mr K.R. Chowdhury, one of the counsel appearing for the Contractor, points out that the contract provided for payment of all wages according to the current rates and, therefore, the arbitrator was well within his jurisdiction to make an award by adopting a formula in keeping with the enhanced rates of wages, and the High Court, he contends, rightly decreed the amounts under that claim in terms of the award.

20. We shall deal with claim Nos. IV and VII(4) separately. But as regards claim Nos. III, VI and IX, we are of the view that the High Court was right in stating that the arbitrator acted outside the contract in awarding those claims. For the very same reason we are of the view that the High Court was wrong in coming to the conclusion, which it did, regarding claim No. II. We say so because there is no justification whatsoever for the arbitrator to act outside the contract.

21. These four claims are not payable under the contract. The contract does not postulate — in fact it prohibits — payment of any escalation under claim No. III for napa slabs or claim No. VI for extra lead of water or claim No. IX for flattening of canal slopes or claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. This conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction: See *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji*[1]. We are in complete agreement with Mr Madhava Reddy's submissions on the point.

22. As regards claim Nos. IV and VII(4), we see no merit in Mr Madhava Reddy's contentions. Claim No. IV relates to 'Refund of excess hire charges of machinery and payment towards losses suffered as a result of poor performance of department machinery and also direction for the future'. This claim, in our view, was rightly allowed by the arbitrator and his decision was rightly upheld by the High Court. The government was, in terms of the contract, bound to compensate the Contractor for the excess higher charges paid as a result of the poor performance of the machinery supplied by the government.

23. Claim No. VII(4) is as regards 'Sand conveyance'. The arbitrator says—

> "The diesel oil requirement shall be taken as 0.35 litres for Item 5 of statement (A) at page 59 of agreement as indicated in the

1 (1964) 5 SCR 480 : AIR 1965 SC 214

original tender and not as 0.035 and price adjustment made accordingly."

a The arbitrator was, in our view, right in so stating and the High Court, in our view, rightly upheld this claim.

24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given b him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

c

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's *Commercial Arbitration,* 2nd edn., p. 641). He commits misconduct if by his award d he decides matters excluded by the agreement (see *Halsbury's Laws of England,* Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A con- e scious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

26. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question f not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. As stated by Lord g Parmoor:[2] (AC p. 276)

> "It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the h matter which he affects to decide is within the submission of the parties."

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what i

2 *Attorney-General for Manitoba* v. *Kelly,* (1922) 1 AC 268, 276 : 1922 All ER Rep 69

the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself. *Bunge & Co.* v. *Dewar and Webb*[3].

27. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. [See *Alopi Parshad & Sons, Ltd.* v. *Union of India*[4]; *Bunge & Co.* v. *Dewar & Webb*[3]; *Christopher Brown Ltd.* v. *Genossenschaft Oesterreichischer*[5]; *Rex* v. *Fulham*[6]; *Falkingham* v. *Victorian Railways Commission*[7]; *Rex* v. *All Saints, Southampton*[8]; *Laing (James), Son & Co. (M/C) Ltd.* v. *Eastcheap Dried Fruit Co.*[9]; *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan*[10]; *Heyman* v. *Darwins Ltd.*[11]; *Union of India* v. *Kishorilal Gupta & Bros.*[12]; *Renusagar Power Co. Ltd.* v. *General Electric Company*[13]; *Jivarajbhai* v. *Chintamanrao*[1]; *Gobardhan Das* v. *Lachhmi Ram*[14]; *Thawardas Pherumal* v. *Union of India*[15]; *Omanhene Kobina Foli* v. *Chief Obeng Akessee*[16]; *F.R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society,*

3 (1921) 8 Ll L Rep 436
4 (1960) 2 SCR 793 : AIR 1960 SC 588
5 (1954) 1 QB 8 : (1953) 3 WLR 689
6 (1951) 2 QB 1 : (1951) 1 All ER 482
7 1900 AC 452 : 69 LJ PC 89
8 (1828) 7 B&C 785 : 1 Man & Rey KB 663
9 (1961) 1 Ll L Rep 142, 145
10 (1978) 2 Ll L Rep 223
11 (1942) AC 356 : (1942) 1 All ER 337
12 AIR 1959 SC 1362 : (1960) 1 SCR 493
13 (1984) 4 SCC 679 : (1985) 1 SCR 432
14 AIR 1954 SC 689, 692
15 (1955) 2 SCR 48 : AIR 1955 SC 468
16 AIR 1934 PC 185, 188 : 40 MLW 138

Limited[17] and *M. Golodetz* v. *Schrier*[18].]

28. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. [See the principles stated in *Anisminic Ltd.* v. *Foreign Compensation Commission*[19]; *Pearlman* v. *Keepers and Governors of Harrow School*[20]; *Lee* v. *Showmen's Guild of Great Britain*[21]; *M.L. Sethi* v. *R.P. Kapur*[22]; *Managing Director, J.& K. Handicrafts* v. *Good Luck Carpets*[23]; *State of A.P.* v. *R.V. Rayanim*[24]. See also Mustill and Boyd's *Commercial Arbitration*, 2nd edn., *Halsbury's Laws of England*, Vol. II, 4th edn.].

29. The umpire, in our view, acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting *ultra fines compromissi.*

30. In the circumstances, we affirm the judgment of the High Court under appeals except in respect of claim No. II. Accordingly, the appeals of the contractor are dismissed; and, the appeals of the government are allowed in respect of claim No. II. We do not, however, make any order as to costs.

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17 (1933) AC 592 : 1933 All ER Rep 616
18 (1947) 80 Ll L Rep 647
19 (1969) 2 AC 147 : (1969) 1 All ER 208
20 (1979) 1 QB 56 : (1979) 1 All ER 365
21 (1952) 2 QB 239 : (1952) 1 All ER 1175
22 (1972) 2 SCC 427 : (1973) 1 SCR 697 : AIR 1972 SC 237
23 (1990) 4 SCC 740 : AIR 1990 SC 864
24 (1990) 1 SCC 433 : AIR 1990 SC 626

STPs in the city of Delhi. The project is of great public importance. It is indeed of national importance. We take judicial notice of the fact that there was utmost urgency to acquire the land in dispute and as such the emergency provisions of the Act were rightly invoked. We reject the first contention raised by the learned counsel.

12. So far as the second contention raised by Mr Vashisht, the same is mentioned to be rejected. Whatever may be the user of the land under the Master Plan and the Zonal Development Plan the State can always acquire the same for public purpose in accordance with the law of the land. In any case the object and purpose of constructing the STPs is to protect the environment, control pollution and in the process maintain and develop the agricultural green.

13. We see no force in any of the contentions raised by Mr Vashisht. We, therefore, dismiss the transfer cases (writ petitions) with costs. We quantify the costs at Rs 10,000 to be paid by each of the petitioners in these cases.

(1996) 1 Supreme Court Cases 18

(BEFORE S.C. AGRAWAL AND G.B. PATTANAIK, JJ.)

STATE OF U.P. .. Appellant;

Versus

RAM NATH INTERNATIONAL CONSTRUCTION (P) LTD. .. Respondent.

Civil Appeal No. 6116 of 1994†, decided on November 10, 1995

Arbitration Act, 1940 — S. 30 — Court can interfere with award only on the grounds set out in S. 30 — It cannot reappreciate the evidence to examine correctness of the conclusions of the arbitrator — But it can examine the clauses of the agreement to determine correctness of the conclusions with reference to the clauses — Where in State's contract with respondent contractor, due to change in drawings and designs quantity of work abnormally increased for which contractor's claim for higher rate based on undisputed analysis given by the contractor was accepted by arbitrator, held, court's interference not called for — However, since after expiry of the period stipulated in the agreement in respect of further quantity of work executed by contractor, State had been paying at a higher rate by calculating in terms of escalation clause in the contract itself, that amount had to be adjusted in calculating the amount to be paid to the contractor on the basis of the higher rate claimed by it and allowed by the arbitrator

Held:

The jurisdiction of the court to interfere with an award of an arbitrator is a limited one. The adjudication of the arbitrator is generally binding between the parties and it is not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion. Award of an arbitrator can be set aside by a court only on the grounds indicated in Section 30 of the Arbitration Act.

† From the Judgment and Order dated 16-12-1993 of the Allahabad High Court in FA from Order No 930 of 1991

It is not open to the court to reassess the evidence to find whether the arbitrator has committed any error or to decide the question of adequacy of evidence and the court cannot sit on the conclusion of the arbitrator by re-examining and reappreciating the evidence considered by the arbitrator. At the same time the arbitrator is a creature of the agreement itself and therefore is duty-bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement itself. If the arbitrator adjudicates a claim of a contractor with reference to the clauses of the agreement itself whereby the agreement gets engrafted into the award, it will be open to the court to examine those clauses of the agreement and find out the correctness of the conclusion of the arbitrator with reference to those clauses. (Para 7)

In the present case in the course of execution of the contract, drawings and designs were changed as a result of which there was abnormal increase of the quantity of work and for such an increase of quantity of work when the contractor claimed a higher rate and gave the analysis before the arbitrator, which was not disputed by the State and the arbitrator accepted the rate, the court will not be justified in interfering with the same. The arbitrator having considered all the relevant materials and there being no legal proposition which has formed the basis for acceptance of a higher rate and on the other hand the same being arrived at on account of the abnormal increase in the quantity of work which was on account of change of drawings and designs, the court will not be justified in interfering with the same. However, in respect of the excess quantity of work executed by the claimant subsequent to the completion period indicated in the agreement, when the claimant has made the claim at a higher rate and that claim is allowed by the arbitrator on the basis of analysis of rates given by him, then the amount already paid to him by the State in accordance with the escalation clause in the agreement has to be adjusted and the claimant would not be entitled to double benefit on that score. (Paras 8 and 9)

Appeal allowed in part R-M/15194/C

Advocates who appeared in this case :
D.V. Sehgal, Senior Advocate (R.B. Misra, Nalin Tripathi and M.K. Roy, Advocates, with him) for the Appellant;
G.L Sanghi, Senior Advocate (Pramod B. Agarwala and Satish Agarwala, Advocates, with him) for the Respondent

The Judgment of the Court was delivered by

PATTANAIK, J.— This appeal is directed against the judgment of the Allahabad High Court dated 16-12-1993 in First Appeal from Order No. 930 of 1991, arising out of an arbitration proceeding.

2. The respondent-contractor had entered into an agreement with the appellant for construction of non-overflow and overflow sections with bridge spillway and other appurtenant works of Maudaha Dam in Hamirpur District in the State of Uttar Pradesh. The agreement was entered into on 26-8-1985 and work commenced from 1-9-1985. The period stipulated for completion of the work was 42 months. In the year 1987 in respect of two items of work namely Items 13 and 15, it is alleged that the appellant changed the designs and drawings as a result of which the quantity of work became abnormally high compared to the estimated quantity of work in the agreement. On account of such abnormal increase of the quantity of work the contractor claimed higher rate than what was agreed to in the agreement. The State

having refused to accede to the contractor's demand and disputes having arisen between the parties, the arbitration clause of the agreement was invoked and dispute was referred to the sole arbitration of the Joint Secretary and Joint Legal Remembrancer to the Government of Uttar Pradesh. Before the arbitrator the respondent-contractor made a claim of Rs 91,56,750 for the increased quantity of work in respect of Item 13 executed till 30-4-1990 and Rs 9,92,402.50 for the increased quantity of work in respect of Item 15 executed till 30-4-1990 together with interest @ 10% thereon. The entire basis of the claim of the contractor was that in respect of the quantity of work in excess of the estimated quantity in the agreement he is entitled to be paid @ Rs 453.50 per cubic metre in place of the agreed rate of Rs 243.00 for Item 13 and the rate of Rs 739.55 per cubic metre in place of agreed rate of Rs 460.00 for Item 15. It was alleged in the claim petition that the State of Uttar Pradesh has paid and is paying the agreed rate of Rs 243.00 per cubic metre in respect of the additional quantity of work in Item 13 and similarly has paid and is paying @ 460.00 per cubic metre even in respect of the additional quantity of work in respect of Item 15. According to the respondent-contractor, on account of substantial change in designs and drawings there has been abnormal increase in the quantity of work compared to the estimated quantity of work in the original agreement and in respect of such additional quantity of work he is not bound to be paid at the agreed rate but at an enhanced rate on the basis of the analysis of rate submitted by him. It was further averred that when the drawings and designs were changed, the contractor had resisted and prayed for the alteration in the rate but the authorities concerned had assured him orally for such change though ultimately did not agree to the same. It was also averred in the claim petition that under the agreement he was bound to carry out the work as per the directions of the authorities concerned and accordingly he has carried out the same.

3. The appellant-State filed written statement before the arbitrator denying its liability to pay at the revised rate as claimed by the contractor. It was admitted that there has been a change in the drawings and designs relating to Items 13 and 15 and on account of such change, the quantity of work in respect of the aforesaid two items has increased. But the claimant is not entitled to any enhanced rate, in view of the different clauses of the agreement itself. It was also averred in the written statement that the so-called variation in the quantity of work is covered by clauses 11.25 and 13.11 of the agreement and therefore the contractor is not entitled to any higher rate.

4. The learned arbitrator after analysing the different clauses of the agreement, came to the conclusion that the contractor could not have refused the work in accordance with the alterations and modifications in the drawings and designs. He further held that there has been a fundamental change in the drawings and designs which abnormally increased the quantum of work than the estimated quantum indicated in the agreement and under the agreement though the contractor cannot claim any excess rate for work up to

the excess of 10%, but beyond the same the contractor would be entitled to claim a higher rate. The arbitrator accepted the analysis of rate given by the contractor and accordingly in respect of the quantity of work executed after the date of the completion of the work indicated in the agreement namely 28-2-1989, he granted as per the rate claimed by the contractor. In all he awarded a total sum of Rs 90,21,765.65 together with interest @ 9% per annum from 21-5-1990 till the date of the award and further interest @ 6% per annum from the date of the award till the payment or till the decree, if any, passed on the basis of the order. The arbitrator also held that in respect of work executed after 30-4-1990 the claimant would be paid at the same rate i.e. Rs 453.50 per cubic metre in respect of Item 13 and Rs 739.55 per cubic metre in respect of Item 15 after adjusting the payments already made as per the rates given in the contract.

5. The contractor filed an application before the Civil Judge, Hamirpur for making the award a rule of court which was registered as Suit No. 53 of 1991. The appellant-State filed his objections challenging the legality of the award. The learned Judge being of the opinion that the court has no jurisdiction to interfere with an award of the arbitrator since the arbitrator had decided all the issues properly with detailed analysis as well as after perusing all the necessary documents, made the award a rule of court. The learned trial Judge also came to the conclusion that the arbitrator was fully within his powers to accept the analysis of rate submitted by the contractor which was in fact not disputed by the State and therefore there is no error in the award which could be interfered with by the court. On the question whether the objections filed by the State could at all be entertained the same having been filed beyond 30 days the Civil Judge came to the conclusion that the objections cannot be entertained and perused as the same was filed beyond the period of 30 days. With these conclusions the award having been made a rule of court and the objection of the State having been rejected, the State preferred an appeal in the High Court of Allahabad under Section 39 of the Arbitration Act. The High Court set aside the conclusion of the trial Judge with regard to the entertainability of the objection filed by the State and held that taking into account the magnitude of the claim of Rs 1 crore and taking into account that the objection could not be filed on 23-3-1991 on account of lawyers' strike and 24-3-1991 was a Sunday, the objection filed on 25-3-1991 has to be considered on condoning the delay, in the interest of justice. But so far as the conclusion of the trial Judge on merits of the case is concerned the High Court refused to interfere with the decision of the trial Judge on the ground that the arbitrator has not committed any error in allowing the claim of the contractor as per the analysis of rates given by it in respect of the extra quantity of work and it is not permissible for the court within the parameter for exercise of its jurisdiction to interfere with the award. Thus appeal having been dismissed, the State has preferred the present appeal.

6. Mr Sehgal, the learned Senior Counsel for the appellant, contended that in view of the escalation clause in the contract itself, the arbitrator had

no jurisdiction to allow the contractor's claim at a new rate on the basis of the analysis of rates and the award, therefore, is vitiated on that score. He further contended that even if it was permissible for the arbitrator to accept the analysis of rates submitted by the contractor for the excess quantity of work executed by him beyond the stipulated period of the contract, yet the arbitrator committed gross error in allowing the total claim without taking into account the payments already made to the contractor in accordance with the escalation clause of the contract and the award is, therefore, vitiated on that score. Mr Sanghi, the learned Senior Counsel appearing for the respondent on the other hand contended that the quantity of work executed by the contractor being far more in excess of the anticipated quantity of work in the contract and such excess being on account of alteration of drawings and designs, the arbitrator was fully within his jurisdiction to accept the analysis of rates submitted by the contractor and award the contractor's claim. It was further contended that the State not having objected to the analysis of rates given by the contractor, the arbitrator was fully justified in awarding the claim of the contractor. Mr Sanghi also contended that the payments already made to the contractor at the escalated rate in respect of the extra quantity of work in accordance with the terms of the contract is of no consequence since the contractor claimed the change of the basic rate which the arbitrator has allowed and on such basic rate the contractor would otherwise be entitled to the escalation in accordance with the clauses of the contract. According to Mr Sanghi, the High Court rightly did not interfere with the award as no error appears to have been pointed out in the award itself.

7. The jurisdiction of the court to interfere with an award of an arbitrator is undoubtedly a limited one. The adjudication of the arbitrator is generally binding between the parties and it is not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion. Award of an arbitrator can be set aside by a court only on the grounds indicated in Section 30 of the Arbitration Act. It is not open to the court to reassess the evidence to find whether the arbitrator has committed any error or to decide the question of adequacy of evidence and the court cannot sit on the conclusion of the arbitrator by re-examining and reappreciating the evidence considered by the arbitrator. At the same time the arbitrator is a creature of the agreement itself and therefore is duty-bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement itself. If the arbitrator adjudicates a claim of a contractor with reference to the clauses of the agreement itself whereby the agreement gets engrafted into the award, it will be open to the court to examine those clauses of the agreement and find out the correctness of the conclusion of the arbitrator with reference to those clauses. Bearing in mind the aforesaid parameters for exercise of jurisdiction by the court in examining the legality of an award of an arbitrator, the award in hand as well as the order of the subordinate Judge and that of the High Court requires scrutiny.

8. Admittedly under the agreement the completion period of work was 28-2-1989. The stipulated quantity of work in respect of Item 13 was 57,000 cubic metres and in respect of Item 15 it was 3500 cubic metres. In the course of execution of the contract, drawings and designs were changed as a result of which there was abnormal increase of the quantity of work and for such an increase of quantity of work when the contractor claimed a higher rate and gave the analysis before the arbitrator, which was not disputed by the State and the arbitrator accepted the rate, the court will not be justified in interfering with the same. It is not possible for us to accept the contention of Mr Sehgal that under the terms of the agreement the contractor was not entitled to claim any higher rate. The arbitrator having considered all the relevant materials and there being no legal proposition which has formed the basis for acceptance of a higher rate and on the other hand the same being arrived at on account of the abnormal increase in the quantity of work which was on account of change of drawings and designs, the court will not be justified in interfering with the same. The first contention of Mr Sehgal, therefore, cannot be accepted.

9. But the second submission of Mr Sehgal is unassailable. After expiry of the period stipulated in the agreement in respect of further quantity of work executed by the contractor, the State has been paying at a higher rate by calculating in terms of the escalation clause in the contract itself. When the claimant filed his claim petition before the arbitrator an assertion was made in paragraph 27 of the claim petition that the opposite party in respect of the extra quantity of work executed in Item 13 *has paid and is paying* at the rate of Rs 243.00 per cubic metre though the claimant is entitled to a rate of Rs 453.50 per cubic metre and hence the claimant is entitled to an additional amount at the rate of Rs 210.50 per cubic metre (Rs 453.50 — 243.00) and the amount thus comes to Rs 91,56,750. Similarly, in respect of extra quantity of work in Item 15 it was averred in paragraph 30 of the claim petition that the opposite party in respect of this extra quantity *has paid and is paying* at the rate of Rs 460 per cubic metre though the claimant is entitled to a rate of Rs 739.55 per cubic metre and hence the claimant is entitled to an additional amount at the rate of Rs 279.55 per cubic metre (Rs 739.55 — 460.00) and the amount thus comes to Rs 9,92,402.50. The claim petition was filed on 19-5-1990. But it was brought to our notice in the course of hearing of this appeal by Mr Sehgal, learned Senior Counsel appearing for the appellant, that subsequent to 28-2-1989 which was the period contemplated under the agreement for completion of work, the contractor-claimant has been paid at an escalated rate in accordance with the escalation clause in the agreement itself. Neither the arbitrator nor any of the forums below have taken note of the aforesaid fact. Mr Sanghi, learned Senior Counsel appearing for the respondent-contractor, however, vehemently urged that the claim of Rs 453.50 per cubic metre in respect of Item 13 and Rs 739.55 per cubic metre in respect of Item 15 was the basic rate claimed by the contractor and therefore any payment already made for excess quantity of work after the stipulated period in the agreement in accordance

with the escalation clause in the agreement cannot be taken into account in adjudicating the claim of the contractor. We are unable to accept this contention of Mr Sanghi inasmuch as the claimant himself, as has been stated earlier unequivocally in the claim petition averring that the claimant has been paid and is being paid at the old rate stipulated in the agreement and he is entitled to the higher claim. In respect of the excess quantity of work executed by the claimant subsequent to the completion period indicated in the agreement, when the claimant has made the claim at a higher rate and that claim is allowed by the arbitrator on the basis of analysis of rates given by him, then the amount already paid to him by the State in accordance with the escalation clause in the agreement has to be adjusted and the claimant would not be entitled to double benefit on that score. Unfortunately, this position has been lost sight of by the arbitrator as well as by the subordinate Judge and the High Court possibly because this has not been brought to notice by the State. Mr Sanghi, learned counsel appearing for the respondent on instruction from his client does not dispute the position that subsequent to 28-2-1989, in respect of the quantity of work executed by the contractor, he has been paid at an escalated rate on the basis of calculation made in accordance with the escalation clause in the agreement. This being the position, we would have ordinarily set aside the award of the arbitrator and remitted the matter for recalculation. But in the course of hearing Mr Sanghi, learned counsel appearing for the respondent, submitted that the matter may be decided by this Court since a considerable period has lapsed in the meantime and did not dispute the calculation-sheet that was filed by Mr Sehgal, learned counsel appearing for the State, as well as the affidavit of Shri Ambika Prasad, Executive Engineer, Maudaha Dam, Construction Division. In the same affidavit after making necessary adjustments of payment, made at the escalated rate, it has been stated that the contractor would be entitled to the amount of Rs 37,26,917.22 in respect of Item 13 for the extra work executed between 1-3-1989 to 30-4-1990 and a sum of Rs 1,71,542.41 in respect of extra quantity of work for Item 15 for the period between 1-3-1989 to 30-4-1990 and thus in all the claimant-contractor would be entitled to Rs 38,98,459.63 in respect of the extra quantity of work executed by him for the period 1-3-1989 to 30-4-1990. Since the calculation made in this affidavit is not disputed and in view of the submission made by Mr Sanghi appearing for the claimant-contractor, we modify the award of the arbitrator and direct that the claimant would be entitled to an additional sum of Rs 38,98,549.63 in respect of the work executed by him up to 30-4-1990 and the same amount would also carry interest at the rate of 9% per annum from 21-5-1990 till payment is made, as awarded by the arbitrator himself.

10. The arbitrator has also held in the award that the claimant would be entitled to be paid at the same rate as indicated in the award in respect of the work executed subsequent to 30-4-1990. Mr Sanghi, the learned Senior Counsel appearing for the contractor, submitted that no reference has been made to the arbitrator as to at what rate the contractor would be paid in respect of the work executed subsequent to 30-4-1990 and in fact the

claimant-contractor had not made any claim on that score. And as such the said direction of the arbitrator must be held to be without jurisdiction. Mr Sehgal, the learned Senior Counsel appearing for the State, also could not point out any material to indicate that the reference included the dispute with regard to the rate at which the contractor would be paid even subsequent to 30-4-1990. The arbitrator obviously cannot entertain and decide any dispute which has not been referred to it. In this view of the matter the direction of the arbitrator must be held to be without jurisdiction and we accordingly quash that part of the direction. In the net result, therefore, the appeal is allowed in part to the extent already indicated. There will be no order as to costs.

(1996) 1 Supreme Court Cases 25

(BEFORE S.C. AGRAWAL AND G.B. PATTANAIK, JJ.)

DEV KUMAR (DIED) THROUGH LRS. .. Appellant;

Versus

SWARAN LATA (SMT) AND OTHERS .. Respondents.

Civil Appeal No. 4204 of 1992†, decided on November 10, 1995

A. **Rent Control and Eviction — Sub-letting — Proof of — Non-residential premises — Parting of possession of the premises by tenant and exclusive possession of sub-tenant essential ingredients to be proved — Burden of proof on landlord — Landlady (Respondent 1) alleging that tenant-appellant had sub-let the premises to Respondents 2 to 4 who were carrying on their business there — Tenant claiming that he was carrying on business as Commission Agent of Respondents 2 to 4 — Landlady's case based on tainted evidence of local Commissioner — Held on facts, landlady failed to establish sub-letting by the tenant — E.P. Urban Rent Restriction Act, 1949, S. 13(2)(ii)(a)**

B. **Rent Control and Eviction — Revision — Scope of High Court's power under S. 15(5) of E.P. Urban Rent Restriction Act — Examination of 'legality and propriety' of order of appellate authority — Conclusion on question of sub-letting is one of question of law — In absence of perversity, findings of the appellate authority on that question not open to interference by High Court under S. 15(5) — E.P. Urban Rent Restriction Act, 1949, Ss. 15(5) & 13(2)(ii)(a) — Civil Procedure Code, 1908, S. 115**

The case of the landlady-Respondent 1 was that the tenant-appellant had given the disputed premises to Respondents 2 to 4 who were transacting their business there in their name and style Ram Saran Rattan Chand. The case of the tenant, on the other hand, was that along with his own business, he was also transacting business as Commission Agent of M/s Ram Saran Bhola Nath. The Controller appointed a local Commissioner calling upon him to find out whether the premises had been sub-let to M/s Ram Saran Rattan Chand. The report of the Commissioner merely indicated that on a particular day the Commissioner went to the disputed premises and purchased a piece of cloth and paid the money, the bill for which was given by the seller in the name of M/s Ram Saran Rattan Chand, Moti Bazar. The

† From the Judgment and Order dated 3-4-1992 of the Punjab and Haryana High Court in C.R. No. 3106 of 1983

(1999) 9 Supreme Court Cases 283

(BEFORE D.P. WADHWA AND M.B. SHAH, JJ.)

RAJASTHAN STATE MINES & MINERALS LTD. .. Appellant;

Versus

EASTERN ENGINEERING ENTERPRISES AND ANOTHER .. Respondents.

Civil Appeal No. 1202 of 1992†, decided on September 20, 1999

A. **Arbitration Act, 1940 — Ss. 30 & 33 — Jurisdiction of arbitrator — Limits to — Where fundamental terms of agreement between the parties are ignored by the arbitrator, held, such arbitrator exceeds his jurisdiction even where the arbitration clause itself is widely worded — Such deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct, but may be tantamount to mala fide action — The situation would give rise to jurisdictional error which could be corrected by the court and for that limited purpose the agreement between the parties would be required to be considered by the court — So if the agreement specifically bars certain claims from being raised and yet an award has been made then court must not uphold such award — Two particular clauses (17 & 18) of the agreement setting out clearly and unambiguously in both positive and negative terms that Respondent 1 contractor was to be paid fixed rates and that he would not be entitled to any extra payment on any account irrespective of increased costs under any item of work — Respondent 1 contractor claiming reimbursement under several heads including increase in the actual cost of excavation, higher cost of explosives and transportation — Arbitrator allowing claims in a non-speaking award (totalling Rs 1.07 crores) — Held, High Court in appeal erred in upholding the award**

B. **Arbitration Act, 1940 — Ss. 30 & 33 — In order to decide whether arbitrator has exceeded his jurisdiction, held, reference to the terms of the contract is a must — This ground is different from error apparent on the face of the award**

C. **Arbitration Act, 1940 — Ss. 30 & 33 — Jurisdiction of arbitrator — Where the reference to the arbitrator is solely based upon the agreement between the parties and no other specific issue which would confer jurisdiction on the arbitrator to go beyond the terms of the contract, is referred to him, the arbitrator is bound by the terms of the contract**

D. **Arbitration Act, 1940 — Ss. 30 & 33 — The contention that the arbitrator acted beyond his jurisdiction in ignoring the stipulations of the contract, held, would be covered by issues raising the questions whether the award was perverse, whether the arbitrator failed to apply his mind to pleadings, documents and evidence as well as to particular clauses of the contract**

E. **Arbitration Act, 1940 — S. 30(a) — Misconduct — Non-speaking award — Where the arbitrator gives an award ignoring fundamental terms**

† From the Judgment and Order dated 17-12-1991 of the Rajasthan High Court in CMA No 254 of 1991

of the contract between the parties, held, he exceeds his jurisdiction and such an award may be set aside even if it is a non-speaking one

F. **Arbitration Act, 1940 — Ss. 30 & 33 — Non-speaking award — Jurisdiction of court limited in case of — Court cannot speculate as to reasons or probe mental process of arbitrator — Court can set aside the award if arbitrator acts beyond his jurisdiction**

G. **Arbitration Act, 1940 — Ss. 30 & 33 — Arbitrator cannot presume to decide a question of law not referred to him — Decision in such situation would not be final even though it may be within his jurisdiction — However, where a specific question of law touching upon jurisdiction of arbitrator is referred to arbitrator then finding of arbitrator on that question may be binding on parties**

H. **Arbitration Act, 1940 — Ss. 30 & 33 — Jurisdiction — Whether action of arbitrator in excess of, how determined — Agreement between parties must be considered as arbitrator cannot disregard its terms — What has to be seen is whether claim could be raised before arbitrator at all — Even where claim raised on basis of widely worded arbitration clause, award passed in respect of claim barred by agreement or law would be in excess of jurisdiction which is different from an error apparent on the face of the award — Court cannot interfere in case of mere error of fact or law in reaching conclusion on the disputed question submitted for his adjudication**

I. **Arbitration Act, 1940 — Ss. 30 & 33 — Justice and reasonableness — Arbitrator cannot ignore the law or misapply it for the sake of what he thinks is just and reasonable — Obliged to decide dispute according to law — He is not a conciliator**

J. **Arbitration Act, 1940 — Ss. 30 & 33 — Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract — Deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action**

The appellant Company belonging to State Govt. entered into an agreement, dated 14-5-1981, with Respondent 1 on turnkey basis for certain specialised engineering work in the Jhamarkotra Mines for the period 13-3-1981 to 12-6-1984. The work involved excavation, removal, transportation including loading and unloading, disposal, dumping, dozing, levelling etc. of overburden at specified dump yards including final dressing of the mine benches, faces and sides etc. and incidental mining of rock phosphate ore encountered during the excavation and its transportation to ore stacks etc. The rate of payment under the agreement was fixed at Rs 35.80 all inclusive per cubic metre in respect of overburden and/or ore actually excavated, mined, removed etc. for the quantity of 21.15 lakh cubic metres, subject to plus or minus 10%. The arbitration clause in the agreement (clause 74) was very widely worded: "... all disputes and differences arising out of or in any way touching or concerning this contract whatsoever, except as to any matter, the decision of which is expressly vested in any authority in this contract, shall be referred to the sole arbitration of...." However, clauses 17 and 18 placed important restrictions on the contractor:

(*i*) Blasting wherever required was to be carried out by the contractor at his cost, including the cost of explosives, transportation and wages of crew/ blasters;

(*ii*) contractor was not permitted to raise claims or disputes on account of blasting, idling of equipment or labour or rise in cost of explosives;

(*iii*) the contractor was entitled to the payment of composite rate of Rs 35.80, all inclusive, per cubic metre and "no other or further payment of any kind or item". The rates were to "remain firm, fixed and binding ... irrespective of any fall or rise in the cost of mining operations ... or for any other reason or any account or any ground whatsoever."

After the commencement of the work, disputes and differences arose. Respondent 1 wrote to the appellant by letter dated 7-9-1983, admitting that the rates of payment were to remain fixed, but still seeking payment at higher rates due to various difficulties faced by it. The appellant finally appointed an arbitrator by letter dated 5-2-1985 "to decide all claims raised by the contractor". Respondent 1 contractor had many grievances and his claims included: (*i*) reimbursement for increase in the actual cost of excavation, at the rate of Rs 25.40 per cu m up to August 1983 and Rs 63.56 per cu. m. thereafter over and above the contract rate; (*ii*) reimbursement for higher cost of explosives and for losses suffered because of its non-availability; (*iii*) reimbursement for additional costs for mining and transport of ore; and (*iv*) reimbursement for additional expenses on account of revised wage structure.

The arbitrator awarded Rs 65 lakhs in an interim award covering some of the claims and then in a final award awarded a total sum of Rs 1.07 crores including the amount earlier granted with 12.5% interest w.e.f. 5-2-1985. The arbitrator gave no reasons for the award.

The District Judge made the award rule of court, rejecting the objections of the appellant under Sections 30 & 33 of the Arbitration Act, 1940. Before the High Court it was contended for the appellant that the award must be set aside as it had been made in contravention of clauses 17 and 18, which expressly set out that the rate of payment was to remain fixed; that the arbitrator had travelled beyond his jurisdiction and had also legally misconducted himself.

The High Court upheld the award, holding that the point about jurisdiction had not been raised before the arbitrator; that the letter appointing the arbitrator dated 5-2-1985 indicated that the contractor was under no impediment as regard the rates payable; that the arbitrator had been asked to decide all claims raised by him; that the appellant had raised objections on the basis of clauses 17 and 18 in its reply to the claim petition but had not raised them before the arbitrator.

Before the Supreme Court, it was contended for the appellant that the order of the High Court was illegal on the face of it, because the appellant had throughout the proceedings maintained that the claims of Respondent 1 were barred by clauses 17 and 18. Therefore, it was submitted, the arbitrator had acted beyond his jurisdiction.

For Respondent 1 it was primarily submitted (*i*) that the arbitration clause was "of the widest amplitude" and as such the award could not be held to be without jurisdiction; and (*ii*) that the award was a non-speaking one and that the court could not go behind it to examine the mental processes of the arbitrator.

Allowing the appeal with costs, the Supreme Court

Held :

Despite the admission by the contractor, it is apparent that the arbitrator has ignored the stipulations in the contract. In the award, the arbitrator has specifically mentioned that he has given due weightage to all the documents placed before him and has also considered the admissibility of each claim. However, while passing the award basic and fundamental terms of the agreement between the parties have been ignored. By doing so, it is apparent that he has exceeded his jurisdiction. (Para 21)

The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action. (Para 22)

It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose the agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. It is true that arbitration clause 74 is very widely worded, and therefore, the dispute was required to be referred to the arbitrator. Hence, the award passed by the arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibit entertaining of the claims made by the contractor. In the letter dated 5-2-1985 appointing the sole arbitrator, it has been specifically mentioned that agreement dated 14-5-1981 was executed by and between the parties and that the contractor has raised the claims as mentioned in the letter dated 7-9-1983 which was denied by the Company and at the request of the contractor, the sole arbitrator was appointed to adjudicate the claims made by the contractor vide his letter dated 7-9-1983. This reference to the arbitrator also clearly provides that reference was with regard to the dispute arising between the parties on the basis of the agreement dated 14-5-1981. It nowhere indicates that the arbitrator was empowered to adjudicate any other claims beyond the agreement between the parties. (Para 23)

The issue whether the award is perverse and that the arbitrator failed to apply his mind to pleadings, documents and evidence as well as clauses 17 and 18 of the agreement would cover the contention that the arbitrator acted beyond his jurisdiction in ignoring the stipulations of the contract. (Para 46)

On the basis of the decisions of the Supreme Court it can be stated that:

(*a*) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(*b*) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(*c*) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

Jivarajbhai Ujamshi Sheth v. *Chintamanrao Balaji*, AIR 1965 SC 214 . (1964) 5 SCR 480, *Champsey Bhara and Co* v. *Jivraj Balloo Spg and Wvg Co Ltd.*, (1922-23) 50 IA 324 : AIR 1923 PC 66, *relied on*

(*d*) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

Continental Construction Co. Ltd. v. *State of M.P.*, (1988) 3 SCC 82 : (1988) 3 SCR 103; *Tarapore & Co.* v. *Cochin Shipyard*, (1984) 2 SCC 680, *relied on*

A.M. Mair & Co. v. *Gordhandas Sagarmull*, AIR 1951 SC 9 : 1950 SCR 792, *referred to*

(*e*) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

Hindustan Construction Co. Ltd. v. *State of J&K*, (1992) 4 SCC 217, *relied on*

(*f*) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

Sudarsan Trading Co. v. *Govt of Kerala*, (1989) 2 SCC 38; *Managing Director, J&K Handicrafts* v. *Good Luck Carpets*, (1990) 4 SCC 740, *relied on*

(*g*) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

H P SEB v. *R J. Shah and Co.*, (1999) 4 SCC 214, *relied on*

(*h*) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement.

T.N. Electricity Board v. *Bridge Tunnel Constructions*, (1997) 4 SCC 121; *New India Civil Erectors (P) Ltd.* v. *Oil & Natural Gas Corpn.*, (1997) 11 SCC 75; *Continental Construction Co. Ltd.* v. *State of M.P.*, (1988) 3 SCC 82 : (1988) 3 SCR 103; *Alopi Parshad and Sons Ltd.* v. *Union of India*, AIR 1960 SC 588 : (1960) 2 SCR 793, *relied on*

(*i*) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

Associated Engg. Co v *Govt of A P*, (1991) 4 SCC 93, *relied on*

(*j*) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law. (Para 44)

Continental Construction Co. Ltd. v *State of M.P.*, (1988) 3 SCC 82 : (1988) 3 SCR 103; *Alopi Parshad and Sons Ltd.* v. *Union of India*, AIR 1960 SC 588 : (1960) 2 SCR 793, *relied on*

The award passed by the arbitrator is against the stipulations and prohibitions contained in the contract between the parties. In the present case, there is no question of interpretation of clauses 17 and 18 as the language of the said clauses is absolutely clear and unambiguous. Even the contractor has admitted in his letter demanding such claims that the contract was signed with the clear understanding that the rate under the contract was firm and final and no escalation in rates except in case of diesel would be granted. Hence, by ignoring the same, the arbitrator has travelled beyond his jurisdiction. It amounts to a deliberate departure from the contract. Further, the reference to the arbitrator is solely based upon the agreement between the parties and the arbitrator has stated so in his interim award that he was appointed to adjudicate the disputes between the parties arising out of the agreement. No specific issue was referred to the arbitrator which would confer jurisdiction on the arbitrator to go beyond the terms of the contract. Hence, the award passed by the arbitrator is, on the face of it, illegal and in excess of his jurisdiction which requires to be quashed and set aside. (Para 45)

Tarapore & Co. v. *Cochin Shipyard Ltd.*, (1984) 2 SCC 680; *A.M. Mair & Co.* v. *Gordhandas Sagarmull*, AIR 1951 SC 9 : 1950 SCR 792, *Hindustan Construction Co Ltd.* v *State of J&K*, (1992) 4 SCC 217; *Tarapore & Co* v *State of M P*, (1994) 3 SCC 521, *P.V. Subba Naidu* v. *Govt of A P.*, (1998) 9 SCC 407, *distinguished*

Ch. Ramalinga Reddy v *Superintending Engineer*, (1994) 5 Scale 67 . (1999) 9 SCC 610, *referred to*

A-M/ATZ/21720/C

Advocates who appeared in this case :

Dr A.M. Singhvi, Senior Advocate (P.K. Ganguli and Pankaj Kr. Singh, Advocates, with him) for the Appellant;

B. Sen, Senior Advocate (Ashok H. Desai, A. Mishra, A.P Dhamija, Pradeep Aggarwal, L.P. Singh and Sushil Kr. Jain, Advocates, with him) for the Respondents.

Chronological list of cases cited ***on page(s)***

6 (1994) 3 SCC 521, *Tarapore & Co.* v. *State of M.P.* 307*b*
7. (1992) 4 SCC 217, *Hindustan Construction Co Ltd.* v. *State of J&K* 306*c*
8. (1991) 4 SCC 93, *Associated Engg Co.* v. *Govt. of A.P.* 305*g-h*
9. (1990) 4 SCC 740, *Managing Director, J&K Handicrafts* v *Good Luck Carpets* 306*f*
10. (1989) 2 SCC 38, *Sudarsan Trading Co.* v. *Govt. of Kerala* 304*g*, 306*d*
11 (1988) 3 SCC 82 : (1988) 3 SCR 103, *Continental Construction Co. Ltd.* v. *State of M P.* 302*e*, 307*d-e*, 310*d-e*
12 (1984) 2 SCC 680, *Tarapore & Co.* v *Cochin Shipyard Ltd* 303*d*, 303*d-e*, 307*e*
13. AIR 1965 SC 214 : (1964) 5 SCR 480, *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji* 301*c*, 305*b*, 306*a*
14. AIR 1960 SC 588 : (1960) 2 SCR 793, *Alopi Parshad and Sons Ltd* v. *Union of India* 303*a-b*, 310*e*
15 AIR 1951 SC 9 : 1950 SCR 792, *A.M. Mair & Co.* v. *Gordhandas Sagarmull* 304*a*
16 (1922-23) 50 IA 324 · AIR 1923 PC 66, *Champsey Bhara and Co.* v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.* 301*e-f*, 302*c*, 302*d*

The Judgment of the Court was delivered by

SHAH, J.— By the impugned judgment and order dated 17-12-1991, the High Court of Judicature of Rajasthan at Jodhpur, dismissed SB Civil Miscellaneous Appeal No. 254 of 1991 filed by the appellant and confirmed the judgment and order dated 1-8-1989 passed by the District Judge, Udaipur in petition under Sections 30 and 33 of the Arbitration Act, 1940. The District Judge had passed the decree in terms of the award.

2. The brief facts of the case are that on 14-5-1981, the appellant and Respondent 1 entered into an agreement on a turnkey basis for excavation, removal, transportation including loading and unloading, disposal, dumping, dozing, levelling etc. of overburden at the specified dump yards including final dressing of the mine benches, faces and sides etc. and incidental mining of rock phosphate ore encountered during the excavation of overburden and its transportation to ore stacks etc. from the footwall, western portion and eastern portions of 'D' Block of the Jhamarkotra Mines including drilling, blasting, loading, transportation, unloading etc. with the leads and lifts involved in connection therewith, more particularly described in the said contract for the period of three years and three months, that is, from 13-3-1981 to 12-6-1984 for the quantity of 21.15 lakh cubic metres subject to plus minus 10% at the fixed rate of Rs 35.80 (Rupees thirty-five and eighty paise) all inclusive per cubic metre in respect of overburden and/or ore actually excavated, mined, removed etc.

3. Respondent 1 vide its letter dated 7-9-1983, raised certain disputes and claimed reimbursement and/or additional payments and/or compensation on account of escalation of cost of work and breach of contract by the appellant. The appellant vide its letter dated 11-9-1984 refuted the claims of Respondent 1 by stating that in no case the rates over and above Rs 35.80 per cubic metre could be given. On 10-11-1984, Respondent 1 invoking the

arbitration clause, requested the Managing Director of the appellant to appoint a sole arbitrator to adjudicate the claims made by the contractor. Thereafter, on 5-2-1985, Shri C.S. Jha, Chairman-cum-Managing Director, Bihar State Mineral Development Corporation Ltd. was appointed as the sole arbitrator "to decide all claims raised by the contractor, M/s Eastern Engineering Enterprises vide its letter dated 7-9-1983".

4. On 20-9-1985, the sole arbitrator made an interim award in respect of three claims, namely, Claims 2, 3 and 5 and awarded Rs 65 lakhs to the claimants. Para 1 of the said award mentions that Mr C.S. Jha was appointed as the sole arbitrator "to decide the disputes between the parties arising out of the agreement dated 14-5-1981". It also recites that by the consent of the parties, arguments were heard claimwise and out of 7 claims submitted by the claimants, hearing in respect of Claims 2, 3 and 5 was completed. It is also stated that when final award would be made in respect of the entire proceedings, interim award would be integrated into and form part of the final award. The appellant challenged the interim award on 15-1-1986 in the Court of the District Judge, Udaipur.

5. Thereafter, on 18-2-1986 the sole arbitrator made final award. It, inter alia, provides that after considering the long-drawn arguments and examination of documentary evidence and having made detailed examination of the calculations "I have given due thought and weightage to all that was placed/argued before me, as *regards admissibility* as well as quantum of *each claim by going through* details of work done under each item of claim as filed before me." Thereafter, he awarded Rs 1.07 crores for the claims made by Respondent 1. The said amount included the amount awarded against Claims 2, 3 and 5 for which he had passed interim award. He further awarded interest @ 12.5% p.a. on the sum awarded from 5-2-1985 till the date of payment or decree, whichever is earlier.

6. That final award was also challenged before the District Judge. The Court framed as many as 12 issues out of which Issues 5 to 8 are as under:

> *5.* Did the arbitrator fail correctly to consider clauses 17 and 18 of the agreement and the Contract Labour (Abolition and Regulation) Act, 1970?
>
> *6.* Did the arbitrator fail to apply his mind to consider pleadings, documents and evidence?
>
> *7.* Whether the award is bad as the learned sole arbitrator failed to apply his mind to documents and decide the dispute on per unit basis?
>
> *8.* Is the award perverse? Has it been improperly procured and is it otherwise invalid as mentioned in the objection petition?

7. Thereafter, the District Judge rejected the contentions raised by the appellant and declared the award as the rule of the court and passed the decree. That was challenged by filing the appeal before the High Court.

8. Before the High Court, it was contended that the District Judge erred in accepting the interim as well as the final award and it was required to be set aside as the arbitrator had ignored the fixed rate mentioned in clauses 17

and 18 of the agreement and thereby he had travelled beyond his jurisdiction. It was also pointed out that by doing so the arbitrator had legally misconducted himself. It was also submitted that the arbitrator was influenced by Mr K. Sehgal, hence, the award was required to be set aside. The High Court arrived at the conclusion that the point of jurisdiction was not raised before the arbitrator. Therefore, the appellant cannot raise the same before the Court. The learned Judge held that the perusal of the letter dated 5-2-1985 goes to show that there was nothing by which the arbitrator was restricted with regard to rates, on the contrary, he was asked to decide all the claims raised by the contractor without any clarification. The High Court further observed that "the appellant raised objection in view of clauses 17 and 18 of the contract in his reply to the claim petition but he has not raised this point before the arbitrator and thus the arbitrator has not disclosed it". The learned Judge further observed that the appellant never asked the arbitrator to decide his objection at the initial stage or the final stage and this conduct of the appellant goes to show that he has waived the objection, otherwise he ought to have asked the arbitrator to decide at the proper stage. The Court held that even before the District Judge, the point of jurisdiction was never raised and the issues framed were with regard to clauses 17 and 18 which were decided against the appellant.

9. Dr A.M. Singhvi, the learned Senior Counsel appearing on behalf of the appellant contended that the judgment and order passed by the High Court is, on the face of it, illegal because all throughout the appellant has contended that the claims made by Respondent 1 were not entertainable in view of clauses 17 and 18 of the agreement. He submitted that, on the face of it, the claims made by Respondent 1 were for prohibited or excepted items under clauses 17 and 18 of the agreement between the parties. Therefore, he submitted that the arbitrator travelled beyond his jurisdiction in awarding the compensation for the said claims. He referred to all claims and pointed out that except the claim for release of additional security deposit of Rs 5 lakhs furnished by way of bank guarantee, no claim could be entertained and granted in view of stipulations in clauses 17 and 18 of the agreement and also because the contract is on a turnkey basis.

10. As against this, learned Senior Counsel, Mr Ashok H. Desai appearing on behalf of Respondent 1 strenuously submitted that in the present case, the arbitration clause is of the widest amplitude and it provides that "all disputes and differences arising out of or in any way touching or concerning the contract whatsoever shall be referred to the sole arbitration". Hence, the award passed by the arbitrator cannot be held to be without jurisdiction or it cannot be held that the arbitrator has travelled beyond his jurisdiction. He also submitted that the award is a non-speaking one and, therefore, also the Court cannot go behind the said award for finding out the mental process of the arbitrator for awarding the said sum. He submitted that the award only depends upon interpretation of the clauses of the agreement between the parties. It is his further contention that, in any case, the

jurisdictional question was not raised properly before the arbitrator or before the District Court and the appellant allowed the arbitrator to proceed with the proceedings without raising its objection of jurisdiction or competence. By the reference letter dated 5-2-1985, the arbitrator was empowered "to decide all claims raised by the contractor vide its letter dated 7-9-1983". He also submitted that even the Committee appointed by the appellant Company to examine the claims of the respondent has recommended some payment to the contractor by granting an escalation in contracted rate and to pay compensation towards loss suffered on account of non-supply of explosives. Hence, the appellant should not be permitted to raise the contention of jurisdiction and the appeal be dismissed.

11. For deciding the controversy, clauses 17 and 18 as well as clause 74 which provide for arbitration are required to be referred to. Clauses 17 and 18 read thus:

> "17. *Blasting operation.—It is express term of this contract that while carrying out the excavation/mining operations from the aforesaid areas, blasting wherever required, shall be undertaken by the contractor at his cost. The remuneration payable under this contract for the work aforesaid is inclusive of this element which includes cost of explosives, its accessories, transportation, salary and wages of its crew/blasters etc., or otherwise.* In view of aforesaid, the contractor shall obtain necessary permission/s from the Director General of Mines Safety and/or other competent authorities for undertaking the blasting operation independently at the aforesaid areas covered by this contract as also obtain necessary licence for the explosive magazine etc. The contractor shall do all that is required to be done to obtain the necessary permission etc., from the competent authorities immediately without any further loss of time and shall make regular and continuous efforts for the same if for the present such permission is not granted to him/her.
>
> In the event of the contractor failing to obtain such permission required from the competent authority for doing blasting operation in the areas covered by this contract after all genuine and effective efforts, the Company may at the request of the contractor and subject to its convenience take up the blasting operation in the areas entrusted to the contractor under this contract, at the cost and risk of the contractor. Provided, however that the contractor shall be bound to observe all terms and conditions of blasting operation in the contract and other operations involved therein shall be duly observed/undertaken by the contractor, as if the blasting is being done by them. Drilling shall be done by the contractor at places and as per the pattern approved in writing by the Engineer-in-Charge. The Engineer-in-Charge may require drilling of additional holes by the contractor before blasting is taken up. The holes not drilled as per the approved drilling pattern shall not be taken up for blasting. On receipt of written requisition from the contractor in the prescribed pro forma duly signed by the authorised representative of the contractor to the Company not less than 2 days prior to intended date of

blasting, blasting will be done by the Company as and when felt necessary and convenient by the Engineer-in-Charge. The Company shall make available the blasting material, its transportation, blasting accessories and blasting crews including blaster/s. In case the Company is not in a position to arrange for the same, the contractor shall make his own arrangements for the same without any liability and obligation on the Company. The Company shall deduct the actual landed cost of all explosives ex-Jhamarkotra as may be used in the course of blasting plus five per cent value of the landed cost of explosives as blasting charges from the contractor's running bill/s or any amount that may be found due and payable to the contractor or the security amount. It is agreed and understood by the contractor that in the event of Company doing blasting as aforesaid, for and on behalf of the contractor, the contractor shall not be allowed and/or permitted to raise any dispute as to make, type, quantity of the explosives that will be used in blasting by the Company, fragmentation of rock, toes at the mining face, landed cost of explosive, time and frequency of blasting etc., and the contractor shall be bound to make good the landed cost of explosives, cost of blasting accessories etc., plus overheads @ 5% as may be certified by the Engineer-in-Charge from time to time. *Provided also that the contractor shall not be entitled and/or justified to raise any claim or dispute on account of blasting or non-blasting or idling of his equipment or his labour or any rise in the landed cost of explosives at any time or during the currency of this agreement or on any ground or any reason of any account, whatsoever.*

At the time of blasting in the areas being worked by the Company or by the contractor if the Company is required to carry out blasting operation, the contractor shall be required to vacate the areas if the areas fall within blasting zone worked by him for which the contractor shall not be entitled to any claim, additional payment whatsoever.

18. *Contractor's remuneration for works under the contract.—In consideration of the performance of the work*, fulfilment of all the obligations, terms and conditions of this agreement by the contractor *in execution of the work covered by this contract in and from the aforesaid areas, the contractor shall be paid remuneration calculated @ Rs 35.80 (Rupees thirty-five and eighty paise) all inclusive per cubic metre in respect of overburden and/or ore actually excavated, mined*, removed, *transported*, disposed of, dumped, dozed, levelled and spreaded including drilling, blasting, mucking, loading and unloading, etc., with all leads and lifts involved in connection with the transportation and dumping of overburden to the dump yards or ore stacks, including all preparatory dressing, finishing and other operational works etc., executed and approved by the Engineer-in-Charge. *The rates aforesaid shall be composite and inclusive of all services, activities and operations involved in the execution of the work as per terms and conditions of this agreement which constitute the whole and inclusive remuneration that is*

payable by the Company to the contractor under this contract. The contractor shall be only entitled to the payment of composite rate as aforesaid and no other or further payment of any kind or item, whatsoever, shall be due and payable by the Company to the contractor under this agreement except as aforesaid.

The rates aforesaid shall remain firm, fixed and binding during the currency of this agreement till the issue of final certificate irrespective of any fall or rise in the cost of mining operations of the work covered by this contract or for any other reason or any account or any ground whatsoever.

Provided, however, that the Company has agreed to freeze the issue rate of diesel as on 13-3-1981, at the rate of Rs 2.78 (Rupees two and seventy-eight paise only) per litre and the Company shall issue the diesel subject to availability and its convenience to the contractor against the surrender of permit/s of the equipment by him at the frozen rate of Rs 2.78 per litre during the currency of this contract even if there be any rise in the cost of diesel after execution of this agreement subject to a ceiling of 1.3 litres (one point three litres) for one cubic metre of rock (in situ) actually handled and work executed by the contractor and approved by the Engineer-in-Charge, as per provisions of this agreement. No diesel at the frozen rate of Rs 2.78 per litre shall be supplied and/or issued to the contractor after the 12th day of June, 1984, if the work is not finally completed by the contractor as aforesaid. The Company shall deduct the cost of diesel @ Rs 2.78 per litre actually issued to the contractor from the contractor's running bills or any amount that may be due to him or the security amount. *Save and except as aforesaid the contractor shall not be entitled to raise any claim and/or dispute on account of any rise in the price of oil, lubricants, tyres, tubes, explosives, spares etc. statutory or otherwise or increase in the wages or minimum wages or on any other ground or reason or account, whatsoever.*"

12. The relevant part of arbitration clause 74 is as under:

"*All disputes and differences arising out of or in any way touching or concerning this contract whatsoever, except as to any matter, the decision of which is expressly vested in any authority in this contract,* shall be referred to the sole arbitration of the person appointed by the Managing Director of the Company who shall have status of a Mines Manager having 1st Class Mines Manager's Certificate and having experience not less than five years in opencast mining as Mines Manager."

13. At this stage, we would refer to the relevant portion of letter dated 7-9-1983 written by the contractor to the appellant as the dispute for the said claims made in the letter is referred to for arbitration:

1. After stating the reasons in delay in starting the work, it is mentioned:

"In view of above, we now request RSMML to consider our case and condone the theoretical delay, which, in fact, was not there and

also give us necessary relief as to consequential damages thereof. Hence, we request you to consider 1-8-1981 as the date of start of work and accordingly, extend the validity of the contract."

2. The demand is "release of additional security deposit of Rs 5 lakhs furnished by us in RSMML's favour by way of bank guarantee" for the reasons stated therein.

3. Request for "rescheduling of the existing excavation schedule" for the reasons mentioned therein.

4. *Claim for escalation in the existing rate of excavation*:

"*We signed the contract with a clear understanding that the rate under this contract is firm and final and we shall get no escalation in our rates, except in case of diesel, which will be supplied to us by the Company at a frozen rate.* With the passage of time our cost calculations went haywire for reasons which were beyond our control."

5. (*i*) From the beginning of the contract we had paid wages equivalent to RSMML wages instead of minimum wages. The difference between the two on an average in the last 25 months works out to Rs 75,000 per month, against an average production of 40,000 cu m per month. Thus the additional cost works out to Rs 1.80 per cu m.

(*ii*) Unforeseen and difficult operating condition in the footwall and its effect on the cost of operation:

"The work in footwall area of 'D' block is a major constituent of the contract both quality and quantitywise *While the contract is termed as a 'turnkey' contract at least in the footwall the work cannot, by any stretch of imagination, be considered as 'turnkey', as the operation in that area is totally controlled by the principal employer.*"

In fact, it was beyond our imagination that our working in the footwall will be so much restricted, resulting the cost of operation, which is virtually very high than normal cost of operation. In view of above, we feel that our request in this regard will be sympathetically considered by the Management, who are also engaged in similar work. Thus, for such poor utilisation of the shovel, the rate should be

$$\frac{35.80}{58.50x100} = 61.20$$

Thus, an additional rate of Rs 25.40 per cu m for the entire footwall operation has to be provided for.

(*iii*) *Non-availability of explosive and use of costly explosive for blasting*:

Reimbursement of Rs 22.55 lakhs towards cash loss due to non-supply of explosives in time plus Rs 1.82 per cu m of rock handled so far.

6. *Claim for transportation of ore*:

After stating reasons in detail, it is claimed thus:

"Till 31-8-1983 mined and transported 45,456 tons of ore and mixed ore from eastern saddle and footwall, the additional expenses involved in this operation are:

(*i*) care being taken during mining to avoid as much as possible admixture of ore and overburden, and

(*ii*) additional transportation involved for taking it to the crusher instead of the dump yard. Towards this we have to make claim of Rs 6 towards this mining cost per ton and Rs 4 towards transportation cost per ton making the total to Rs 4,05,660 for 40,566 tons of ore after allowing ½% of the total excavation volume of footwall i.e. 3.36 lakhs cu m."

"To sum up, claims under various heads are as under:

(*i*) not to levy any damages for not starting work in time and to treat 1-8-1981 as the date of start of work and thereafter calculate 3 years for completing this work under this contract;

(*ii*) to release performance bank guarantee of Rs 5 lakhs furnished in your favour by way of additional security deposit;

(*iii*) to reschedule the excavation schedule keeping in view the industrial climate at Jhamarkotra @ 40,000 cu m per month;

(*iv*) to allow us escalation of Rs 3.62 in our rates towards additional cost that has been incurred by us with retrospective effect;

(*v*) to admit our claim of Rs 22.55 lakhs towards loss suffered on account of non-supply of explosives, Rs 4,05,660 towards additional cost of mining and transportation of ore and Rs 52,53,650 on account of loss suffered by us for unforeseen and difficult operating condition at footwall or *in other words the present rate of Rs 35.80 per cu m with retrospective effect*."

14. On the basis of the claims made in the letter dated 7-9-1983, the respondent filed claim statement for 8 items which is tabulated by the High Court in its judgment:

"*Claim No.*	*Description of claim*	*Relief claimed*
1.	Claim for increase in rate for excavation work at the footwall area demand for escalation in the existing rates of excavation.	Claimed reimbursement @ Rs 25.40 per cu m up to August 1983 thereafter @ Rs 63.56 per cu m. Over and above the contract rate of Rs 35.80 cu m. In all claim under this item quantified for Rs 1,36,43,218.
2.	Claim for increase in costs of work due to use of high	Claimed reimbursement @ Rs 1.80 per cu m for all

a		explosives instead of use of ANFO mixture.	excavation done/to be done under the contract using high explosives instead of ANFO mixture.
b	*3.*	Claim for reimbursement for losses suffered due to non-availability of explosive.	Claim reimbursement of Rs 22.55 lakhs by way of loss during the period February 1963 to May 1983.
c	*4.*	Claim for reimbursement of additional costs for mining and transport of ore.	Claimed reimbursement of additional costs at the rate of Rs 6 per ton towards mining and Rs 4 per ton towards additional transportation to the crusher. Total Rs 10 per ton for 47,856 tons of ore and mixed ore up to 31-12-1984 quantifying claim of Rs 4,31,890.
d	*5.*	Claim for reimbursement of additional expenditure incurred on account of agreement with RPMS for wages to labourers.	Claim reimbursement @ Rs 1.82 per cu m for excavation done/to be done on account of respondent entering into an agreement with RPMS dated 26-5-1981 Ex. C-1 of the arbitration proceedings.
e	*6.*	Claim for release of additional security deposit.	Claimed release of duly discharged bank guarantee of Rs 5 lakhs on account of additional security deposit.
f	*7.*	Claim for reimbursement of additional expenses on account of revised wage structure w.e.f. 1-4-1983.	Claim reimbursement of Rs 0.90 per cu m of excavation done since 1-4-1983 or to be done thereafter as per Exs. C-58 and C-68.
g	*8.*	Interest.	Claimed interest on the amount of award @ Rs 18% per annum or decree, whichever is earlier."

15. As stated earlier by interim award, the arbitrator has awarded Rs 65 lakhs for Claims 2, 3 and 5. Thereafter, by final award, he has awarded total sum of Rs 1.07 crores with 12.5% interest w.e.f. 5-2-1985.

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16. Before discussing further, what emerges from the facts stated above is:

(*1*) In the award, no reasons are assigned for granting various claims to that extent, it is non-speaking. For Claims 2, 3 and 5, Rs 65 lakhs were awarded by interim award dated 20-9-1985.

(*2*) In the interim award, the arbitrator has made it clear that he was appointed as the sole arbitrator vide memo dated 5-2-1985 "to decide the dispute between the parties arising out of the agreement dated 14-5-1981". So, his authority or jurisdiction to decide the claims raised by the contractor was on the basis of the agreement between the parties.

(*3*) In the final award also, in the first para itself, the arbitrator has stated that:

> "The claimants have put in claims arising out of and in relation to the work 'excavation and removal of overburden at the Jhamarkotra Mines of "*RSMML*" *executed under agreement dated 14-5-1981, and have put in their claims under 7 heads of claim* and have further claimed interest, pendente lite and future at 18% per annum'. It further mentions that he has given due weightage to all the documents placed and arguments submitted before him 'as regards admissibility as well as quantum of each claim by going through details of work done under each item of claims as filed before me'."

(*4*) In the letter dated 7-9-1983, the contractor himself has clarified, admitted and stated thus:

> "We signed the contract with a clear understanding that the rate under this contract is firm and final and we shall get no escalation in our rates, except in case of diesel, which will be supplied to us by the Company at a frozen rate. With the passage of time our cost calculations went haywire for reasons which were beyond our control."

(*5*) The appellant in his detailed reply before the arbitrator to the claims made by the contractor has pointed out and relied upon clauses 17 and 18 for contending that the contractor was not entitled to any such claim under the contract.

(*6*) Before the District Judge also, the issues pertaining to clauses 17 and 18 as stated above were raised.

(*7*) Before the High Court also, it was contended that the arbitrator made award against the stipulations of the agreement between the parties and thereby travelled beyond his jurisdiction.

17. From the facts stated above, learned counsel for the appellant has rightly pointed out that Claim 1 for increase in rate of excavation work at footwall area and Claim 4 for reimbursement of additional costs for mining and transport of ore is against the stipulation of clause 18 as narrated above, which inter alia, specifically provides as under:

"(*a*) The contractor shall be paid remuneration calculated @ Rs 35.80 (Rupees thirty-five and eighty paise only) all inclusive per cubic metre in respect of overburden and/or ore actually excavated ... *transported....*

(*b*) The contractor shall be only entitled to payment of composite rate as aforesaid and no other or further payment of any kind of item, whatsoever, shall be due and payable by the Company to the contractor under this agreement except as aforesaid.

(*c*) The rates shall remain firm, fixed and binding irrespective of any fall or rise in the cost of mining operations of the work covered by the contract or for any other reason or any account or any ground whatsoever."

18. Similarly, Claim 2 for increase in costs of work due to use of high explosives instead of use of ANFO mixture and Claim 3 for reimbursement for losses suffered due to non-availability of explosive is also against clause 17, which inter alia, provides:

"(*a*) It is *express term of this contract* that while carrying out the excavation/mining operations from the aforesaid areas, blasting wherever required, shall be undertaken by the contractor at his cost. The remuneration payable under this contract for the work aforesaid is inclusive of this element *which includes cost of explosives, its accessories, transportation, salary and wages* of its crew/blasters etc., or otherwise.

(*b*) Provided also that the contractor *shall not be entitled and/or justified to raise any claim* or dispute on account of blasting or non-blasting or idling of his equipment or his labour or *any rise in the landed cost of explosives at any time* or during the currency of this agreement or *on any ground or any reason of any account, whatsoever.*"

19. Similarly, Claim 5 for reimbursement of additional expenditure incurred on account of RPMS and Claim 7 for reimbursement of additional expenses on account of revised wage structure w.e.f. 1-4-1983 also cannot be granted in view of the aforesaid stipulations and also part of clause 18 which, inter alia, provides as under:

"Save and except as aforesaid the contractor shall not be entitled to raise any claim and/or dispute on account of any rise in the price of oil, lubricants, tyres, tubes, explosives, spares, etc. statutory or otherwise or *increase in the wages or minimum wages or on any other ground or reason or account, whatsoever.*"

20. Apart from the aforesaid specific stipulations, even the contractor has admitted in his letter dated 7-9-1983 that the contract was signed with the clear understanding that the rate under the contract was firm and final and that no escalation in rates except in case of diesel would be granted.

21. Despite the admission by the contractor, it is apparent that the arbitrator has ignored the aforesaid stipulations in the contract. In the award,

the arbitrator has specifically mentioned that he has given due weightage to all the documents placed before him and has also considered the admissibility of each claim. However, while passing the award basic and fundamental terms of the agreement between the parties are ignored. By doing so, it is apparent that he has exceeded his jurisdiction.

22. Further, in the present case, there is no question of interpretation of clauses 17 and 18 as the said clauses are so clear and unambiguous that they do not require any interpretation. It is both, in positive and negative terms by providing that the contractor shall be paid rates as fixed and that he shall not be entitled to extra payment or further payment for any ground whatsoever except as mentioned therein. The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. It is true that arbitration clause 74 is very widely worded, therefore, the dispute was required to be referred to the arbitrator. Hence, the award passed by the arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibit entertaining of the claims made by the contractor. In the letter dated 5-2-1985 appointing the sole arbitrator, it has been specifically mentioned that agreement dated 14-5-1981 was executed by and between the parties and that the contractor has raised the claims as mentioned in the letter dated 7-9-1983 which was denied by the Company and at the request of the contractor, the sole arbitrator was appointed to adjudicate the claims made by the contractor vide his letter dated 7-9-1983. This reference to the arbitrator also clearly provides that reference was with regard to the dispute arising between the parties on the basis of the agreement dated 14-5-1981. It nowhere indicates that the arbitrator was empowered to adjudicate any other claims beyond the agreement between the parties. No such issue was referred for adjudication. Even the arbitrator in his interim award has specifically stated that he was appointed to adjudicate the disputes between the parties arising out of the agreement dated 14-5-1981.

24. However, learned Senior Counsel, Mr Ashok H. Desai, submitted that the award is a non-speaking one and the arbitration clause in this case

empowers the arbitrator not only to decide all disputes arising out of the contract but also to decide all disputes in any way touching the contract whatsoever, hence the arbitrator is not required to confine himself only to the terms of the contract but can pass an appropriate award so as to do justice between the parties including awarding damages suffered by the contracting parties. Therefore, the award cannot be said to be without or beyond jurisdiction. He further submitted that the award passed by the arbitrator is on the basis of the interpretation of clauses 17 and 18 and, therefore, the award would be within his jurisdiction.

25. Learned counsel for both the parties submitted that the law on this subject is well settled. However, they referred to various decisions to buttress their respective contentions. To do justice to their contentions, we would refer to the various decisions of this Court relied upon by them. In *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji*[1] the dispute arose between the partners of a firm on retirement of the partners which was referred to the arbitrator. The arbitrator had passed a non-speaking award. While revoking the award, the High Court in concurrence with the Court below upheld two objections:

(*a*) that the arbitrator exceeded his jurisdiction; and

(*b*) that he was guilty of misconduct in receiving some evidence behind the back of one partner, Chintamanrao.

26. Before this Court, it was contended that the deed of partnership as well as the order of reference left the arbitrator a free hand and even if the arbitrator wrongly interpreted the deed of partnership and had included the depreciation and appreciation while valuing partnership property, no question of jurisdiction could arise. The partnership deed referred to by the Court provided that in ascertaining the valuation of the firm, the property was to be valued at the book value of the firm and such stock and moveables thus valued shall be given to the remaining partners. After considering the decision in *Champsey Bhara and Co.* v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.*[2] Shah. J, observed that:

(*a*) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(*b*) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(*c*) The primary duty of the arbitrator under the deed of a reference in which was incorporated the partnership agreement, was to value the net assets of the firm and to award to the retiring partners a share therein. In making the "valuation of the firm", his jurisdiction was restricted in a

1 AIR 1965 SC 214 . (1964) 5 SCR 480
2 (1922-23) 50 IA 324 · AIR 1923 PC 66

manner provided by para 13 of the partnership agreement. As the arbitrator has expressly stated in his award that in arriving at his valuation, he has included the depreciation and appreciation of the property, the arbitrator has travelled outside his jurisdiction and the award was on that account liable to be set aside. This was not a case in which the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication. It is a case of assumption of jurisdiction not possessed by him, and that renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid. The award must fail in its entirety as it was not possible to sever from the valuation made by the arbitrator, the value of the depreciation and appreciation included.

27. In a concurring judgment, Hidayatullah, J., after considering the decision in *Champsey Bhara and Co. case*[2] observed that:

> "The first point is therefore to decide what were the limits of the arbitrator's action as disclosed by the reference and the deed of partnership and then to see what the arbitrator has actually done and not what he may have stated loosely in his award. This is the only way in which the excess of jurisdiction can be found. If the interpretation of the deed of partnership lies with the arbitrator, then there is no question of sitting in appeal over his interpretation, in view of the passage quoted above from *Champsey case*[2], but if *the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him, and the Court can find that he has exceeded his jurisdiction on proof of such action.*" (emphasis supplied)

28. The next decision on which reliance is placed is *Continental Construction Co. Ltd.* v. *State of M.P.*[3] In the said case, it was contended by the contractor that the contract could not be completed within the stipulated time because of alleged gross delay on the part of the State in allotment of work and discharge of its obligation under the contract. He had, therefore, incurred unforeseen expenditure and claimed damages to the tune of Rs 5,29,812. The matter was referred to the retired Engineer-in-Chief, PWD, Bhopal, who partly allowed the contractor's claim. The award was set aside by the District Judge. Appeal was also dismissed by the High Court and in appeal before this Court, it was contended that the contractor was not entitled to extra cost for material and labour in terms of the contract. This Court held that the arbitrator misconducted himself in allowing the claim without deciding the objection of the State that in view of the specific clauses of the contract, the contractor was not legally entitled to claim extra cost. The Court observed: (SCC p. 88, para 5)

> "*If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally*. The arbitrator is not a conciliator and cannot ignore the law

3 (1988) 3 SCC 82 : (1988) 3 SCR 103

or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the court provided his error appears on the face of the award. *In this case, the contractor having contracted, he cannot go back to the agreement simply because it does not suit him to abide by it.* The decision of this Court in *Alopi Parshad and Sons Ltd.* v. *Union of India*[4] may be examined. *There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like.* There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous."

(emphasis supplied)

29. Thereafter, the Court distinguished the decision in *Tarapore & Co.* v. *Cochin Shipyard Ltd.*[5] In the said case, there were no specific clauses which barred consideration of extra claims in events of price escalation. At this stage, we would mention that in *Tarapore Co. case*[5] this Court after considering the various decisions has held that a specific question as to whether the claim of compensation made by the contractor demurred and disputed by the respondent would be covered within the scope, ambit and width of the arbitration clause was specifically referred by the parties for the decision of the arbitrator. In such cases, the award cannot be set aside on the ground that there is an error of law on the face of the award. Learned Senior Counsel, Mr Ashok H. Desai has heavily relied upon this decision in support of his contention that in the present case also, arbitration clause 74 is very widely worded. Dealing with the arbitration clause, the Court observed

> "arbitration clause so widely worded, as disputes arising out of the contract or in relation to the contract or execution of the works, would comprehend within its compass a claim for compensation relating to estimates and arising out of the contract. The test is whether it is necessary to have recourse to the contract to settle the dispute that has arisen".

Further, while interpreting such clause, the Court has held as under: (SCC p. 716, para 40)

4 AIR 1960 SC 588 (1960) 2 SCR 793
5 (1984) 2 SCC 680

"*40.* We may now turn to some decisions to which our attention was drawn. The first case we would like to refer to is *A.M. Mair & Co.* v. *Gordhandas Sagarmull*[6]. The Court was concerned with the arbitration clause drawn up as: 'all matters, questions, disputes, differences and/or claims, arising out of and/or concerning, and/or in connection and/or in consequence of, or relating to, the contract etc.' The question arose whether the due date under the contract was extended within the time, earlier reserved. The arbitrator held that the due date of the contract has been extended by a mutual agreement and the respondents were held liable to pay a sum of Rs 4116 together with interest at the rates specified in the award. It was contended that the dispute is not covered by the arbitration clause. This Court while holding that the dispute is covered by the arbitration clause observed that looking to the rival contentions, such a dispute, the determination of which turns on the true construction of the contract, would also seem to be a dispute under or arising out of or concerning the contract. The test formulated was that if in settling a dispute, a reference to the contract is necessary, such a dispute would be covered by the arbitration clause."

30. It is true that the arbitration clause in the present case, is also very widely worded and that all disputes in any way touching or concerning the contract whatsoever are required to be referred to arbitration. Therefore, reference of the dispute to the arbitrator cannot be termed as without jurisdiction. Still the question would be whether the arbitrator will have authority or jurisdiction to grant damages or compensation in the teeth of the stipulation providing that no escalation would be granted and that the contractor would only be entitled to payment of the composite rate as mentioned and no other or further payment of any kind or item whatsoever shall be due and payable by the Company to the contractor; the rates wherever fixed are binding during the currency of the agreement irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or on any account or any other ground whatsoever. In the said case, there was no such specific agreement or stipulation. Further, the Court has also given a finding that it was a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties. Hence the Court held that in such a situation, even if the view taken by the arbitrator may not accord with the view of the Court, the award cannot be set aside on the ground that there is an error of law apparent on the face of the record. Facts and issues in the present case are quite different as stated above.

31. In *Sudarsan Trading Co.* v. *Govt. of Kerala*[7] this Court posed the following questions for its decision: (SCC p. 41, para 3)

"[H]ow should the court examine an award to find out whether it was a speaking award or not; and if it be a non-speaking award, how and to

6 AIR 1951 SC 9 : 1950 SCR 792

7 (1989) 2 SCC 38

what extent the court could go to determine whether there was any error apparent on the face of the award to be liable for interference by the court. The other question that arises in this case is, to what extent can the court examine the contract in question though not incorporated or referred to in the award."

32. In that case also, the arbitrator had passed non-speaking awards but with regard to each and every claim he had separated and passed the order either accepting or rejecting the claim or partly accepting the claim of the contractor.

33. After referring to the various decisions including *Jivarajbhai Ujamshi Sheth case*[1] the Court observed as under: (SCC p. 55, para 30)

"This was reiterated by Justice Hidayatullah that if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the court can find that he exceeded his jurisdiction on proof of such excess. In that case the arbitrator in working out net profits for four years took into account depreciation of immovable property. For this reason he must be held to have exceeded his jurisdiction and it is not a question of his having merely interpreted the partnership agreement for himself as to which the civil court could have had no say, unless there was an error of law on the face of the award. Therefore, it appears to us that there are two different and distinct grounds involved in many of the cases. *One is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement* but in the former, it cannot, unless the agreement was incorporated or recited in the award." (emphasis supplied)

This Court further observed: (SCC pp. 55-56, para 31)

"*31.* An award may be remitted or set aside on the ground that the arbitrator in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside the award — whatever might be said about it in the award or by the arbitrator. ... It has to be reiterated that an arbitrator acting beyond his jurisdiction — is a different ground from the error apparent on the face of the award."

34. Further, dealing with the non-speaking award and also for the claims on the ground of escalation of price, due to various reasons including payment of minimum rates of wages payable to various categories of workers, this Court in *Associated Engg. Co.* v. *Govt. of A.P.*[8] referred to the contract clauses and set aside the award by holding: (SCC p. 102, para 21)

"This conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside

8 (1991) 4 SCC 93

the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction: See *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji*[1]."

The Court further held as under: (SCC p. 103, para 25)

"25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's *Commercial Arbitration*, 2nd Edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see *Halsbury's Laws of England*, Vol. II, 4th Edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award."

35. Learned counsel for the respondent relied upon the case of *Hindustan Construction Co. Ltd.* v. *State of J&K*[9]. In the said case, the Court has observed that the award was a non-speaking one and contained no reasoning which could be declared to be faulty; the scope of the court's jurisdiction in interfering with the non-speaking award is extremely limited. While discussing the contention, the Court quoted the decision in the case of *Sudarsan Trading Co. case*[7] (which we have earlier referred) and thereafter held that the High Court had not rested its decision on any question of the arbitrator having exceeded his jurisdiction or travelled beyond the contract; the Court had set aside the award on the ground of error apparent on the face of it. The Court further held that the clauses of the contract referred to by the High Court were not so clear or unambiguous as to warrant an inference that the interpretation placed on them by the arbitrators was totally unsustainable. In that view of the matter, the Court held that it was difficult to say that the arbitrator's interpretation was erroneous on the face of it. Hence, the aforesaid decision would have no bearing on the facts and the law involved in this matter.

36. Similarly, in *Managing Director, J&K Handicrafts* v. *Good Luck Carpets*[10] dealing with the non-speaking award, the Court negatived the contention that the agreement containing the arbitration clause cannot be looked into even to find out as to what was the nature of the dispute contemplated by it with regard to which a reference to an arbitrator was contemplated, nor so, when the award was a non-speaking one, by observing thus: (SCC pp. 742-43, para 5)

"Firstly, the award is not a totally non-speaking one inasmuch as it gives a resume of the incentive scheme and the agreement between the parties as also the items of the claim made by the respondent. Of course while fixing the amount found payable by the appellant, no reasons are

9 (1992) 4 SCC 217
10 (1990) 4 SCC 740

recorded. Secondly, if there is any challenge to the award on the ground that the arbitrator had no jurisdiction to make the award with regard to a particular item inasmuch as it was beyond the scope of reference, the only way to test the correctness of such a challenge is to look into the agreement itself. In our opinion, looking into the agreement for this limited purpose is neither tantamount to going into the evidence produced by the parties nor into the reasons which weighed with the arbitrator in making the award."

37. In *Tarapore & Co.* v. *State of M.P.*[11] this Court again considered whether the arbitrator had exceeded his jurisdiction in awarding extra payment to the contractor on account of payment of enhanced wages to labour by the contractor pursuant to statutory revision of minimum wages by the Government or increase in rates of fair wages by the Wage Committee binding on the contractor under conditions of tender notice. In the said case, the Court considered the distinction between the latent and patent jurisdiction of the arbitrator in deciding the disputes and after referring to the arbitration clause, observed:

> Any dispute relating to or arising out of or in any way connected with the contract has to be referred to arbitration. It cannot be said that there was patent lack of jurisdiction on the part of arbitrators in having gone into the question of reimbursement; at the best it could be said that arbitrators had no jurisdiction to entertain the claim and hence a case of latent lack of jurisdiction.

38. After considering the decisions in *Continental Construction Co.*[3] and *Tarapore and Co.*[5] this Court held that as there was an absence of the escalation clause, it was not a case where on the basis of the terms of the agreement entered between the parties, it can be held that the arbitrator had no jurisdiction to make the award. The Court observed that it cannot be held that the arbitrator has no jurisdiction to make the award because of lack of a specific provision permitting the claim at hand. The Court further observed: (SCC p. 532, para 25)

> "It has to be seen whether the term of the agreement permitted entertainment of the claim by necessary implication. It may be stated that we do not accept the broad contention of Shri Nariman that whatever is not excluded specifically by the contract can be subject-matter of claim by a contractor. Such a proposition will mock at the terms agreed upon. Parties cannot be allowed to depart from what they had agreed. Of course, if something flows as a necessary concomitant to what was agreed upon, courts can assume that too as a part of the contract between the parties."

39. After referring to the facts as found from the record, the Court held that the award cannot be said to be beyond the jurisdiction of the arbitrator insofar as increased payment on account of rise in rates of fair wages was

11 (1994) 3 SCC 521

concerned. In our view, the said finding is based on appreciation of evidence on record and the terms of the contract. However, the Court made it clear that part of the award which is relatable to increase in minimum wages cannot be regarded as one within jurisdiction and observed (at SCC p. 533, para 28) "needless to say that if an arbitrator acts beyond jurisdiction, the same would amount to misconduct".

40. In *T.N. Electricity Board* v. *Bridge Tunnel Constructions*[12] the contractor had set up the claims raised at rates higher than the contracted rates and twice the rate for the work done after the expiry of the contract period. For those claims, dispute was raised and the matter was referred to the arbitrator. The civil court made the award the rule of the court. The High Court confirmed the same. In appeal, this Court set aside the award and while discussing various contentions, observed as under: (SCC p. 134, para 25)

> "If the arbitrator decides a dispute which is beyond the scope of his reference or beyond the subject-matter of the reference or he makes the award disregarding the terms of reference or the arbitration agreement or terms of the contract, it would be a jurisdictional error beyond the scope of reference; he cannot clothe himself to decide conclusively that dispute as it is an error of jurisdiction which requires to be ultimately decided by the court."

41. In *New India Civil Erectors (P) Ltd.* v. *Oil & Natural Gas Corpn.*[13] this Court again considered the contention wherein the arbitrator has passed an award contrary to the specific stipulation/condition contained in the agreement between the parties. The Court observed thus: (SCC p. 79, para 9)

> "It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account."

42. The aforesaid judgment was considered in *H.P. SEB* v. *R.J. Shah and Co.*[14] and in para 26, the Court held as under: (SCC p. 225)

> "*26.* In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or

12 (1997) 4 SCC 121
13 (1997) 11 SCC 75
14 (1999) 4 SCC 214

claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction."

43. Learned Senior Counsel, Mr Ashok H. Desai relied upon the case of *P.V. Subba Naidu* v. *Govt. of A.P.*[15] In that case, a non-speaking award was rendered by the arbitrator. The Court held that the terms of the arbitration clause were very wide, therefore, all the disputes which arise as a result of the contract would be covered by the arbitration clause and that all claims were expressly referred to the arbitrator and were raised before the arbitrator. In that set of circumstances, by purporting to construe the contract the Court could not take upon itself the burden of saying that it was contrary to the contract and as such beyond jurisdiction. Thereafter, the Court referred to the decision in *Ch. Ramalinga Reddy* v. *Superintending Engineer*[16] and observed that in that case the arbitrator was required to decide the claims referred to him having regard to the contract. Hence, his jurisdiction was expressly limited to decide claims under the terms of the contract but in the case which was considered by the Court, there was no clause in the contract which prevented the arbitrator from examining the claims put up before the arbitrator. Considering the aforesaid aspect, in our view, this judgment also would have no bearing in the present case, as there are express prohibitions and stipulations in the contract for non-payment of extra amount on any ground whatsoever. In the present case, the rates were to remain firm, fixed and binding irrespective of fall or rise in the cost of mining operation of the work covered by the contract or for any other reason. The contract was for a composite rate and it stipulated that no other or further payment of any kind of item whatsoever was payable by the Company to the contractor.

44. From the resume of the aforesaid decisions, it can be stated that:

(*a*) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(*b*) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(*c*) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(*d*) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

15 (1998) 9 SCC 407
16 (1994) 5 Scale 67 · (1999) 9 SCC 610

(*e*) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(*f*) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(*g*) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(*h*) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in *Continental Construction Co. Ltd.*[3] by relying upon the following passage from *Alopi Parshad* v. *Union of India*[4] which is to the following effect: (SCC p. 88, para 5)

> "There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous."

(*i*) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(*j*) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the

arbitrator is a tribunal selected by the parties to decide the disputes according to law.

45. In view of the aforesaid law and the facts stated above, it is apparent that the award passed by the arbitrator is against the stipulations and prohibitions contained in the contract between the parties. In the present case, there is no question of interpretation of clauses 17 and 18 as the language of the said clauses is absolutely clear and unambiguous. Even the contractor has admitted in his letter demanding such claims that the contract was signed with the clear understanding that the rate under the contract was firm and final and no escalation in rates except in case of diesel would be granted. Hence, by ignoring the same, the arbitrator has travelled beyond his jurisdiction. It amounts to a deliberate departure from the contract. Further, the reference to the arbitrator is solely based upon the agreement between the parties and the arbitrator has stated so in his interim award that he was appointed to adjudicate the disputes between the parties arising out of the agreement. No specific issue was referred to the arbitrator which would confer jurisdiction on the arbitrator to go beyond the terms of the contract. Hence, the award passed by the arbitrator is, on the face of it, illegal and in excess of his jurisdiction which requires to be quashed and set aside.

46. Lastly, we would mention a few other contentions raised by the learned counsel for the respondent which are required to be stated for rejection. His contention that the arbitrator has acted beyond his jurisdiction was not raised before the District Court as well as before the arbitrator, is without any substance. Surprisingly, to say the least, the High Court as well as the District Court observed that no specific contention with regard to the jurisdiction was raised before the arbitrator. It appears that the High Court and the District Court had not considered the written statement filed by the appellant before the arbitrator. The District Court has also raised Issues 5 to 8 quoted above, which would cover the contention raised by the appellant. The issue whether the award is perverse and that the arbitrator failed to apply his mind to pleadings, documents and evidence as well as clauses 17 and 18 of the agreement would cover the contention that the arbitrator acted beyond his jurisdiction in ignoring the stipulations of the contract. With regard to the Committee's report on which the learned counsel for the respondent has relied upon, it had been pointed out by the learned counsel for the appellant that the said report was specifically rejected by the Board of the appellant. Hence, it would have no bearing on the award which was to be passed by the arbitrator.

47. In the result, the appeal is allowed with costs. The award passed by the arbitrator is quashed and set aside. Consequently, the judgment and order dated 17-12-1991 passed by the High Court in SB Civil Miscellaneous Appeal No. 254 of 1991 confirming the judgment and decree dated 1-8-1989 passed by the District Judge, Udaipur in Civil Miscellaneous Cases Nos. 131 of 1985 and 45 of 1986 is also quashed and set aside.

(2003) 5 Supreme Court Cases 705

(BEFORE M.B. SHAH AND ARUN KUMAR, JJ.)

OIL & NATURAL GAS CORPORATION LTD. .. Appellant;

Versus

SAW PIPES LTD. .. Respondent.

Civil Appeal No. 7419 of 2001†, decided on April 17, 2003

A. **Arbitration and Conciliation Act, 1996 — Ss. 34(2), 28(a), 13(5) and 16(6) — Grounds on which a court can, under S. 34(2), set aside the arbitral award stated**

B. **Arbitration and Conciliation Act, 1996 — Ss. 34(2)(a)(v), 24, 28 and 31(3) — Court's power under S. 34(2)(a)(v) to interfere with the award — Scope — An award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act or against the terms of contract, held, would be patently illegal — Hence, would be subject to interference under S. 34(2)(a)(v) — Respondent contractor entering into a contract with appellant ONGC to supply pipes of specified description by the specified date — Terms of contract entitling ONGC to recover damages at the stipulated rate for delay, if any, in supply of the goods and further stating the same to be agreed and genuine pre-estimate of damages and not as penalty — Further, the terms of contract authorising ONGC to deduct the amount of such damages from the contractor's bill — Moreover, the terms of contract while providing for payment of interest on delayed payments, specifically stating that no interest would be paid on disputed claims — At a subsequent stage, at the contractor's request, ONGC extending the time for the supply of the goods subject to the condition that ONGC would recover the agreed stipulated damages — ONGC deducting the amount of the damages accordingly — Contractor disputing such deduction before Arbitral Tribunal — Arbitral Tribunal holding the deduction to be wrongful on the ground that ONGC had failed to establish that it had suffered any monetary loss, and directing the same to be refunded together with interest — Such an award, held, violative of S. 28(2) & (3) and totally unjustified — Hence, set aside under S. 34(2) — Further held, in respect of situations where it was impossible to assess or prove damages, the specified terms of the contract itself had made a provision in consonance with Ss. 73 and 74 of Contract Act — Contract Act, 1872, Ss. 73 and 74**

C. **Arbitration and Conciliation Act, 1996 — S. 28(3) — Award to be in accordance with terms of the contract — For construction of the contract the intention of parties is to be gathered from the words used in the agreement — This is more so where the agreement has been drafted by experts**

D. **Deeds and Documents — Contract — Intention of parties — Determination of — Plea that it should be gathered from the words used, upheld — More so when drafted by experts**

E. **Arbitration and Conciliation Act, 1996 — Ss. 34(2)(a)(v) and 2 to 43 — Jurisdiction or power of Arbitral Tribunal — Scope and manner of**

† From the Judgment and Order dated 21-6-2000 of the Bombay High Court in A. No. 256 of 2000

exercise of — Term "arbitral procedure" occurring in S. 34(2)(a)(v) — Meaning — Ss. 2 to 43, held, prescribe the procedure and power of Arbitral Tribunal — These provisions make no distinction between jurisdiction/power and procedure — Both are synonymous in the present case — Hence, award made dehors the said provisions, held, on the face of it is illegal

F. **Arbitration and Conciliation Act, 1996 — S. 34(2)(b)(ii) — Jurisdiction of the court to set aside arbitral award under — Phrase "public policy of India" — Meaning and scope — Held, should be given a wider and not a narrower meaning — Hence, the court can set aside the award if it is: (i) contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (ii) is patently illegal or (iii) is so unfair and unreasonable that it shocks the conscience of the court — However, illegality of a trivial nature can be ignored — Further held, non-incorporation of exhaustive grounds by the legislature for challenging the award in contrast to Ss. 68 to 70 of English Arbitration Act or the object of speedy disposal of disputes, held, did not have the effect of limiting the jurisdiction of the court to set aside a patently illegal award — Interpretation of Statutes — Liberal construction — Applied — Purposive interpretation — Applied to a phrase not defined in the Act — Arbitration Act, 1940, Ss. 23 and 28 — UNCITRAL Model Law, Art. 34**

The respondent Company was engaged in the business of supplying equipment for offshore oil exploration and maintenance. In response to a tender notice, the respondent by its letter dated 27-12-1995, on agreed terms and conditions, offered to supply to the appellants casing pipes of the specified size. The appellant accepted the offer. As per terms and conditions, the goods were required to be supplied on or before 14-11-1996. The contract deed provided that in case of failure to deliver the store or any instalment thereof within the scheduled time, the appellant would be, without prejudice to any other right or remedy, entitled to recover from the respondent as agreed liquidated damages and not by way of penalty, a sum equivalent to 1% (one per cent) of the contract price of the whole unit per week for such delay or part thereof subject to a ceiling of 10%. It was clarified that that was an agreed, genuine pre-estimate of damages duly agreed by the parties. The deed added that such liquidated damages would be recovered from the bill for payment of the cost of material submitted by the respondent. That any delay beyond 60 days on the part of the appellant in making payments on undisputed claims would attract interest @ 1% per month but no interest would be payable on disputed claims. Since during September/October 1996 there was a general strike of steel mill workers all over Europe, the Italian suppliers of the respondent could not supply the requisite raw material to the respondent in time. Therefore, the respondent sought from the appellant an extension of 45 days' time for the execution of the order. The appellant granted the time with a specific statement *inter alia* that the amount equivalent to liquidated damages for delay in supply of pipes would be recovered from the respondent. The appellant made payment for the goods supplied after deducting an amount of US dollars 3,04,970.20 and Rs 15,75,559 as liquidated damages. That deduction was disputed by the respondent and, therefore, the dispute was referred to the Arbitral Tribunal under the Arbitration and Conciliation Act, 1996 (for short "the Act"). The Arbitral Tribunal held that for recovery of liquidated damages, it was for the appellant to establish that it had suffered any loss because of the non-supply of the goods within the prescribed

time-limit. On evidence, holding that the appellant had failed to do so, the Arbitral Tribunal held that the appellant had wrongfully deducted the said amounts. The Arbitral Tribunal further held that the respondent was entitled to recover the said amount with interest at the rate specified in the award. After unsuccessfully approaching the High Court, the appellant filed the instant appeal. The appellant contended that: (*i*) where there was clear violation of Sections 28 to 31 of the Act or the terms of the contract between the parties, the award could be set aside by the court while exercising jurisdiction under Section 34 of the Act, (*ii*) since under the terms of the contract the appellant was entitled to recover agreed liquidated damages at the agreed rate, the award was contrary to Section 28(3) of the Act, (*iii*) the award was on the face of it illegal and erroneous as the Arbitral Tribunal had misinterpreted the law in holding that the appellant was required to prove the loss suffered by it before recovering the liquidated damages, (*iv*) the grant of interest by the Arbitral Tribunal on the liquidated damages deducted by the appellant was against the specific terms of the contract which provided that on "disputed claim", no interest would be payable, and (*v*) for the purpose of construction of contracts, the intention of the parties has to be gathered from the words they have used and not independently thereof. On the other hand the respondent contended that the court's jurisdiction under Section 34 was limited and the award could be set aside mainly on the ground of conflict with "public policy of India". That the phrase "public policy of India" could not be interpreted to mean that in case of violation of some provisions of law, the court could set aside the award. That unlike Article 34 of the UNCITRAL Model Law, Section 34 of the Act did not provide error of law as a ground to challenge the arbitral award. That if the legislature wanted to give a wider jurisdiction to the court, it would have done so by adopting provisions similar to Sections 68, 69 and 70 of the English Arbitration Act, 1996. That the purpose of giving limited jurisdiction to the court was to ensure that the disputes are resolved at the earliest by giving finality to the award passed by the forum chosen by the parties. That in view of Section 74 of the Contract Act, compensation/damages could be awarded only if the loss is suffered because of the breach of contract. That, in any case, even if there was any error in arriving at the said conclusion, the award could not be interfered with under Section 34 of the Act. That where two views are possible with regard to interpretation of statutory provisions and/or facts, the court should refuse to interfere with such award.

Allowing the appeal, the Supreme Court

Held :

Arbitral Procedure

In Section 34(2)(*a*)(*v*) of the Act, the composition of the Arbitral Tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in Part I of the Act i.e. Sections 2 to 43. These provisions prescribe the procedure to be followed by the Arbitral Tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the Arbitral Tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the Tribunal to decide the dispute is prescribed. In these sections there is no distinction between the jurisdiction/power and the procedure. Therefore, if the award is *dehors* the said provisions, it would be, on

the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act. (Paras 8, 11 and 12)

Harish Chandra Bajpai v. *Triloki Singh*, AIR 1957 SC 444 : 1957 SCR 370, *followed*

Section 34 read conjointly with other provisions of the Act indicates that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it could not be set aside by the court. Holding otherwise would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. (Para 13)

Such interpretation of Section 34(2)(*a*)(*v*) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. The principle is — there cannot be any wrong without a remedy. (Para 14)

M.V. Elisabeth v. *Harwan Investment & Trading (P) Ltd.*, 1993 Supp (2) SCC 433; *Dhannalal* v. *Kalawatibai*, (2002) 6 SCC 16, *relied on*

Therefore, if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with under Section 34. However, such failure of procedure should be patent affecting the rights of the parties. (Para 15)

Section 34(2)(b): "Public policy of India": Meaning

The phrase "public policy of India" occurring in Section 34(2)(*b*) is not defined in the Act. The concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Hence, it should be given meaning in the context and also considering the purpose of the section and scheme of the Act. (Para 16)

In a case where the validity of the award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning is given some of the provisions of the Arbitration Act would become nugatory. Sections 28(2), 28(3) and 24 may be taken as illustrations of such provisions. (Para 22)

Central Inland Water Transport Corpn. Ltd. v. *Brojo Nath Ganguly*, (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103; *Murlidhar Aggarwal* v. *State of U.P.*, (1974) 2 SCC 472, *relied on*

Renusagar Power Co. Ltd. v. *General Electric Co.*, 1994 Supp (1) SCC 644, *considered*

Janson v. *Driefontein Consolidated Gold Mines Ltd.*, 1902 AC 484, 500 : (1900-03) All ER Rep 426 : 87 LT 372 (HL); *Richardson* v. *Mellish*, (1824) 2 Bing 229, 252 : 130 ER 294; *Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.*, 1971 Ch 591, 606; *A. Schroeder Music Publishing Co. Ltd.* v. *Macaulay*, (1974) 1 WLR 1308 : (1974) 3 All ER 616 (HL); *Kedar Nath Motani* v. *Prahlad Rai*, AIR 1960 SC 213 : (1960) 1 SCR 861, *referred to*

Sir William Holdsworth: *History of English Law*, Vol. III, p. 55; *Lord Mustill & Stewart C. Boyd, Q.C.'s Commercial Arbitration 2001*, *referred to*

Again, it is true that the legislature has not incorporated exhaustive grounds for challenging the award passed by the Arbitral Tribunal or the grounds on which appeal against the order of the court would be maintainable. But in Section 34(2)(*b*) the phrase "public policy of India" is not required to be given a narrower meaning. Hence, the award which is passed in contravention of

Sections 24, 28 or 31 could be set aside. Moreover, Sections 13(5) and 16 enable a party to challenge the constitution of the Arbitral Tribunal or the arbitral award under Section 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India". (Paras 26 and 28)

Rattan Chand Hira Chand v. *Askar Nawaz Jung*, (1991) 3 SCC 67, *relied on*

Justice B.P. Saraf and Justice S.M. Jhunjhunuwala: *Law of Arbitration and Conciliation* — Nani Palkhiwala's opinion to, *referred to*

Giving a limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice. (Para 30)

Therefore, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. The concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in addition to the narrower meaning given to the term "public policy" in *Renusagar case*, 1994 Supp (1) SCC 644 it has to be held that the award could be set aside if it is patently illegal. The result would be that an award could be set aside if it is contrary to:

(*a*) fundamental policy of Indian law; or

(*b*) the interest of India; or

(*c*) justice or morality; or

(*d*) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such an award is opposed to public policy and is required to be adjudged void. (Para 31)

Renusagar Power Co. Ltd. v. *General Electric Co.*, 1994 Supp (1) SCC 644, *referred to*

It is settled law that the intention of the parties is to be gathered from the words used in the agreement. Therefore, when the parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty, there was no justifiable reason for the Arbitral Tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods. Further, in arbitration proceedings, the Arbitral Tribunal is required to decide the dispute in accordance with the terms of the contract. (Paras 40 to 42)

Modi & Co. v. *Union of India*, AIR 1969 SC 9 : (1968) 2 SCR 565; *Provash Chandra Dalui* v. *Biswanath Banerjee*, 1989 Supp (1) SCC 487; *Delta International Ltd.* v. *Shyam Sundar Ganeriwalla*, (1999) 4 SCC 545, *referred to*

In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract. When the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the

words used therein. In a case where agreement is executed by experts in the field, it cannot be held that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same. (Paras 74 and 46)

Fateh Chand v. *Balkishan Dass*, AIR 1963 SC 1405 : (1964) 1 SCR 515 at p. 526, *distinguished*

Maula Bux v. *Union of India*, (1969) 2 SCC 554; *Union of India* v. *Rampur Distillery and Chemical Co. Ltd.*, (1973) 1 SCC 649; *H.M. Kamaluddin Ansari and Co.* v. *Union of India*, (1983) 4 SCC 417, *relied on*

Union of India v. *Raman Iron Foundry*, (1974) 2 SCC 231, *held, overruled*

Bhai Panna Singh v. *Bhai Arjun Singh*, AIR 1929 PC 179 : 1929 All LJ 791; *Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.*, AIR 1962 SC 1314 : 1962 Supp (3) SCR 549, *referred to*

In the present case if the contractual term is taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the Arbitral Tribunal was not with regard to interpretation of the question of law. It was only a general reference with regard to claim of the respondent. Hence, if the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere with the same. (Para 55)

Alopi Parshad & Sons Ltd. v. *Union of India*, AIR 1960 SC 588 : (1960) 2 SCR 793; *Union of India* v. *A.L. Rallia Ram*, AIR 1963 SC 1685 : (1964) 3 SCR 164; *Maharashtra SEB* v. *Sterilite Industries (India)*, (2001) 8 SCC 482, *followed*

Champsey Bhara and Co. v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.*, (1922-23) 50 IA 324 : AIR 1923 PC 66; *In the matter of an arbitration between King and Duveen, Re,* (1913) 2 KB 32 : 82 LJ KB 733 : 108 LT 844; *Govt. of Kelantan* v. *Duff Development Co. Ltd.*, 1923 AC 395 : 129 LT 356 (HL); *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*, (1999) 9 SCC 283; *Sikkim Subba Associates* v. *State of Sikkim*, (2001) 5 SCC 629; *G.M., N. Rly.* v. *Sarvesh Chopra*, (2002) 4 SCC 45; *Seth Thawardas Pherumal* v. *Union of India*, AIR 1955 SC 468 : (1955) 2 SCR 48; *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society*, 1933 AC 592 : 1933 All ER Rep 616 : 102 LJ KB 648 : 149 LT 193 (HL); *Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*, AIR 1967 SC 1030 : (1967) 1 SCR 105; *Arosan Enterprises Ltd.* v. *Union of India*, (1999) 9 SCC 449, *referred to*

Where in respect of situations where it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. (Para 67)

Therefore, the impugned award directing the appellant to refund the amount deducted for the breach as per contractual terms requires to be set aside and is hereby set aside. (Para 69)

Respondent's claim to the amount deducted: whether a disputed claim or undisputed

As the award directing the appellant to refund the amount deducted is set aside, question of granting interest on the same would not arise. Still however, to demonstrate that the award passed by the Arbitral Tribunal is, on the face of it,

erroneous with regard to grant of interest, the same is being considered herein. (Para 70)

If the agreed amount of the liquidated damages is deducted and thereafter the contractor claims it back on the ground that the appellant was not entitled to deduct the same as it had failed to prove loss suffered by it, the said claim undoubtedly would be a "disputed claim". The arbitrators were required to decide by considering the facts and the law applicable, whether the deduction was justified or not. That itself would indicate that the claim of the contractor was "disputed claim" and not "undisputed". The reason recorded by the arbitrators that as the goods were received and bills were not disputed, therefore, the claim for recovering the amount of bills could not be held to be "disputed claim" is, on the face of it, unjust unreasonable, unsustainable and patently illegal as well as against the expressed terms of the contract. (Para 72)

It is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, the part of the award granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act. (Para 73)

Conclusions

Therefore, it is held that the court can set aside an arbitral award under Section 34(2):

(1) for the reasons mentioned in Section 34(2)(*a*)(*i*) to (*v*),

(2) for the reasons stated in Section 28(1)(*a*),

(3) for the reasons stated in Section 34(2)(*b*)(*ii*) on ground of conflict with the public policy of India, that is to say, if it is contrary to:

(*a*) fundamental policy of Indian law; or

(*b*) the interest of India; or

(*c*) justice or morality; or

(*d*) if it is patently illegal.

(4) for the reasons stated in Sections 13(5) and 16(6). [Para 74(A)]

Hence, the impugned award directing the appellant to refund US $ 3,04,970.20 and Rs 15,75,559 with interest which was deducted is set aside. [Paras 74(B) and 75]

G. **Contract Act, 1872 — Ss. 73 and 74 — Compensation/Damages — Principles and considerations for assessment of, in case of breach of contract — When plaintiff not obliged to prove that it suffered a loss**

In terms of Sections 73 and 74 of the Contract Act, it can be held that:

(*1*) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(*2*) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(*3*) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not

required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(*4*) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation. (Para 68)

Fateh Chand v. *Balkishan Dass*, AIR 1963 SC 1405 : (1964) 1 SCR 515 at p. 526; *Maula Bux* v. *Union of India*, (1969) 2 SCC 554, *explained*

H-M/NWTZ/28063/C

Advocates who appeared in this case :

Ashok H. Desai, Dushyant A. Dave, Sunil Gupta and Ashwani Kumar, Senior Advocates (Ms Anuradha Bindra, Kashi Vishweshwaran, Ms Padmalakshmi Nigam, Vikram Mehta, K.R. Sasiprabhu, A.M. Khattawala, Mahesh Agarwal, Rishi Agarwal, E.C. Agarwala, Prabhjit Jauhar and S.S. Jauhar, Advocates, with them) for the appearing parties.

Chronological list of cases cited ***on page(s)***

22. AIR 1963 SC 1685 : (1964) 3 SCR 164, *Union of India* v. *A.L. Rallia Ram* 737*e-f*, 739*a*
23. AIR 1963 SC 1405 : (1964) 1 SCR 515 at p. 526, *Fateh Chand* v. *Balkishan Dass* 732*e-f*, 733*f*, 736*a-b*, 739*f*, 740*c-d*, 740*e-f*
24. AIR 1962 SC 1314 : 1962 Supp (3) SCR 549, *Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.* 732*e-f*
25. AIR 1960 SC 588 : (1960) 2 SCR 793, *Alopi Parshad & Sons Ltd.* v. *Union of India* 737*a*
26. AIR 1960 SC 213 : (1960) 1 SCR 861, *Kedar Nath Motani* v. *Prahlad Rai* 721*b*
27. AIR 1957 SC 444 : 1957 SCR 370, *Harish Chandra Bajpai* v. *Triloki Singh* 717*h*
28. AIR 1955 SC 468 : (1955) 2 SCR 48, *Seth Thawardas Pherumal* v. *Union of India* 738*c*
29. 1933 AC 592 : 1933 All ER Rep 616 : 102 LJ KB 648 : 149 LT 193 (HL), *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society* 738*d-e*, 738*f*
30. AIR 1929 PC 179 : 1929 All LJ 791, *Bhai Panna Singh* v. *Bhai Arjun Singh* 730*a*
31. 1923 AC 395 : 129 LT 356 (HL), *Govt. of Kelantan* v. *Duff Development Co. Ltd.* 737*c*
32. (1922-23) 50 IA 324 : AIR 1923 PC 66, *Champsey Bhara and Co.* v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.* 737*b*, 738*a-b*, 739*b-c*
33. (1913) 2 KB 32 : 82 LJ KB 733 : 108 LT 844, *In the matter of an arbitration between King and Duveen, Re* 737*c*
34. 1902 AC 484, 500 : (1900-03) All ER Rep 426 : 87 LT 372 (HL), *Janson* v. *Driefontein Consolidated Gold Mines Ltd.* 720*c*
35. (1824) 2 Bing 229, 252 : 130 ER 294, *Richardson* v. *Mellish* 720*c*

The Judgment of the Court was delivered by

SHAH, J.—

Court's jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996

1. Before dealing with the issues involved in this appeal, we would first decide the main point in controversy, namely, — the ambit and scope of the court's jurisdiction in case where the award passed by the Arbitral Tribunal is challenged under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") as the decision in this appeal would depend upon the said finding. In other words — whether the court would have jurisdiction under Section 34 of the Act to set aside an award passed by the Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

2. Learned Senior Counsel Mr Ashok Desai appearing for the appellant submitted that in case where there is clear violation of Sections 28 to 31 of the Act or the terms of the contract between the parties, the said award can be and is required to be set aside by the court while exercising jurisdiction under Section 34 of the Act.

3. Mr Dushyant Dave, learned Senior Counsel appearing on behalf of the respondent Company submitted to the contrary and contended that the court's jurisdiction under Section 34 is limited and the award could be set aside mainly on the ground that the same is in conflict with the "public policy of

India". According to his submission, the phrase "public policy of India" cannot be interpreted to mean that in case of violation of some provisions of law, the court can set aside the award.

4. For deciding this controversy, we would refer to the relevant part of Section 34 which reads as under:

> "34. *Application for setting aside arbitral award.*—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) *An arbitral award may be set aside by the court only if*—
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> (*a*) the party making the application furnishes proof that—
>
> (*i*) a party was under some incapacity, or
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> (*ii*) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
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> (*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (*v*) *the composition of the Arbitral Tribunal or the arbitral procedure* was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, *was not in accordance with this Part*; or
>
> (*b*) the court finds that—
>
> (*i*) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (*ii*) the arbitral award is in conflict *with the public policy of India.*
>
> *Explanation.*—Without prejudice to the generality of sub-clause (*ii*), it is hereby declared, for the avoidance of any doubt, *that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud* or corruption or was in violation of Section 75 or Section 81." (emphasis supplied)

5. For our purpose, it is not necessary to refer to the scope of self-explanatory clauses (*i*) to (*iv*) of sub-section (2)(*a*) of Section 34 of the Act and it does not require elaborate discussion. However, clause (*v*) of sub-section (2)(*a*) and clause (*ii*) of sub-section (2)(*b*) require consideration. For proper adjudication of the question of jurisdiction, we shall first consider what meaning could be assigned to the term "arbitral procedure".

"***Arbitral procedure***"

6. The ingredients of clause (*v*) are as under:

(1) The court may set aside the award:

(*i*)(*a*) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(*b*) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(*ii*) if the arbitral procedure was not in accordance with:

(*a*) the agreement of the parties, or

(*b*) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

7. However, exception for setting aside the award on the ground of composition of the Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

8. In the aforesaid sub-clause (*v*), the emphasis is on the agreement and the provisions of Part I of the Act from which parties cannot derogate. It means that the composition of the Arbitral Tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in Part I of the Act i.e. Sections 2 to 43. At the same time, agreement for composition of the Arbitral Tribunal or arbitral procedure should not be in conflict with the provisions of the Act from which parties cannot derogate. Chapter V of Part I of the Act provides for conduct of arbitral proceedings. Section 18 mandates that parties to the arbitral proceedings shall be treated with equality and each party shall be given full opportunity to present his case. Section 19 specifically provides that the Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. Failing any agreement between the parties subject to other provisions of Part I, the Arbitral Tribunal is to conduct the proceedings in the manner it considers appropriate. This power includes the power to determine the admissibility, relevance, the materiality and weight of any evidence. Sections 20, 21 and 22 deal with place of arbitration, commencement of arbitral proceedings and language respectively. Thereafter, Sections 23, 24 and 25 deal with statements of claim and defence, hearings and written proceedings and procedure to be followed in case of default of a party.

9. At this stage, we would refer to Section 24 which is as under:

"24. *Hearings and written proceedings.*—(1) Unless otherwise agreed by the parties, *the Arbitral Tribunal shall decide whether to hold oral hearings* for the presentation of evidence or for oral argument, or whether

the proceedings shall be conducted on the basis of documents and other materials:

Provided that the *Arbitral Tribunal shall hold oral hearings, at an appropriate stage of the proceedings*, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) *The parties shall be given sufficient advance notice of any hearing* and of any meeting of the Arbitral Tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the Arbitral Tribunal by one party *shall be communicated to the other party*, and any expert report or evidentiary document on which the Arbitral Tribunal may rely in making its decision shall be communicated to the parties." (emphasis supplied)

10. Thereafter, Chapter VI deals with making of arbitral award and termination of proceedings. Relevant sections which require consideration are Sections 28 and 31. Sections 28 and 31 read as under:

"28. *Rules applicable to substance of dispute.*—(1) Where the place of arbitration is situated in India,—

(*a*) in an arbitration other than an international commercial arbitration, *the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India*;

(*b*) in international commercial arbitration,—

(*i*) the Arbitral Tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(*ii*) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(*iii*) failing any designation of the law under sub-clause (*ii*) by the parties, the Arbitral Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The Arbitral Tribunal shall decide *ex aequo et bono* or as *amiable compositeur* ***only*** if the parties have expressly authorised it to do so.

(3) In all cases, the Arbitral Tribunal *shall decide in accordance with the terms of the contract* and shall take into account the usages of the trade applicable to the transaction.

* * *

31. *Form and contents of arbitral award.*—(1) An arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) *The arbitral award shall state the reasons upon which it is based, unless—*

(*a*) the parties have agreed that no reasons are to be given, or

(*b*) the award is an arbitral award on agreed terms under Section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The Arbitral Tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7)(*a*) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(*b*) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties,—

(*a*) the costs of an arbitration shall be fixed by the Arbitral Tribunal;

(*b*) the Arbitral Tribunal shall specify—

(*i*) the party entitled to costs,

(*ii*) the party who shall pay the costs,

(*iii*) the amount of costs or method of determining that amount, and

(*iv*) the manner in which the costs shall be paid.

Explanation.—For the purpose of clause (*a*), 'costs' means reasonable costs relating to—

(*i*) the fees and expenses of the arbitrators and witnesses,

(*ii*) legal fees and expenses,

(*iii*) any administration fees of the institution supervising the arbitration, and

(*iv*) any other expenses incurred in connection with the arbitral proceedings and the arbitral award." (emphasis supplied)

11. The aforesaid provisions prescribe the procedure to be followed by the Arbitral Tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the Arbitral Tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the Tribunal to decide the dispute is prescribed. In these sections there is no distinction between the jurisdiction/power and the procedure. In *Harish Chandra Bajpai* v. *Triloki Singh*[1] while dealing with Sections 90 and 92 of the Representation

1 AIR 1957 SC 444 : 1957 SCR 370

of the People Act, 1951 (as it stood), this Court observed thus: (AIR p. 454, para 18)

> "It is then argued that Section 92 confers powers on the Tribunal in respect of certain matters, while Section 90(2) applies the Civil Procedure Code in respect of matters relating to *procedure, that there is a distinction between power and procedure*, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under Section 92 and not under Section 90(2). *We do not see any antithesis between 'procedure' in Section 90(2) and 'powers' under Section 92*. When the respondent applied to the Tribunal for amendment, he took a procedural step, and that, he was clearly entitled to do under Section 90(2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of a petition is competent, but the passing of any order thereon is not? We are of opinion that there is no substance in this contention either." (emphasis supplied)

12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is *dehors* the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

13. The question, therefore, which requires consideration is — whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under sub-section (1)(*a*) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be — whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

14. The aforesaid interpretation of the clause (*v*) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. The principle is — there cannot be any wrong without a remedy. In *M.V. Elisabeth* v. *Harwan Investment & Trading (P) Ltd.*[2] this Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice. Similarly, in *Dhannalal* v. *Kalawatibai*[3] this Court observed that wrong must not be left unredeemed and right not left unenforced.

15. The result is — if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.

What meaning could be assigned to the phrase "Public Policy of India"?

16. The next clause which requires interpretation is clause (*ii*) of sub-section (2)(*b*) of Section 34 which inter alia provides that the court may set aside the arbitral award if it is in conflict with the "public policy of India". The phrase "public policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and constitutional provisions.

17. For this purpose, we would refer to a few decisions referred to by the learned counsel for the parties. While dealing with the concept of public policy, this Court in *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*[4] has observed thus: (SCC pp. 217-19, paras 92-93)

> "*92.* The Indian Contract Act does not define the expression 'public policy' or 'opposed to public policy'. From the very nature of things, the expressions 'public policy', 'opposed to public policy', or 'contrary to public policy' are incapable of precise definition. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions

2 1993 Supp (2) SCC 433
3 (2002) 6 SCC 16
4 (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103

which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. *There are two schools of thought — 'the narrow view' school and 'the broad view' school.* According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of 'the narrow view' school would not invalidate a contract on the ground of public policy unless that particular ground had been well established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson* v. *Driefontein Consolidated Gold Mines Ltd.*[5]: *'Public policy is always an unsafe and treacherous ground for legal decision.'* That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson* v. *Mellish*[6] *described public policy as 'a very unruly horse, and when once you get astride it you never know where it will carry you'. The Master of the Rolls, Lord Denning, however, was not a man to shy away* from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in *Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.*[7]: 'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles'. Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of equity would never have evolved. Sir William Holdsworth in his '*History of English Law*', Vol. III, p. 55, has said:

> 'In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.'

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles

5 1902 AC 484, 500 : (1900-03) All ER Rep 426 : 87 LT 372 (HL)
6 (1824) 2 Bing 229, 252 : 130 ER 294
7 1971 Ch 591, 606

underlying the fundamental rights and the directive principles enshrined in our Constitution.

93. The normal rule of common law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd.* v. *Macaulay*[8], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani* v. *Prahlad Rai*[9], reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at p. 873):

> 'The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.'

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void." (emphasis supplied)

18. Further, in *Renusagar Power Co. Ltd.* v. *General Electric Co.*[10] this Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which *inter alia* provided that a foreign award may not be enforced under the said Act, if the court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the conclusion that public policy comprehended in Section 7(1)(*b*)(*ii*) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the "public policy of India" and does not cover the

8 (1974) 1 WLR 1308 : (1974) 3 All ER 616 (HL)
9 AIR 1960 SC 213 : (1960) 1 SCR 861
10 1994 Supp (1) SCC 644

public policy of any other country. For giving meaning to the term "public policy", the Court observed thus: (SCC p. 682, para 66)

> "*66.* Article V(2)(*b*) of the New York Convention of 1958 and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression 'public policy' in Article V(2)(*b*) of the New York Convention and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(*c*) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that '*public policy*' in Section 7(1)(*b*)(*ii*) has been *used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.* Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. *Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.*"
>
> (emphasis supplied)

The Court finally held that: (SCC p. 685, para 76)

> "*76.* Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(*b*)(*ii*) of the Act."

19. This Court in *Murlidhar Aggarwal* v. *State of U.P.*[11] while dealing with the concept of "public policy" observed thus: (SCC pp. 482-83, paras 31-32)

> "*31.* Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.
>
> *32.* ... The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hidebound by precedent. *The Judges must look beyond the narrow field of*

11 (1974) 2 SCC 472

past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decisions on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. … The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere." (emphasis supplied)

20. Mr Desai submitted that the narrow meaning given to the term "public policy" in *Renusagar case*[10] is in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality. It was not a case where validity of the award is challenged before a forum prescribed under the Act. He submitted that the scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign award are not identical. A foreign award by definition is subject to double exequatur. This is recognized *inter alia* by Section 48(1) and there is no parallel provision to this clause in Section 34. For this, he referred to *Lord Mustill & Stewart C. Boyd, Q.C.'s Commercial Arbitration 2001* wherein (at p. 90) it is stated as under:

> "Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the convention assumes that they will trust the supervising authorities of the chosen venue. It follows that if, and to the extent that the award has been struck down in the local court it should as a matter of theory and practice be treated when enforcement is sought as if to the extent it did not exist."

21. He further submitted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in the domestic arbitration the only recourse is to Section 34.

22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution

proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide *ex aequo et bono* (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

23. The learned Senior Counsel Mr Dave submitted that Parliament has not made much change while adopting Article 34 of the UNCITRAL Model Law by not providing error of law as a ground of challenge to the arbitral award under Section 34 of the Act. For this purpose, he referred to Sections 68, 69 and 70 of the Arbitration Act, 1996 applicable in England and submitted that if the legislature wanted to give a wider jurisdiction to the court, it would have done so by adopting similar provisions.

24. Section 68 of the law applicable in England provides that the award can be challenged on the ground of serious irregularities mentioned therein. Section 68 reads thus:

> "68. *Challenging the award: serious irregularity.*—(1) A party to arbitral proceedings may (upon notice to the other parties and to the Tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the Tribunal, the proceedings or the award.

A party may lose the right to object (see Section 73) and the right to apply is subject to the restrictions in Sections 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(*a*) failure by the Tribunal to comply with Section 33 (general duty of Tribunal);

(*b*) the Tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see Section 67);

(*c*) failure by the Tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(*d*) failure by the Tribunal to deal with all the issues that were put to it;

(*e*) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(*f*) uncertainty or ambiguity as to the effect of the award;

(*g*) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(*h*) failure to comply with the requirement as to the form of the award; or

(*i*) any irregularity in the conduct of the proceedings or in the award which is admitted by the Tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the Tribunal, the proceedings or the award, the court may—

(*a*) remit the award to the Tribunal, in whole or in part, for reconsideration;

(*b*) set the award aside in whole or in part, or

(*c*) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the Tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section."

25. Similarly, Section 69 provides that appeal on the point of law would be maintainable and the procedure thereof is also provided. Section 70 provides supplementary provisions.

26. It is true that the legislature has not incorporated exhaustive grounds for challenging the award passed by the Arbitral Tribunal or the ground on which appeal against the order of the court would be maintainable.

27. On this aspect, eminent Jurist and Senior Advocate Late Mr Nani Palkhivala while giving his opinion to *Law of Arbitration and Conciliation* by Justice Dr B.P. Saraf and Justice S.M. Jhunjhunuwala, noted thus:

"I am extremely impressed by your analytical approach in dealing with the complex subject of arbitration which is emerging rapidly as an alternate mechanism for resolution of commercial disputes. The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to Section 68 of the English Arbitration Act, 1996 which gives power to the court to correct errors of law in the award.

I welcome your view on the need for giving the doctrine of 'public policy' its full amplitude. *I particularly endorse your comment that courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice.*

If the Arbitral Tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. *Hence, if the award has resulted in an injustice, a court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India.*"

28. From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the Arbitral Tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India" as contended by learned Senior Counsel Mr Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in *Rattan Chand Hira Chand* v. *Askar Nawaz Jung*[12] observed thus: (SCC pp. 76-77, para 17)

"*17.* ... It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the

12 (1991) 3 SCC 67

society. *Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society.*"

(emphasis supplied)

29. Learned Senior Counsel Mr Dave submitted that the purpose of giving limited jurisdiction to the court is obvious and is to see that the disputes are resolved at the earliest by giving finality to the award passed by the forum chosen by the parties. As against this, learned Senior Counsel Mr Desai submitted that in the present system even the arbitral proceedings are delayed on one or the other ground including the ground that the arbitrator is not free and the matters are not disposed of for months together. He submitted that the legislature has not provided any time-limit for passing of the award and this indicates that the contention raised by the learned counsel for the respondent has no bearing in interpreting Section 34.

30. It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass award within reasonable time as fixed by the court. It is also true that on occasions, arbitration proceedings are delayed for one or other reason, but it is for the parties to take appropriate action of selecting proper arbitrator(s) who could dispose of the matter within reasonable time fixed by them. It is for them to indicate the time-limit for disposal of the arbitral proceedings. It is for them to decide whether they should continue with the arbitrator(s) who cannot dispose of the matter within reasonable time. However, non-providing of time-limit for deciding the dispute by the arbitrators could have no bearing on interpretation of Section 34. Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar case*[10] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

(*a*) fundamental policy of Indian law; or

(*b*) the interest of India; or

(*c*) justice or morality, or

(*d*) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

Now on facts

32. The brief facts of the case are as under:

The appellant ONGC which is a public sector undertaking, has challenged the arbitral award dated 2-5-1999 by filing Arbitration Petition No. 917 of 1999 before the High Court of Bombay. Learned Single Judge dismissed the same. Appeal No. 256 of 2000 preferred before the Division Bench of the High Court was also dismissed. Hence, the present appeal.

33. It is stated that in response to a tender, the respondent Company which is engaged in the business of supplying equipment for offshore oil exploration and maintenance by its letter dated 27-12-1995 on agreed terms and conditions, offered to supply to the appellants 26" diameter and 30" diameter casing pipes. The appellant by letter of intent dated 3-6-1996 followed by a detailed order accepted the offer of the respondent Company. As per terms and conditions, the goods were required to be supplied on or before 14-11-1996.

34. It was the contention of the respondent that as per clause (18) of the agreement, the raw materials were required to be procured from the reputed and proven manufacturers/suppliers approved by the respondent (*sic* appellant) as listed therein. By letter dated 8-8-1996, the respondent placed an order for supply of steel plates, that is, the raw material required for manufacturing the pipes with Liva Laminati, Piani S.P.A., Italian suppliers stipulating that material must be shipped latest by the end of September 1996 as timely delivery was of the essence of the order. It is also their case that all over Europe including Italy there was a general strike of the steel mill workers during September/October 1996. Therefore, the respondent by its letter dated 28-10-1996 conveyed to the appellant that Italian suppliers had faced labour problems and was unable to deliver the material as per the agreed schedule. The respondent, therefore, requested for an extension of 45 days' time for execution of the order in view of the reasons beyond its control. By letter dated 4-12-1996, the time for delivery of the pipes was extended with a specific statement *inter alia* that the amount equivalent to liquidated damages for delay in supply of pipes would be recovered from the respondent. It is the contention of the respondent that the appellant made payment of the goods supplied after wrongfully deducting an amount of US $ 3,04,970.20 and Rs 15,75,559 as liquidated damages. That deduction was disputed by the respondent and, therefore, dispute was referred to the Arbitral Tribunal. The Arbitral Tribunal arrived at the conclusion that strikes affecting the supply of raw material to the claimant are not within the definition of "force majeure" in the contract between the parties, and hence, on that ground, it cannot be said that the amount of liquidated damages was

wrongfully withheld by the appellant. With regard to other contention on the basis of customs duty also, the Arbitral Tribunal arrived at the conclusion that it would not justify the delay in the supply of goods. Thereafter, the Arbitral Tribunal considered various decisions of this Court regarding recovery of liquidated damages and arrived at the conclusion that it was for the appellant to establish that it had suffered any loss because of the breach committed by the respondent in not supplying the goods within the prescribed time-limit. The Arbitral Tribunal thereafter appreciated the evidence and arrived at the conclusion that in view of the statement volunteered by Mr Arumoy Das, it was clear that shortage of casing pipes was only one of the other reasons which led to the change in the deployment plan and that it has failed to establish its case that it has suffered any loss in terms of money because of delay in supply of goods under the contract. Hence, the Arbitral Tribunal held that the appellant has wrongfully withheld the agreed amount of US $ 3,04,970.20 and Rs 15,75,559 on account of customs duty, sales tax, freight charges deducted by way of liquidated damages. The Arbitral Tribunal further held that the respondent was entitled to recover the said amount with interest at the rate of 12 per cent p.a. from 1-4-1997 till the date of the filing of statement of claim and thereafter having regard to the commercial nature of the transaction at the rate of 18 per cent per annum *pendente lite* till payment is made.

35. For challenging the said award, learned Senior Counsel Mr Desai submitted that:

(*1*) the award is vitiated on the ground that there was delay on the part of respondent in supplying agreed goods/pipes and for the delay, the appellant was entitled to recover agreed liquidated damages i.e. a sum equivalent to 1% of the contract price for whole unit per week of such delay or part thereof. Thereby, the award was contrary to Section 28(3) which provides that the Arbitral Tribunal shall decide the dispute in accordance with the terms of the contract;

(*2*) the award passed by the arbitrator is on the face of it illegal and erroneous as it arrived at the conclusion that the appellant was required to prove the loss suffered by it before recovering the liquidated damages. He submitted that the Arbitral Tribunal misinterpreted the law on the subject;

(*3*) in any set of circumstances, the award passed by the arbitrator granting interest on the liquidated damages deducted by the appellant is, on the face of it, unjustified, unreasonable and against the specific terms of the contract, namely, clause 34.4 of the agreement, which provides that on "disputed claim", no interest would be payable.

36. As against this, learned Senior Counsel Mr Dave submitted that it is settled law that for the breach of contract provisions of Section 74 of the Contract Act would be applicable and compensation/damages could be awarded only if the loss is suffered because of the breach of contract. He submitted that this principle was laid down by the Privy Council as early as

in 1929 in *Bhai Panna Singh* v. *Bhai Arjun Singh*[13] wherein the Privy Council observed thus: (AIR p. 180)

"The effect of Section 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs 10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered."

37. He submitted that this Court has also held that the plaintiff claiming liquidated damages has to prove the loss suffered by him. In support of this contention, he referred to and relied upon various decisions. In any case, it is his contention that even if there is any error in arriving at the said conclusion, the award cannot be interfered with under Section 34 of the Act.

38. At this stage, we would refer to the relevant terms of the contract upon which learned counsel for the appellant has based his submissions, which are as under:

"*11. Failure and termination clause/liquidated damages.—Time and date of delivery shall be essence of the contract.* If the contractor fails to deliver the stores, or any instalment thereof within the period fixed for such delivery in the schedule or at any time repudiates the contract before the expiry of such period, the purchaser may, without prejudice to any other right or remedy available to him, recover damages for breach of the contract:

(*a*) *Recovery from the contractor as agreed liquidated damages are not by way of penalty*, a sum equivalent to 1% (one per cent) of the contract price of the whole unit per week for such delay or part thereof (*this is an agreed, genuine pre-estimate of damages duly agreed by the parties*) which the contractor has failed to deliver within the period fixed for delivery in the schedule, where delivery thereof is accepted after expiry of the aforesaid period. It may be noted that such recovery of liquidated damages may be up to 10% of the contract price of whole unit of stores which the contractor has failed to deliver within the period fixed for delivery, or

* * *

(*e*) it may further be noted that clause (*a*) provides for recovery of liquidated damages on the cost of contract price of delayed supplies (whole unit) at the rate of 1% of the contract price of the whole unit per week for such delay or part thereof up to a ceiling of 10% of the contract price of delayed supplies (whole unit). *Liquidated damages for delay in supplies thus accrued will be recovered by the paying authorities of the purchaser specified in the supply order, from the bill for payment of the cost of material submitted by the contractor or his foreign principals in accordance with the terms of supply order or otherwise.*

(*f*) Notwithstanding anything stated above, equipment and materials will be deemed to have been delivered only when all its

13 AIR 1929 PC 179 : 1929 All LJ 791

components, parts are also delivered. If certain components are not delivered in time the equipment and material will be considered as delayed until such time all the missing parts are also delivered.

12. Levy of liquidated damages (LD) due to delay in supplies.—LD will be imposed on the total value of the order unless 75% of the value ordered is supplied within the stipulated delivery period. Where 75% of the value ordered has been supplied within stipulated delivery period, LD will be imposed on the order value of delayed supply(ies). However, where in judgment of ONGC, the supply of partial quantity does not fulfil the operating need, LD will be imposed on full value of the supply order.

34.4. Delay in release of payment.—In case where payment is to be made on satisfactory receipt of materials at destination or where payment is to be made after satisfactory commissioning of the equipment as per terms of the supply order, ONGC shall make payment within 60 days of receipt of invoice/claim complete in all respects. Any delay in payment on undisputed claim/amount beyond 60 days of the receipt of invoice/claim will attract interest @ 1% per month. *No interest will be paid on disputed claims.* For interest on delayed payments to small scale and ancillary industrial undertakings, the provisions of the 'Interest of Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 will govern.' "

39. Mr Desai referred to the decision rendered by this Court in *Delta International Ltd.* v. *Shyam Sundar Ganeriwalla*[14] and submitted that for the purpose of construction of contracts, the intention of the parties is to be gathered from the words they have used and there is no intention independent of that meaning.

40. It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. (Re: *Modi & Co.* v. *Union of India*[15].) Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. (Re: *Provash Chandra Dalui* v. *Biswanath Banerjee*[16].)

41. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated

14 (1999) 4 SCC 545
15 AIR 1969 SC 9 : (1968) 2 SCR 565
16 1989 Supp (1) SCC 487

damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the Arbitral Tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods.

42. Further, in arbitration proceedings, the Arbitral Tribunal is required to decide the dispute in accordance with the terms of the contract. The agreement between the parties specifically provides that without prejudice to any other right or remedy if the contractor fails to deliver the stores within the stipulated time, the appellant will be entitled to recover from the contractor, as agreed, liquidated damages equivalent to 1% of the contract price of the whole unit per week for such delay. Such recovery of liquidated damages could be at the most up to 10% of the contract price of whole unit of stores. Not only this, it was also agreed that:

(*a*) liquidated damages for delay in supplies will be recovered by paying the authority from the bill for payment of cost of material submitted by the contractor;

(*b*) liquidated damages were not by way of penalty and it was agreed to be genuine pre-estimate of damages duly agreed by the parties;

(*c*) this pre-estimate of liquidated damages is not assailed by the respondent as unreasonable assessment of damages by the parties.

43. Further, at the time when the respondent sought extension of time for supply of goods, time was extended by letter dated 4-12-1996 with a specific demand that the clause for liquidated damages would be invoked and the appellant would recover the same for such delay. Despite this specific letter written by the appellant, the respondent had supplied the goods which would indicate that even at that stage, the respondent was agreeable to pay liquidated damages.

44. On this issue, learned counsel for the parties referred to the interpretation given to Sections 73 and 74 of the Indian Contract Act in *Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.*[17], *Fateh Chand* v. *Balkishan Dass*[18] (SCR 515 at 526), *Maula Bux* v. *Union of India*[19], *Union of India* v. *Rampur Distillery and Chemical Co. Ltd.*[20] and *Union of India* v. *Raman Iron Foundry*[21].

45. Relevant parts of Sections 73 and 74 of the Contract Act are as under:

"73. *Compensation for loss or damage caused by breach of contract.*— When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, *or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

17 AIR 1962 SC 1314 : 1962 Supp (3) SCR 549
18 AIR 1963 SC 1405 : (1964) 1 SCR 515 at p. 526
19 (1969) 2 SCC 554
20 (1973) 1 SCC 649
21 (1974) 2 SCC 231

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

* * *

74. *Compensation for breach of contract where penalty stipulated for.*— When a contract has been broken, *if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby*, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty." (emphasis supplied)

46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

47. Now, we would refer to various decisions on the subject. In *Fateh Chand case*[18] the plaintiff made a claim to forfeit a sum of Rs 25,000 received by him from the defendant. The sum of Rs 25,000 consisted of two items — Rs 1000 received as earnest money and Rs 24,000 agreed to be paid by the defendant as out of sale price against the delivery of possession of the property. With regard to earnest money, the Court held that the plaintiff was entitled to forfeit the same. With regard to the claim of remaining sum of Rs 24,000, the Court referred to Section 74 of the Indian Contract Act and observed that Section 74 deals with the measure of damages in two classes of cases: (*i*) where the contract names a sum to be paid in case of breach, and (*ii*) where the contract contains any other stipulation by way of penalty. The Court observed thus: (AIR p. 1411, para 10)

"The measure of damages in the case of breach of a stipulation *by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for.* In assessing damages the court has, subject to the limit of the penalty stipulated, jurisdiction to award such

compensation as it deems reasonable having regard to all the circumstances of the case. *Jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable*, and that imposes upon the court duty to award compensation according to settled principles. *The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of 'actual loss or damage'; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.* (emphasis supplied)

The Court further observed as under: (AIR p. 1411, para 11)

"Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

48. From the aforesaid decision, it is clear that the Court was not dealing with a case where contract named a sum to be paid in case of breach but with a case where the contract contained stipulation by way of penalty.

49. The aforesaid case and other cases were referred to by a three-Judge Bench in *Maula Bux case*[19] wherein the Court held thus: (SCC p. 559, para 6)

"*It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract.* But the expression 'whether or not actual damage or loss is proved to have been caused thereby' is intended to cover different classes of contracts which come before the courts. *In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration* as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him." (emphasis supplied)

50. In *Rampur Distillery and Chemical Co. Ltd.*[20] also, a two-Judge Bench of this Court referred to *Maula Bux case*[19] and observed thus: (SCC p. 651, para 3)

> "It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within Section 70 of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, 'where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty'."

51. In *Raman Iron Foundry case*[21] this Court considered clause 18 of the contract between the parties and arrived at the conclusion that it applied only where the purchaser has a claim for a sum presently due and payable by the contractor. Thereafter, the Court observed thus: (SCC p. 243, para 11)

> "*11.* Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract *in terrorem* is a penalty and the court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, *a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit.* It therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any

pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages." (emphasis supplied)

52. Firstly, it is to be stated that in the aforesaid case the Court has not referred to the earlier decision rendered by the five-Judge Bench in *Fateh Chand case*[18] or the decision rendered by the three-Judge Bench in *Maula Bux case*[19]. Further, in *H.M. Kamaluddin Ansari and Co.* v. *Union of India*[22] a three-Judge Bench of this Court has overruled the decision in *Raman Iron Foundry case*[21] and the Court while interpreting similar term of the contract observed that it gives wider power to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time may become due to the contractors under other contracts and the Court observed that clause 18 of the standard contract confers ample powers on the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

53. In the light of the aforesaid decisions, in our view, there is much force in the contention raised by the learned counsel for the appellant. However, the learned Senior Counsel Mr Dave submitted that even if the award passed by the Arbitral Tribunal is erroneous, it is settled law that when two views are possible with regard to interpretation of statutory provisions and/or facts, the court would refuse to interfere with such award.

54. It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. But this would depend upon reference made to the arbitrator: (*a*) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; (*b*) it is also settled law that in a case of reasoned award, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; and (*c*) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally.

55. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the Arbitral Tribunal was not with regard to interpretation of the question of law. It was only a general reference with regard to claim of the respondent. Hence, if the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere with the same.

22 (1983) 4 SCC 417

56. Dealing with the similar question, this Court in *Alopi Parshad & Sons Ltd.* v. *Union of India*[23] observed that the extent of jurisdiction of the court to set aside the award on the ground of an error in making the award is well defined and held thus: (AIR p. 592, para 16)

> "The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous—*Champsey Bhara and Co.* v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.*[24] If, however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit its being set aside — *In the matter of an arbitration between King and Duveen, Re*[25] and *Govt. of Kelantan* v. *Duff Development Co. Ltd.*[26]

Thereafter, the Court held that if there was a general reference and not a specific reference on any question of law then the award can be set aside if it is demonstrated to be erroneous on the face of it. The Court, in that case, considering Section 56 of the Indian Contract Act held that the Indian Contract Act does not enable a party to a contract to *ignore the express provisions thereof and* to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity and that the *arbitrators were not justified in ignoring the expressed terms of the contract prescribing the remuneration payable to the agents*. The aforesaid law has been followed continuously. (*Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*[27], *Sikkim Subba Associates* v. *State of Sikkim*[28] and *G.M., N. Rly.* v. *Sarvesh Chopra*[29].)

57. There is also elaborate discussion on this aspect in *Union of India* v. *A.L. Rallia Ram*[30] wherein the Court succinctly observed as under: (AIR p. 1691, para 13)

> "*But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous.* An error in law on the face of the award means: 'you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition

23 AIR 1960 SC 588 : (1960) 2 SCR 793
24 (1922-23) 50 IA 324 : AIR 1923 PC 66
25 (1913) 2 KB 32 : 82 LJ KB 733 : 108 LT 844
26 1923 AC 395 : 129 LT 356 (HL)
27 (1999) 9 SCC 283
28 (2001) 5 SCC 629
29 (2002) 4 SCC 45
30 AIR 1963 SC 1685 : (1964) 3 SCR 164

which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a 'reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound': *Champsey Bhara and Co.* v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.*[24] But this rule does not apply where questions of law are specifically referred to the arbitrator for his decision; the award of the arbitrator on these questions is binding upon the parties, for by referring the specific questions the parties desire to have a decision from the arbitrator on those questions rather than from the court, and the court will not, unless it is satisfied that the arbitrator had proceeded illegally, interfere with the decision." (emphasis supplied)

58. The Court thereafter referred to the decision rendered in *Seth Thawardas Pherumal* v. *Union of India*[31] wherein Bose, J. delivering the judgment of the Court had observed: (AIR p. 475, para 18)

"Therefore, when a question of law is the point at issue, unless 'both' sides 'specifically' agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceedings is not enough."

The learned Judge also observed at SCR p. 59 (AIR p. 475, para 18) after referring to *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society*[32], AC at p. 616:

"Simply because the matter was referred to incidentally in the pleadings and arguments in support of, or against, *the general issue about liability for damages, that is not enough to clothe the arbitrator with exclusive jurisdiction on a point of law*." (emphasis supplied)

59. The Court also referred to the test indicated by Lord Russell of Killowen in *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society*[32] and observed that the said case adequately brings out a distinction between a specific reference on a question of law, and a question of law arising for determination by the arbitrator in the decision of the dispute. The Court quoted the following observations with approval: (All ER p. 621 F-H)

"It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. ... The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

31 AIR 1955 SC 468 : (1955) 2 SCR 48

32 1933 AC 592 : 1933 All ER Rep 616 : 102 LJ KB 648 : 149 LT 193 (HL)

60. Further, in *Maharashtra SEB* v. *Sterilite Industries (India)*[33] the Court observed as under: (SCC p. 486, paras 9-10)

"*9.* The position in law has been noticed by this Court in *Union of India* v. *A.L. Rallia Ram*[30] and *Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[34] to the effect that the arbitrator's award both on facts and law is final; that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award, the following observations in *Champsey Bhara & Co.* v. *Jivraj Balloo Spg. and Wvg. Co. Ltd.*[24], a decision of the Privy Council, are relevant (IA p. 331)

> 'An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.'

10. In *Arosan Enterprises Ltd.* v. *Union of India*[35] this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator."

61. The next question is — whether the legal proposition which is the basis of the award for arriving at the conclusion that ONGC was not entitled to recover the stipulated liquidated damages as it has failed to establish that it has suffered any loss is erroneous on the face of it. The Arbitral Tribunal after considering the decisions rendered by this Court in the cases of *Fateh Chand*[18], *Maula Bux*[19] and *Rampur Distillery*[20] arrived at the conclusion that

> "in view of these three decisions of the Supreme Court, it is clear that it was for the respondents to establish that they had suffered any loss because of the breach committed by the claimant in the supply of goods under the contract between the parties after 14-11-1996. In the words we have emphasized in *Maula Bux decision*[19], it is clear that if loss in terms of money can be determined, the party claiming the compensation 'must prove' the loss suffered by him".

33 (2001) 8 SCC 482
34 AIR 1967 SC 1030 : (1967) 1 SCR 105
35 (1999) 9 SCC 449

62. Thereafter the Arbitral Tribunal referred to the evidence and the following statement made by the witness Das:

> "The redeployment plan was made keeping in mind several constraints including shortage of casing pipes."

63. Further, the Arbitral Tribunal came to the conclusion that under these circumstances, the shortage of casing pipes of 26" diameter and 30" diameter was not the only reason which led to redeployment of rig Trident II to Platform B-121. The Arbitral Tribunal also appreciated the other evidence and held that the attempt on the part of ONGC to show that production of gas on platform B-121 was delayed because of the late supply of goods by the claimant failed. Thereafter, the Arbitral Tribunal considered the contention raised by the learned counsel for ONGC that the amount of 10% which had been deducted by way of liquidated damages for the late supply of goods under the contract was not by way of penalty. In response thereto, it was pointed out that *it was not the case of* learned counsel Mr Setalvad on behalf of the claimants that "these stipulations in the contract for deduction of liquidated damages was by way of penalty". Further, the Arbitral Tribunal observed that in view of the decisions rendered in *Fateh Chand*[18] and *Maula Bux*[19] cases,

> "all that we are required to consider is whether the respondents have established their case of actual loss in money terms because of the delay in the supply of the casing pipes under the contract between the parties".

Finally, the Arbitral Tribunal held that as the appellant has failed to prove the loss suffered because of delay in supply of goods as set out in the contract between the parties, it is required to refund the amount deducted by way of liquidated damages from the specified amount payable to the respondent.

64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in *Fateh Chand case*[18] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, *inter alia* (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable

compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

65. In *Maula Bux case*[19] plaintiff Maula Bux entered into a contract with the Government of India to supply potatoes at the Military Headquarters, U.P. Area and deposited an amount of Rs 10,000 as security for due performance of the contract. He entered into another contract with the Government of India to supply at the same place poultry eggs and fish for one year and deposited an amount of Rs 8500 for due performance of the contract. The plaintiff having made persistent default in making regular and full supplies of the commodities agreed to be supplied, the Government rescinded the contracts and forfeited the amounts deposited by the plaintiff, because under the terms of the agreement, the amounts deposited by the plaintiff as security for the due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. In context of these facts, the Court held that it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made. Hence, claim for damages was not granted.

66. In *Maula Bux case*[19] the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated

time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. The Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

68. From the aforesaid discussions, it can be held that:

(*1*) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(*2*) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(*3*) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(*4*) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

69. For the reasons stated above, the impugned award directing the appellant to refund the amount deducted for the breach as per contractual terms requires to be set aside and is hereby set aside.

Whether the claim of refund of the amount deducted by the appellant from the bills is disputed or undisputed claim?

70. As the award directing the appellant to refund the amount deducted is set aside, question of granting interest on the same would not arise. Still however, to demonstrate that the award passed by the Arbitral Tribunal is, on the face of it, erroneous with regard to grant of interest, we deal with the same.

71. The Arbitral Tribunal arrived at the conclusion that the appellant wrongfully withheld/deducted the aggregate amount of US $ 3,04,970.20 on account of delay in supply of goods and amount of Rs 15,75,559 on account of excise duty, sales tax, freight charges deducted as and by way of liquidated damages from the amount payable by the respondent and thereafter arrived at the conclusion that the said amount was deducted from undisputed invoice amount, therefore, the said claim of the respondent cannot be held to be "disputed claim".

72. It is apparent that the claim of the contractor to recover the said amount was disputed mainly because it was an agreed term between the parties that in case of delay in supply of goods the appellant was entitled to recover damages at the rate as specified in the agreement. It was also agreed that the said liquidated damages were to be recovered by paying authorities from the bills for payment of the cost of material submitted by the contractor. If this agreed amount is deducted and thereafter the contractor claims it back on the ground that the appellant was not entitled to deduct the same as it has failed to prove loss suffered by it, the said claim undoubtedly would be a "disputed claim". The arbitrators were required to decide by considering the facts and the law applicable, whether the deduction was justified or not. *That itself would indicate that the claim of the contractor was "disputed claim" and not "undisputed"*. The reason recorded by the arbitrators that as the goods were received and bills are not disputed, therefore, the claim for recovering the amount of bills cannot be held to be "disputed claim" is, on the face of it, unjust, unreasonable, unsustainable and patently illegal as well as against the expressed terms of the contract. As quoted above, clause 34.4 in terms provides that no interest would be payable on "disputed claim". It also provides that in which set of circumstances, interest amount would be paid in case of delay in payment of undisputed claim. In such case, the interest rate is also specified at 1% per month on such undisputed claim amount. Despite this clause, the Arbitral Tribunal came to the conclusion that it was undisputed claim and held that in law, the appellant was not entitled to

withhold these two payments from the invoice raised by the respondent and hence directed that the appellant was liable to pay interest on wrongful deductions at the rate of 12% p. a. from 1-4-1997 till the date of filing of the statement of claim and thereafter having regard to the commercial nature of the transaction at the rate of 18% p.a. *pendente lite* till payment.

73. It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the Arbitral Tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act.

Conclusions

74. In the result, it is held that:

(*A*) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(*i*) a party was under some incapacity, or

(*ii*) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(*i*)(*a*) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(*b*) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(*ii*) if the arbitral procedure was not in accordance with:

(*a*) the agreement of the parties, or

(*b*) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(*c*) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other

substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(*a*) fundamental policy of Indian law; or

(*b*) the interest of India; or

(*c*) justice or morality; or

(*d*) if it is patently illegal.

(4) It could be challenged:

(*a*) as provided under Section 13(5); and

(*b*) Section 16(6) of the Act.

(*B*)(1) The impugned award requires to be set aside mainly on the grounds:

(*i*) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(*ii*) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(*iii*) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(*iv*) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(*v*) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(*vi*) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(*vii*) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

75. For the reasons stated above, the impugned award directing the appellant to refund US $ 3,04,970.20 and Rs 15,75,559 with interest which were deducted for the breach of contract as per the agreement requires to be set aside and is hereby set aside. The appeal is allowed accordingly. There shall be no order as to costs.

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(2007) 4 Supreme Court Cases 697

(BEFORE TARUN CHATTERJEE AND D.K. JAIN, JJ.)

FOOD CORPORATION OF INDIA .. Appellant;

Versus

CHANDU CONSTRUCTION AND ANOTHER .. Respondents.

Civil Appeal No. 1874 of 2007†, decided on April 10, 2007

A. **Arbitration Act, 1940 — S. 30 — "Misconduct" by arbitrator — Scope — Ignoring specific terms or going beyond four corners of the contract — Impermissibility — Distinction with errors in construction of contract — Relevance of relief given in similar contracts, but concerning other parties — Held, where there is an express term in the contract arbitrator cannot find on construction of the contract an implied term inconsistent with such express term — Not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable — He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award — In present case, arbitrator having awarded excess payment for materials (certain sand used for filling up of the plinth under the floors) expressly covered by a specific term of the contract and which payment was thus included in the quoted rates, award of excess payment for the said material set aside — Clarified, respondent claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which was not the case — Fact that another contractor had been separately paid for the material was irrelevant — Respondent claimants' claim had to be adjudicated on the specific terms of their agreement and no other — Arbitration and Conciliation Act, 1996 — S. 34 — Jurisdiction**

B. **Contract — Construction of contract — Implied term(s) inconsistent with express term — Implication of, by court or arbitrator — Impermissibility**

Allowing the appeal, the Supreme Court

Held :

The word "misconduct" in Section 30 has neither been defined in the Act nor is it possible for the court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word "misconduct" in Section 30(*a*) of the Act does not necessarily only comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in an excessive award or unjust result. (Para 10)

The arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of

† Arising out of SLP (C) No. 3335 of 2006. From the Judgment and Order dated 14-10-2005 of the High Court of Judicature at Bombay in Appeals Nos. 861 and 862 of 2005

the award, falling within the ambit of legal misconduct which could be corrected by the court. However, it must be clarified that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. (Para 11)

Where there is an express term the arbitrator cannot find on construction of the contract, an implied term inconsistent with such express term. Not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award. (Paras 12 and 13)

An arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. (Para 15)

Union of India v. *Jain Associates*, (1994) 4 SCC 665; *Associated Engg. Co.* v. *Govt. of A.P.*, (1991) 4 SCC 93; *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*, (1999) 9 SCC 283; *Naihati Jute Mills Ltd.* v. *Khyaliram Jagannath*, AIR 1968 SC 522; *Continental Construction Co. Ltd.* v. *State of M.P.*, (1988) 3 SCC 82; *Bharat Coking Coal Ltd.* v. *Annapurna Construction*, (2003) 8 SCC 154, *followed*

Alopi Parshad & Sons Ltd. v. *Union of India*, AIR 1960 SC 588, *relied on*

From the extracted terms of the agreement between FCI and the claimants, it is manifest that the contract was to be executed in accordance with the CPWD specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. Filling up of the plinth with sand under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19-9-1989, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator for extra payment for supply of sand is contrary to the unambiguous terms of the contract. By awarding extra payment for supply of sand the arbitrator has outstepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract: manifestly ignoring the clear stipulation in the contract. By doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of Claim 9, on the face of it, is beyond his jurisdiction, is illegal and needs to be set aside. (Paras 19 and 20)

The arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the

claimants was low and another contractor had been separately paid for the material. The claimants' claim had to be adjudicated on the specific terms of their agreement with FCI and no other. (Para 19)

D-M/A/36084/C

Advocates who appeared in this case :
Ajit Pudussery, Advocate, for the Appellant;
V.N. Sharma, Arun Sharma, P.V. Yogeswaran and A.K. Sharma, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2003) 8 SCC 154, *Bharat Coking Coal Ltd.* v. *Annapurna Construction* 703*a*
2. (1999) 9 SCC 283, *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises* 702*d*
3. (1994) 4 SCC 665, *Union of India* v. *Jain Associates* 702*b*
4. (1991) 4 SCC 93, *Associated Engg. Co.* v. *Govt. of A.P.* 702*d*, 703*d*
5. (1988) 3 SCC 82, *Continental Construction Co. Ltd.* v. *State of M.P.* 702*f-g*
6. AIR 1968 SC 522, *Naihati Jute Mills Ltd.* v. *Khyaliram Jagannath* 702*f*
7. AIR 1960 SC 588, *Alopi Parshad & Sons Ltd.* v. *Union of India* 702*d-e*

The Judgment of the Court was delivered by

D.K. JAIN, J.— Leave granted.

2. Challenge in this appeal, by Food Corporation of India (for short "FCI"), is to the final judgment and order dated 14-10-2005 passed by the Division Bench of the High Court of Judicature at Bombay, affirming the judgment of the learned Single Judge in Arbitration Petition No. 334 of 2004. By the impugned order, the award of an amount of Rs 8,23,101 by the sole arbitrator against Claim 9 has been upheld.

3. A brief factual background giving rise to the appeal is as follows:

FCI undertook construction of godowns at Panvel, District Raigad and issued notice inviting tenders for construction of 50,000 MT capacity conventional godowns in 10 units along with ancillary work and services. Pursuant thereto, the respondents (hereinafter referred to as the claimants) submitted tender, which was accepted by FCI. A formal contract was executed between FCI and the claimants on 19-9-1984. As per the terms of the contract, the work was to be completed within 10 months from the 30th day of issue of the orders and the time was deemed to be of the essence of the contract.

4. As the claimants could not complete the work within the stipulated time, which was once extended, FCI issued a show-cause notice to them seeking to terminate the contract. Ultimately, the contract was terminated vide order dated 15-11-1987. The claimants invoked the arbitration agreement and requested FCI to appoint an arbitrator. Since there was no response from FCI, the claimants filed a suit in the High Court for appointment of an arbitrator. An arbitrator was appointed, who gave his award on 27-8-1998. As payment in terms of the award was not made, the claimants again moved the High Court. FCI, in turn, filed a petition in the High Court for setting aside of the award. With the consent of parties, the

award was set aside and the matter was remitted to the arbitrator for fresh adjudication.

5. In fresh proceedings before the arbitrator, the stand of the claimants, qua Claim 9 was that the rate quoted by them for filling the plinth under floors including watering, ramming, consolidation and dressing; in terms of Item 1.7 of the Schedule of rates was only for labour and did not cover "providing or supplying" sand for the said purpose and yet they were required to supply sand for filling. As such the claimants were entitled to be paid extra for supply of sand. Accordingly, they made a claim of Rs 8,23,101 for providing and supplying 5487.34 cubic metres of sand.

6. The claim was resisted by FCI on the ground that the scope of work, specifications and the item rates were governed by the terms of the contract and as per clause (2) of the agreement dated 19-9-1984, the claimants were to be paid the "respective amount for the work actually done by him at the 'schedule of rates' as contained in the appended Schedule and such other sums as may become payable to the contractor under the provisions of this contract". The contract clearly stipulated that the work was to be carried out as per specifications contained in Volumes I and II of CPWD Manual, para 2.9.4 whereof provided that the "rate" includes the cost of materials and labour. Therefore, the claimants were not entitled to any extra amount for supply of sand. The arbitrator gave his award on 31-12-2003 accepting the said claim. For reference, the relevant portion of the award is extracted below:

> "According to defence under the provision of 1967 CPWD specification Volumes I and II, the nature of the item includes sand also and not merely the labour charges, similarly the rate of sand-filling is for consolidated thickness or loose thickness or voids to any extent and this claim is denied in toto. Now here the dispute between the two parties is over the words supplying and providing and in respect of this item the particular words are missing whereas as observed earlier they were being found in respect of certain other items. According to the claimants since these words were missing in respect of this item of work, they took it that the material i.e. sand would be supplied and, therefore, they quoted only the labour rate. The tender of M/s Gupta and Co. as pointed out to me, shows that in respect of this item of work, these words providing and supplying were used. It is submitted that there can't be two different phrapavlogies (*sic* phraseologies) in respect of the same item and as observed earlier, nothing prevented FCI from using those words and not giving rise to any confusion. Comparative statement showing contents and details of schedule items based on tender working with PWD, Bombay which clearly provides for rates for quantity of work for schedule items. The claimants here are trying to establish that their quotations were based without including the cost of materials supplied. If we see the figures in respect of the items, we find substantial force in the say of the claimants that the rate quoted by them is so low that it could

not be in respect of price inclusive of cost of sand. If we see the wording of specification with contractor M/s Gupta & Co., we find additional words supplying and providing have been added under similar items of the schedule. Why these words were missing in case of the claimants is difficult to follow. The respondents contend that 1967 CPWD's specification in Volumes I and II covers the specifications not only for labour charges but also for providing and supplying of the materials required. It is very difficult to understand this defence, for if we look at the figures quoted in the tenders it would make it absolutely clear that the inclusion of cost of sand could not have to be in the mind of the contractor claimants. The figures are very low and I may be permitted to say that these figures do not cover the cost of sand. There is force in the say of the claimant that he did not vouch that he himself was to supply sand. Of course, I must say that there is no very satisfactory evidence about the quantity of sand used, its price and amount paid by the claimant to his suppliers but when the work was done FCI was bound to take upon it to make the payment though it may appear to be somewhat arbitrary. I allow this claim of Rs 8,23,101 (Rupees eight lakhs twenty-three thousand one hundred and one only)."

7. Being aggrieved, FCI filed objections against the award under Section 30 of the Arbitration Act, 1940 praying for setting aside of the award on Claim 9, but without any success. The learned Single Judge affirmed the view taken by the arbitrator that the rate quoted by the claimant did not include the cost of the material. FCI carried the matter in appeal before the Division Bench. Before the Division Bench, FCI also attempted to raise the issue of award of interest by the arbitrator, which was not permitted on the ground that the issue was neither taken up before the arbitrator nor was raised before the learned Single Judge. As noted above, the Division Bench has dismissed the appeal. Hence, the present appeal.

8. Learned counsel for the petitioner has submitted that the claim for supply of sand against Claim 9 was patently opposed to the terms of the contract between the parties. It is urged that the relevant clause of the contract is clear, unambiguous and admits of no such interpretation as has been given by the arbitrator. It is, thus, pleaded that the arbitrator has misconducted himself in awarding additional amount of Rs 8,23,101 in favour of the claimants, which part of the award deserves to be set aside.

9. On the other hand, learned counsel for the claimants submitted that it was within the domain of the arbitrator to construe the terms of contract in the light of the evidence placed on record by the claimants, particularly the terms of similar contracts entered into by FCI with the other contractors. It is asserted that the view taken by the arbitrator being plausible the High Court was justified in declining to interfere with the award.

10. While considering objections under Section 30 of the Arbitration Act, 1940 (for short "the Act"), the jurisdiction of the court to set aside an award is limited. One of the grounds stipulated in the section on which the court can

interfere with the award is when the arbitrator has "misconducted" himself or the proceedings. The word "misconduct" has neither been defined in the Act nor is it possible for the court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word "misconduct" in Section 30(*a*) of the Act does not necessarily (*sic* only) comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result. (*Union of India* v. *Jain Associates*[1])

11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see *Associated Engg. Co.* v. *Govt. of A.P.*[2] and *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*[3]).

12. In this context, a reference can usefully be made to the observations of this Court in *Alopi Parshad & Sons Ltd.* v. *Union of India*[4] wherein it was observed that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in *Naihati Jute Mills Ltd.* v. *Khyaliram Jagannath*[5] this Court had observed that where there is an express term, the court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13. In *Continental Construction Co. Ltd.* v. *State of M.P.*[6] it was emphasised that not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and

1 (1994) 4 SCC 665
2 (1991) 4 SCC 93
3 (1999) 9 SCC 283
4 AIR 1960 SC 588
5 AIR 1968 SC 522
6 (1988) 3 SCC 82

so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

14. In *Bharat Coking Coal Ltd.* v. *Annapurna Construction*[7] while inter alia, observing that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus: (SCC pp. 161-62, para 22)

> "22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action (also see *Associated Engg. Co.* v. *Govt. of A.P.*[2]).

16. Thus, the issue which arises for determination is whether in awarding Claim 9, the arbitrator has disregarded the agreement between the parties and in the process exceeded his jurisdiction and has, thus, committed legal misconduct.

17. For deciding the controversy, it would be necessary to refer to the relevant clauses of the contract, which read thus:

> "*1. General specifications*
>
> *1.1.* The civil, sanitary, water supply and road works shall be carried out as per Central Public Works Department specification of works at Delhi, 1967, Volumes I and II with correction slips up to date .... In the case of civil, sanitary, water supply and road works and electrical works should there be any difference between the Central Public Works Department specifications mentioned above and the specifications of schedule of quantities, the latter i.e. the specification of schedule of quantities, shall prevail. For items of work not covered in the CPWD specifications or where the CPWD specifications are silent on any particular point, the relevant specifications or code of practice of the Indian Standard Institution shall be followed.
>
> *1.2.* Should any clarification be needed regarding the specifications for any work the written instructions from the Engineer-in-charge shall be obtained."

7 (2003) 8 SCC 154

18. Para 2.9.4 of the CPWD specifications insofar as it is relevant for the present appeal, reads as follows:

"*2.9.4. Rate.*— It includes the cost of materials and labour involved in all the operations described above."

19. From the above extracted terms of the agreement between FCI and the claimants, it is manifest that the contract was to be executed in accordance with the CPWD specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. It is to be borne in mind that filling up of the plinth with sand under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with FCI and no other.

20. Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has outstepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of Claim 9, on the face of it, is beyond his jurisdiction; is illegal and needs to be set aside.

21. Consequently, the appeal is allowed and the impugned judgment of the High Court to the extent it pertains to Claim 9 is set aside. However, on the facts and circumstances of the case, there shall be no order as to costs.

applicable to the area included in the city may be continued as if they had been initiated under this Act;

(*d*)-(*g*) * * *"

12. The argument of Ms Rachna Gupta that the appellants are entitled to seek release of land in terms of the proviso to Section 17 of the 1973 Act is without merit and deserves to be rejected because that provision is attracted only in respect of land acquired under that Act and not for the schemes framed under the 1945 Act which were saved by Section 577 of the 1959 Act.

13. In view of the above, we hold that the High Court did not commit any error by declining the appellants' prayer for ordering release of the land which stood acquired more than 30 years ago and that too by ignoring the fact that a portion of the land covered by the scheme has been transferred to the Corporation, which had developed the same and allotted plots to eligible applicants.

14. We also agree with the High Court that after having accepted the amount of compensation, the appellants do not have the locus to seek a direction for release of the acquired land.

15. In the result, the appeals are dismissed. The interim order passed on 12-4-2001[1] and continued by subsequent orders stands automatically vacated.

(2011) 15 Supreme Court Cases 101

(BEFORE R.M. LODHA AND J.S. KHEHAR, JJ.)

SATYANARAYANA CONSTRUCTION COMPANY .. Appellant;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Civil Appeal No. 2012 of 2006, decided on October 12, 2011

A. **Contract and Specific Relief — Remedies/Relief — Restitutionary remedies — Recompense for benefit conferred — Quantum Meruit ("as much as is deserved") — Claim for additional amount over and above contractually agreed amount on ground of excess amount spent — Permissibility of — Principle of subsidiarity — Applicability of, in claiming restitutionary relief — Binding effect of terms of contract on parties — Once rate had been fixed in contract for a particular work, contractor is not entitled to claim additional amount merely because he had spent more for carrying out said work — Restitution — Contract Act, 1872 — S. 70 — Applicability (Paras 11 and 12)**

B. **Arbitration and Conciliation Act, 1996 — S. 34 — Jurisdiction of arbitrator — Limits to — Award in excess of jurisdiction — Arbitrator awarding higher rate than rate agreed in contract — Held, beyond his competency and authority — Arbitrator is not empowered to rewrite terms of contract and award contractor a higher rate for the work for which rate was already fixed in contract (Paras 11 and 12)**

1 *Kailash N. Dwivedi* v. *State of U.P.*, SLP (C) No. 12422 of 1999, order dated 12-4-2001 (SC)

Dismissing the appeal, the Supreme Court

Held :

As per the contract, the contractor was to be paid for cutting the earth and sectioning to profile, etc. @ Rs 110 per cubic metre. However, the arbitrator awarded the a rate of Rs 210 per cubic metre. There may be some merit in the contention that the contractor was required to spend a huge amount on the rock blasting work but once the rate had been fixed in the contract for a particular work, the contractor was not entitled to claim additional amount merely because he had to spend more for carrying out such work. The whole exercise undertaken by the arbitrator in determining the rate for the work at Serial No. 3 of Schedule A was beyond his competence and authority. It was not open to the arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The arbitrator having exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the award passed by the arbitrator with regard to Claim 4. Thus, the High Court did not commit any error in upsetting the award of the arbitrator with regard to Claim 4 in the statement of claim.

(Paras 11 and 12)

Union of India v. *Satyanarayana Construction Co.*, (2005) 3 An LT 460 : (2005) 2 Arb LR 496 (AP), *affirmed*

N-M-D/48978/SV

Chronological list of cases cited ***on page(s)***

1. (2005) 3 An LT 460 : (2005) 2 Arb LR 496 (AP), *Union of India* v. *Satyanarayana Construction Co.* 102*e*

ORDER

1. This is an appeal from the judgment passed by the Division Bench of the Andhra Pradesh High Court on 8-4-2005[1].

2. The appellant, M/s Satyanarayana Construction Co. (for short "the contractor") was awarded a contract for earthwork in formation and miscellaneous works from Ch. 24,150 m to Ch. 27,700 m between Dharur and Rukmapur Stations. The work was to be completed by the contractor by 21-5-1997 but it was extended from time to time and the last date for completion of the work, as per extended time, was 31-3-1998. According to the contractor, except for few minor works that remained to be verified, it completed the work by 31-3-1998 but the respondents did not pass the final bill.

3. For resolution of the disputes in relation to the above contract, the contractor sought appointment of an arbitrator but the arbitrator was not appointed by the respondents. The contractor, then, approached the Chief Justice of the Andhra Pradesh High Court by filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act"). After hearing the parties, the Chief Justice allowed the application

1 *Union of India* v. *Satyanarayana Construction Co.*, (2005) 3 An LT 460 : (2005) 2 Arb LR 496 (AP)

made by the contractor under Section 11 of the 1996 Act and appointed Justice Shri T.N.C. Rangarajan, retired Judge of the High Court, as an arbitrator.

4. The sole arbitrator entered upon the reference. The contractor submitted his statement of claim. The claim of the contractor was under diverse heads; the principal claim being Claim 4 for a sum of Rs 1,89,99,999 (Rupees one crore eighty-nine lakhs ninety-nine thousand nine hundred ninety-nine only) as additional remuneration relating to cutting the earth and sectioning to profile. The claim was contested by the respondents. They set up a plea that the contractor unduly delayed the execution of the work and was not entitled to any further claim.

5. Before the arbitrator, the parties relied upon the documentary evidence. No oral evidence was let in by any of the parties. The arbitrator, by his award dated 31-12-2000, awarded a total sum of Rs 95,00,000 (Rupees ninety-five lakhs only) in favour of the contractor payable by the respondents on or before 31-3-2001 failing which it was directed that the due amount shall carry compound interest @ 12% p.a. with quarterly rests until payment.

6. The respondents challenged the award by filing objections under Section 34 of the 1996 Act through a petition being OP No. 77 of 2001. The First Additional Chief Judge, City Civil Court, Secunderabad heard the parties and by his order dated 4-7-2002 dismissed the respondents' petition.

7. Not satisfied with the order of the First Additional Chief Judge, City Civil Court, Secunderabad, the respondents preferred an appeal under Section 37 of the 1996 Act before the Andhra Pradesh High Court. The Division Bench of the High Court, after hearing the parties, allowed the appeal, set aside the order of the First Additional Chief Judge, City Civil Court, Secunderabad passed on 4-7-2002 and modified the award dated 31-12-2000 passed by the arbitrator with regard to Claims 4, 6, 8 and 11.

8. Mr Anil Kumar Tandale, learned counsel for the contractor assailed the judgment of the High Court mainly with regard to Claim 4. He extensively referred to the reasons given by the arbitrator in awarding rate of Rs 210 per cubic metre for the work relating to "cutting the earth and sectioning to profile". Mr Tandale submitted that the arbitrator took into consideration the relevant aspects in awarding higher rate for that work than the rate agreed to between the parties under the contract. Mr Tandale further submitted that the High Court exceeded its jurisdiction in setting aside the well-reasoned award passed by the arbitrator.

9. Mr Harish Chandra, learned Senior Counsel for the respondents, on the other hand, justified the judgment of the High Court.

10. In Schedule A appended to the contract, rates of the items not covered by SSR 96 are provided. At Serial No. 3 of Schedule A, the rate and

amount of earthwork in cutting all types of soils is provided. It reads as follows:

Sl. No.	*Description*	*Quantity*	*Unit*	*Rate*	*Amount*
3	Earthwork in cutting in all types of soils including soft disintegrated rock and with boulders of any size or continuous rock with blasting as required at site including side drains trolley refuges catchwater drains, etc., including excavation, sectioning to profile, dressing of slopes surface and leading of cut spoil into spoil dumps or into embankment up to maximum lead of 150 m and all lifts and dressing slopes and surfaces of spoils dumps with all contractor's tools, plant and machinery and labour complete as directed by the engineer.	60,000	1 cu. m	110	66,00,000.00

11. Thus, as per the contract, the contractor was to be paid for cutting the earth and sectioning to profile, etc. @ Rs 110 per cubic metre. There may be some merit in the contention of Mr Tandale that the contractor was required to spend huge amount on the rock blasting work but, in our view, once the rate had been fixed in the contract for a particular work, the contractor was not entitled to claim additional amount merely because he had to spend more for carrying out such work. The whole exercise undertaken by the arbitrator in determining the rate for the work at Serial No. 3 of Schedule A was beyond his competence and authority. It was not open to the arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The arbitrator having exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the award passed by the arbitrator with regard to Claim 4.

12. We, thus, find that the High Court did not commit any error in upsetting the award of the arbitrator with regard to Claim 4 in the statement of claim.

13. Mr Tandale did not assail the judgment of the High Court with regard to other claims upset by the High Court, namely, Claims 8 and 11. With regard to Claim 6, the High Court has already directed the respondents to calculate the amount under this head at the time of settling the final bill and also directed the respondents to pay interest @ 12% p.a. on the due amount, if not paid. Obviously, in view of the directions given by the High Court in para 26 of its judgment, the respondents will have to calculate the amount as regards the contractor's Claim 6 at the time of settling the final bill. If the final bill has not been settled so far, we direct the respondents to settle the final bill expeditiously and, in any case, not later than eight weeks from the date of receipt of copy of this order. The respondents shall have to pay interest as directed by the High Court on the due amount, if not paid so far.

14. Consequently, appeal is dismissed with no order as to costs.

(2011) 15 Supreme Court Cases 105

(BEFORE H.S. BEDI AND CHANDRAMAULI KR. PRASAD, JJ.)

AMARCHAND TIWARI AND OTHERS .. Appellants;

Versus

STATE OF MADHYA PRADESH .. Respondent.

Criminal Appeal No. 1507 of 2008, decided on April 26, 2011

Criminal Trial — Sentence — Principles for sentencing — Sentence reduced — Sentence — Reduction of — A-4, the husband, sentenced to undergo three years' RI under S. 498-A IPC — He underwent two years and eight months of sentence — To meet ends of justice sentence of A-4 reduced to that already undergone — A-2 sentenced to undergo one year's RI — A-2 was a juvenile on date of FIR — She could not have been tried in a criminal court with other accused — Many years elapsed since prosecution started — Procedure of Juvenile Board not required to be resorted to — Trial against A-2 held to be vitiated — Conviction of A-2 set aside

J-M/49601/SR

ORDER

1. The appellants herein have been convicted under Section 498-A of the Penal Code, 1860 and whereas Appellants 1, 2 and 3 had been sentenced to undergo rigorous imprisonment for one year, Appellant 4, Vishnu Prasad, the husband, has been sentenced to undergo three years' rigorous imprisonment. It is the conceded position that Amarchand Tiwari and Gayatri Devi, A-1 and A-3, have already undergone the one year's sentence whereas A-4 has undergone two years and eight months of the sentence. We, accordingly, feel that the ends of justice would be met if the sentence of Vishnu Prasad is reduced to that already undergone by him.