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17th September, 2019

REASONS LEAD TO CONCLUSION

1. Mc Dermott International Inc. -Vs- Burn Standard Co. Ltd., (2006) 11 SCC 181, Relevant Para 56, 57

Statement of Reasons is a mandatory requirement unless dispensed by the parties or statutory provision.

A Copy of the judgment attached hereto at **page no. 2 to 59.**

2. Saroj Bala -Vs- Rajive Stock Brokers & Anr., 2005 (81) DRJ 143, Relevant Para 6, 7

The parties to a lis whether before a court or domestic forum chosen by the parties like the arbitrator, are entitled to know the reasons that led to the success or failure of a claim before it.

A Copy of the judgment attached hereto at **page no. 60 to 63.**

3. Punjab State Electricity Board -Vs- National Small Industries Corporation, 2014 SCC Online Cal 5444, Relevant Para 3, 4

Reasons are indispensable in any form of adjudication in a constitutional democracy governed by rule of law.

A Copy of the judgment attached hereto at **page no. 64 to 65.**

4. Santokh Singh -Vs- Bhai Siri Ram Singh, AIR 1963 P&H 95, Relevant Para 15, 16

Conclusion should not be based on a pure question of fact, the tribunal has to examine the legal principles that lead to the conclusion.

A Copy of the judgment attached hereto at **page no. 66 to 73.**

(2006) 11 Supreme Court Cases 181

(BEFORE B.P. SINGH AND S.B. SINHA, JJ.)

McDERMOTT INTERNATIONAL INC. .. Appellant;

Versus

BURN STANDARD CO. LTD. AND OTHERS .. Respondents.

IAs Nos. 2-3 in Civil Appeal No. 4492 of 1998†, decided on May 12, 2006

A. **Arbitration and Conciliation Act, 1996 — Ss. 34 and 5 — Role of court — Grounds for interference under S. 34, enumerated — Position vis-à-vis Ss. 30 and 33, Arbitration Act, 1940, compared — Non-interference with pure questions of fact and appreciation of evidence — Held, the 1996 Act makes provision for the supervisory role of courts and for the review of the arbitral award only to ensure fairness — This supervisory role is to be kept at a minimum level and interference is envisaged only in cases of fraud or bias, violation of natural justice, etc. — Interference on ground of "patent illegality" is permissible only if the same goes to the root of the matter, and a public policy violation should be so unfair and unreasonable as to shock the conscience of the court — What would constitute "public policy" is a matter dependant upon the nature of the transaction and the statute — Relevance of pleadings and particulars on record in this regard, explained**

B. **Arbitration and Conciliation Act, 1996 — S. 34 — Relief that may be granted — Held, court cannot correct errors of arbitrator(s) — It can only quash the award leaving the parties free to begin the arbitration again if it is so desired**

Four contracts were awarded by ONGC in favour of Burn Standard Company Limited (for short "BSCL") for fabrication, transportation and installation of six platforms and associated pipelines, to be installed in ONGC's Bombay High Sea. The said contracts contained arbitration agreements.

BSCL and McDermott International Inc. ("MII") entered into a sub-contractual agreement with regard to the fabrication and installation of offshore platforms, on a project-by-project basis. BSCL retained the job of fabrication of the ED and EE decks, six helidecks and procurement of materials for the overall project other than pipeline materials and some process equipment which was issued by ONGC, sub-contracting the remaining work to MII. The said agreement contained a separate arbitration clause between the parties.

In terms of a letter of intent dated 14-9-1984 a contract was entered into by and between BSCL and ONGC. A part of the said contract work was assigned to MII on or about 1-1-1986. The work under the said sub-contract agreement was to be completed within 24 months but in all respects it was completed in early 1989.

Disputes and differences having arisen between the parties, MII invoked the arbitration clause. BSCL having challenged the various partial/interim awards and final award of the arbitrator under Section 34, Arbitration and Conciliation Act, 1996 ("1996 Act") before the Supreme Court (as per the order of the Supreme Court appointing the arbitrator), the parties were before the Supreme Court.

† From the Judgment and Order dated 8-5-1998 of the High Court of Calcutta in AP No. 237 of 1997 : **(1999) 1 ICC 656**

Disposing of the application in the terms below, the Supreme Court

Held :

In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-à-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression "error of law….". The same was added by judicial interpretation. (Paras 46 and 48)

While interpreting Section 30 of the 1940 Act, a question had been raised before the courts as to whether the principle of law applied by the arbitrator was (*a*) erroneous or otherwise, or (*b*) wrong principle was applied. If, however, no dispute existed as on the date of invocation, the question could not have been gone into by the arbitrator. (Para 48)

The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. (Para 52)

The arbitral award can be set aside if it is contrary to (*a*) fundamental policy of Indian law; (*b*) the interests of India; (*c*) justice or morality; or (*d*) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act. (Paras 58 and 59)

What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (Para 60)

ONGC Ltd. v. *Saw Pipes Ltd.*, (2003) 5 SCC 705, *followed*

State of Rajasthan v. *Basant Nahata*, (2005) 12 SCC 77, *relied on*

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

Central Inland Water Transport Corpn. Ltd. v. *Brojo Nath Ganguly*, (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103, *referred to*

O.P. Malhotra: *The Law and Practice of Arbitration and Conciliation*, 2nd Edn., p. 1174, *referred to*

As regards certain contentions raised challenging the arbitral award, in view of the fact that the same relate to pure questions of fact and appreciation of evidence it is not necessary to advert to the said contentions in the present case. (Para 160)

C. **Arbitration — Jurisdiction of Arbitrator — Scope — Construction of contract agreement — Jurisdiction in respect of — Relevance of scope and ambit of arbitration agreement — Held, interpretation of a contract is a matter for arbitrator to determine, even if it gives rise to determination of a question of law — Factors and materials to be considered in construction/interpretation of contract, enumerated — Arbitration and Conciliation Act, 1996, Ss. 34 and 16**

D. **Contract — Construction/interpretation of contract — Relevant factors and materials for, enumerated**

The terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. Correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. Once it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award. (Paras 112 and 113)

State of U.P. v. *Allied Constructions*, (2003) 7 SCC 396; *U.P. SEB* v. *Searsole Chemicals Ltd.*, (2001) 3 SCC 397; *Ispat Engg. & Foundry Works* v. *Steel Authority of India Ltd.*, (2001) 6 SCC 347; *Pure Helium India (P) Ltd.* v. *ONGC*, (2003) 8 SCC 593; *D.D. Sharma* v. *Union of India*, (2004) 5 SCC 325; *Chairman and MD, NTPC Ltd.* v. *Reshmi Constructions, Builders & Contractors*, (2004) 2 SCC 663; *Union of India* v. *Banwari Lal & Sons (P) Ltd.*, (2004) 5 SCC 304; *Continental Construction Ltd.* v. *State of U.P.*, (2003) 8 SCC 4, *followed*

Sudarsan Trading Co. v. *Govt. of Kerala*, (1989) 2 SCC 38, *cited*

E. **Arbitration and Conciliation Act, 1996 — S. 31 — Reasons in support of award — Mandatoriness of, unless arbitration agreement provides otherwise, emphasised (Paras 55 and 57)**

Another important change which has been made by reason of the provisions of the 1996 Act is that unlike the 1940 Act, the arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by a reasoned award. The mandatoriness of giving reasons unless the arbitration agreement provides otherwise has been emphasised by the Supreme Court in *Konkan Rly. case*. (Paras 55 and 57)

Konkan Rly. Corpn. Ltd. v. *Mehul Construction Co.*, (2000) 7 SCC 201, *relied on*

Bachawat's Law of Arbitration and Conciliation, 4th Edn., pp. 855-56, *referred to*

F. **Arbitration and Conciliation Act, 1996 — Ss. 31 and 2(c) — Partial and/or additional arbitral awards — Permissibility, nature and scope of — Comparison with "interim award" — Arbitrator making final directions with respect to certain claims and deferring certain claims to a later stage, and disposing of the latter by an additional award thereafter — Permissibility of — Held, some arbitrators instead of using expression "interim award" use "partial award" — By reason thereof the nature and character of the award is not changed — An interim award in terms of S. 31(6) is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim**

stage — A partial award is not akin to a preliminary decree — In present case, additional award made by the arbitrator is not vitiated in law

G. **Arbitration and Conciliation Act, 1996 — Ss. 34, 31 and 2(c) — Awards that may be challenged under S. 34 — Held, both partial/interim award and the final award are subject-matter of challenge under S. 34**

The 1996 Act does not use the expression "partial award". It uses "interim award" or "final award". An award has been defined under Section 2(*c*) to include an interim award. Section 31(6) contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage. (Para 68)

As would appear from the partial award of the arbitrator in the present case, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the arbitrator to advert thereto at a later stage. (Para 69)

A partial award is not akin to a preliminary decree. On the other hand it is final in all respects with regard to disputes referred to the arbitrator which are subject-matters of such award. (Para 70)

Some arbitrators instead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of an award is not changed. As, for example in arbitral proceedings conducted under the Rules of Arbitration of the International Chamber of Commerce, the expression "partial award" is generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. (Para 70)

Further, both the partial award and the final award are subject-matter of challenge under Section 34 of the Act. (Para 70)

The additional award given in the present case is not vitiated in law. (Para 71)

H. **Contract Act, 1872 — S. 55 — Compensation for delay in performance — Entitlement to — Need for service of notice on promisor in respect of such compensation, if any — On facts, though the contract had a time-limit for performance, held, that did not imply that the promisee should have repudiated the contract as soon as the time-limit had expired — The contract not being one where time was of the essence, it was not voidable for delay, but compensation was payable, and for the same no notice was required to be served on the promisor**

I. **Contract Act, 1872 — S. 55 — Time whether of the essence — Determination of — Held, the same is a question of the intention of the parties, to be gathered from the terms of the contract**

J. **Contract Act, 1872 — S. 55 — Time whether of the essence — Construction contracts — General rule — Held, in construction contracts generally time is not of the essence unless special features exist therefor**

Question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties, to be gathered from the terms of the contract. (Para 88)

Hind Construction Contractors v. *State of Maharashtra*, (1979) 2 SCC 70, *followed*
Halsbury's Laws of England, 4th Edn., Vol. 4, para 1179, *referred to*
Lamprell v. *Billericay Union*, (1849) 3 Exch 283 : 18 LJ Ex 282; *Webb* v. *Hughes*, (1870) LR 10 Eq 281 : 39 LJ Ch 606 : 18 WR 749; *Charles Rickards Ltd.* v. *Oppenheim*, (1950) 1 KB 616 : (1950) 1 All ER 420 (CA), *cited*

At that time when the contract was entered into it was supposed to be performed by 30-12-1985. A stipulation for commissioning of ED and EE platforms within a time-frame has also been mentioned i.e. February 1986. MII served a notice on 10-4-1998 invoking the arbitration agreement. The same would not mean that it should have repudiated the contract as soon as the 20 months' schedule fixed by the contract expired. Delay and disruptions might have occurred for various reasons. In the instant case, therefore, the matter would be covered by the second part of Section 55 of the Contract Act, 1872 providing that where the parties did not intend time to be of the essence of the contract, the contract was not voidable, but the promisee was entitled to compensation for loss occasioned. For the aforementioned purpose, no notice was required to be served. In any event, the contract provided for extension of time. The parties, furthermore, agreed for payment of liquidated damages. Moreover, the contract itself contains provisions for extension of its terms and payment of damages in case of delay in execution of the contract. (Paras 72 to 75 and 84)

Arosan Enterprises Ltd. v. *Union of India*, (1999) 9 SCC 449, *cited*

MII states that it had never raised a contention that time was of the essence of the contract, but the claim arises in view of the delay caused in completion of the contract for a period of 34 months and consequent escalation of costs. The price payable in terms of the sub-contract did not adequately cover the increased costs incurred by MII. On a plain reading of the provisions of Section 55 of the Contract Act, 1872 it is evident that as the parties did not intend that time was to be of the essence of the contract on the expiry whereof the contract became voidable at the instance of one of the parties, but by reason thereof the parties shall never be deprived of damages. BSCL had never pleaded before the arbitrator that the time was of the essence of the contract. In construction contracts generally time is not of the essence of the contract unless special features exist therefor. No such special features, in the instant case, have been shown to have existed. (Paras 85 and 86)

K. **Arbitration and Conciliation Act, 1996 — S. 16 — Jurisdiction of arbitrator — Challenge to — Nature of and when to be raised — Held, said question is to be raised during arbitration proceedings or soon after initiation thereof, and is required to be determined as a preliminary ground (Para 51)**

L. **Arbitration and Conciliation Act, 1996 — Ss. 16, 34 and 37 — Arbitrator's ruling on his jurisdiction — Remedies available against — Held, decision of arbitrator on his jurisdiction would be subject-matter of challenge under S. 34, and if he opined that he had no jurisdiction, an appeal thereagainst is provided for under S. 37 (Para 51)**

Primetrade AG v. *Ythan Ltd.*, (2006) 1 All ER 367, *referred to*

M. **Arbitration and Conciliation Act, 1996 — Ss. 34, 16 and 23 — Scope of arbitration — Disputes included — Claims made prior to invocation of arbitration — Inclusion of fresh disputes to enlarge scope of reference — Permissible mode for — Held, a claim for damages made prior to invocation**

of arbitration, becomes a dispute within meaning of the 1996 — Furthermore, scope of reference is enlarged when parties file their statements putting forward claims not covered by the original reference

In the present case the claim for damages had been made prior to invocation of arbitration. Once such a claim was made prior to invocation, it became a dispute within the meaning of the provisions of the 1996 Act. The same claim was specifically referred to arbitration by MII in terms of its notice dated 10-4-1989. In fact BSCL never raised any plea before the arbitrator that the said claim was arbitrary or beyond its authority. Such an objection was required to be raised by BSCL before the arbitrator in terms of Section 16 of the 1996 Act. The Supreme Court even prior to the enactment of a provision like Section 16 of the 1996 Act has clearly held that it is open to the parties to enlarge the scope of reference by inclusion of fresh disputes and they must be held to have done so when they file their statements putting forward claims not covered by the original reference. (Paras 99 and 101)

Waverly Jute Mills Co. Ltd. v. *Raymon & Co. (India) (P) Ltd.*, (1963) 3 SCR 209 : AIR 1963 SC 90; *Dharma Prathishthanam* v. *Madhok Construction (P) Ltd.*, (2005) 9 SCC 686, *relied on*

N. **Arbitration and Conciliation Act, 1996 — Ss. 34, 16 and 23 — Scope of arbitration — "Disputes" that may be considered by arbitrator — Necessity of denial of claims for raising of "disputes" — Held, it is not in every case that a claim must be followed by a denial — If a matter is referred to any arbitrator within a reasonable time, party invoking arbitration may proceed on the basis that the other party has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator (Paras 118 and 117)**

Major (Retd.) Inder Singh Rekhi v. *Delhi Development Authority*, (1988) 2 SCC 338, *limited*

O. **Contract Act, 1872 — S. 37 — Contractual claim — Basis for — Need for invoicing — Uninvoiced contractual claims if permissible — Held, uninvoiced claims can be the subject-matter of a dispute — A claim can also be made through correspondence or in meetings**

P. **Contract Act, 1872 — S. 73 — Claim for damages — Basis for — Need for invoice, if any — Held, for raising a claim based on breach of contract, no invoice is required to be drawn — Hence in present case, the claim for damages in respect of structural material procured by appellant on behalf of respondent, being based on correspondence between the parties, was rightly considered by the arbitrator**

Q. **Contract Act, 1872 — S. 73 — Claim for overhead costs/additional management costs which resulted in decrease in profits — Nature of — Held, is a claim for damages**

An invoice is drawn only in respect of a claim made in terms of the contract. For raising a claim based on breach of contract, no invoice is required to be drawn. A claim for overhead costs which had resulted in decrease in profit or additional management costs, is a claim for damages. (Paras 98 and 97)

In any case uninvoiced claims can be the subject-matter of a dispute. It is not correct to contend that the invoice is the only base whereby and whereunder a claim can be made. There is no legal warrant for the said proposition. A claim can also be made through correspondence or in meetings. Hence, certain claims

were incorrectly rejected by the arbitration in the present case only on the ground that no invoice had been raised and consequently no difference or dispute had arisen by and between the parties at the time when the reference to arbitration was made. (Paras 89, 96 and 92)

The claim as regards procurement of structural material related to damages. According to MII, the said claim did not strictly relate to a claim under the contract. BSCL was required to procure the steel and as it was not in a position to do so, MII had agreed to procure steel on its behalf, provided it agreed to cover MII's cost for accelerated procurement, material priced premiums, order fixing costs and other incidental charges. Such a claim was the subject-matter of correspondence which passed between the parties. Receipt of such letters from MII is not denied or disputed by BSCL. The right reserved by MII to claim such additional costs towards procurement of the materials on behalf of BSCL was not denied or disputed and the same is explicitly provided for in the relevant clause of the contract. Only pursuant to or in furtherance of the said correspondence, had procurement on the said basis been undertaken by MII and acceptance of BSCL in this behalf was presumed. The arbitrator correctly proceeded on such presumption. (Paras 93 to 95)

R. **Contract Act, 1872 — S. 73 — Compensation/Damages — Claim for — Need for quantification when claiming the same — Held, there is no such need — Quantification of a claim is merely a matter of proof — Practice and Procedure — Tort Law — Civil Procedure Code, 1908 — Or. 7 R. 7 (Para 100)**

S. **Arbitration and Conciliation Act, 1996 — Ss. 34 and 16 — Computation of damages/compensation — Method of measurement not specified in contract — Modes permissible — Formulae that may be used — Jurisdiction of arbitrator — Held, method used for computation will depend on facts and circumstances of each case — Different formulae can be applied in different circumstances, and which formula is to be applied would eminently fall within the domain of the arbitrator — Efficacy of various formulae (Emden, Hudson, Eichleay) in various contexts, considered — In present case, arbitrator having considered many formulae, but having applied the Emden Formula and having insisted that the sufferance of actual damages be proved, cannot be said to have committed an error warranting interference by the court — Contract Act, 1872 — Ss. 73 and 55**

T. **Contract Act, 1872 — S. 73 — Computation of damages — Overhead expenses — Quantification of loss suffered on account of increase in — Method of measurement not specified in contract — Appropriate formula to be used — Relative merits of Emden, Hudson and Eichleay formulae, considered**

U. **Contract Act, 1872 — Ss. 73 and 37 — Quantification of damages/compensation — Scope — Court must consider only strict legal obligations and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do**

Sections 55 and 73 of the Contract Act, 1872 do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. The method used for computation of damages will depend upon the facts and circumstances of each case. In the assessment of

damages, the court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. (Paras 109 and 102)

There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. Different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator. The arbitrator quantified the claim by taking recourse to the Emden Formula. The arbitrator also referred to other formulae, but opined that the Emden Formula is a widely accepted one. If the arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by the Supreme Court. (Paras 109, 110, 103, 106 and 107)

M.N. Gangappa v. *Atmakur Nagabhushanam Setty & Co.*, (1973) 3 SCC 406, *followed*

Lavarack v. *Woods of Colchester Ltd.*, (1967) 1 QB 278 : (1966) 3 All ER 683 : (1966) 3 WLR 706 (CA), *approved*

A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Contract Act, 1872. (Para 115)

The person concerned who computed the loss for MII indisputably at one point of time or the other was associated with MII. He applied the Emden Formula while calculating the amount of damages having regard to the books of accounts and other documents maintained by MII. The arbitrator did insist that sufferance of actual damages must be proved by bringing on record books of accounts and other relevant documents. (Para 108)

Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor. (Para 104)

Using the Emden Formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organisation as a whole by the total turnover. This formula has the advantage of using the contractor's actual head office overhead and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases. (Para 104)

The Eichleay Formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the

same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses. (Para 104)

Norwest Holst Construction Ltd. v. *Coop. Wholesale Society Ltd.*, [1998] EWHC Technology 339; *Beechwood Development Co. (Scotland) Ltd.* v. *Mitchell*, (2001) CILL 1727; *Harvey Shopfitters Ltd.* v. *Adi Ltd.*, (2004) 2 All ER 982 : [2003] EWCA Civ 1757; *Nicon Inc.* v. *United States*, (USCA Fed Cir), 331 F. 3d 878 (Fed. Cir. 2003); *Gladwynne Construction Co.* v. *Mayor and City Council of Baltimore*, 807 A. 2d 1141 (2002) : 147 Md. App. 149; *Charles G. William Construction Inc.* v. *White*, 271 F 3d 1055 (Fed. Cir. 2001), *referred to*

Hudson's Building and Engineering Contracts, *referred to*

V. Contract Act, 1872 — S. 37 — Tripartite agreement — Terms of sub-contract — Importation of terms contained in head contract into the sub-contract — Scope — Effect of terms of head contract beyond that explicitly incorporated into sub-contract — Limitation clause in sub-contract to the effect that in case of inconsistency sub-contract to prevail — Effect of

W. Contract Act, 1872 — S. 73 — Tripartite agreement — Exclusion of consequential damages between head contractors — Effect on sub-contract entered into by one of the head contractors — Held, such an exclusion clause cannot be extended to obligations assumed by the head contractor towards its sub-contractor — In any case, on facts, the damages in question claimed by the appellant sub-contractor, MII were not consequential damages, but direct losses occasioned by breaches by the respondent head contractor, BSCL

Article 3.1 of the sub-contract (set out in para 121 herein) is unidirectional and only provides that MII will owe all the obligations to and shall have benefit of all rights, remedies and redresses against BSCL under the sub-contract that BSCL owed to ONGC under main contract. It does not provide that BSCL would be bound or have the same benefits against MII in the same way. Therefore by reason of Article 3.1 of the sub-contract the main contract between ONGC and BSCL would apply to the relevant sub-contract work and MII was enjoined with a duty towards BSCL to fulfil its obligations and responsibilities. But, thereby, BSCL cannot absolve itself from its liability so far as breach of the terms and conditions of the sub-contract is concerned. By reason of Article 3.1, the contract by and between ONGC and BSCL has not been subsumed in the sub-contract so as to absolve BSCL from its own contractual liability for breach of contract or otherwise. (Para 122)

In terms of clause 37 of the main contract between ONGC and BSCL [set out in para 116 herein] neither of the parties are liable to the other for any consequential damages. The claim for damages raised by MII cannot be said to be consequential damages. The claim relates to direct losses purported to have been occasioned by the failure to perform the contractual duty on the part of BSCL and to honour the time-bound commitments. Such a loss, according to MII, occurred on account of increased overhead cost and decreased profit and additional management costs by reason of BSCL's delays and disruptions. It is only in that view of the matter that the Emden Formula was taken recourse to. Furthermore, clause 37 of the main contract was a matter of an agreement by and between ONGC and BSCL. In law, it could not have been extended to the

obligations assumed by BSCL towards MII in terms of the contract entered into by and between the said parties. So far as ONGC is concerned, it cannot be said to have any role to play in the event of breach of obligation on the part of BSCL towards its sub-contractor. (Para 120)

Bharat Coking Coal Ltd. v. *L.K. Ahuja*, (2004) 5 SCC 109; *Sunley (B) & Co. Ltd.* v. *Cunard White Star Ltd.*, (1940) 1 KB 740 : (1940) 2 All ER 97 (CA), *distinguished*

X. Arbitration and Conciliation Act, 1996 — Ss. 34 and 16 — Method of measurement not specified in contract — Jurisdiction of arbitrator — Fabrication charges for certain parts of offshore oil rigs — Use of AISC Code though not provided for in contract for estimation of — Propriety — The AISC Code being an industry standard, the contract being silent as to method of measurement, the head contractor having used the same in other contracts, held, by adopting the AISC Code arbitrator did not act contrary to terms of the contract — Contract Act, 1872 — S. 73 (Paras 123 to 130)

Y. Arbitration and Conciliation Act, 1996 — Ss. 34 and 16 — Claims in respect of actual work done, but not specified (explicitly) in contract — Tenability — Appreciation of evidence by arbitrator — Interference when justified — Appellant sub-contractor claiming substantial fabrication charges in refurbishment of certain buoyancy tanks and fabrication of tie-downs and sea-fastening relating to construction of offshore oil rigs — Respondent claiming that these heads of fabrication not being provided for in the contract, claims in respect thereof were not allowable — Arbitrator considering evidence that the fabrication work was actually done, and the refurbishment and fabrication done was necessary for, and in fact a part of the fabrication work specified in the contract, and also noting admissions of respondent in this regard — These matters being in the realm of appreciation of evidence and fact, held, no interference is called for as findings arrived at by arbitrator cannot be said to be perverse (Paras 131 to 136)

Z. Contract Act, 1872 — Ss. 62 and 8 — Novation/variation in contract — Acceptance by silence — Inference of — Conduct signifying acceptance — Compliance with changed/novated term of contract without demur — Tripartite agreement consisting of head, intermediate and sub-contractor — On basis of stance of head contractor, intermediate contractor varying term in question — Sub-contractor complying with varied term without demur — Irrelevance of intermediate contractor having demurred in turn (unsuccessfully) before head contractor — Contract — Tripartite agreement

MII had substituted heavier material, as material conforming to ONGC specification was not available readily in the market. The matter was referred to EIL. Use of material was found to be technically acceptable to EIL to which ONGC agreed. ONGC, however, made it clear that it would not make payment for the substituted material. BSCL immediately by a telex informed the same to MII. Clause 5 of the contract categorically states that MII was to procure the material which was to be reimbursed by BSCL. The extra amount incurred by MII for procuring materials having extra thickness, therefore, was not payable. To the aforementioned extent, there has been a novation of contract. MII had never asserted, despite the forwarding of the contention of ONGC, that it would not comply therewith. It, thus, accepted in sub silentio. It, thus, must be held to have accepted that no extra amount shall be payable. (Paras 146 and 151)

The involvement of ONGC was necessary and if it is the accepted case of the parties that ONGC would not entertain any claim of BSCL in this behalf, a fortiori having regard to the tripartite agreement, the arbitrator could have no jurisdiction to determine the claim in favour of MII only because at one point of time BSCL had raised its own claim with ONGC. Any reduction of the claim of BSCL by ONGC had a direct nexus with the claim of MII. It was, therefore, not a case where ONGC was not involved in the matter. The exchange of letters categorically proves that MII had accepted that it would not be entitled to any extra amount in that behalf. MII by necessary implication accepted the said contention. The principle of acceptance sub silentio shall also be attracted in the instant case. MII was, therefore, not entitled to raise a claim to the extent of fabrication on account of the increased charges for substitution of material. (Para 152)

[**Ed.**: *See also* (1981) 1 SCC 80 and (1985) 2 SCC 9.]

ZA. **Contract Act, 1872 — Ss. 73, 37 and 56 — Consequences of breaches of contract/delay in performance — Effect on working out of contract — Foreign exchange rate frozen as per a certain date — Party liable to make payments as per the said clause making delays and also liable for other breaches — Effect on applicability of the forex clause**

ZB. **Contract Act, 1872 — Ss. 56 and 55 — Price fixation clause (foreign exchange rate fixation clause) — Effect of delay on part of party liable to make payments for work done by the other — Relevance of allocation of risk envisaged in the contract in respect of the price concerned (price of foreign exchange)**

It is one thing to say that having regard to the nature of breach on the part of BSCL, MII would be entitled to claim damages, but it is another thing to say that by reason thereof it would be entitled to full payment without deduction relating to the risk of conversion of Indian rupees to US dollars. (Para 141)

The arbitrator held that MII would be entitled to receive the entire amount as BSCL, despite receipt of payment from ONGC, did not pay the amount to MII. For the purpose of applicability of the exchange rates, the same is irrelevant. The award was required to be made in terms of the contract whereby and whereunder the foreign exchange rate was frozen as was applicable on 9-8-1984. The parties were bound by the said terms of contract. It may be noticed that the sub-contract was entered into on 1-1-1986. The execution of the contract had started much earlier i.e. much before the date of entering into the contract. The purpose for which the rupee-US dollar conversion rate has been frozen as on 9-8-1984 must be viewed from the angle that thereby the parties thought that loss or gain towards the exchange rates would be on account of MII. (Para 143)

There might be some delay on the part of BSCL to make payments but to hold that the exchange rate clause shall cease to have any application only because of the breaches on the part of BSCL, cannot be accepted. It cannot be accepted that the exchange variation provision does not relate to the payments in respect of Claims 1, 2 and 3. The objection raised by BSCL to the said extent is accepted. (Paras 144 and 145)

ZC. **Arbitration and Conciliation Act, 1996 — S. 31 — Power of arbitrator to award interest, pre-award, pendente lite and post-award — Scope, and manner of exercise of — Factors to be considered, laid down — Reduction of statutory rate of 18% by court — When warranted — Exercise of jurisdiction by Supreme Court under Art. 142**

(Paras 154 to 156 and 159)

Pure Helium India (P) Ltd. v. *ONGC*, (2003) 8 SCC 593; *Mukand Ltd.* v. *Hindustan Petroleum Corpn. Ltd.*, (2006) 9 SCC 383 : (2006) 4 Scale 453, *followed*

D-M/ATZ/34310/S

Advocates who appeared in this case :

Dipankar Gupta, Senior Advocate (Anil Bhatnagar, O.P. Khaitan and Ms Bharti Badesra, for O.P. Khaitan & Co., Advocates, with him) for the Appellant;

Jayanto Mitra, Debal Banerjee, Senior Advocates (Pallav Sisodia, Rudgaman Bhattacharya and Ms Shipra Ghose, Advocates, with them) for the Respondents.

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The Judgment of the Court was delivered by

S.B. SINHA, J.—

Introduction

1. Oil was discovered in the Bombay High Region in 1974 whereupon a plan of rapid development of offshore oil and gas production was embarked upon by the Government of India through the Oil and Natural Gas Commission (ONGC). With a view to achieve exploration of production programme, ONGC appointed contractors to fulfil substantial portions of its offshore construction requirements. Burn Standard Company Limited (for short "BSCL") was interested in the second stage of platform construction of ONGC i.e. structural and progress fabrication and material procurement. Four contracts were thereafter awarded in favour of BSCL for fabrication, transportation and installation of six platforms bearing Nos. ED, EE, WI-8, WI-9, WI-10 and N-3 and associated pipelines. They were to be installed in ONGC's Bombay High Sea.

Contract

2. The said contracts covered:

(*i*) Material procurement and fabrication of the ED and EE jackets, piles and decks.

(*ii*) Transportation and installation of the ED and EE jackets, piles and decks.

(*iii*) Material procurement and fabrication of the WI-8, WI-9, WI-10 and N-3 jackets, piles, temporary decks and main decks (the "Four Platform Fabrication Main Contract"), and

(*iv*) Transportation and installation of the WI-8, WI-9, WI-10 and N-3 jackets, piles, temporary decks and decks, and installation of four pipelines and eight risers (the "Four Platform Installation Main Contract").

The said contracts contained arbitration agreements.

3. BSCL and McDermott International Inc. (for short "MII") entered into technical collaboration agreement on 25-9-1984 in terms whereof the latter agreed to transfer technology to the former with regard to design, construction and operation of a fabrication yard. The said agreement contains a separate arbitration clause between the parties.

4. However, with regard to the fabrication and installation of offshore platforms, BSCL decided to give a sub-contract of the work to MII on a project-by-project basis. BSCL while retained the job of fabrication of the

ED and EE decks, six helidecks and procurement of materials for the overall project other than pipeline materials and some process equipment which was issued by ONGC, sub-contracted the remaining work.

5. In terms of a letter of intent dated 14-9-1984 a contract was entered into by and between BSCL and ONGC for fabrication and installation of offshore platforms ED, EE, WI-8, WI-9, WI-10 and N-3 and laying of WI-8 to WI-9, WI-9 to WI-10, WI-9 to WI-S and N-3 to NO pipelines and 8 associated risers as well as WI-7 to WI-8, WI-9 to SD, WI-10 to SV, EB to SC1, EC to SHP, ED to SHP, EE to SHP pipelines and 11 associated risers. A part of the said contract work was assigned to MII in respect of fabrication, transportation and installation of structures, modules, platforms and pipeline components on or about 1-1-1986. The work under the said agreement was to be completed within 24 months but in all respects it was completed in early 1989.

Terms of the contract

6. The relevant covenants between the parties contained in the said agreement are as under:

"*Article 2*

MII shall, unless inconsistent with the provisions of this sub-contract, perform, fulfil and observe all the obligations, covenants and agreements required on the part of BSCL to be performed, fulfilled and observed in terms of the main contracts to the extent these obligations, covenants and agreements relate to the sub-contract work including such obligations, agreements and covenants as may in future be added, modified or provided in the main contracts between the buyer and BSCL with concurrence of MII to the extent thereof. These obligations, covenants and agreements, as have been agreed to be performed, fulfilled and observed by MII shall include the performance of the sub-contract work in the manner and to the specifications as provided in the respective main contracts.

Article 3

3.1. MII shall be bound to BSCL by the terms of this sub-contract agreement and to the extent that the provisions of the respective main contract between the buyer and BSCL apply to the relevant sub-contract work of MII as defined in this sub-contract agreement, MII shall assume towards BSCL all the obligations and responsibilities which BSCL, by such main contract, assumes to the buyer and shall have the benefit of all rights, remedies and redresses against BSCL which BSCL, by such main contract, has against the buyer, insofar as applicable to this sub-contract agreement, provided that when any provision of the respective main contract between the buyer and BSCL is inconsistent with this sub-contract agreement, this sub-contract agreement shall govern and prevail over the main contract.

3.2. BSCL shall be bound to MII by the terms of this sub-contract agreement and to the extent that the provisions of the respective main contracts between the buyer and BSCL apply to the relevant sub-contract

work of MII as defined in this sub-contract agreement, BSCL shall assume towards MII all the obligations and responsibilities that the
a buyer, by such main contracts, assumes towards BSCL, and shall have the benefit of all rights, remedies and redresses against MII which buyer, by such main contracts, has against BSCL insofar as applicable to this sub-contract agreement provided that when any provisions of the main contract between the buyer and BSCL is inconsistent with any provisions of this sub-contract agreement, this sub-contract agreement shall govern
b and prevail over the main contract.

Article 5

5.1. Except as otherwise provided herein, all claims made by the buyer against BSCL shall be the responsibility of MII when such claims arise or are derived from MII's sub-contract scope of work; similarly, all claims made by buyer that arise or are derived from BSCL's scope of
c work shall be the responsibility of BSCL. To the extent that BSCL, as main contractor vis-à-vis the buyer, would be liable for any claims that arise or are derived from MII's sub-contract scope of work, MII shall hold harmless and keep indemnified BSCL from any such claims to the extent analogous with MII's sub-contract.

Article 6 — Arbitration

d 6.1. Should there be any dispute or difference between BSCL and the buyer in regard to any matter connected with BSCL relating to or arising out of the main contract(s), which may involve MII's performance or affect MII's interest under the sub-contract, BSCL shall keep MII informed and shall act in consultation and coordination with MII to ascertain the facts and agree on the appropriate action to be taken. MII
e shall render all assistance and cooperation that BSCL may require in this regard. If it is determined that the dispute or difference does not involve MII's performance or affect MII's interests, MII shall render such reasonable assistance and cooperation as BSCL may require; provided, however, that MII shall be entitled to reimbursement of costs, if any, incurred therefor with the prior approval of BSCL.

f 6.2. If any dispute or difference arising between BSCL and buyer under or in respect of or relating to the main contract insofar as it relates to the work to be carried out by MII is referred to arbitration and any award/judgment/decree/order is passed, or a settlement is otherwise reached with MII's consent, MII shall be bound to accept the same and bear all MII's liability resulting therefrom. MII shall, however, be
g assisted at all stages by BSCL with such arbitration proceedings and MII shall bear all expenses of such arbitration/litigation and/or negotiated settlement, if any. However, expenses incurred by BSCL in deputing their officials to attend such arbitration/proceeding/litigation would be to BSCL's accounts.

6.3. All disputes and differences in respect of any matter relating to
h or arising out of or in connection with the execution or construction of this sub-contract document, if the same cannot be and/or is not the subject-matter of dispute between BSCL and the buyer under the main

contracts and is not settled mutually by negotiation, shall be referred to arbitration under the Indian Arbitration Act, 1940, as amended from time to time, by appointing some agency acceptable to both the parties as arbitrators and if no agency is found acceptable to both the parties, then by constituting a Board of Arbitration consisting of three arbitrators, one to be nominated/appointed by each party and the third to be appointed by the two arbitrators as umpire. The arbitration proceeding shall be held at New Delhi and the decision of the arbitrators or the umpire, as the case may be, shall be final and binding on both parties hereto. The arbitrators or the umpire, as the case may be, shall record their reasons for passing awards, copies of which shall be sent to the parties.

Article 10

10.1. Any amendment and/or modification of this sub-contract shall be valid only if it is in writing and signed by both the parties.

All other terms and conditions not specified in this sub-contract shall be as stipulated in the main contracts.

10.2. This sub-contract agreement shall be governed by the laws of the Republic of India."

Disputes

7. Disputes and differences having arisen between the parties, MII invoked the arbitration clause by a legal notice dated 10-4-1989.

8. Several proceedings as regards invocation of arbitration clause were initiated by the parties before the Calcutta High Court. The said proceedings ultimately ended in favour of MII leading to appointment of two arbitrators for determination of the disputes and differences between the parties. The arbitrators who were earlier appointed were removed and Mr Justice A.N. Sen, a retired Judge of this Court was appointed as a sole arbitrator. It is stated that Mr Justice A.N. Sen declined to act as an arbitrator and by an order dated 28-8-1998, Mr Justice R.S. Pathak was appointed by this Court as a sole arbitrator. The arbitrator was to continue with the proceedings from the stage it had reached. The said order is in the following terms:

"(*1*) Mr Justice R.S. Pathak, retired Chief Justice of India is appointed as the sole arbitrator in the case to resolve the disputes and differences which had been raised by the parties and were the subject-matter of the arbitration proceedings before the arbitrators earlier appointed;

(*2*) that the learned arbitrator shall enter upon the reference within three weeks from the date of service of this order upon him;

(*3*) that the arbitration proceedings shall be held at New Delhi. However, in the event the learned arbitrator considers it necessary to hold any sitting at any other place, he may do so with the consent of the parties;

(*4*) the learned arbitrator shall continue with the proceedings from the stage where the proceedings of the arbitration were on 8-5-1998, when the impugned order came to be made by the Calcutta High Court;

(*5*) all the proceedings held till 8-5-1998 shall be treated as the arbitration proceedings held before the learned sole arbitrator now appointed;

(*6*) it shall be in the discretion of the learned arbitrator to take or not to take oral evidence or to take oral evidence by way of affidavits. The learned arbitrator would be at liberty to adopt summary proceedings for concluding arbitration proceedings;

(*7*) that the learned arbitrator shall publish his award, as far as possible, within a period of one year from the date of entering upon the reference;

(*8*) that the fees of the arbitrator (which may be fixed by him) and all expenses of arbitration proceedings shall be shared equally by the parties;

(*9*) the learned arbitrator shall file the award in this Court;

(*10*) any application which may become necessary to be filed during or after the conclusion of arbitration proceedings, shall be filed only in this Court."

Claim of MII

9. Before the learned arbitrator, MII raised the following claims:

1.	For fabrication of jackets, temporary decks and main decks	US$	1,182,817.94
2.	For transportation and installation of jackets and decks	US$	4,351,062.68
3.	For installation of pipelines and risers	US$	840,064.23
4.	For structural material procurement	US$	5,301,534.13
	For bulk material procurement	US$	84,919.14
		UK£	262,296.43
		S$	680,764.29
5.	For transportation of pipe	US$	1,231,415.00
6.	For reimbursables	US$	377,309.30
7.	For change orders and extra work	US$	7,423,741.95
8.	For delays and disruptions	US$	13,233,343.00
8-A.	For exchange entitlements	US$	2,881,195.03
9.	For interest up to 21-8-1989	US$	10,909,772.19
		UK£	148,254.14
		S$	521,102.56
	Total	US$	47,817,174.59
		UK£	410,550.57
		S$	1,201,866.85"

10. Before the arbitrator, apart from the aforementioned amount, interest on the outstanding amount was also claimed at the rate of 15% per annum on all claims for which invoices were not paid until the award, as well as interest from 21-8-1989 and future interest at the rate of fifteen per cent.

11. BSCL filed counter-statements as also counterclaims before the learned arbitrator.

12. The learned arbitrator took up the following claims for his consideration:

1. Fabrication of jackets, temporary decks and main decks

2. Transportation and installation of jackets, decks (permanent and temporary) and helidecks

3. Pipelines and risers installation

4. Structural material and rolling

5. Bulk material

6. Transportation of pipes

7. Reimbursables

8. Change orders and extra works

9. Delays and disruptions

9-A. Whether MII is entitled to an exchange loss as claimed in paras 4.74 to 4.78 of the statement of claims? If so, of what amount?

10. Interest

11. Jurisdiction

12. Did MII commit breach of the contract?

13. Is the claim of MII barred by limitation?

14. Counterclaim

15. General

13. It was agreed to by and between the learned counsel for the parties that the 1996 Act shall apply instead and in place of the 1940 Act.

Partial award

14. The learned arbitrator having heard the parties inter alia on the jurisdictional question, initially passed a partial award on 9-6-2003 determining the same in favour of MII. The decision on Points 6, 8 and 9 was deferred for a period of four months by the learned arbitrator so as to enable BSCL to dispose of all claims raised by MII in the meanwhile which had arisen before reference to the arbitration. The said claims were rejected. A detailed reasoned statement by ONGC/BSCL referring to each individual document relied upon was filed in the arbitral proceedings. However, by reason of the said partial award, as regards Points 1 to 5, 7 and 9-A, MII became entitled to payment from BSCL for the following amounts:

"On Point 1	US$	1,182,817.69
On Point 2	US$	3,133,612.40 &
	US$	28,400.00
On Point 3	US$	665,039.41 &
	US$	54,000.00
On Point 4	US$	2,809,100.54 &
	US$	2,300,200.00
On Point 5	US$	65,207.39
	UK Pound	232,604.40 &
	Singapore $	548,271.81
On Point 7	US$	322,351.87
	US$	52,422.51
	US$	1,573,466.00
	US$	512,187.16
On Point 9-A	US$	3,330,790.94"

Proceedings re: Additional award

15. On Point 10, MII was held to be entitled to interest on the amount awarded at the rate of 10% per annum from the date on which the amount fell due for payment till the date of the partial award and the awarded amount together with interest was directed to bear interest at the same rate from the date of the award to the date of payment.

16. The parties thereafter filed applications under Section 33 of the Arbitration and Conciliation Act, 1996 alleging that certain claims made by them had not been dealt with and/or were omitted from consideration by the learned arbitrator in his partial award.

17. MII in its application contended:

"(*i*) While deciding Point 4 regarding structural material and rolling, MII's claim for US$ 128,000.00 as contended in para 4.29 of the statement of claim has not been dealt with and has been omitted from the award.

(*ii*) While deciding Point 7 regarding corporate income tax, MII's claim that BSCL should be liable to the tax authorities for all further liabilities for Indian corporate income tax as may be assessed in respect of the income received by MII under the sub-contract as also for all tax liabilities that may be assessed in respect of any award in favour of MII in the present arbitration proceedings as contained in para 4.84 of the statement of claim has not been dealt with and has been omitted from the award.

(*iii*) In deciding Point 7 regarding corporate income tax, MII has claimed two amounts, one of US$ 804,789.36 being interest @ 15% per annum up to 29-2-1992 paid by MII in respect of corporate income tax liability to the tax authority, and the other on account of principal amount

of tax payment of US$ 1,623,048.00. In paras 18.17 and 18.18 of the award, the learned arbitrator has in respect of the principal claim allowed an amount of US$ 1,573,466.00 on account of corporate income tax and an amount of US$ 512,187.16 by way of interest. MII has also claimed interest on these two amounts from 29-2-1992 till payment. This claim for interest has not been dealt with in the award and has been omitted from the award.

(*iv*) While deciding Point 10 relating to interest, MII's claim for interest on amounts paid but paid late as contained in paras 5.1 and 5.2 has not been dealt with and has been omitted from the award."

BSCL raised a preliminary objection in regard to MII's claim under Section 33 of the Act contending that there exists no provision for making a partial award.

Additional award

18. By reason of the additional award dated 29-9-2003, the learned arbitrator, however, held:

"*1*. MII's claim in respect of US$ 128,000.00 is not accepted.

2. MII's claim for a declaration that BSCL is liable to the tax authorities for all further liabilities for Indian corporate income tax as may be assessed in future in respect of income received by MII under the sub-contract is allowed only insofar as it related to MII's liability, if any, to corporate income tax, on the amounts awarded to it by a partial award, an additional award and a final award.

3. MII is entitled to interest at 10% per annum for the period from 1-3-1992 to the date of payment in respect of the principal amount of US$ 1,573,466.00 on account of corporate income tax and the interest amount of US$ 512,187.16 calculated up to 29-2-1992.

4. MII is entitled to interest at 10% per annum for the period of delay in BSCL making payment of MII's invoices, that is, for the period from due date of payment to the date of actual payment. Such amount will carry interest at 10% per annum from the date of the partial award to the date of its payment."

19. The learned arbitrator rejected BSCL's objection in regard to the maintainability of the said proceeding stating that the same can be a subject-matter for determination of jurisdictional question in a proceeding under Section 33 of the 1996 Act.

20. BSCL filed an application under Section 34 of the Act questioning the said partial award dated 9-6-2003 as also the additional award dated 29-9-2003.

Final award

21. The learned arbitrator thereafter took up the leftover matters for his consideration viz. Points 6, 8 and 9 observing that ONGC in the meantime had expressed no interest in participating in the decision-making process at the inter-party level and, thus, arrived at an inference that the machinery set

up under the sub-contract has broken down and it would be for him to determine the same.

22. The final award was thereupon passed.

23. On Point 6 which related to transportation of pipes, the learned arbitrator held MII to be entitled to US$ 919,194.32 against BSCL in respect of the nine barge pipes for transporting them from Mangalore to Bombay.

24. Point 8 related to change orders and extra work. The learned arbitrator awarded MII US$ 305,840.00 as regards Change Order 1. As regards Change Order 6, MII was awarded US$ 72,000.00 against BSCL. Furthermore, in respect of Change Order 9, MII was awarded US$ 300,000.00 against BSCL. As regards extra work, MII was awarded US$ 4,870,290.96 against BSCL pursuant to the invoices covered under the said point whereas MII's claim for US$ 637,473.00 was rejected.

25. Point 9 related to delays and disruptions. MII was awarded US$ 574,000.00 against BSCL in respect of Change Order 2. MII was further awarded US$ 1,271,820.00 and US$ 355,000.00 against BSCL under Change Orders 3 and 7 respectively. As regards increased cost and expenditure incurred by MII, it was awarded US$ 8,973,031.00.

26. So far as the claim of interest is concerned, the learned arbitrator made the following order:

> "MII is entitled to interest on the amounts awarded under various heads by final award. In my opinion, having regard to the circumstances of the case, a rate of interest at 10 per cent per annum will be appropriate from the date on which the amount fell due for payment to the date of this final award. The awarded amount including interest shall bear the interest at the same rate from the date of this final award to the date of the payment by BSCL."

The learned arbitrator also awarded US$ 750,000.00 as costs of the arbitration.

27. An application was filed by BSCL under Section 34 of the Act praying for setting aside the final award.

Submissions

28. Mr Jayanto Mitra, learned Senior Counsel and Mr Pallav Sisodia, learned counsel appearing on behalf of BSCL made the following submissions:

> (*i*) The arbitrator had no jurisdiction to make a partial award which is not postulated under the 1996 Act as an award in piecemeal is impermissible in law.
>
> (*ii*) While making the partial award, the learned arbitrator opined that involvement of ONGC was imperative for determination of Points 6, 8 and 9 i.e. claims relating to transportation of pipes, change orders and extra work and delays and disruptions and, thus, the final award must be held to be bad in law.

(*iii*) As the sub-contract provided for a back-to-back contract, determination of various claims depended upon determination of interpretative application of the main contract by ONGC wherefor directions of ONGC were binding on the parties.

(*iv*) Although US$ 8.8 million has been awarded as regards alleged delay and disruption of work, no reason, far less any cogent or sufficient reason, as was mandatorily required in terms of Section 31 of the Act having been assigned, the impugned award is vitiated in law.

(*v*) In its award, the learned arbitrator was bound to determine the actual loss suffered by the parties and as the same was not determined, the award cannot be enforced.

(*vi*) The award as regards loss of profit under various heads is based on no evidence and, thus, wholly unreasonable.

(*vii*) The claims made by MII were not only contrary to the terms of contract but also substantive law of India and were otherwise opposed to public policy.

(*viii*) As the contract did not contain any agreed schedule or any stipulation as to whether the work was required to be finished within a stipulated period, in view of the fact that the contention of MII was that the time was of the essence of contract, the only remedy available to it in terms of Section 55 of the Indian Contract Act was to revoke the contract upon giving a notice therefor. In the absence of such a notice, damages could not be claimed. Reliance in this behalf has been placed on *Arosan Enterprises Ltd.* v. *Union of India*[1].

(*ix*) No amount towards extra work was payable to MII having regard to the payment clauses contained in the contract and in particular the minutes of the meeting held by the parties on 9-8-1984.

(*x*) In view of the clear terms of the contract, ONGC was a necessary party and the learned arbitrator committed an error in refusing to implead it in the proceeding.

(*xi*) The learned arbitrator having rejected the claim of MII in his partial award dated 9-6-2003 on the ground that increased overhead decrease of profit and additional management cost had not been raised before reference to arbitration and, thus, was beyond the scope of arbitral reference, could not have determined the selfsame question in his final award. The objection and the award for US$ 8.8 million had not been taken into consideration and, thus, the same is liable to be set aside.

(*xii*) The learned arbitrator could not have awarded the said sum solely on the basis of the opinion of one Mr D.J. Parson who did not have any personal knowledge of the facts of the case, particularly in view of the fact that no evidence was adduced as regards sufferance of actual loss by MII. Mechanical application of Emden Formula was also wholly

1 (1999) 9 SCC 449

uncalled for and no award could be made relying on or on the basis thereof.

(*xiii*) So far as the claim of extra work is concerned, the learned arbitrator has wrongly allowed the claim of MII in respect of Invoices Nos. 2806470 to 2806475 although due date for payment of the said amount fell after the commencement of reference to arbitration and, thus, as no dues existed on that date, the arbitrator had no jurisdiction to make an award in relation thereto.

(*xiv*) As regards "exchange loss", MII's claim was allowed without any amendment to the statement of claim. Claim of MII was wrongly allowed by the learned arbitrator for entire value of the invoices without any deduction as delay in making payment by BSCL to MII on account of delay in receiving payment from ONGC has no relevance and in any event was contrary to the terms of the contract.

The learned arbitrator had also not taken into consideration that in terms of the contract, foreign exchange rate was frozen at the rate of Rs 100 = 8.575 dollars as was applicable on 9-8-1984.

(*xv*) The claim for US$ 2.3 million was outside the scope of reference to arbitration as no demand therefor was made. Such a claim was made for the first time only in the statement of claim.

(*xvi*) In terms of clause 37 of the contract entered into by and between ONGC and BSCL, no award by way of damages was payable. Similar provision was also contained in the sub-contract entered into by and between the parties.

(*xvii*) As MII was to compensate for the supply of materials by BSCL subsequently, no award for a sum of US$ 2.3 million could be made.

(*xviii*) As no invoice in respect of the claim of US$ 28,400 on account of an additional barge trip to transport the ED temporary deck had been raised, the learned arbitrator had no jurisdiction to decide the same.

(*xix*) The award under the said head for a sum of US$ 54,000 on account of additional survey of WI-S and WI-9 pipelines was not an arbitrable dispute being clearly outside the purview of the arbitration proceedings.

(*xx*) Relying on or on the basis of the American Institute of Steel Construction (AISC) Code as a base for measurement being contrary to the contract, the award is liable to be set aside.

(*xxi*)(*a*) *Re: Buoyancy tanks in respect of ED and EE jackets*

As BSCL had paid MII for fabrication of the same buoyancy tanks and the buoyancy tanks were the same which were used for WI-8, WI-9 and WI-10 and N-3 platforms, claim on the said account

once over again was not maintainable ignoring the evidence of Mr S.K. Mukherjee (RW 1).

(*b*) *Tie-down and sea-fastening*

As tie-down materials are required for safe transportation of structures allotted on transportation barge, the learned arbitrator erred in allowing the claim of MII as they are not permanent part of jacket decks of any platform.

(*c*) *Substitution of materials*

The learned arbitrator committed a serious error in not taking into account the material evidence adduced by BSCL to the effect that MII was instructed to substitute the specified materials with available material at no additional cost of fabrication.

29. That in terms of the contract, it was for MII to procure the materials which were to be reimbursed by BSCL. The claim for US$ 20,832.108 was based on fabrication charges on account of increased tonnage for material substitution for WI-8, WI-9, WI-10 and N-3 jackets and piles as well as ED and EE jackets and, thus, as the learned arbitrator had allowed claim only to the extent of fabrication, the amount claimed by MII could not have been allowed in toto.

30. Mr Dipankar Gupta, learned Senior Counsel appearing on behalf of MII, on the other hand, submitted that no case has been made out for setting aside the award of the learned arbitrator. In reply to the submissions made on behalf of BSCL, it was urged as below:

Re: *Increased overhead decrease of profit and additional management cost*

31. The amount has been awarded on the basis of statement of Mr D.J. Parson. The contract clearly provided that WI-8, WI-9, WI-10 and N-3 platforms were to be completed by 30-12-1985 whereas ED and EE platforms were to be commissioned in February 1986. It is not the case of MII that the time was of the essence of contract and, thus, in terms of Section 55 of the Indian Contract Act, damages were payable. Even in terms of the main contract between BSCL and ONGC, time was not of the essence of the contract. The contract contained clauses for extension of time and liquidated damages which are also indicative of the fact that time was not of the essence of the contract and, thus, damages for delay are permissible in law in view of the decision of this Court in *Hind Construction Contractors* v. *State of Maharashtra*[2].

32. Change Orders 2, 3 and 7 covered compensation under various heads as specified therein. The award of the learned arbitrator clearly shows that additional costs had been incurred by MII and, thus, the award cannot be faulted. The partial award did not deal with the said claims. The dispute was specifically referred to arbitration in terms of the notice dated 10-4-1998. The quantification of damages being a matter of evidence and proof, no case has

2 (1979) 2 SCC 70

been made out for interference with the award particularly in view of the fact that BSCL had never raised any objection as regards the jurisdiction of the arbitrator.

33. Reliance on the Emden Formula cannot be said to be against the law prevailing in India as Sections 55 and 73 of the Indian Contract Act provided only for entitlement to compensation and not the mode and manner in which such compensation is to be quantified.

34. Clause 37 of the main contract between ONGC and BSCL has no application as MII's claim is not for any consequential damage but for the direct losses occasioned by BSCL's breach of contractual duty to honour its time-bound commitments. The said clause cannot be extended to the obligations towards MII under the sub-contract as ONGC has no role to play in respect of the breach of its obligations towards it by BSCL under the sub-contract.

Re: Partial award

35. A partial award is in effect and substance an interim award within the meaning of Sections 31(6) and 2(*c*) of the Act and, thus, the validity of the partial award is not open to question.

Re: Exchange loss

36. Clause 4.0 of the contract only relates to payment for transportation and installation and BSCL did not make any payment to MII despite receipt of the whole amount from ONGC except an amount of Rs 12,70,290. In any event, clause 4.0 has no relevance to the exchange loss dispute. BSCL acted contrary to the agreed terms as it made payment upon applying the fixed exchange rate of Rs 100 = US$ 8.575. BSCL was to pay to MII the amount as per the current rate, only on reconciliation; MII was to refund the excess amount to BSCL which ensured that exchange loss would be shared by both the parties.

Re: Uninvoiced claims

37. BSCL never raised any objection before the arbitrator that the claim for US$ 2,300,200 for procurement of structural material could not be raised in view of the provisions contained in Section 16 of the 1996 Act. Invoice in any event, is merely a basis for claim and such a claim may be raised in correspondences as also in the meetings. The claim for US$ 2,300,200 was not strictly claim for damages, as in terms of the contract BSCL was required to procure the steel and as it being not in a position to do so, MII agreed to procure the same on its behalf if BSCL would agree to pay US$ 2,300,200 to cover MII's cost for accelerated procurement and other costs. This offer was the subject-matter of correspondence between the parties. As no dispute was raised to recover the same amount from BSCL, procurement job was undertaken. The finding arrived at by the learned arbitrator in this behalf is entirely a finding of fact. Reference to clause 5 of the contract was wholly irrelevant. This clause provides that BSCL shall procure suitable steel for "jackets" on replacement basis for MII purchased steel. BSCL did not procure the required amount of steel to replace the structural materials that

MII provided from its inventory as an accommodation to BSCL. MII did so on the understanding that the structural material removed from MII's inventory would be promptly replaced by BSCL. BSCL did not replace the material.

Re: Method of measurement

38. Clauses 23.1.1(*a*) and (*c*) of the main contract between BSCL and ONGC have no application as the same covers payment for "structural material" which is an altogether different claim being Claim 4. The claim was towards labour charges for fabrication of structures, labour charges and not claim for cost of material. AISC Code applied in relation to the fabrication job is as under:

> "The scheme of the contract provided in relation to fabrication and the application of AISC Code is explained below:
>
> (*i*) the sub-contract provides total estimated tonnage of 18, 178 ST with the following break-up:
>
> ED?EE platforms 6078 ST (p. 166, IA No. 2 Vol. 2)
> WI-8, WI-9, WI-10 and N-3 platforms
> 12,100 ST/18, 178 ST (p. 371, IA No. 2 Vol. 2)"

Re: Buoyancy tanks for ED and EE jackets

39. MII's claim is for labour cost at the rate of US$ 1067 per ST involved for fabrication work in the refurbishment of the buoyancy tanks. The finding of the arbitrator is a finding of fact inter alia based on the admission of the witness, namely, Shri S.K. Mukherjee, who was examined on behalf of BSCL.

Re: Tie-down and sea-fastening

40. In offshore construction, jackets and decks are fabricated onshore and then they are transported on barges to the offshore location for installation. Jobs pertaining to tie-down and sea-fastening required substantial fabrication work and no claim has been made towards costs of welding the tie-downs and sea-fasteners to the deck.

41. Clause 2 of the contract would have no application to the instant case as it provides only for a stage payment on milestone basis. But, clause 2.1(*a*)(*i*) which substantially covers sea-fastening job as part of the fabrication contract would be applicable. BSCL had not been able to show that the fabrication of tie-down and sea-fastening materials was included within the scope of transportation and not as a separate item under the head "fabrication".

Re: Substitution

42. It was for BSCL in terms of the sub-contract to procure and supply all materials but as it was not in a position to do so, MII on instructions of BSCL used available materials which were having larger thickness and weight vis-à-vis those specified in ONGC's specifications. The same having been approved both by the Engineer and ONGC, MII was entitled to compensation towards the labour charges at the rate of US$ 1067 per ST.

Re: Extra work Invoices Nos. 2806470 to 2806475

43. The invoices which were contained in Annexure 9 to MII's statement of claims were substituted by new documents in terms whereof the due date of invoice was corrected to 9-3-1989 and, thus, fall due for payment prior to the notice dated 10-4-1989 invoking arbitration. The payment of extra work became due when the work was performed and moreover, the invoices in question did not specify any date for payment.

Re: Interest

44. The ground has been taken only in the supplementary affidavit filed on behalf of BSCL on 21-9-2004 beyond a period of three months as specified in Section 34 of the Act. The arbitrator has awarded the principal amount and interest thereon up to the date of award and future interest thereupon which do not amount to award of interest on interest as interest awarded on the principal amount up to the date of award became the principal amount which is permissible in law.

Challenge to award: Legal scope of

45. Section 2(1)(*b*) of the 1996 Act reads as under:

> "2. (1)(*b*) 'arbitration agreement' means an agreement referred to in Section 7;"

46. In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-à-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder.

47. Section 30 of the 1940 Act reads, thus:

> "30. *Grounds for setting aside award.*—An award shall not be set aside except on one or more of the following grounds, namely—
>
> (*a*) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (*b*) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;
>
> (*c*) that an award has been improperly procured or is otherwise invalid."

48. The section did not contain the expression "error of law....". The same was added by judicial interpretation. While interpreting Section 30 of the 1940 Act, a question has been raised before the courts as to whether the principle of law applied by the arbitrator was (*a*) erroneous or otherwise, or (*b*) wrong principle was applied. If, however, no dispute existed as on the date of invocation, the question could not have been gone into by the arbitrator.

Changes under the new Act

49. The 1996 Act makes a radical departure from the 1940 Act. It has embodied the relevant rules of the modern law but does not contain all the

provisions thereof. The 1996 Act, however, is not as extensive as the English Arbitration Act.

50. Different statutes operated in the field in respect of a domestic award and a foreign award prior to coming into force of the 1996 Act, namely, the 1940 Act, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. All the aforementioned statutes have been repealed by the 1996 Act and make provisions in two different parts, namely, matters relating to domestic award and foreign award respectively.

Vis-à-vis grounds for setting aside the award

51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

53. However, this Court, as would be noticed hereinafter, has had the occasion to consider the matter in great detail in some of its decisions.

54. In *Primetrade AG* v. *Ythan Ltd.*[3] jurisdictional issue based on interpretation of documents executed by the parties fell for consideration having regard to the provisions of the Carriage of Goods by Sea Act, 1992. It was held that as the appellant therein did not become holder of the bills of lading and alternatively as the conditions laid down in Section 2(2) were not fulfilled, the arbitrator had no jurisdiction to arbitrate in the disputes and differences between the parties.

Vis-à-vis the duty to assign reasons

55. Another important change which has been made by reason of the provisions of the 1996 Act is that unlike the 1940 Act, the arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by a reasoned award.

3 (2006) 1 All ER 367

56. In *Bachawat's Law of Arbitration and Conciliation*, 4th Edn., pp. 855-56, it is stated:

> "... 'Reason' is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.
>
> The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in *Poyser and Mills' Arbitration*. In re, 'proper, adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.
>
> The meaning of the word 'reason' was explained by the Kerala High Court in the contest of a reasoned award....
>
> 'Reasons are the links between the materials on which certain conclusions are based and the actual conclusions....'
>
> A mere statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored....
>
> Statement of reasons is a mandatory requirement unless dispensed with by the parties or by a statutory provision."

57. In *Konkan Rly. Corpn. Ltd.* v. *Mehul Construction Co.*[4] this Court emphasised the mandatoriness of giving reasons unless the arbitration agreement provides otherwise.

Public policy

58. In *Renusagar Power Co. Ltd.* v. *General Electric Co.*[5] this Court laid down that the arbitral award can be set aside if it is contrary to (*a*) fundamental policy of Indian law; (*b*) the interests of India; or (*c*) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *ONGC Ltd.* v. *Saw Pipes Ltd.*[6] (for short "*ONGC*"). This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*[7] wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal

4 (2000) 7 SCC 201
5 1994 Supp (1) SCC 644
6 (2003) 5 SCC 705
7 (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103

bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC*[6] this Court, apart from the three grounds stated in *Renusagar*[5], added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See *State of Rajasthan* v. *Basant Nahata*[8].)

61. In *ONGC*[6] this Court observed: (SCC pp. 727-28, para 31)

> "*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*[5] 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

6 *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705

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

8 (2005) 12 SCC 77

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."

62. We are not unmindful that the decision of this Court in *ONGC*[6] had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. (See *The Law and Practice of Arbitration and Conciliation* by O.P. Malhotra, 2nd Edn., p. 1174.)

63. Before us, the correctness or otherwise of the aforesaid decision of this Court is not in question. The learned counsel for both the parties referred to the said decision in extenso.

64. We, therefore, would proceed on the basis that *ONGC*[6] lays down the correct principles of law.

Supervisory jurisdiction

65. We may consider the submissions of the learned counsel for the parties on the basis of the broad principles which may be attracted in the instant case i.e. (*i*) whether the award is contrary to the terms of the contract and, therefore, no arbitrable dispute arose between the parties; (*ii*) whether the award is in any way violative of the public policy; (*iii*) whether the award is contrary to the substantive law in India viz. Sections 55 and 73 of the Indian Contract Act; (*iv*) whether the reasons are vitiated by perversity in evidence in contract; (*v*) whether adjudication of a claim has been made in respect whereof there was no dispute or difference; or (*vi*) whether the award is vitiated by internal contradictions.

66. For the aforementioned purpose, it would be necessary to see as to what law the arbitrator was required to apply.

67. We may, therefore, consider the legal submissions before adverting to the merits of the matter.

Validity of the "partial award"

68. The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2(*c*) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

69. The learned arbitrator evolved the aforementioned procedure so as to enable the parties to address themselves as regards certain disputes at the first instance. As would appear from the partial award of the learned arbitrator, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having

6 *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705

regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the learned arbitrator to advert thereto at a later stage. If the partial award answers the definition of the award, as envisaged under Section 2(*c*) of the 1996 Act, for all intent and purport, it would be a final award. In fact, the validity of the said award had also been questioned by BSCL by filing an objection in relation thereto.

70. We cannot also lose sight of the fact that BSCL did not raise any objection before the arbitrator in relation to the jurisdiction of the arbitrator. A ground to that effect has also not been taken in its application under Section 34 of the Act. We, however, even otherwise do not agree with the contention of Mr Mitra that a partial award is akin to a preliminary decree. On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred to the arbitrator which are subject-matters of such award. We may add that some arbitrators instead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of an award is not changed. As, for example, we may notice that in arbitral proceedings conducted under the Rules of Arbitration of the International Chamber of Commerce, the expression "partial award" is generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. We may state that both the partial award and the final award are subject-matter of challenge under Section 34 of the Act.

71. Section 33 of the Act empowers the Arbitral Tribunal to make correction of errors in arbitral award, to give interpretation of a specific point or a part of the arbitral award, and to make an additional award as to claims, though presented in the arbitral proceedings, but omitted from the arbitral award. Sub-section (4) empowers the Arbitral Tribunal to make additional arbitral award in respect of claims already presented to the Tribunal in the arbitral proceedings but omitted by the Arbitral Tribunal provided:

1. there is no contrary agreement between the parties to the reference;

2. a party to the reference, with notice to the other party to the reference, requests the Arbitral Tribunal to make the additional award;

3. such request is made within thirty days from the receipt of the arbitral award;

4. the Arbitral Tribunal considers the request so made justified; and

5. additional arbitral award is made within sixty days from the receipt of such request by the Arbitral Tribunal.

The additional award, in our opinion, is not vitiated in law.

Delay and disruption

Operative facts

72. According to the applicants, the contract entered into by and between MII and BSCL did not provide for any period of completion. MII, on the

other hand, states that at that time when the contract was entered into it was supposed to be performed by 30-12-1985 as would appear hereinafter:

> "For jackets and temporary decks (for Platforms WI-8, WI-9, WI-10 and N-3), the completion period is 30-4-1985 and for decks and helidecks (for Platforms WI-8, WI-9, WI-10 and N-3) the completion date is 30-12-1985. Clause (*ii*) in the 'Schedule of Completion of Well Platforms' states: "... the completion dates ... will be reckoned for purpose of L/d."

In terms of the provisions of the contract the jobs in respect of WI-8, WI-9, WI-10 and N-3 were to be performed within the said period.

73. A stipulation for commissioning of ED and EE platforms within a time-frame has also been mentioned i.e. February 1986 as would appear from the following:

> "*1.* The agreement for commissioning of Platforms ED and EE is, by the end of February 1986, subject to the provisions of this contract."

74. MII served a notice on 10-4-1998 invoking the arbitration agreement. The same would not mean that it should have repudiated the contract as soon as 20 months' schedule fixed by the contract expired. Delay and disruptions might have occurred for various reasons. In the instant case, therefore, the matter would be covered by the second part of Section 55 of the Indian Contract Act providing that where the parties did not intend time to be of the essence of the contract, the contract was not voidable, but the promisee was entitled to compensation for loss occasioned. For the aforementioned purpose, no notice was required to be served. In any event, the contract provided for extension of time, as would appear from clause 27(*ii*) and the relevant portions of clause 28 which read as under:

> "27. (*ii*) Should the amount of extra work, if any, which the contractor is required to perform under clauses 24 to 26 ants, fairly entitled the contractor to extension of time beyond the scheduled date for completion of either the whole or part of the works or for such extra work as the case may be. Company and contractor shall mutually discuss and decide extensions of time to be granted to the contractor and the revised schedule for completion of the works.
>
> 28. (*i*) Subject to any requirements in the contract, specifications as to the completion of any portion of the work before completion of the whole and subject to the other provisions contained in the contract, the works shall be completed in accordance with the agreed schedule as indicated in Appendix II. Company may, if the exigencies of the works or other projects so required, amend the completion schedule and/or phase out completion.
>
> * * *
>
> 28. (*iii*) ... No extension in completion shall be permitted unless authorised in writing by the Company as a "variation in completion schedule" or as otherwise specified in the contract. In any case, no

portion of the works shall extend beyond the commencement of the 1986 monsoon."

75. The parties, furthermore, agreed for payment of liquidated damages, as would appear from clause 28(*v*)(*a*) which reads as under:

> "28. (*v*)(*a*) ... recovery is its sole and only remedy for delayed completion of work by contractor, as ascertained and agreed liquidated damages, and not by way of penalty, as sued equivalent to 2.5% of the contract price for the item which is delayed, for each month of delay (or pro rata thereof for part of a month), beyond the scheduled completion date, subject to a maximum of 7.5% of the said contract price. Such liquidated damages shall be leviable after allowing a grace period of 15 days. The monsoon peril requiring which no work can be carried out, orders shall be excluded for the purpose of determining the quantum of delay in completion of work."

Moreover, the contract itself contains provisions for extension of its terms and payment of damages in case of delay in execution of the contract.

76. The claim for increased overhead and decreased profit and additional project management cost flows out of the same operative facts as the delay and disruption change in respect of Change Orders 2, 3 and 7.

77. We may at the outset point out that the question as regards the effect of the said claims which were not considered in the first round of the arbitral proceedings shall be dealt with a little later.

78. So far as Change Order 2 is concerned, the learned arbitrator has accepted the contention of MII that it had to incur additional cost due to delay in receipt of equipment and materials supplied. In his final award, the learned arbitrator noticed:

> "... It appears that BSCL accepted and acknowledged that MII had incurred additional cost on account of this delay occasioned by BSCL...."

79. So far as Change Order 3 is concerned, the learned arbitrator in para 67.2 of the final award noticed as under:

> "... This was followed by a meeting on 7-10-1986 and 8-10-1986 attended by the representatives of ONGC, EIL, BSCL and MII, during which ONGC advised BSCL that BSCL should absorb one half of the mobilisation and demobilisation costs of MII's marine equipment, since the delay was occasioned by BSCL in completing the helidecks...."

80. So far as Change Order 7 is concerned, the learned arbitrator has recorded in para 68.1 of the final award as under:

> "... This change order was accepted by BSCL and ONGC but MII has received no payment...."

It was further recorded in para 68.4 of the final award:

> "... Even after the work was completed, there was a meeting on 16-6-1987 and 17-6-1987 at which ONGC informed that the change order was agreed to in principle...."

81. So far as the claim of compensation in addition to the said Change Orders 2, 3 and 7 is concerned, the statement of claim of MII is as under:

a "4.65. BSCL's delays and disruptions required McDermott to alter the fabrication and installation sequence to match deliveries of equipment. This precluded McDermott performing certain activities as planned in the sub-contract. Change Order 2 relates to additional cost incurred by McDermott due to delay in receipt of equipment and material supplied by BSCL. BSCL's delivery of the equipment was up to
b seventeen months late. During this period, McDermott continued to fabricate the decks installing material as it became available. The delay resulted in additional costs to McDermott due to change order with cost effect of US$ 574,000.00. BSCL has failed and neglected to make payment of the invoice for this change order.

4.66. Change Order 3 relates to mobilisation and demobilisation of
c Derrick Barge 26 to complete BSCL work in the 1986/1987 construction season. The sub-contract price was based on mobilisation and demobilisation of a single barge in the 1984/1985 and 1985/1986 construction seasons only and performance of the offshore scope of work in a continuous sequence. Due to BSCL delays, WI-8, WI-9, WI-10 and N-3 decks and helidecks were not completed for installation during the
d 1985/1986 work season. Further, WI-7 to WI-8 pipeline and five risers could not be installed due to unavailability of material and lack of access to the EB and EC jackets, which were still under construction. In the 1986/1987 construction season, McDermott used Derrick Barge 27, which was already in the field, to install WI-8, WI-9, WI-10 and N-3 decks. McDermott also had to mobilise Derrick Barge 26 in the same
e construction season for installation of WI-7 to WI-8 pipeline and associated risers. On the instructions of BSCL, McDermott mobilised Derrick Barge 26 in February 1987. Derrick Barge 26 installed the pipelines and risers and was demobilised from the field on 10-3-1987. For the mobilisation/demobilisation of Derrick Barge 26 for the 1986/1987 construction season work, McDermott submitted a change
f order to BSCL with cost effect of US$ 1,271,820.00. BSCL has failed and neglected to make payment of the invoices for this change order.

4.67. Change Order 7 relates to offshore installation or late-supplied equipment on WI-8, WI-9, WI-10 and N-3 decks. As early as February 1986, the parties contemplated that certain BSCL-supplied equipment planned for installation by McDermott onshore would have to be
g installed offshore due to the projected late delivery. The cost of installing equipment offshore is as much as US$ 1,140,705.00. On 6-11-1986, McDermott reviewed the list of outstanding equipment and revised its change order to US$ 355,000.00. On the instructions of BSCL, McDermott performed the change order work and installed outstanding equipment offshore. BSCL has failed and neglected to make payment of
h the invoice for this change order."

82. In the final award also the learned arbitrator noticed:

"The discussion covering earlier issues establishes that BSCL was guilty of delays and disruptions. Proceeding from there, the question is whether MII is entitled to an amount on account of increased overhead and loss of profit and additional project management costs? MII states that construction law recognises that construction contractor incurs two general jobs of costs in the course of its operation; the operating costs that are attributable to a particular project, and costs such as overhead that are expended for the performance of the business as a whole, including the particular project. Consequently, construction law recognises that owner-caused delay entitles the contractor to recover from the owner the increased overhead and loss of profit as part of damages. Reference has been made to *Hudson's Building and Engineering Contracts*, Article 8.176-91, pp. 1074-81 (11th Edn.), Molly J.B., 'A formula for Success'. Three formulae have been evolved for computation of a claim for increased overhead and loss of profit due to prolongation of the works: the Hudson Formula, the Emden Formula and Eichleay Formula. Of these three, the Emden Formula is the one widely applied and which has received judicial support in a number of cases."

Section 55 of the Indian Contract Act

83. Section 55 of the Indian Contract Act reads as under:

"55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

84. In *Arosan Enterprises Ltd.*[1] the law was stated in the following terms: (SCC pp. 461-62, para 13)

"*13.* These presumptions of the High Court in our view are wholly unwarranted in the contextual facts for the reasons detailed below but before so doing it is to be noted that in the event the time is the essence of the contract, question of there being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The

1 *Arosan Enterprises Ltd.* v. *Union of India*, (1999) 9 SCC 449

extension if there be any, should and ought to be categorical in nature rather than being vague or on the anvil of presumptions. In the event the parties knowingly give a go-by to the stipulation as regards the time—the same may have two several effects: (*a*) parties name a future specific date for delivery, and (*b*) parties may also agree to the abandonment of the contract—as regards (*a*) above, there must be a specific date within which delivery has to be effected and in the event there is no such specific date available in the course of conduct of the parties, then and in that event, the courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract. Be it recorded that in the event the contract comes within the ambit of Section 55, Contract Act, the remedy is also provided therein."

It was further observed: (SCC pp. 465-66, para 19)

"*19.* Turning now on to the issue of duty to speak, can it be said that silence on the part of the buyer in not replying to the letters dated 15-11-1989, 20-11-1989, 24-11-1989, 4-12-1989 and 20-12-1989 only shows that the buyer was not willing to extend the delivery period after 15-11-1989—the answer cannot but be in the negative, more so by reason of the fact that fixation of a second delivery date by the Appellate Bench of the High Court as noticed above, cannot be termed to be in accordance with the law. There was, in fact, a duty to speak and failure to speak would forfeit all the rights of the buyer in terms of the agreement. Failure to speak would not, as a matter of fact, jeopardise the seller's interest neither would the same authorise the buyer to cancel the contract when there have been repeated requests for acting in terms of the agreement between the parties by the seller to that effect more so by reason of a definite anxiety expressed by the buyer as evidenced in the intimation dated 8-11-1989 and as found by the arbitrator as also by the learned Single Judge."

We, therefore, are of the opinion that in the instant case the second part of Section 55 of the Indian Contract Act would be attracted and not the first part.

Whether time was of the essence of the contract

85. The question which further arises for consideration is as to whether the respondents having proceeded on the basis that time was of the essence of the contract, it was bound to issue a notice of repudiating the contract subject to reservation as regards its claim of damages. MII, however, states that it had never raised a contention that the time was of the essence of the contract, but the claim arises in view of the delay caused in completion of the contract for a period of 34 months and consequent escalation of costs. The price payable in terms of the sub-contract did not adequately cover increased costs expended by MII. On a plain reading of the provisions of Section 55 of the Indian Contract Act, it is evident that as the parties did not intend that time was to be of the essence of the contract on the expiry whereof the contract

became voidable at the instance of one of the parties, but by reason thereof the parties shall never be deprived of damages.

86. We may notice that BSCL had never pleaded before the arbitrator that the time was of the essence of the contract. In construction contracts generally time is not of the essence of the contract unless special features exist therefor. No such special features, in the instant case, have been brought to our notice.

87. The learned arbitrator proceeded on the basis that BSCL had accepted and acknowledged that no additional cost on account of delay was occasioned in completing the helidecks. MII is found to have incurred additional cost for offshore installation. The learned arbitrator has also found that MII had not received any payment on account of such increased cost. The compensation under the said head of claim was only in addition to Change Orders 2, 3 and 7 to which we shall advert to a little later.

88. This Court in *Hind Construction* v. *State of Maharashtra*[2] stated: (SCC pp. 76-77, paras 7 & 8)

> "*7.* ... that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. ... (See *Halsbury's Laws of England*, 4th Edn., Vol. 4, para 1179).
>
> *8.* ... even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; ... (See *Lamprell* v. *Billericay Union*[9] Exch at p. 308; *Webb* v. *Hughes*[10]; *Charles Rickards Ltd.* v. *Oppenheim*[11].)"

Uninvoiced claims

89. The principal question which arises for consideration is whether uninvoiced claims could be a subject-matter of dispute. While dealing with the claims falling within the purview of the partial award, the arbitrator noticed:

> "23. *Interruption of WI-9 to WI-S pipeline laying (US$ 115,087.50).*—The statement of claim by MII mentions that an amount of US$ 10,671,340.00 on account of delay and disruption expenses and costs are claimed. Admittedly, they had not yet been invoiced when the reference to arbitration was made. It is not clear what the specific claims included within that sum are. If they had not been invoiced, it cannot be said that they remained unpaid, and that, therefore, a difference or dispute had arisen between the parties when the reference to arbitration was made."

2 (1979) 2 SCC 70
9 (1849) 3 Exch 283 : 18 LJ Ex 282
10 (1870) LR 10 Eq 281 : 39 LJ Ch 606 : 18 WR 749
11 (1950) 1 KB 616 : (1950) 1 All ER 420 (CA)

It was further noticed:

"Reference has been made to the claim in respect of the standby of MII transportation spread, additional compensation on account of the construction of temporary emergency helidecks, the extended stay of MII personnel and a claim in respect of Lay Barge 26. All these claims will be considered after it has been satisfactorily proved that invoices in respect of each of these claims were issued and had become due for payment before the reference to arbitration was made and also meanwhile the arbitration record will have received the statement of ONGC/BSCL in respect of Change Order Proposals 2, 3, 7 and 8. Therefore, the consideration of these claims is deferred."

90. No invoice was raised by MII for the following claims:

(*i*) Claim of US$ 2,300,200 for procurement of structural material on BSCL's behalf.

(*ii*) US$ 28,400 for additional barge trip.

(*iii*) US$ 54,000 for additional pipeline survey.

91. The said claims are the subject-matter of the partial award. It was dealt with by the learned arbitrator in the following terms:

"It was pointed out by BSCL that ONGC did not accept the reconciliation attempted by MII in regard to the pipelines. I have examined the documents pertinent to this question, and I find that the variation is so marginal that it can reasonably be ignored. It seems to me that to take account of those variations is to attempt to make too fine a point. I would accept the reconciliation statement and proceed on that basis. BSCL contends that the claim made by MII on account of the additional survey of WI-8, WI-9 pipelines is not acceptable because it is covered within the lump sum price mentioned in the sub-contract. I am not impressed by that submission because had it been so covered ONGC would not have undertaken to conduct the additional survey itself. It was treated as something outside the subject-matter covered by the lump sum price and when ONGC requested BSCL to conduct the additional survey, and at the behest of BSCL the additional survey was conducted by MII, there is good reason for MII to claim the payment of US$ 54,000 for that survey."

92. While dealing with the claims for the standby of DB 26 and interruption in WI-9 to WI-S pipeline laying, the arbitrator in his partial award held:

"22. *Standby Derrick Barge 26 (US$ 1,396,800.00).*—The claim for payment of standby charges in respect of Derrick Barge 26 relates to a standby for 24 days of that vessel. The MII statement of claim mentions that MII has not sent any invoice to BSCL. Therefore it cannot be said that any claim has been made by MII yet in the matter. Consequently, the position is that no difference or dispute concerning this had arisen between the parties when the reference to arbitration was made. Therefore, so far as this arbitration is concerned, the claim cannot be entertained. It falls outside this arbitration and cannot be considered.

23. *Interruption in WI-9 to WI-S pipeline laying (US$ 115,087.50).*— The statement of claim by MII mentions that an amount of US$ 10,671,340.00 on account of delay and disruption expenses and costs is claimed. Admittedly, they had not yet been invoiced when the reference to arbitration was made. It is not clear what are the specific claims included within that sum. If they had not been invoiced, it cannot be said that they remained unpaid, and that therefore a difference or dispute had arisen between the parties when the reference to arbitration was made."

The said claims were, thus, rejected only on the ground that no invoice had been raised and consequently no difference or dispute had arisen by and between the parties at the time when the reference to arbitration was made.

93. Mr Mitra contended that applying the same line of reasoning, the learned arbitrator should have rejected the aforementioned claims. However, we may notice that the said claim as regards procurement of structural material related to damages. According to MII, the said claim strictly did not relate to damages (*sic* a claim) under the contract. BSCL was required to procure the steel and as it was not in a position to do so, MII had agreed to procure steel on its behalf, provided it agreed to cover MII's cost for accelerated procurement, material priced premiums, order fixing costs and other incidental charges. It is not in dispute that such a claim was the subject-matter of correspondence which passed between the parties. Receipt of such letters from MII is not denied or disputed by BSCL. It has also not been disputed that the right reserved by MII to claim such additional costs towards procurement of the materials on behalf of BSCL was not denied or disputed. Only pursuant to or in furtherance of the said correspondence, had procurement on the said basis been undertaken by MII and acceptance of BSCL in this behalf was presumed. The learned arbitrator proceeded on such presumption. According to the learned arbitrator, despite such knowledge, BSCL failed to make payment. The learned arbitrator in his award has gone into the said question in detail. Reference had been made to the evidence of Shri A.R. Taylor, who was examined on behalf of MII. The said witness was cross-examined by BSCL. Both the parties had filed detailed written submissions before the learned arbitrator. It is on the basis of such evidence brought on record and submissions made before him, the learned arbitrator held:

"... In my opinion, BSCL must be taken to have accepted the proposal of MII and to have gone along with MII's action flowing from that proposal and to have benefited thereby."

94. With a view to consider the submission of Mr Mitra that in terms of the contract entered into by and between the parties, MII was not entitled to the said claim, it would be proper to notice the relevant clause of the contract which is in the following terms:

"5. *Replacement steel.*—BSCL shall procure suitable steel for jackets (based on MTO supplied by MII) on a replacement basis for MII purchased steel. BSCL shall purchase steel as plate suitable for rolling 24

in OD and above tubulars. Replacement material shall be delivered by BSCL to MII's yard at Dubai Emirate, United Arab Emirates or to Singapore Port Authority for trans-shipment by MII (at BSCL's cost) to Batam Island, Indonesia. MII shall indicate the destination when furnishing the replacement steel request."

95. In terms of the aforementioned provision of the contract, BSCL was required to procure suitable steel for jackets on replacement basis in regard to the quantum of steel purchased by MII. If BSCL had failed to procure the said required amount of steel to replace the structural materials which MII had provided from its inventory as an accommodation to BSCL, indisputably the understanding between the parties was that either such materials should be replaced or the cost therefor had to be paid. It has not been disputed before the arbitrator that BSCL (*sic* did not) promptly replaced the material. It is in that view of the matter, the learned arbitrator in his partial award held:

> "15.19. The procurement was effected by MII from its inventory on the basis that it would be replaced by BSCL promptly. It was not so replaced. To effect the replacement MII would be compelled to pass through the entire burdensome process of procuring the structural material directly from outside sources. MII suffered loss and damage which it has quantified at US$ 2.3 million in the light of the considerations mentioned by it earlier."

96. The arbitrator has noticed that the claim of MII arose only after it has been satisfactorily proved that the invoices in respect of each of these claims were issued and had become due for payment before reference to the arbitrator. It furthermore appears that para 23 of the partial award and the claim for compensation on the aforementioned head are not identical. Para 23 of the partial award dealt with the claim in respect of WI-9 to WI-S pipeline laying. So far as para 24 of the said award is concerned, the learned arbitrator noticed the specific invoices issued against Change Orders 2, 3 and 7 relating to delay and disruptions. It is, therefore, in our considered opinion, not correct to contend that the invoice is the only base whereby and whereunder a claim can be made. There is no legal warrant for the said proposition. A claim can also be made through correspondence or in meetings.

97. A claim for overhead costs resulting in decrease in profit or additional management costs is a claim for damages.

98. An invoice is drawn only in respect of a claim made in terms of the contract. For raising a claim based on breach of contract, no invoice is required to be drawn.

99. It is furthermore not in dispute that the claim for damages had been made prior to invocation of arbitration. Once such a claim was made prior to invocation, it became a dispute within the meaning of the provisions of the 1996 Act. It is not disputed that the same claim was specifically referred to arbitration by MII in terms of its notice dated 10-4-1989.

100. While claiming damages, the amount therefor was not required to be quantified. Quantification of a claim is merely a matter of proof.

101. In fact BSCL never raised any plea before the arbitrator that the said claim was arbitrary or beyond its authority. Such an objection was required to be raised by BSCL before the arbitrator in terms of Section 16 of the 1996 Act. It may also be of some interest to note that this Court even prior to the enactment of a provision like Section 16 of the 1996 Act in *Waverly Jute Mills Co. Ltd.* v. *Raymon & Co. (India) (P) Ltd.*[12], *Dharma Prathishthanam* v. *Madhok Construction (P) Ltd.*[13] clearly held that it is open to the parties to enlarge the scope of reference by inclusion of fresh disputes and they must be held to have done so when they filed their statements putting forward claims not covered by the original reference.

Method for computation of damages

102*. What should, however, be the method of computation of damages is a question which now arises for consideration. Before we advert to the rival contentions of the parties in this behalf, we may notice that in *M.N. Gangappa* v. *Atmakur Nagabhushanam Setty & Co.*[14] this Court held that the method used for computation of damages will depend upon the facts and circumstances of each case.

102-A. In the assessment of damages, the court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. (See *Lavarack* v. *Woods of Colchester Ltd.*[15], All ER p. 690 G.)

103. The arbitrator quantified the claim by taking recourse to the Emden Formula. The learned arbitrator also referred to other formulae, but, as noticed hereinbefore, opined that the Emden Formula is a widely accepted one.

104. It is not in dispute that MII had examined one Mr D.J. Parson to prove the said claim. The said witness calculated the increased overheads and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled "Change Orders, Overtime, Productivity" commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overheads and loss of profit. Mr D.J. Parson is said to have brought out the additional project management cost at US$ 1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(*a*) *Hudson Formula*: In *Hudson's Building and Engineering Contracts*, Hudson Formula is stated in the following terms:

> "Contract head office overhead and profit percentage x $\frac{\text{Contract sum}}{\text{Contract period}}$ x Period of delay"

12 (1963) 3 SCR 209 : AIR 1963 SC 90

13 (2005) 9 SCC 686

* **Ed.**: Para 102 corrected vide Official Corrigendum No. F.3/Ed.B.J./52/2006 dated 31-7-2006

14 (1973) 3 SCC 406

15 (1967) 1 QB 278 : (1966) 3 All ER 683 : (1966) 3 WLR 706 (CA)

In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

(*b*) *Emden Formula*: In *Emden's Building Contracts and Practice*, the Emden Formula is stated in the following terms:

$$\text{"Head office overhead and profit} \times \frac{\text{Contract sum}}{\text{Contract period}} \times \text{Period of delay"}$$

$$\frac{\text{Head office overhead and profit}}{100}$$

Using the Emden Formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organisation as a whole by the total turnover. This formula has the advantage of using the contractor's actual head office overhead and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases including *Norwest Holst Construction Ltd.* v. *Coop. Wholesale Society Ltd.*[16], *Beechwood Development Co. (Scotland) Ltd.* v. *Mitchell*[17] and *Harvey Shopfitters Ltd.* v. *Adi Ltd.*[18].

(*c*) *Eichleay Formula*: The Eichleay Formula was evolved in America and derives its name from a case heard by the Armed Services Board of Contract Appeals, Eichleay Corporation. It is applied in the following manner:

Step 1

$$\frac{\text{Contract billings}}{\text{Total billings for contract period}} \times \text{Total overhead for contract period} = \text{Overhead allocable to the contract}$$

Step 2

$$\frac{\text{Allocable overhead}}{\text{Total days of contract}} = \text{Daily overhead rate}$$

Step 3

$$\text{Daily contract overhead rate} \times \text{Number of days of delay} = \text{Amount of unabsorbed overhead"}$$

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first

16 Decided on 17-2-1998, [1998] EWHC Technology 339
17 Decided on 21-2-2001, (2001) CILL 1727
18 Decided on 6-3-2003, (2004) 2 All ER 982 : [2003] EWCA Civ 1757

determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

105. Before us several American decisions have been referred to by Mr Dipankar Gupta in aid of his submission that the Emden Formula has since been widely accepted by the American courts being *Nicon Inc.* v. *United States*[19], *Gladwynne Construction Co.* v. *Mayor and City Council of Baltimore*[20] and *Charles G. William Construction Inc.* v. *White*[21].

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.

107. If the learned arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court.

Actual loss: Determination of

108. A contention had been raised both before the learned arbitrator as also before us that MII could not prove the actual loss suffered by it as is required under the Indian law viz. Sections 55 and 73 of the Indian Contract Act as Mr D.J. Parson had no personal knowledge in regard to the quantum of actual loss suffered by MII. D.J. Parson indisputably at one point of time or the other was associated with MII. He applied the Emden Formula while calculating the amount of damages having regard to the books of accounts and other documents maintained by MII. The learned arbitrator did insist that sufferance of actual damages must be proved by bringing on record books of accounts and other relevant documents.

109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the

19 Decided on 10-6-2003 (USCA Fed Cir), 331 F. 3d 878 (Fed. Cir. 2003)
20 Decided on 25-9-2002, 807 A. 2d 1141 (2002) : 147 Md. App. 149
21 271 F 3d 1055 (Fed. Cir. 2001)

aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.

111. In *State of U.P.* v. *Allied Constructions*[22] this Court held: (SCC p. 398, para 4)

> "*4*. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co.* v. *Govt. of Kerala*[23]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *U.P. SEB* v. *Searsole Chemicals Ltd.*[24] and *Ispat Engg. & Foundry Works* v. *Steel Authority of India Ltd.*[25])."

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd.* v. *ONGC*[26] and *D.D. Sharma* v. *Union of India*[27].)

22 (2003) 7 SCC 396
23 (1989) 2 SCC 38
24 (2001) 3 SCC 397
25 (2001) 6 SCC 347
26 (2003) 8 SCC 593
27 (2004) 5 SCC 325

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in *Chairman and MD, NTPC Ltd.* v. *Reshmi Constructions, Builders & Contractors*[28], *Union of India* v. *Banwari Lal & Sons (P) Ltd.*[29], *Continental Construction Ltd.* v. *State of U.P.*[30] and *State of U.P.* v. *Allied Constructions*[22].

115. A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.

Clause 37—Effect of

116. We may now look at clause 37 of the main contract entered into by and between ONGC and BSCL which reads as under:

> "37. *Indirect and consequential damages.*—Neither company nor contractor shall be liable to the other for any consequential damages, which shall include but not be limited to loss of revenue/profits, loss or escape of product, etc."

117. In *Major (Retd.) Inder Singh Rekhi* v. *Delhi Development Authority*[31], whereupon Mr Mitra placed strong reliance, an award made under the old Act was in issue. A dispute had arisen whether there was a claim and denial or repudiation thereof. In that context, it was held: (SCC p. 340, para 4)

> "There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

118. There is no dispute about the aforementioned principle but the same would not mean that in every case the claim must be followed by a denial. If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator.

28 (2004) 2 SCC 663
29 (2004) 5 SCC 304
30 (2003) 8 SCC 4
22 (2003) 7 SCC 396
31 (1988) 2 SCC 338

119. In *Bharat Coking Coal Ltd.* v. *L.K. Ahuja*[32] this Court opined: (SCC p. 118, para 24)

> "*24.* Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading 'Loss or Profit'. It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd.* v. *Cunard White Star Ltd.*[33] by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant."

We are herein not concerned with such a case.

120. In terms of clause 37 of the main contract, reference whereto has been made hereinbefore, neither of the parties are liable to the other for any consequential damages. The claim for damages raised by MII cannot be said to be consequential damages. The claim relates to direct losses purported to have been occasioned by the failure to perform the contractual duty on the part of BSCL and to honour the time-bound commitments. Such a loss, according to MII, occurred on account of increased overhead cost and decreased profit and additional management costs by reason of BSCL's delays and disruptions. It is only in that view of the matter, that the Emden Formula was taken recourse to. Furthermore, clause 37 of the main contract was a matter of an agreement by and between ONGC and BSCL. In law, it could not have been extended to the obligations assumed by BSCL towards MII in terms of the contract entered into by and between the said parties. So far as ONGC is concerned, it cannot be said to have any role to play in the event of breach of obligation on the part of BSCL towards its sub-contractor.

121. Article 3.1 of the sub-contract reads as under:

> "MII shall be bound to BSCL by the terms of this sub-contract agreement and to the extent that the provisions of the respective main contract between the buyer and BSCL apply to the relevant sub-contract work of MII as defined in this sub-contract agreement, MII shall assume towards BSCL all the obligations and responsibilities which BSCL, by such main contract, assumes to the buyer and shall have the benefit of all

32 (2004) 5 SCC 109
33 (1940) 1 KB 740 : (1940) 2 All ER 97 (CA)

rights, remedies and redresses against BSCL which BSCL, by such main contract, has against the buyer, insofar as applicable to this sub-contract agreement, provided that when any provision of the respective main contract between the buyer and BSCL is inconsistent with this sub-contract agreement, this sub-contract agreement shall govern and prevail over the main contract."

122. By reason of the said provision, therefore, the main contract between ONGC and BSCL would apply to the relevant sub-contract work and MII was enjoined with a duty towards BSCL to fulfil its obligations and responsibilities. But, thereby, BSCL cannot absolve itself from its liability so far as breach of the terms and conditions of the sub-contract is concerned. In other words, by reason of Article 3.1, the contract by and between ONGC and BSCL has not been subsumed in the sub-contract so as to absolve BSCL from its own contractual liability for breach of contract or otherwise.

Method of measurement

123. The main contention of BSCL in this behalf is that the learned arbitrator acted illegally and without jurisdiction in adopting the AISC Code. The question arose in the context of the provisions in the contract that MII was required to undertake to fabricate the materials which were required to be supplied and, therefore, was entitled to fabrication charges from BSCL. It has not been denied or disputed before us that the parties did not agree to a fixed method of measurement. They did not refer to the AISC Code in the contract but only because the AISC Code was not referred to in the contract, the same by itself may not be a ground for us to hold that the arbitrator had gone beyond the terms of the contract. Clauses 23.1.1(*a*) and (*c*) of the main contract read as under:

"23.1.1. (*a*) Payment for structural material viz. steel and steel tubulars, anodes, flooding and grouting stems, rubberised rings and rubberised items for barge bumpers, rub-strips and boat landing shall be made on the basis of actual landed cost at contractor's yard. Landed cost would include c.i.f. price, testing charges, if any, plus port charges, clearing and handling charges at port, transportation to contractor's fabrication yard plus local taxes (like octroi), if any. Company shall pay to contractor an additional 7½ per cent of the landed cost referred to above to cover the cost of procurement.

* * *

(*c*) In computing the quantity of steel materials used on each platform for the purpose of sub-clause (*a*) above, an allowance of 4% shall be made for wastage. The payment to contractor shall be for weights including the wastage element credit for steel scrap shall be given by contractor to company at the rate of Rs 500.00 per short ton for the said wastage of 4%."

Clause 11 and clause 5 read as under:

"11. *Fabricated tonnages.*—The quantities of materials used in the works shall be jointly (i.e. by ONGC/Engineer, BSCL and MII)

determined on the basis of as-fabricated tonnage as per the main contract between the buyer and BSCL and shall be used for adjusting the sub-contract price."

"5. The preceding fabrication rates are worked out taking into consideration installation of all equipment, fabrication and installation of process piping, electricals and instrumentation work including pre-commissioning and all-yard test in addition to structural fabrication work in accordance with the specifications. For computing the tonnage for reimbursement of fabrication, installation, pre-commissioning and testing work at the yard by MII the tonnage of equipment and items for top side facilities shall not be included and fabrication tonnage shall be solely on the basis of as-built tonnage as approval by the buyer."

124. Submission of Mr Mitra is that a combined reading of the aforementioned provisions would go to show that the method of measurement was the subject-matter of the contract. We do not agree. Clause 23.1.1 has no application in the present case as it covers payment for structural material which has no nexus with Claim 4 (*sic* Claim 1). The claim of MII was for labour charges due under the sub-contract for fabricating the structures.

125. The learned arbitrator, in his partial award, while dealing with the said claim held:

"*15.7.* As regards replacement steel, BSCL would procure suitable steel for jackets (based on MTO supplied by MII), on a replacement basis for MII purchased steel. BSCL would purchase steel as plate suitable for rolling 24 in OD and tubulars. Replacement material would be delivered by BSCL to MII's yard at Dubai, UAE or to Singapore Port Authority for trans-shipment by MII, at BSCL's cost, to Batam Island, Indonesia. In the matter of computing the prices payable for structural fabrication of piles, jackets and decks clause 23.1.1 of the main fabrication contract provided that the prices would be computed as follows: The payment for structural material, namely, steel and steel tubulars and anodes, flooding and grouting system, rubberised rings and rubberised items for barge bumpers, rub-strips and boat landing would be made on the basis of actual landed cost at the yard of BSCL or MII. The landed cost would include CIF price, testing charges, if any, plus port charges, clearing and handling charges at port, transportation to BSCL's or MII's fabrication yard plus local taxes, and ONGC would pay to BSCL an additional 7½ per cent of the landed cost to cover the cost of procurement."

126. Wastage allowance was relevant only for the purpose of allowance due to BSCL from MII in respect of scrap materials. The learned arbitrator in his award had referred to evidence adduced in this behalf by Shri A.R. Taylor. The provisions of the contract have no bearing on calculation of gross fabricated weight of the structures for determining the fabrication charges due.

127. The use of the AISC Code relates to the claim for fabrication charges being Claim 1. The said claim was for labour charges which was not

a claim for cost of material and, thus, nothing to do therewith. The scheme of the contract provides that total estimated tonnage of 18,178 ST will have the following break-ups:

ED/EE platforms	— 6078	ST
WI-8, WI-9, WI-10 and N-3 platforms	— 12,100	ST
	18,178	ST

128. Since the total tonnage of 18,178 ST was only an estimated tonnage, the sub-contract made provision for variation of the contract price on the basis of "as-fabricated" tonnage. Further the quantities of the materials used were to be jointly determined by ONGC/EIL, BSCL and MII on the basis of fabricated tonnage which was to be used for adjusting the sub-contract price. If the "as-fabricated tonnage" was found to be less than the estimated tonnage, the excess payment received by MII through monthly bills was to be refunded. If the "as-fabricated tonnage" was found to be more than the estimated tonnage, MII was to be paid for the additional tonnage by applying the rate of US$ 1067 per ST. The contract was silent with respect to the method or code to be applied for determining the "as-fabricated tonnage".

129. Clause 1.1.13 defined specifications to mean Industry Standard Codes (ISC). In the absence of a contractually specified method of calculation, MII applied the AISC manual of steel construction for calculating the as-fabricated tonnage. AISC is an industry standard. It has been applied by ONGC in other contracts. Even the arbitrator has noted that BSCL has also accepted the validity of the AISC Code. Now BSCL cannot turn around and take a contrary position before this Court in the proceedings under Section 34 of the Act. Hence by adopting the AISC Code, the arbitrator has not acted contrary to the terms of the contract.

130. The arbitrator in his award noticed that the parties impliedly accepted the validity of the AISC method of calculation for calculating the final fabricated weight in the following terms:

> "... Instances of those contracts have been provided by MII during the arbitration proceeding showing that the AISC Code has been employed for determining the final 'as-fabricated tonnage' of structures... It seems to me that inasmuch as BSCL has applied the AISC Code in the case of long-to-long point distance measurement it cannot be denied that the AISC Code is regarded as a valid basis for measurement. There is no reason why it should be applied in the case of one category of fabrication and not in the case of another."

If before the arbitrator, the said mode of calculation was accepted, we do not see any reason why BSCL should be permitted to raise the said question before us.

Buoyancy tanks for ED and EE jackets

131. It involves a question of fact. It was a part of Claim 1 for fabrication. The contention of BSCL is that whereas buoyancy tanks which were used in WI-8 and N-3 jackets were removed by MII after installation thereof, the same had been used after refurbishment on the ED/EE jackets

and in that view of the matter, no fabrication was required to be done. The claim of MII was that it had nothing to do with the cost of material or the nature of the fabrication work involved. Its claim was purely based on the labour cost at the rate of US$ 1067 per ST which was incurred by it towards fabrication work in the refurbishment of the buoyancy tanks. According to it, the tonnage of the buoyancy tanks had not been taken into account by ONGC on the ground that no fabrication work was done after removal of the buoyancy tanks from N-3 and WI-8 jackets. The learned arbitrator, however, in his partial award found as of fact that substantial fabrication work had been done by MII in the refurbishment of the said buoyancy tanks in the following terms:

> "12.22... Accepting those instructions, MII made substantial fabrication in refurbishing, handling, rigging and welding the buoyancy tanks on the ED and EE jackets. The oral evidence of RW 1 S.K. Mukherjee shows that the attachment of buoyancy tanks involves substantial fabrication activity. There can be no doubt that fabrication work had to be done and that involved a measure of labour activity. MII has demonstrated that there was difference in weight between the original buoyancy tanks used on N-3 and WI-8 jackets and the weight of those tanks when used on the ED and EE jackets. It says that this clearly points to substantial fabrication activity for refurbishment of those two tanks."

132. It has further been held by the learned arbitrator that MII had also been able to establish that there had been a difference in weight between the original buoyancy tanks used on N-3 and WI-8 jackets and the weight of those tanks when used in ED and EE jackets. In fact, the learned arbitrator in arriving at the said conclusion had taken into consideration the admission of Shri S.K. Mukherjee who was examined on behalf of BSCL itself that attachment of buoyancy tanks involved substantial fabrication activity. The dispute raised is a matter of appreciation of evidence. The findings arrived at by the learned arbitrator cannot, thus, be said to be perverse.

Tie-downs and sea-fastening

133. This claim relates to the question whether MII was entitled to payment for fabrication as the tie-downs and sea-fastening require substantial fabrication job in regard whereof there did not exist any provision in the contract. The learned arbitrator has accepted the claim of MII holding that offshore construction contracts, jackets and decks are fabricated onshore and then they are transported on barges to the offshore location for installation wherefor the lugs, braces and other sea-fastening and tie-down items are required to be created which the installation contractor is to use to weld the jackets and decks to the transportation barges, thereby securing the jackets for their journey to the offshore location. MII had merely claimed payment for fabrication of tie-downs and sea-fastening as part of the fabrication scope of work. Reference has been made to clause 2 of the contract which is as under:

> "2.1. (*i*)(*a*) Load-out, sea-fastening, ... 60% of the transportation and installation lump sum price of jacket, piles and appurtenances.

(*b*) Load-out, sea-fastening, ... 40% of the transportation and installation lump sum price of decks, hook-up and resting.

134. The said provision has no application in the instant case as it merely provides for stage payment on milestone basis. In fact, the clause which would be attracted in the present case contained in clause 2.1(*a*)(*i*) is as under:

"The scope of work to be executed by contractor under this contract shall comprise ...

(*i*) Jackets

Including barge bumpers, boat landing, grouting and flooding systems, launch trustees, riser clamps. Catholic protection anodes, and mats and other accessories and components indicated in the drawings and specifications including lifting lugs, pulling lugs, retaining lugs, etc. for lead out and refastening and upending of the jacket."

135. It specifically covers sea-fastening as part of the scope of fabrication contract work. WI-8, WI-9, WI-10 and N-3 fabrication contract also contains a similar clause in clause 2.1.

136. The learned arbitrator in para 12.24 of his award noticed that BSCL itself has acknowledged to ONGC that the tie-down materials had been fabricated as part of the fabrication scope and the weight could not be disallowed in calculating the "as-fabricated tonnage". It, therefore, evidently cannot take a stand which is contrary thereto and inconsistent therewith. Thus, by reason of the award, the learned arbitrator was of the opinion that the sea-fastening and tie-down were part of the transportation and installation scope and BSCL did not succeed in proving that the said item should be included in the scope of transportation and is not a separate item under the head of fabrication. Again, the findings of the learned arbitrator were within his domain, being findings of fact.

Foreign exchange

137. Dispute in relation to the said claim would depend upon the interpretation of clause 3 of Section 2 of the Consolidated Sub-Contract Price Schedule which provides:

"While the sub-contract price for the work described in the letter of intent is payable by BSCL to MII in US dollars the main contract price is payable by ONGC to BSCL in Indian rupees. It has been agreed that rupee-US dollar exchange rate shall remain fixed at Rs 100.00 = US$ 8.575 and loss or gain due to any variation in the rupee-US dollar exchange rate at the time of actual remittance of bills would be to MII's account.

The aforesaid rate was the prevailing rate as on 9-8-1984 as mentioned in the letter of intent dated 11-9-1984. Within 30 days of completion of MII's scope of work under the sub-contract, a reconciliation will be made of all the payments made from time to time.

If the cumulative value of all rupees expended to buy US dollar remittance for the sub-contract work described in the letter of intent is

less than the rupee equivalent of the sub-contract price as determined on the basis of the aforesaid rate prevailing on 9-8-1984, BSCL shall remit the balance amount of Indian rupees, if any, to MII in US dollars at the prevailing rate of exchange on the date of such US dollar remittance; and if after such reconciliation it is found that BSCL has expended rupees in excess of the rupees equivalent of the sub-contract price for the work described in the letter of intent, MII shall arrange to refund any such excess in rupees to BSCL."

Clause 4.0 of the contract provides that the payment will be made by BSCL to MII on receipt of payment by BSCL from ONGC.

138. It is not in dispute that by reason of the contract entered into by and between the parties the rate was frozen at Rs 100 = US$ 8.575. One of the questions which arises for consideration is as to whether the said provision applied to all the claims or not. According to MII, having regard to the provisions for milestone payments for transportation and installation, clause 4.0 would apply only in relation thereto.

139. It is contended that BSCL had not correctly understood the merit and purport of the said provision which has been sought to be explained. The said provision according to MII would be as under:

> If the contract is followed, MII gets US$ 100 and pays back US$ 7.43, therefore, the net receipt of MII is US$ 92.57. However, BSCL had adjusted the exchange rate at the time of payment only. The rate as per contract is 1 US$ = 11.662. Thus, the rate on the date of payment is Rs 13. Therefore, the net receipt of MII is only US$ 89.70. In reality, the loss suffered by MII was much greater since in the fifty-four month life of the project, the value of the Indian rupee deteriorated drastically against the US dollar.

140. It is not in dispute that in terms of the contract, the payments made by BSCL, which was to be in US dollars, was required to be reconciled at the end of the contract. According to MII, if BSCL expended less than the rupee amount stipulated in the sub-contract in dollar payments, BSCL would convert the unused rupees to dollars to remit the dollars to MII. Whereas if BSCL expended more than the agreed amount of rupees, MII would refund the excess amount to BSCL so as to ensure sharing of exchange loss by both the parties. According to MII, however, BSCL acted contrary to the said provision insofar as instead of paying the full amount of invoice in US dollars it paid at the fixed exchange rate relying on, or on the basis of, the aforementioned provisions, resulting in loss suffered by MII.

141. The learned arbitrator proceeded on the basis that loss of exchange provisions had no application in respect of structural material (Claim 4), bulk material (Claim 5), transportation of pipe (Claim 6), reimbursables (Claim 7), change orders and extra work (Claim 8) and delay and disruption (Claim 9). BSCL although has acted in breach of the contract in which variation provision as regards the claims of the sub-contract viz. scope of fabrication work (Claim 1), transportation and installation of platforms (Claim 2) and

transportation and installation of pipelines and risers (Claim 3) while making payments. It is, however, one thing to say that having regard to the nature of breach on the part of BSCL, MII would be entitled to claim damages, but it is another thing to say that by reason thereof it would be entitled to full payment without deduction relating to BSCL conversion of Indian rupees to US dollars. It is not in dispute that the initial claim of MII was US$ 2,881,195.03 which was later on revised to US$ 3,330,790.94.

142. In terms of the agreement, payments were to be made to MII if the payments were certified by EIL and upon receipt of payments from ONGC and upon receipt of foreign exchange clearance. For appreciating the aforementioned disputes, it may be necessary to refer to the general terms of payment clause:

> "1. *Fabrication.*—Claims for structural fabrication work are to be billed by MII duly certified by EIL on monthly basis and the payment of the same bills shall be released after 60 days of receipt of the bill by BSCL.
>
> 4. *Payments as stipulated above will be subject to the following conditions.*—(*a*) Receipt of foreign exchange clearance by BSCL. (*b*) Payments on milestone basis will be made by BSCL to MII only after payments have been received by BSCL from ONGC."

143. The learned arbitrator held that MII would be entitled to receive the entire amount as BSCL, despite receipt of payment from ONGC, did not pay the amount to MII. For the purpose of applicability of the exchange rates, the same, in our opinion, is irrelevant. The award was required to be made in terms of the contract whereby and whereunder the foreign exchange rate was frozen as was applicable on 9-8-1984. The parties were bound by the said terms of contract. It may be noticed that the sub-contract was entered into on 1-1-1986. The execution of the contract had started much earlier i.e. much before the date of entering into the contract. The purpose for which the rupee-US dollar conversion rate has been frozen as on 9-8-1984 must be viewed from the angle that thereby the parties thought that loss or gain towards the exchange rates would be on account of MII. It is in the aforementioned situation that a letter of intent in the following terms was served:

> "M/s McDermott International Inc.,
> P.O. Box 3098,
> Dubai,
> United Arab Emirates.
> Dear Sirs,
> Sub: ED, EE, WIs-8, 9, 10 and N-3 platforms
> Ref: Minutes of meeting dated 9-8-1984
> Your offer P/M 547 dated 9-8-1984
> 8/3132 dated 4-9-1984

With reference to the above, we are pleased to issue this letter of intent conveying acceptance of your offer for the following:

a 1.0. FABRICATION

1.1. Fabrication, load-out and sea-fastening of 6 jackets with piles including all appurtenances such as boat landing, conductor, riser clamps, etc.

b 1.2. Fabrication, load-out and sea-fastening of 4 main decks, WI-8, WI-9, WI-10 and N-3 complete with installation of all equipments, process piping, electricals and instrumentation work including all-yard test.

1.3. Refurbishing of 4 temporary decks to be supplied by ONGC.

2.0. TRANSPORTATION

c 2.1. Transportation, installation, hook-up and commissioning of all above i.e. 1.1, 1.2 and 1.3 and ED, EE decks and 6 helidecks fabricated by BSCL at Jellingham. Temporary deck will be collected from ONGC and taken to MII yard. Additionally the temporary decks will be removed prior to installation of this deck and handed back to ONGC.

d 3.0. Transportation, installation, hook-up and commissioning of submarine pipelines and risers.

4.0. PRICES

The lump sum price is as follows:

4.1. For 1.1, 1.2 and 1.3 of above		US$ 19,400,000
4.2. For 2.0 of above		US$ 23,025,000
e	Total	US$ 42,425,000

4.3. PIPELINES

For 3.0 above pipelines totalling 28 US$ 3,800,000 L.S. km in length and installation of 8 risers @ US$ 91 per metre of pipeline and US$ 156,485 per riser.

f 4.4. The above lump sum prices are based on estimated tonnages and flowline length and number of risers. Any variation in the above will alter the prices pro rata.

4.5. The above amounts are based on the exchange rate between US dollars and Indian rupees (as ruling on 9-8-1984). Any variation in the above rate will be to MII's account.

g 5.0. TERMS & CONDITIONS

5.1. All terms and conditions other than the payment terms as stipulated by ONGC in their contract with BSCL for the above platforms will be applicable to MII.

h 5.2. The lump sum price is inclusive of all engineering required for total scope of BSCL's and MII's work for six platforms as well as all technical service support by provision of expert personnel to BSCL.

6.0. TERMS OF PAYMENT

Terms of payment are to be mutually discussed and agreed to. It is however understood that payment on milestone basis will be made by BSCL to MII only after payments have been received by BSCL from ONGC.

7.0. DELIVERY

MII will ensure delivery in such a manner that the delivery dates as stipulated by ONGC for the above platforms will be met.

8.0. It may be noted that this letter of intent is subject to clearance of import list from DGTD and receipt of sanction from the Government of India for release of requisite amount of foreign exchange and import licenses, etc. In case the Government's clearance/approval is not received, this letter of intent will be withdrawn without any financial repercussions on either side. We shall however inform you as soon as the Government's approval/clearance is received by us.

Subject to this, we would request you to proceed with the work to ensure completion within the agreed schedule."

144. There might be some delay on the part of BSCL to make payments. We may not go into the aforementioned question, but to hold that the exchange rate clause shall cease to have any application only because of the breaches on the part of BSCL, cannot be accepted.

145. We are not in a position to accept that the exchange variation provision does not relate to the payments in respect of Claims 1, 2 and 3. The objection raised by the claimant to the said extent is accepted.

Substitution

146. It is not in dispute that MII had substituted heavier material, as material conforming to ONGC specification was not available readily in the market. The matter was referred to EIL. Use of material was found to be technically acceptable to EIL to which ONGC agreed by a letter dated 3-5-1985. ONGC, however, made it clear that it would not make payment for the substituted material. BSCL immediately by a telex dated 13-5-1985 informed the same to MII. ONGC also in its letter dated 6-12-1984 categorically stated:

"The subject-matter highlighted in your letter mentioned above has been reviewed by us and we have found that payment against increased tonnage on account of material substitutions proposed by M/s BSCL/MII cannot be agreed to. Based on the above we reiterate our view that we will pay the material/fabrication costs based on the materials shown in the AFC drawings."

147. The claim of MII is based on the failure on the part of BSCL to fulfil its part of the obligation in procurement of the required material. It is true that BSCL agreed to reimburse MII for the same. MII's claim is partially based on the facts that EIL had recommended payments therefor as stated in a letter to ONGC dated 10-2-1987 and 6-4-1987.

148. However, it is also not in dispute that ONGC did not accept the said recommendations and refused to take into consideration the substituted tonnage for payment of "as-fabricated tonnage".

149. There may be a dispute in this behalf between BSCL and ONGC. However, admittedly, ONGC refused payment to BSCL.

150. In his partial award, the learned arbitrator noticed that ONGC's involvement was imperative. ONGC had all along maintained its stand that it was not ready and willing to bear the extra costs. The correspondence between the parties was brought on record.

151. Clause 5 of the contract categorically states that MII was to procure the material which was to be reimbursed by BSCL. The extra amount incurred by MII for procuring materials having extra thickness, therefore, was not payable. To the aforementioned extent, there has been a novation of contract. MII had never asserted, despite forwarding of the contention of ONGC, that it would not comply therewith. It, thus, accepted in sub silentio. It, thus, must be held to have accepted that no extra amount shall be payable. It is one thing to say that some more amount might have been spent towards fabrication but the learned arbitrator has awarded the exact amount claimed by MII in the following terms:

> "I am satisfied that MII is entitled to a payment of US$ 20,832.108 for the disallowed tonnage of 19.584 ST at the contractual rate of US$ 1067 per ST."

152. It is in the aforementioned context that the involvement of ONGC was necessary and if it is the accepted case of the parties that ONGC would not entertain any claim of BSCL in this behalf, a fortiori having regard to the tripartite agreement, the learned arbitrator could have no jurisdiction to determine the claim in favour of MII only because at one point of time BSCL had raised its own claim with ONGC. In other words, any reduction of the claim of BSCL by ONGC had a direct nexus with the claim of MII. It was, therefore, not a case where ONGC was not involved in the matter. The exchange of letters categorically proves that MII had accepted that it would not be entitled to any extra amount in that behalf. MII by necessary implication accepted the said contention. The principle of acceptance sub silentio shall also be attracted in the instant case. MII was, therefore, not entitled to raise a claim to the extent of fabrication on account of the increased charges for substitution of material used for WI-8, WI-9, WI-10 and N-3 jackets and piles.

153. To the aforementioned extent, the claim of MII was beyond the terms of the contract.

Interest

154. The power of the arbitrator to award interest for pre-award period, interest pendente lite and interest post-award period is not in dispute. Section 31(7)(*a*) provides that the Arbitral Tribunal may award 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 award is made i.e. pre-award period. This, however, is

subject to the agreement as regards the rate of interest on unpaid sums between the parties. The question as to whether interest would be paid on the whole or part of the amount or whether it should be awarded in the pre-award period would depend upon the facts and circumstances of each case. The Arbitral Tribunal in this behalf will have to exercise its discretion as regards (*i*) at what rate interest should be awarded; (*ii*) whether interest should be awarded on the whole or part of the award money; and (*iii*) whether interest should be awarded for the whole or any part of the pre-award period.

155. The 1996 Act provides for award of 18% interest. The arbitrator in his wisdom has granted 10% interest both for the principal amount as also for the interim. By reason of the award, interest was awarded on the principal amount. An interest thereon was up to the date of award as also the future interest at the rate of 18% per annum.

156. However, in some cases, this Court has resorted to exercise of its jurisdiction under Article 142 in order to do complete justice between the parties.

157. In *Pure Helium India (P) Ltd.*[26] this Court upheld the arbitration award for payment of money with interest at the rate of 18% p.a. by the respondent to the appellant. However, having regard to the long lapse of time, if award is satisfied in entirety, the respondent would have to pay a huge amount by way of interest. With a view to do complete justice to the parties, in exercise of jurisdiction under Article 142 of the Constitution of India, it was directed that the award shall carry interest at the rate of 6% p.a. instead and in place of 18% p.a.

158. Similarly in *Mukand Ltd.* v. *Hindustan Petroleum Corpn. Ltd.*[34], while this Court confirmed the decision of the Division Bench upholding the modified award made by the learned Single Judge, the Court reduced the interest awarded by the learned Single Judge subsequent to the decree from 11% per annum to 7½ % per annum observing that 7½ % per annum would be the reasonable rate of interest that could be directed to be paid by the appellant to the respondent for the period subsequent to the decree.

159. In this case, given the long lapse of time, it will be in furtherance of justice to reduce the rate of interest to 7½ %.

160. As regards certain other contentions, in view of the fact that the same relate to pure questions of fact and appreciation of evidence, we do not think it necessary to advert to the said contentions in the present case.

Conclusion

161. IAs Nos. 2 and 3 are allowed in part and to the extent mentioned hereinbefore. The award of the learned arbitrator is modified to the aforementioned extent. In the facts and circumstances of this case, there shall be no order as to costs.

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26 *Pure Helium India (P) Ltd.* v. *ONGC*, (2003) 8 SCC 593
34 (2006) 9 SCC 383 : (2006) 4 Scale 453

2005 (81) DRJ 143

HIGH COURT OF DELHI

OMP No. 149/2002

Saroj Bala.....Applicant.

Versus

Rajive Stock Brokers Ltd. & Anr.....Respondents

T.S. Thakur, J.

Decided on 11.03.2005

Arbitration and Conciliation Act, 1996

Section 31 (3) — Arbitration Award given by arbitrator appointed in terms of the bye laws of the stock exchange — Arbitration award containing no reasons in support of the conclusion drawn therein — Award of arbitrator set aside and another arbitrator appointed for fresh decision in accordance with the law.

[Paras 7 & 8]

Cases Referred :

Astra Construction Pvt. Ltd. v. State of H.P.	2002 (Vol. 108) Co.Cases 711
Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.	(2003) 5 SCC 705
Tamil Nadu Electricity Board v. M/s. Bridge Tunnel Constructions and others	AIR 1997 SC 1376
Vashdev Morumal Sawlani v. Yogesh Mehta and another	(2002) 2 Mh.LJ 76

PRESENT : Mr. I.C. Kumar, Adv. for the Appellant.

T.S. Thakur, J.

1. The respondent company is a member of the National Stock Exchange while the petitioner is a constituent who deals in stocks and shares. Disputes between the petitioner and the respondent company having arisen, the same were referred for adjudication to Col. Gujral G. Singh. who was appointed an arbitrator in terms of the bye-laws, rules and regulations of the stock exchange. Before the arbitrator as against the petitioner's claim for a sum of Rs. 24,30,794/-, the respondent company made a counter claim of Rs. 3,33,691/-. By his award dated 25.02.2002, the arbitrator has rejected both the claims. While the petitioner's claim has been rejected on the ground that the same has not been substantiated, the claim made by the respondent has been turned down on the ground that the same is beyond the period of limitation prescribed for the same. Aggrieved, the petitioner has challenged the award on several grounds in so far as the same rejects her claim. The respondent company has not, however, assailed the award or appeared to contest the present application under Section 34 of the Arbitration & Conciliation Act, 1996. Consequently, the award, in so far as it rejects the

claim made by the respondent, has attained finality. The only question left to be determined is whether the award in so far as it rejects the claim of the petitioner also suffers from any infirmity apparent on the face of the record so as to warrant interference with the same in the present proceedings.

2. Appearing for the petitioner, Mr. Kumar argued that the award in so far as it pertains to the claim of the petitioner, was on the face of it, unsustainable. He urged that the arbitrator was, in terms of Section 31(3) of the Arbitration & Conciliation Act, 1996, obliged to give reasons in support of his conclusion. The failure of the arbitrator to do so was, according to the learned counsel, a ground sufficient to justify setting aside of the award and remission of the matter to another arbitrator to be appointed by this court. Reliance in support of that submission was placed by Mr. Kumar upon the decisions of the Supreme Court in **Tamil Nadu Electricity Board v. M/s. Bridge Tunnel Constructions and others AIR 1997 SC 1376, Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705** and the judgment of the High Court of Bombay in **Vashdev Morumal Sawlani v. Yogesh Mehta and another (2002) 2 Mh.LJ 76**. Reliance was also placed upon a Single Bench decision of the High Court of Himachal Pradesh in **Astra Construction Pvt. Ltd. v. State of Himachal Pradesh 2002 (Vol. 108) Company Cases 711**.

3. Section 31(3) of the Arbitration & Conciliation Act, 1996 reads as follows:-

> "(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. A plain reading of the above would show that the arbitral tribunal is under an obligation to state the reasons upon which it makes its award. That obligation would disappear only in two situations namely:-(i) where the parties have agreed that no reasons are to be given by the arbitrator or (ii) where the award is based on agreed terms under Section 30. The present case does not fall in anyone of those situations. Neither the arbitration clause on the basis whereof the reference in question was made nor any subsequent agreement arrived at between the parties at any stage prior to the making of the award, dispensed with the requirement of the arbitrator recording his reasons. It is also not a case where the award is based on agreed terms under Section 30 of the Act. There is, therefore, no gainsaying that the arbitrator was, in the instant case, obliged to state his reasons in support of the conclusions drawn by him in the award. The question is whether that requirement has been satisfied. An answer to that would necessarily depend upon how the arbitrator has dealt with the claim made before him in the

impugned award. The award runs into 2 1/2 pages in which the arbitrator has recalled the stands taken by each party and then addressed himself to the question whether the claim made by the petitioner was barred by limitation. One of the inferences which the arbitrator has drawn in the award after noticing the background in which the claims have been made, is that the petitioner's claim was time barred, although the award remains silent as to how and under what provision of Limitation Act, such a bar arises. What is significant is that having said that the claim is time barred, the arbitrator considers it to be prudent to examine the same on merits. While doing so, the arbitrator has, after referring to the claim and the reply of the respondent, concluded as under:-

> "Examination of Accounts. I examined each and every entry on which the Applicant had based his claim and also examined the documents produced by both the parties to substantiate the claim. Bills, Contract-Notes, Statements of Accounts, Bank Statements and all other relevant documents were perused in the presence of both the parties and inferences drawn. It was conclusively proved that the Respondent's reply was correct and the Applicant did not have any case for his claim."

5. It is evident from the above that the arbitrator has, apart from stating that the perusal of statements of accounts, bank statements and other relevant documents conclusively proved that the respondent's reply was correct and the claimant had no case, omitted to give any reasons for that conclusion.

6. The obligation to record reasons has a salutary purpose to serve. The parties to a lis whether before a court or a domestic forum chosen by the parties like the arbitrator, are entitled to know the reasons that led to the success or the failure of a claim brought before it. The need for disclosure of reasons in support of the conclusions is essential also because it is the disclosure of reasons alone that can effectively demonstrate that the arbitrator or the court before whom the matter was brought had applied its mind. Application of mind by the authority deciding an issue in controversy, is a sine qua non for a proper exercise of the jurisdiction vested in any authority determining the rights and obligations of the parties. The duty to act judicially arises from the nature of the jurisdiction exercised by the authority. Implicit in the duty to act judicially is the obligation to pass an order only after due and proper application of mind.. Application of mind in turn can be demonstrated by the disclosure of the mind which is best done by recording reasons for the conclusion drawn by the authority. That apart, an award made by an arbitral tribunal is open to challenge before the court under Section 34 of the Act. The decision of the Supreme Court in Oil and Natural Gas Commission (supra) has dealt with and elucidated the scope and parameters of the jurisdiction of the court to examine the validity of the

arbitral awards. Disclosure of reasons except in cases where parties agree that the same need not be recorded would, therefore, provide a vital key to the court exercising jurisdiction under Section 34 of the Act to examine whether the award suffers from any illegality to call for modification or setting aside of the same. The necessity of recording reasons cannot, thus, be undermined, having regard especially to the fact that arbitration as an alternative dispute resolution mechanism is catching up and cases involving stakes and issues of far reaching importance in the commercial world are being referred for adjudication by arbitration.

7. Judged in the above background, the award made by the arbitrator, does not, in my opinion, satisfy the requirements of Section 31(3) inasmuch as the arbitrator has not, apart from saying that the claims have not been established, recorded any reason why the same have not been proved. Simply stating that the arbitrator has perused and compared statements of accounts and other documents from which it is proved that the respondent's reply was correct and the applicant did not have any case for his claim is not in my opinion tantamount to recording reasons in support of the award or the conclusion drawn therein. The arbitrator was required to broadly indicate, if not in minute detail the reasons for which he considered the claim to be unsupported or disproved by the documentary evidence placed before him. This the arbitrator has obviously failed to do leaving no option for me except to set aside the award.

8. I accordingly allow this petition, set aside the award made by the arbitrator in so far as the same rejects the claim of the petitioner claimant before him. Having regard to the nature of the controversy and keeping in view the need for providing an independent forum to resolve the disputes, I direct that the claim made by the petitioner shall stand remitted and referred to the arbitration of Justice P.N. Nag, former Judge of this Court. Keeping in view the nature of the claim and the fact that it is going to be a second round of litigation for the parties, I direct that the arbitrator shall be entitled to claim a fee of Rs. 5500/- per hearing subject to an optimum of Rs. One lakh. The parties shall deposit the amount in equal proportions during the course of the arbitration proceedings as and when directed by the arbitrator. Since the respondent is not represented, the arbitrator shall issue notice to it before proceeding further. The records of the erstwhile arbitrator shall be sent to the new arbitrator to ensure that the same reaches the arbitrator within six weeks from today.

9. No costs.

A.P. No. 1267 of 2013

Punjab State Electrictiy Board v. National Small Industries Corporation Ltd.

2014 SCC OnLine Cal 5444

(BEFORE SANJIB BANERJEE, J.)

M/s. Punjab State Electrictiy Board, Now Punjab State Transmission Corporation Limited

Versus

M/s. National Small Industries Corporation Ltd.

Mr. Debabrata Roy, Adv. ... for the petitioner

Ms. S. Rahaman, Adv. ... for the respondent

A.P. No. 1267 of 2013

Decided on March 10, 2014

ORDER

SANJIB BANERJEE, J.:— The Court: An arbitral award passed by the West Bengal Micro Small Enterprises Facilitation Council on May 19, 2011 has been assailed on the grounds that the procedure followed by the council was in derogation of the procedure envisaged by Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 and that the award does not disclose any reasons.

It is not necessary to assess whether there has been any infraction of Section 18 of the said Act of 2006 since it is evident from the award that not a sentence or a line has been expended therein in support of amount awarded in favour of the respondent. Section 16 of the Act provides for arbitration in accordance with the provisions of the Arbitration and Conciliation Act 1996. Section 31 of the 1996 Act mandates that reasons be furnished in support of an arbitral award.

Reasons are indispensable in any form of adjudication in a constitutional democracy governed by the rule of law. Indeed, even if the statute in the present case had not commanded reasons to be furnished, unless the statute had expressly provided for reasons being dispensed with, it was incumbent on the arbitral tribunal to indicate the reasons in support of the award in keeping with the bundle of rights guaranteed to a citizen under the Constitution.

Reasons are the safeguard against the *ipse dixit* of the adjudicating forum; they are links between the facts on which a claim is founded and the conclusions which are arrived at by the adjudicating authority. Reasons indicate the basis on which the adjudicating authority was impelled to arrive at the conclusion on the set of facts before it.

In view of the award not meeting the fundamental test under the 1996 Act and indicating any reasons in support thereof, the entirety of the award dated May 19, 2011 is set aside. Since the petitioner had deposited 75 per cent of the amount at the time of lodging the petition to challenge the award, the petitioner will be entitled to refund of the entire amount together with the accrued interest thereon less the Registrar's usual commission.

The petitioner will also be entitled to costs of the present proceedings assessed at 1000 GM which the respondent will be at liberty to claim from the members of the council who formed the arbitral tribunal for their ignorance or arrogance in not assigning reasons in support of the award.

Urgent certified website copies of this order, if applied for, be supplied to the

parties subject to compliance with all requisite formalities.

1962 SCC OnLine P&H 330 : AIR 1963 P&H 95 : PLR (1964) 66 P&H 4 (SN) (1)

Punjab and Haryana High Court

(BEFORE D. FALSHAW, C.J. AND I.D. DUA, J.)

S. Santokh Singh ... Defendant-Appellant;

Versus

Bhai Siri Ram Singh ... Plaintiff-Respondent.

Letters Patent Appeal No. 38 of 1961

Decided on May 29, 1962

The Judgment of the Court was delivered by

INDER DEV DUA, J.:— This appeal is directed against the judgment of a learned Single Judge of this Court in R.S.A. No. 288 of 1956, whereby he allowed the appeal and reversing the judgment and decree of the learned District Judge restored that of the Court of first instance. Facts giving rise to the dispute briefly stated are that Bhai Siri Ram Singh plaintiff (respondent in this appeal) instituted a suit on 10th of August, 1949, for rendition of accounts of the dissolved partnership and for recovery of the amount which may be found due to him from his partner S. Santokh Singh defendant. The parties are admittedly related to each other. According to the plaintiff's allegation they were doing business of agricultural farming in partnership in Khamgarh and Sadiq Nagar in Bahawalpur State, now in Pakistan.

2. They obtained on lease from Messrs Panju Mal Khazan Chand 70 squares of agricultural land in Chak Mohd Amir pucca in the same State, in December 1941, for cultivating it in partnership till Rabi 1944, on certain terms. During the continuation of this partnership a sum of Rs. 5,000/- was paid by S. Santokh Singh defendant to Bhai Siri Ram Singh plaintiff on 2nd December, 1942, towards part payment of the plaintiff's share of the profits but no accounts were ever rendered by the defendant. As the entire income had been received by the defendant and as in spite of repeated demands he never cared to render full account of the income realized by him and of the expenses incurred, the plaintiff was compelled as a last resort to file the present suit. The defendant resisted the suit questioning the jurisdiction of the Court and also pleading time bar. The allegation of partnership in respect of the lease in Chak pucca was also denied. The plaintiff, according to the defendant, was to be given profit as bonus for his work as a supervisor.

3. The pleadings of the parties gave rise to the following issues:—

(1) Whether the suit is within time?

(2) Whether the Court has jurisdiction to hear the suit?

(3) Whether the plaintiff was not a partner in the lease of Chak Pacca and the share in the profit was to be given to plaintiff as a bonus merely for his working as a Supervisor?

(4) If issue No. 3 is not proved, what were the terms of the partnership?

(5) If issue No. 3 is not proved, whether the defendant is not liable to render the accounts?

4. The trial Court after considering the evidence on the record upheld the plea of partner ship between the parties in regard to the lease in question on the terms enumerated in the plaint in view of this finding, issue No. 5 did not arise. The suit was held to be within limitation on the ground that the defendant had acknowledged in liability to render accounts as per letters Exhibit P. 3 to P. 6. The jurisdiction of the Courts a Jullundur was also upheld on the ground that the defendant had a residence within the jurisdiction of the Court and also because the hear office of the partnership was also locate within the limits of the Court's jurisdiction where the accounts were also maintained.

5. The defendant went in appeal to the Court of the District Judge. That Court upheld the decision on the issue of jurisdiction. On the question of partnership, however, after considering the evidence on the record it came to the conclusion in disagreement with that of the trial Court, that there was neither any direct evidence of partner ship nor were there any circumstances which ??? to the inference in favour of the existence of such partnership. The decision on the plea of limitation was also reversed, the Court holding the letter Exhibits P. 3 to P. 6 did not refer any partnership. According to the Court of Firm Appeal, acknowledgment must be self-contain and no extrinsic evidence could be led to show the acknowledgment related to the liability question. For these reasons, the Court of ??? District Judge allowed the appeal and setts aside the decree of the trial Court dismissed ??? plaintiff's suit with costs throughout.

6. The plaintiff then appealed to this Court and a learned Single Judge holding that the question of the existence of partnership was a mixed question of feet and law went into the entire evidence and on its appraisal came to the conclusion that the partnership between the parties was fully established. I may here reproduce the conclusion of the learned Single Judge in his own words:—

> "The entire documentary evidence in this case leads me to the irresistible conclusion that the parties worked as partners for exploitation of the Chak Pacca lease, in which there was an undoubted sharing of the profits. The plaintiff admittedly received a sum of Rs. 5,000/- as a share of profits and as said in *Lindley on Partnership* (Eleventh Edition) at page 44, 'the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business' though the receipt of such a share does not of itself make him a partner in the business. As held in *Badeley* v. *Consolidated Bank Ltd.*, a decision of the Court of Appeal in (1888) 38 Ch D 238, 'if all that is known is that two persons are participating in the profits of a business, this unless explained, leads to the conclusion that the business is the joint business of the two and that they are partners."

7. The objection raised on behalf of the defendant before the learned Single Judge that the conclusion of the learned District Judge was based on a finding of feet was repelled with the observation that the letters on which reliance had been placed by both parties had not been subjected to any close analysis by the District Judge and his decision was based primarily on the circumstances of the case, more especially the absence of an agreement, the uncertainty about the plaintiff's position regarding the place where the agreement if partnership was made, the absence of proof of my financial contribution by the plaintiff and the controlling hand of the defendant in the

business management.

8. According to the learned Single Judge, it was ??? on the District Judge, as a final Court of fact, to consider the legal effect of the correspondence on which both parties had placed reliance and he should not have disposed of the entire correspondence with the observation that though these steers indicate an identity of interest in the business the plaintiff had nowhere been described as a ??? The proper approach, according to the learned Single Judge, would have been for the District Judge to consider the contents of the ??? and not their omissions. In this view of the latter the learned Single Judge felt bound to hold ??? the finding of the lower appellate Court lacked the foundational basis of evidence.

9. The learned Judge further observed that the question whether a person is a partner or not is a ??? question of law and fact. Reliance for this view was placed on *Debi Parshad* v. *Jairam Pass*, ILR 1952 Punj 284. Reference was then made to *??? Mills, Madurai* v. *Commr. of Income-tax, Madras*, 1956 SCR 691 : ((S) AIR 1957 SC ???), for the view that interference by High Court justifiable where the finding of fact on a matter ??? is a mixed question of law and fact is ??? and perverse in nature. Reviewing the entire evidence, the learned Judge, as already noticed, found himself unable to agree with the defendant's contention, that the parties had entered into a joint venture without any joint interest as this conclusion did not derive sustenance from the documentary evidence. Holding partnership to be proved, according to the learned Judge, the question of limitation did not arise and indeed this is said to have been conceded by the learned counsel for the defendant. We these conclusions, the learned Single Judge, as already observed, allowed the appeal and setting aside the judgment and decree of the learned District Judge restored that of the trial Court.

10. On Letters Patent Appeal, Shri Awasthy has laid stress on the contention that the conclusions of the learned District Judge were based on findings of fact and, therefore, the learned Judge in Single Bench had no jurisdiction to reevaluate the evidence and come to its own independent findings. Reliance has in this connection been placed on *Deity Pattabhiramaswamy* v. *S. Hanymayya*, AIR 1959 SC 57, the head note of which reads thus:—

> "the provisions of Section 100 of the CPC are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that, the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence."

11. Reference in the course of judgment has been made by the Supreme Court to the earlier Privy Council decisions in *Durga Chowdhrani* v. *Jawahir Singh*, ILR 18 Cal 23 (PC), *Midanopore Zamindari Co., Ltd.* v. *Uma Charan*, AIR 1923 PC 187, and *Wali Mohammad* v. *Muhammad Baksh*, ILR 11 Lah 199 : (AIR 1930 PC 91). Particular emphasis has been laid by the appellant's counsel on the following observations of the Supreme Court:—

> "But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100 of the CPC, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public."

12. The counsel has also referred us to *Paras Nath Thakur* v. *Smt. Mohani Dasi*, AIR 1959 SC 1204, where it has been observed that the finding of fact even when it is an inference from other facts found on evidence does not become a question of law

except in certain specified cases. In this connection, reference was made to the earlier decision of the Supreme Court in *Meenakshi Mills case*, 1956 SCR 691 : ((S) AIR 1957 SC 49) the decision relied upon by the learned Single Judge.

13. There is still another decision in *G. Verikataswami Naidu and Co.* v. *Commr. of Income Tax*,

AIR 1959 SC 359 on which too the counsel placed his reliance. In that case the Supreme Court discussed the effect of the decision of the Court of First. Appeal on a question of mixed law and fact. To this decision I will have to advert more closely a little later. Reference has also been made to a still later decision of the Supreme Court in *Raruha Singh* v. *Achal Singh*, AIR 1961 SC 1097, for the proposition that in second appeal the High Court's jurisdiction is confined only to questions of law.

14. On behalf of the respondent, Shri Mittal has placed strong reliance on a Division Bench decision of this Court in AIR 1952 Punj 284, where Harnam Singh, J., (with whom Weston, C.J., agreed) observed that the question whether a person is a partner or an agent of a firm is a mixed question of law and fact, and that if in deciding a question of fact the Court of First Appeal does not take into consideration documents which had an important bearing the finding given by the Court of First Appeal is not binding on the High Court in second appeal. In this connection, our attention has also been drawn to section 4 of the Partnership Act which defines the terms 'partnership', 'Partner' and 'firm', and it has been contended that it is a question of law to draw an inference of the existence of partnership from basic facts and, therefore, this conclusion, based on the inference so drawn, constitutes a question of law reviewable by a Court of Second Appeal. The respondent has also tried to get assistance from the Supreme Court decisions to which our attention has been drawn on behalf of the appellant, particularly *Meenakshi Mills case*, 1956 SCR 691 : ((S) AIR 1957 SC 49).

15. Now, in *Debi Parshad's case*, AIR 1952 Punj 284 the learned Single Judge came to the conclusion that the learned District Judge there had mis-read and mis-construed Explanation 2 to section 6 of the Indian Partnership Act. The learned Single Judge there upheld the argument that partnership is a matter of intention which is a question of fact but he justified his interference on the ground that the law applicable in arriving at the question of fact having not been correctly applied the finding became reviewable by the Court of Second Appeal. The reasons given by the learned Single Judge in that case for interference in Second Appeal thus appear to me unexceptionable and it is only when a principle of law has been wrongly applied even when coming to a finding of fact that this Court can interfere on Second Appeal. The decision on this point was affirmed on appeal by the Division Bench. The position has been clarified by the Supreme Court in *G. Venkataswami's case*, AIR 1959 SC 359. At page 364 of the report Gajendragadkar, J., who spoke for the Bench, has after referring to *Meenakshi Mills' case*, 1956 SCR 691 : (S) AIR 1957 SC 49) put the position thus:—

> "Even if the conclusion of the tribunal about the character of the transaction is treated as a conclusion on a question of feet, it cannot be ignored that, in arriving at its final conclusion on facts proved, the tribunal has undoubtedly to address itself to the legal requirements associated with the concept of trade or business. Without taking into account such relevant legal principles it would not be possible to decide whether the transaction in question is or is not in the nature of trade. If that be so, the final conclusion of the tribunal can be challenged on the ground that the relevant legal principles have been misapplied by the tribunal in reaching its

decision on the point; and such a challenge would be open under section 66(1) because it is a challenge on a ground of law. The same result is achieved from another point of view and that is to treat the final conclusion as one on a mixed question of law and fact. On this view the conclusion is not treated as one on a pure question of fact, and its validity is allowed to be impeached on the ground that it has been based on a misapplication of the true legal principles. It would thus be seen that whether we call the conclusion in question as one of the feet or as one on a question of mixed law and fact, the application of legal principles which is an essential part in the process of reaching the said conclusion is undoubtedly a matter of law and if there has been an error in the application of the said principles it can be challenged as an error of law. The difference then is merely one of form and not substance; and on the whole it is more convenient to describe the question involved as a mixed question of law and fact. That is the view expressed by this Court in the case of *Meenakshi Mills, Madurai*, 1956 SCR 691 : ((S) AIR 1957 SC 49); and in our opinion, it avoids any confusion of thought and simplifies the position by treating such questions as analogous to those falling under the category of questions of law."

16. It appears, therefore, that according to the decisions of the Supreme Court just noticed unless there is an error of law in arriving at the conclusion on a question of mixed law and fact, the conclusion though based upon the primary evidentiary facts cannot be challenged on second appeal. Error in appreciating documentary evidence or errors in drawing inferences are not considered as errors of law and conclusions of fact even if based on circumstances have generally been considered to be binding on this Court on second appeal. Of course, construction of a document of title is on a different footing and is treated on the same basis as error of law.

17. Now, in the case in hand Shri Mittal has submitted that the decision of the trial Court was clear and detailed but that of the learned Judge suffered from legal errors which have beer set right by the learned Single Judge. The counsel has in this connection drawn our attention to section 6 of the Indian Partnership Act and submitted that in order to determine whether the requirements of this section are satisfied all fact proved on the record have to be considered together With this preliminary submission the counsel he read the judgment of the learned District Judge This judgment shows that the learned District Judge first, on considering the evidence on the cord, concluded that there was no partnership agreement expressly created between the parties this conclusion is not assailed before us.

18. The learned Judge then proceeded to observe that such an agreement need not be express and can properly and legally arise out of mutual under

standing evidenced by a consistent course of conduct and also by express admissions of the parties. He then proceeded to state that in the present case in the plaint as well as in his statement as a witness the plaintiff's claim was based on an express agreement made on a particular day at Jullundur and that having so stated his case he could not be permitted to fall back on mutual understanding giving rise to relationship of partnership. Finally, the District Judge opined that even if the plaintiff could rely on such a plea enough evidence had not been brought on the record to warrant a presumption in favour of existence of a partnership. The District Judge then considered the documentary evidence produced in the case and after adverting to it in a detailed matter, he observed that there were no circumstances justifying inference of partnership. The learned Judge also in this connection stated that mutual agency was

an essential element of partnership and holding this element to be wanting in the case before him, he repelled the contention of the existence of partnership.

19. The counsel has contended that the learned District Judge had not kept to the forefront the essential requisites contained in Section 6 of the Indian Partnership Act, and, therefore, his finding was vitiated by an error of law. Here it would be helpful to reproduce section 6:—

"6. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall he had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1. The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2. The receipt by a person of a here of the profits of a business, or of a payment ??? upon the earning of profits or varying nth the profits earned by a business, does not of self make him a partner with the persons carrying on the business; and in particular, the receipt E such share or payment—

(a) by a lender of money to persons engaged about to engage in any business.

(b) by a servant or agent as remuneration,

(c) by the widow or child or a deceased partner, as annuity, or

(d) by a previous owner or part owner of the rosiness, as consideration for the sale of the good ??? or share thereof,

does not of itself make the receiver a partner the persons carrying on the business."

20. Considering the decision of the learned District Judge in the background of this section, I am aid I do not find it possible to hold that he has any way ignored the basic principle underlying section.

21. The counsel then submitted that Exhibits 35 and P.B. were not considered by the ??? District Judge and that his failure to ??? these two documents vitiates his judgment, phasis has also been laid on the circumstance that revenue for the land in question was paid by the respondent-plaintiff.

22. After devoting my most earnest thought to the contentions raised at the bar I am of the view that however erroneous the decision of the learned District Judge may be on the merits (a point on which I express no opinion), it is difficult to hold that it is vitiated by an error of law. Merely because the Court of second appeal, if sitting as a Court of first appeal may have come to a different conclusion on a question of fact or even on a question of mixed law and fact, it would by itself constitute no ground for interference on second appeal; it is the application of legal principles in the process of reaching the conclusion which affords a justification for interference with that conclusion on second appeal and if there is no such error in applying the true legal principles, then, as I consider the Supreme Court decision in *G. Venkataswami Naidu's case*, AIR 1959 SC 359 there is no scope for interference by the Court of second appeal. I would, therefore, be inclined to hold that the conclusion on the question of non-existence of partnership being a finding of fact could not be reversed on second appeal, and the learned Single Judge was not justified in reversing it.

23. In view of the conclusion of the learned Single Judge that there was a partnership in existence, it was conceded before him, that the question of limitation did not arise. Now, that the conclusion on the existence of partnership has been reversed, the question will naturally arise whether or not the suit was within limitation. The learned District Judge when dealing with the question of acknowledgment observed that the acknowledgments must he self-contained and that no outside help should be required in order to show that it related to the debt in suit. The letters

Exhibits P. 3 to P. 6 were held by the learned District Judge not to be self-contained.

24. Here, it is pertinent to point out that the learned District Judge was not wholly correct in his observations. Surrounding circumstances are in my opinion, relevant and can always be taken into consideration in construing the words used in the writing which is sought to be utilized as an acknowledgment. Oral evidence of course is to be excluded but not the surrounding circumstances. And then the Courts are generally inclined to lean in favour of a liberal construction of the statements contained in documents said to amount to acknowledgment. Though of course where no admission is made Courts cannot infer one: See *Shapoor Fredom Mazda* v. *Durga Prosad*, AIR 1961 SC 1236. Letters Exhibit P. 2 and Exhibits P. 3 to P. 6 are, in my opinion, quite clear in showing admission of liability to account on the part of defendant No. 1. I would, therefore, be inclined to hold that the suit in the present case was within limitation.

25. When Shri Mittal, the learned counsel for the plaintiff-respondent, was confronted with the position that the conclusions of the learned District Judge were of fact and, therefore, binding on this Court, he submitted that there was an alternative case made out by the plaintiff. In this connection he referred to the statement of defendant

No. 1 made in the trial Court on 20-4-1953. According to this statement, the plaintiff had been engaged by defendant No. 1 as a supervising manager of this firm Chak Pucca at Rs. 200/- per month. He was also to get bonus on the profits when declared. Defendant No. 1 had suggested five per cent on the profits as bonus but the plaintiff had left the matter to defendant No. 1. A sum of Rs. 5,000/- had been given by defendant No. 1 to the plaintiff as an advance against this understanding.

26. S. Santokh Singh began this statement by stating that in his statement dated 22-12-1949, S. Santokh Singh had made reference to Exhibit P.C. in which there is a mention of division of profits. This, it was explained by him referred to certain monies as bonus which were to be arrived at after the profits were received. Shri Mittal in support of this contention placed reliance on a decision of the Supreme Court in *Firm Sriniwas Ram Kumar* v. *Mahabir Prasad*, AIR 1951 SC 177. The following observations have in particular been relied upon:—

> "A plaintiff may rely upon different rights alternatively and there is nothing in the Code of Civil Procedure to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that basis. The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had no opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant, in his pleadings. In such circumstances when no injustice can possibly result to the defendant, it may not be proper to drive the

plaintiff, to a separate suit.

27. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in *Mohan Manucha* v. *Manzoor Ahmad*, 70 Ind App 1 : (AIR 1943 PC 29). This appeal arose out of a suit commenced by the plaintiff-appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by both the lower Court as well as by the P.C. but the P.C. held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under Section 65 of the Contract Act. Although no such alternative claim was made in the plaint, the P.C. allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellant even though the appeal was heard ex parte in the absence of the respondent."

28. In answer to this contention Shri Awasthy submitted that there was no concluded contract between the parties and merely because defendant No. 1 had suggested five per cent on the profits as bonus and the plaintiff had left the matter to him, it would not constitute a legal basis for granting to the plaintiff a decree against defendant No. 1. Shri Awasthy also contended that this plea could not form the subject-matter of an alternative case and indeed he goes to the length of submitting that such an alternative plea would offend the provisions of Order 6, Rule 17 of the CPC.

29. After considering the respective contentions raised at the bar, I am inclined to think that unless on the material on the record we come to a conclusion that there was a completed contract between the parties it will not be safe to grant a decree on Letters Patent Appeal to the plaintiff on the basis of the statement made by S. Santokh Singh on 20-4-1953. I quite see that till 20-4-1953 defendant No. 1 had also never taken up the position of giving bonus to the plaintiff on the profits and that this statement was perhaps made to get over the contents of some of the Letters written by the defendant. The position, however, remains that on the basis of this statement it is not possible to come to a conclusion that the payment of five per cent bonus on the profits was one of the terms of the contract entered into between the parties. I am, therefore, unable to sustain the alternative case put forward by Shri Mittal.

30. For the foregoing reasons this appeal succeeds and allowing the same I dismiss the plaintiff's suit. In the circumstances of the case however, the parties are directed to bear their own costs throughout.

31. D. FALSHAW, C.J.:— I agree.

JF/V.B.B.

32. *Appeal allowed*.

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