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8th June, 2020

RES JUDICATA AND ARBITRATION

1. KV George vs. Secretary to Government, Water and Power Department, 05.10.1989, (1989) 4SCC 595, Relevant paras 16-18

- Principles of res judicata are applicable to arbitration proceedings as well as awards

A copy of the judgment attached hereto at **page no. 2 to 10.**

2. Smita Conductors Ltd. v. Euro Alloys Ltd., 31.08.2001, AIR 2001 SC 3730, Relevant paras 6-10

- Finding in an arbitration suit that there is an arbitration agreement between the parties operates as *res judicata* in proceedings for enforcement of the award

A copy of the judgment attached hereto at **page no. 11 to 23.**

3. Union of India v. Pundari Ka Kshudu and Sons, 09.09.2003, AIR 2003 SC 3209, Relevant paras 28-34

- Where a party to the arbitration proceedings accepts award in favour of the other party, it shall be deemed to have accepted the arbitrator's finding that it has committed breach of contract, and the said finding when attains finality would operate res judicata.

A copy of the judgment attached hereto at **page no. 24 to 36.**

4. Food Corporation of India vs. AM Ahmed, 31.10.2006, (2006) 13 SCC 779, Relevant paras 7-10

- In an application for appointment of arbitrator, the claim for reimbursement of escalation cost was rejected by the subordinate court and confirmed by the High Court and Supreme Court.
- It was held that the Food Corporation of India was barred by res judicata from raising the same issue in subsequent proceedings

A copy of the judgment attached hereto at **page no. 37 to 53.**

5. Smt. Charanjit Kaur vs. SR cable, 24.06.2008, AIR 2009 MP 66, Relevant paras 9-14

- A suit filed by the plaintiff was withdrawn in view of the arbitration agreement, but when the counter-claim was entertained by the Court, the plaintiff immediately filed an application of objection under section 8 of the Arbitration and conciliation Act, 1996.
- It was held that it is mandatory for the Court to refer the matter for arbitration and no departure would be permitted on the plea of waiver or on ground of approbate or reprobate and the principle of res judicata would apply to bring a fresh suit for the same cause of action.

A copy of the judgment attached hereto at **page no. 54 to 61.**

6. Himachal Sorang Power Private Limited vs. NCC Infrastructure Holdings Limited, 13.03.2019, 2019 SCC Online Del 7575, Relevant paras 127

- The Court which has supervisory jurisdiction or even personal jurisdiction resulting out of an appeal in an arbitration over parties has the power to disallow commencement of fresh proceedings on the ground of res judicata or constructive res judicata.
- If persuaded to do so the Court could hold such proceeding to be vexatious and/ or oppressive. This bar could obtain in respect of an issue of law or fact or even a mixed question of law and fact.

A copy of the judgment attached hereto at **page no. 62 to 83.**

authorities were within the competence to apply the rate prevailing on the date of removal. We are of the opinion that even though the taxable event is the manufacture or the production of an excisable article, the duty can be levied and collected at a later date for administrative convenience.

5. Having regard to the facts and the circumstances of this case and having regard to the scheme of the excise law, we are of the opinion that the Tribunal was right and there are no grounds to assail the order of the Tribunal. In the aforesaid view of the matter, the appeal must fail and, accordingly, is dismissed. There will, however, be no order as to costs.

(1989) 4 Supreme Court Cases 595

(BEFORE SABYASACHI MUKHARJI AND B.C. RAY, JJ.)

K.V. GEORGE . . Appellant;

Versus

SECRETARY TO GOVERNMENT, WATER AND POWER DEPARTMENT, TRIVANDRUM AND ANOTHER . . Respondents.

Civil Appeal Nos. 4209-10 of 1989†, decided on October 5, 1989

Arbitration Act, 1940 — Sections 30, 33, 41 — Misconduct — Award made without considering counter claims — Held, illegal and unsustainable — Arbitrator committed misconduct — Hence trial court's initial order setting aside the award and remitting the same to the arbitrator for fresh disposal considering claims and counter claims rightly upheld and decree in terms of the award passed by trial court on review rightly set aside by High Court — Civil Procedure Code, 1908, Section 114 and Order 47 Rule 1 (Para 12)

Arbitration Act, 1940 — Section 41 — Second claim petition barred when cause of action referred to arbitration enabling party to seek for larger and wider relief but all the reliefs not sought — Though all issues open to be raised in the first claim petition but not so raised — Held, second claim petition raising the remaining issues barred — Civiil Procedure Code, 1908, Order 2, Rule 2 (Paras 14 and 15)

Muhammad Hafiz v. *Mirza Muhammad Zakariya,* AIR 1922 PC 23: 49 IA 9: 26 CWN 153, *relied on*

Arbitration Act, 1940 — Section 41 — Civil Procedure Code, 1908, Section 11 — Res judicata — Principle of res judicata or constructive res judicata applicable to arbitration proceedings (Paras 16 to 18)

Daryao v. *State of U.P.,* AIR 1961 SC 1457: (1962) 1 SCR 574; *Satish Kumar* v. *Surinder Kumar,* AIR 1970 SC 833: (1969) 2 SCR 244, *relied on*

Appeal dismissed with costs R-MM/9605/C

† From the Judgment and Order dated April 10, 1987 of the Kerala High Court in M.F.A. No. 291 and 304 of 1982

Advocates who appeared in this case:

K.N. Bhat, Senior Advocate (Mukul Mudgal , Advocate, with him) for the Appellant;

M.M. Abdul Khader, Senior Advocate (T.T. Kunhikannan, Advocate, with him) for the Respondents.

The Judgment of the Court was delivered by

RAY, J.—Special leave granted.

2. These appeals on special leave have been filed by the contractor, K.V. George against the judgment and order passed on April 10, 1987 by the Kerala High Court in M.F.A. Nos. 291 and 304 of 1982 whereby the High Court set aside the judgment of the Sub-Court, Trivandrum in O.P. (Arb.) No. 296 of 1981 as also the award of the arbitrator in A.C. No. 276 of 1980 and directed that the arbitrator will dispose of the Arbitration Case No. 132 of 1980 in the light of the judgment of the Sub-Court in O.P. (Arb.) No. 81 of 1981 in accordance with law considering the claim of the contractor-appellant and the counter-claim of the respondents.

3. The appellant who is a contractor entered into a contract with the respondents on April 22, 1978 in connection with the construction of a embankment across Musaliyar Padom between Chaniage 2573.5 M to 2827 M of E.B. Main Canal of Kallada Irrigation Project. The work was required to be completed by March 30, 1980 i.e. two years from the date of selection notice which was dated March 30, 1978. As the appellant failed to complete the work as per the terms of the contract, the respondents sent a notice dated April 26, 1980 to the appellant cancelling the contract at his risk and cost. On July 2, 1980 the appellant filed a claim being Arbitration Case No. 132 of 1980 before the named arbitrator i.e. the Chief Engineer (Arbitration), Vellayambalam, Trivandrum claiming enhancement of rates in respect of the earth work involved in the contract, interest on delayed payments and costs. The second respondent, the Superintending Engineer, K.I.P. Circle, Karnataka filed a defence statement stating inter alia in para 2(1) that the time of completion of the work was fixed as 24 months from the date of handing over site to the contractor and he could have anticipated all such variations before quoting rates. As per agreement the rates once agreed will not be enhanced. The department is not bound to pay the claimant a revision of schedule. In para 2(*m*) it has also been pleaded that as per agreement the contractor is bound to carry out additional and extra items of works that arise during execution. The additional and extra items of works done by the contractor are quite meagre when compared to the total volume of the work. The extra and excess items were covered by supplemental agreement. The contractor was not able to complete even 35 per cent of the total work within the time for completion of the work and as such the claimant is not entitled to attributed delay on this account. A counter-claim was filed by the

Superintending Engineer, K.I.P. Circle, Kottarakkara, respondent 2 wherein a claim of a sum of Rs. 28,84,000 was made.

4. The arbitrator by his order dated January 22, 1981 made the award in regard to claim No. 1 directing the respondents to pay 35 per cent increase in the agreed rate for the item of earth work excavating and filling for forming the compacted embankment with earth from barrow area. Claim No. 1 was thus allowed. Claim Nos. 2 and 3 regarding interest were disallowed. As regards counter-claim Nos. 1 and 2, it was ordered that those issues will be considered separately and so no award was made.

5. The appellant thereafter filed O.P. (Arb.) No. 81 of 1981 in the Court of Sub-Judge, Trivandrum under Section 14 of the Arbitration Act for making the award a rule of the court. On objections being raised by the respondents, the Court of the Sub-Judge after hearing the parties by order dated August 18, 1981 remitted the reference to the arbitrator for fresh consideration on the ground that the arbitrator did not consider the counter-claims made by the respondents. The appellant thereafter filed I.A. No. 3780 of 1981 in the Court of Sub-Judge praying that the order dated August 18, 1981 may be reviewed. In the meantime, the appellant filed another Arbitration Case No. 276 of 1980 before the same arbitrator in respect of the wrongful termination of the contract and also raised 13 items of claims therein. The arbitrator after going through the objections of the respondent made an award on October 29, 1981 whereby he ordered that the rearrangement of the work should not be at the risk and cost of the appellant. As regards claim No. 2, he ordered 30 per cent increase in rates (as per original and supplemental agreement) for all items of work carried out by the appellant except on items covered by Award No. 132 of 1980 dated January 22, 1981. Claim Nos. 3 and 5 were rejected. As regards claim No. 4 an increase of 20 per cent in the agreed rates for these items was allowed. Claim No. 11 regarding interest was disallowed. It was also stated in the award inter alia that the claimant shall be entitled to the refund of the security amount as well as refund of the retention amounts, the claimant shall be entitled to his final bill in terms of the award, the counter-claim for recovery of costs on rearrangement of work and also the counter-claims filed by the respondent dated April 8, 1981 were declined. The appellant filed O.P. (Arb.) No. 296 of 1981 for making the second award a rule of the court. A statement of defence was filed by the respondents wherein it has been stated inter alia in para 6 that :

> "The claims made in this petition under paras 6(*ii*), (*iii*), (*iv*), (*v*), (*vi*), (*vii*) and (*viii*) are barred by res judicata and constructive res judicata. No work was done by the claimant after termination of the contract on June 24, 1980. The claim petition in Arbitration Case No. 132 of 1980 was filed by the claimant before the hon'ble arbitrator on July 2, 1980. It was open to him to raise these claims in that arbitration petition. Having not done this raising of these

> claims now which are all bogus and imaginary is barred by constructive res judicata. He had not raised these claims before Chief Engineer (next superior authority) and also before the hon'ble arbitrator in his petition dated October 27, 1980. Hence it is prayed that the above claims may not be taken up for arbitration and they may be rejected."

It has also been stated in sub-para (*iv*) of para 6 that :

> "(*iv*) As above. Also there had been no error in the rates. The claimant was paid at his agreed rates, and he had received it and also no dispute lies on it. Claim may be rejected. Work done was recorded as per Item No. 7 of application of agreement and was paid as per agreement."

6. The Sub-Judge by order dated March 18, 1982 made the award a rule of the court dismissing the plea of res judicata raised by the respondents in O.P. (Arb.) No. 296 of 1981. The respondents filed two appeals being F.M.S. Nos. 291 and 304 of 1982 before the High Court of Kerala at Ernakulam which held that the arbitrator could not review its order on the facts of the present case and so allowed F.M.A. No. 291 of 1982. The High Court also allowed F.M.A. No. 304 of 1982 holding that principles of constructive res judicata would apply to the arbitration case. Feeling aggrieved by the aforesaid judgment and order passed in F.M.A. Nos. 291 and 304 of 1982, the appellant-contractor has preferred the instant appeals on special leave.

7. Mr. Bhatt, learned counsel appearing on behalf of the appellant has submitted in the first place that the High Court was wrong in reversing the judgment and order of the trial court without considering the provisions of Section 114 as well as Order XLVII, Rule 1 of the Code of Civil Procedure inasmuch as Order XLVII, Rule 1 clearly provides that review of an order may be made either on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. In the instant case, the first award was set aside by the trial court on the ground that the counter-claim filed on behalf of the respondents was not considered by the arbitrator and so it remitted the same for consideration afresh. It has been held by the High Court that the refusal to consider the counter-claims had rendered the prior award liable to be set side for misconduct of the arbitrator and the proceedings. It has been urged by the learned counsel that the counter-claim has been fully considered in the second award made by the arbitrator and as such the first award cannot be set aside on the ground of non-consideration of a counter-claim and it cannot be treated as misconduct of the arbitrator and the proceedings for non-consideration of the counter-claim in the first award. It has been further contended in this connection that the finding of the High Court to the effect that the subsequent award passed by the arbitrator dealing with the counter-claims did not have the effect of mitigating the misconduct of the arbitrator or of condoning the error on the face of the award, is also not

sustainable inasmuch as the counter-claim filed by the respondents was duly considered by the arbitrator in the second award made by him.

8. It has also been submitted by the learned counsel for the appellant that the principles of res judicata and constructive res judicata are not applicable to the award made in Arbitration Case No. 291 of 1981 inasmuch as the disputes that were raised were not ripe for being referred to arbitration in view of the terms of the contract that the contractor had to raise the dispute before the Superintending Engineer and thereafter before the Chief Engineer and had to wait till the end of the stipulated period. It has been further submitted that since the period was not over, the claims that have been raised subsequently in the second claim petition before the arbitrator could not be raised in the first claim petition before the arbitrator and as such the second award made by the arbitrator cannot be said to have been barred by res judicata as provided in Section 11 of the Code of Civil Procedure or by the rules of constructive res judicata. The judgment and order of the High Court in allowing F.M.A. No. 304 of 1982 setting aside the award made in Arbitration Case No. 296 of 1981 is unwarranted and as such it is not sustainable. It has also been contended that the claim made in the second claim petition before the arbitrator is not barred by Order II, Rule 2 of the Code of Civil Procedure inasmuch as the disputes raised in the second claim petition before the arbitrator were not ripe for reference as the appellant had to wait till the end of the stipulated period in accordance with the terms of the contract. The judgment and order of the High Court in allowing the F.M.A. No. 304 of 1982 is not legal and valid and is liable to be set aside.

9. Mr. Abdul Khadir, learned counsel appearing on behalf of the respondents on the other hand urged before this Court that the Sub-Judge acted legally in directing the arbitrator to dispose of the Arbitration Case No. 132 of 1980 in the light of the judgment of the Sub-Court in O.P. (Arb.) No. 81 of 1981 and in setting aside the order of review because no case for review nor any sufficient cause has been made out for exercising the power of review under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure. The High Court, it has been submitted, was right in holding that the order of review was unwarranted and in setting aside the same and directing the arbitrator to dispose of the reference in accordance with law considering the claim of the contractor-appellant and the counter-claim of the respondents. It has been further submitted by Mr. Abdul Khadir that in view of the provisions of Section 41 of the Arbitration Act which specifically provides that the provisions of the Code of Civil Procedure shall apply to arbitration proceedings, the principles of res judicata or of constructive res judicata will apply to arbitration proceeding. The appellant-contractor having not raised all his claims in his first claim petition made to the arbitrator for decision and award having been made thereon, the second claim petition before the arbitrator making

certain other claims in Arbitration Case No. 276 of 1980 is barred by the principles of constructive res judicata inasmuch as on the termination of the contract by order dated April 26, 1980 the contractor could have raised all his disputes arising out of the contract at that time, but the appellant chose to take only some of the issues arising from the said breach of contract before the arbitrator. The second claim petition raising some issues before the arbitrator is therefore, hit by the principles of constructive res judicata and the High Court rightly allowed the appeal setting side the award made in Arbitration Case No. 276 of 1980. It has also been submitted that the provisions of Order II, Rule 2 of the Code of Civil Procedure apply to the arbitration case and the appellant having not sought reference of all the issues, he should be deemed to have surrendered those issues and he is debarred from raising those issues in a subsequent claim petition made before the arbitrator. In this connection, he has cited the ruling in *Muhammad Hafiz* v. *Mirza Muhammad Zakariya*[1]. The learned counsel drew our attention to para 2(*i*) of the objections filed by the respondents in Arbitration Case No. 132 of 1980 wherein it has been stated that:

> "... As per agreement the rates once agreed will not be enhanced. The department is not bound to pay the claimant a revision of schedule."

10. It has been further submitted by the learned counsel on behalf of the respondents that the appellant was not entitled to an increase in the rates as he claimed increase with the agreement and the claim that has been made is untenable.

11. It has been lastly submitted on behalf of the respondents that the arbitrator has misconducted himself and the proceedings by not deciding the counter-claim filed by the government while considering the claim filed by the appellant and making an award. The High Court has rightly held that the arbitrator misconducted himself and the proceedings and allowed the appeal, setting aside the second award made by the arbitrator in Arbitration Case No. 276 of 1980.

12. The first question that falls for consideration in this case is whether the finding of the High Court setting aside the order of review made in I.A. No. 3780 of 1981 and setting aside the order made in O.P. (Arb.) No. 81 of 1981 dated August 18, 1981 whereby the case was remanded to the arbitrator is sustainable or not. Admittedly, the appellant filed a claim petition being Arbitration Case No. 132 of 1980 making certain claims before the arbitrator. The respondents filed the counter-claims. The arbitrator without considering the counter-claims kept the counter-claims for subsequent consideration and made an award. The trial court set aside the award and remitted the same to the arbitrator for making a fresh award considering the claims and counter-

1. AIR 1922 PC 23: 49 IA 9: 26 CWN 153

claims filed by the parties. On an application for review, the trial court set aside the order and passed a decree in terms of the award. It is not disputed that the arbitrator did not at all consider the counter-claims and kept the same for consideration subsequently while making award in respect of the claims filed by the appellant. Undoubtedly, this award made by the arbitrator is not sustainable in law and the arbitrator has misconducted himself and in the proceedings by making such an award. It is the duty of the arbitrator while considering the claims of the appellant to consider also the counter-claims made on behalf of the respondents and to make the award after considering both the claims and counter-claims. This has not been done and the arbitrator did not at all consider the counter-claims of the respondents in making the award. As such the first award dated January 22, 1981 made by the arbitrator in Arbitration Case No. 132 of 1980 is wholly illegal and unwarranted and the High Court was right in holding that the arbitrator misconducted himself and the proceedings in making such an award and in setting aside the same and directing the arbitrator to dispose of the reference in accordance with law considering the claim of the contractor and the counter-claim of the respondents. The order allowing the application for review by the trial court is also bad inasmuch as there was no mistake or error apparent on the face of the order dated August 18, 1981 made in O.P. (Arb.) No. 81 of 1981 nor any sufficient reason has been made out for review of the said order. The order dated August 18, 1981 is legal and valid order and the order dated March 18, 1982 allowing the application for review being I.A. No. 3780 of 1981 and setting aside the order in O.P. (Arb.) 81 of 1981 dated August 18, 1981 is, therefore, bad and unsustainable.

13. With regard to the submission that the issues that have been raised in the second claim petition before the arbitrator is barred under the provisions of Order II, Rule 2 of the Code of Civil Procedure, it is convenient to refer to a passage in Mulla's *Code of Civil Procedure* (Volume II, 14th edn.) at page 894 :

> "..... This rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. What the rule lays down is that where there is one entire cause of action, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts."

14. It is pertinent to refer in this connection to the decision in *Muhammad Hafiz* v. *Mirza Muhammad Zakariya*[1] wherein a mortgage deed provided that if the interest was not paid for six months the creditor should be competent to realise either the unpaid amount of the interest due to him or the amount of principal and interest, by bringing a suit in court without waiting for the expiration of the time fixed, and the plaintiff, more than 3 years after (i.e. time fixed), brought a suit for interest alone and got a decree. It was held that the second suit for principal and arrears of interest was not maintainable as under Order II,

Rule 2, CPC he must be deemed to have relinquished his claim for further relief, he having exercised the option of suing for interest alone. It was further held that the cause of action referred to in the rule is the cause of action which gives occasion to, and forms the foundation of, the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings.

15. In the instant case, the contract was terminated by the respondents on April 26, 1980 and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the arbitrator by the appellant. This having not been done the second claim petition before the arbitrator raising the remaining disputes is clearly barred.

16. With regard to the submission as to the applicability of the principles of res judicata as provided in Section 11 of the Code of Civil Procedure to arbitration case, it is to be noted that Section 41 of the Arbitration Act provides that the provisions of the Code of Civil Procedure will apply to the arbitration proceedings. The provisions of res judicata are based on the principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well. It is convenient to refer to the decision in *Daryao* v. *State of U.P.*[2] wherein it has been held that the principles of res judicata will apply even to proceedings under Articles 32 and 226 of the Constitution of India. It has been observed that:

> "Now, the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32."

17. In *Satish Kumar* v. *Surinder Kumar*[3] it has been observed that:

> "The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the

2. (1962) 1 SCR 574, 582-83: AIR 1961 SC 1457
3. AIR 1970 SC 833 : (1969) 2 SCR 244 quoting from an unreported judgment in *Uttam Singh Dugal & Co.* v. *Union of India*, Civil Appeal No. 162 of 1962, dated October 11, 1962 (SC)

> arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject matter of the reference.... This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed."

18. Considering the above observations of this Court in the aforesaid cases we hold that the principle of res judicata or for that the principles of constructive res judicata apply to arbitration proceedings and as such the award made in the second arbitration proceeding being Arbitration Case No. 276 of 1980 cannot be sustained and is therefore, set aside. The High Court has rightly allowed the F.M.A. No. 304 of 1982 holding that the appellant-contractor was precluded from seeking the second reference. No other points have been raised before us by the appellant.

19. In the premises aforesaid, we dismiss these appeals with costs quantified at Rs. 5000 and affirm the judgment and order dated April 10, 1987 made by the High Court.

(1989) 4 Supreme Court Cases 603

(BEFORE K. JAGANNATHA SHETTY AND A.M. AHMADI, JJ.)

SOUTHERN ROADWAYS LTD., MADURAI,
REPRESENTED BY ITS SECRETARY . . Appellant;

Versus

S.M. KRISHNAN . . Respondent.

Civil Appeal No. 4177 of 1989†, decided on October 5, 1989

Contract Act, 1872 — Sections 182, 188, 201, 211, 218 and 230 — Agent acquires no interest in principal's property — After termination of agency, agent cannot interfere with the business of principal on ground of his possessory title to the premises on which such business is carried on, subject, however, to contract to the contrary — Service Law — Termination — Agency

Contract Act, 1872 — Sections 201, 202, 205 and 221 — Revocation of agency by principal — Effect

Contract Act, 1872 — Section 182 — Agent's relationship with principal — Fiduciary relation not essential

† From the Judgment and Order dated March 28, 1989 of the Madras High Court in O.S.A. No. 48 of 1989

(2001) 7 Supreme Court Cases 728

(BEFORE S. RAJENDRA BABU AND S.N. PHUKAN, JJ.)

SMITA CONDUCTORS LTD. . . Appellant;

Versus

EURO ALLOYS LTD. . . Respondent.

Civil Appeal No. 12930 of 1996†, decided on August 31, 2001

A. **Arbitration — Foreign Awards (Recognition and Enforcement) Act, 1961 — S. 2(a) and Schedule, Art. II(2) — "Agreement in writing" — Correspondence addressed to bank in respect of opening of letters of credit pursuant to contract between the parties and telex messages to opposite party, after development of problems, indicating wish to invoke force majeure clause — Held on facts, there was an agreement in writing between the appellants and respondents as defined under Art. II(2) — High Court rightly allowed respondent's petition for enforcement of the award against appellant — Contention that an agreement for purposes of Art. II(2) r/w S. 2(a) may be inferred from conduct alone not decided**

B. **Arbitration — Foreign Awards (Recognition and Enforcement) Act, 1961 — S. 7(1)(b)(ii) — Award contrary to public policy not to be enforced — Held, expression "public policy" means public policy of India; it is to be necessarily construed as applied in private international law — Therefore a foreign award cannot be recognised or enforced if it is contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality — Held, on facts, no question of public policy was involved and award against appellant could not be faulted on that ground — Further held, such a question would have arisen if the relevant RBI restrictions on imports into India had resulted in the impossibility of implementing the terms of the contract between the parties — Arbitration and Conciliation Act, 1996, S. 34(2)(b)(ii) — Private International Law — Award — Public policy — Award not to be enforced if in contravention of own country's public policy**

C. **Arbitration — Award — If view of arbitrators is a plausible view and cannot be ruled out as impossible to accept, held, court cannot substitute its own view in its place**

Dismissing the appeal, the Supreme Court

Held :

What needs to be understood in the context of Section 2(*a*) and Schedule Article II(2) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para (2) of Article II. If the para is broken down into elementary parts, it consists of four aspects. It includes an arbitral clause (*1*) in a contract containing an arbitration clause signed by the parties, (*2*) an arbitration agreement signed by the parties, (*3*) an arbitral clause in a contract contained in exchange of letters or telegrams, and (*4*) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any

† From the Judgment and Order dated 12-7-1996 of the Bombay High Court in AP No. 41 of 1993

one of these four categories, it must be treated as an agreement in writing. (Para 6)

In the present case there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the bank. There is no correspondence between the parties either disagreeing with the terms of the contract or the arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message in which there is a reference to two contracts in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. Maybe, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard. (Para 6)

Sen Mar, Inc. (US) v. *Tiger Petroleum Corpn. N.V.*, (1993) 18 Yearbook Commercial Arbitration 493; *Finagrain Compagnie Commerciale Agricole et Financiere S.A.* v. *Patano Snc (Italy)*, (1996) 21 Yearbook Commercial Arbitration 571; *Gaetano Butera (Italy)* v. *Pietro e Romano Pagnan (Italy)*, (1979) 4 Yearbook Commercial Arbitration 296; *Begro B.V.* v. *Ditta Voccia & Ditta Antonio Lamberti*, (1978) 3 Yearbook Commercial Arbitration 278; *Societa Atlas General Timbers* v. *Agenzia Concordia Line*, (1978) 3 Yearbook Commercial Arbitration 267, *distinguished by implication*

When the appellant and the respondent agreed to deal in certain goods, certain terms had to be agreed between them. Those terms were set out in the contracts. If those are the two contracts pursuant to which the appellant is trading with the respondent, the conclusion is obvious that those terms are reduced to writing and acknowledged by reason of opening of letters of credit to which reference is made in these two contracts. It would be illogical to contend that those letters of credit though not addressed to the respondent would indicate that they were not acting in pursuance of the contracts with the respondent and now it is not possible for the appellant to wriggle out of the same. It cannot be said that what is agreed to by them is only regarding the supply of goods and not in regard to other terms. (Para 7)

The expression "public policy" means public policy of India and the recognition and enforcement of foreign award cannot be questioned on the ground that it is contrary to the foreign country's public policy and this expression has been used in a narrow sense must necessarily be construed as applied in private international law which means that a foreign award cannot be recognised or enforced if it is contrary to (*1*) fundamental policy of Indian law; or (*2*) the interests of India; or (*3*) justice or morality. (Para 12)

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

V.O. Tractoroexport v. *Tarapore & Co.*, (1969) 3 SCC 562 : (1970) 3 SCR 53, *referred to*

The view taken by the arbitrators on the effect of the force majeure clause in the light of Reserve Bank of India's directives is a plausible view and cannot be ruled out as impossible of acceptance, and, therefore, the question of substituting

our view for that of the arbitrators would not arise. Question of public policy would have arisen if there was complete restriction on the implementation of the terms of the contract. There was no such restriction imposed. But, on the other hand, certain restrictions were imposed which could have been worked out by resorting to appropriate measures in terms of the contract as held by the arbitrators. In that view of the matter, it cannot be said that any question of public policy as such arises for consideration in a situation of this sort. The argument is almost a red herring and does not constitute a valid reason for interference with the award. (Para 15)

A-M/TZ/24506/C

Advocates who appeared in this case :

K.K. Venugopal, Senior Advocate (G.K. Banerjee, R.N. Karanjawala, Ms Nandini Gore, Ms Julie Buragohain and Ms Manik Karanjawala, Advocates, with him) for the Appellant;

Dr A.M. Singhvi, Senior Advocate (K.G. Singhania, Mahesh Agarwal, Rishi Agarwala, Mohit Lahoty, Saif Mahmood, P.C. Sen and E.C. Agarwala, Advocates, with him) for the Respondent.

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

1. (1996) 21 Yearbook Commercial Arbitration 571, *Finagrain Compagnie Commerciale Agricole et Financiere S.A.* v. *Patano Snc (Italy)* 732*f-g*
2. 1994 Supp (1) SCC 644, *Renusagar Power Co. Ltd.* v. *General Electric Co.* 734*e*, 736*h*, 737*e-f*, 737*g-h*, 740*a*
3. (1993) 18 Yearbook Commercial Arbitration 493, *Sen Mar, Inc. (US)* v. *Tiger Petroleum Corpn. N.V.* 732*e-f*
4. (1979) 4 Yearbook Commercial Arbitration 296, *Gaetano Butera (Italy)* v. *Pietro e Romano Pagnan (Italy)* 733*a-b*
5. (1978) 3 Yearbook Commercial Arbitration 278, *Begro B.V.* v. *Ditta Voccia & Ditta Antonio Lamberti* 733*d-e*
6. (1978) 3 Yearbook Commercial Arbitration 267, *Societa Atlas General Timbers* v. *Agenzia Concordia Line* 733*e-f*
7. (1969) 3 SCC 562 : (1970) 3 SCR 53, *V.O. Tractoroexport* v. *Tarapore & Co.* 738*a*

The Judgment of the Court was delivered by

RAJENDRA BABU, J.— A contract (bearing No. S-142) for supply of aluminium rods of 2400 metric tonnes @ 200 MT per shipment every month from January to December 1991 was proposed by the respondent to the appellant on 31-8-1990 containing an arbitration clause. In the letter accompanying the contract, it was stated to sign and return copy for the sake of good order. The appellant did not sign nor return the said contract. Reminders were sent in this regard from time to time. On 4-2-1991, letter from the respondent enclosing the amendment to the contract was sent to the appellant but without any result. On 25-2-1991, another contract (bearing No. S-336) was proposed by the respondent to the appellant for supply of 2000 MT of aluminium rods @ 500 MT per shipment. In the first contract, initially there was no arbitration clause. However, on 18-3-1991, the contract bearing the same number i.e. S-142, was sent containing the arbitration clause with certain amendment for signature and return of the second copy. But the contract was not signed and sent by the appellant. On the basis of

certain irrevocable letters of credit for US $ 2,43,250 opened by the appellant, shipments were made in January, February and March 1991. In the meanwhile, a circular was issued on 19-3-1991 by Reserve Bank of India (for the sake of brevity referred to as "RBI") to all scheduled commercial banks placing restrictions on import of goods. It was followed up by another letter of the same date addressed by the Executive Director, RBI to the Chairmen of all commercial banks explaining the circular dated 19-3-1991 in relation to the foreign exchange reserve. On 22-4-1991, one more circular was issued by RBI modifying the margins for opening letters of credit as prescribed by circular dated 19-3-1991. The appellant sent a telex on 30-4-1991 to the respondent to the effect that severe restrictions had been imposed by RBI due to unprecedented foreign exchange crisis and RBI had not cleared the application for letter of credit. Therefore, the appellant wanted to invoke the force majeure clause cancelling the April shipment for both the contracts. The respondent wrote to the appellant on 30-5-1991 to the effect that they had closed their position and initiated arbitration proceedings with reference to both the contracts. When the appellant did not respond to the same, letter was received by the appellant from the London Metal Exchange appointing the second arbitrator in terms of the arbitration clause.

2. On 30-8-1991, a suit (bearing No. 2963 of 1991) was filed by the appellant seeking a declaration that there is no valid agreement between the parties and that arbitration before the London Metal Exchange was void. The learned Single Judge of the Bombay High Court did not grant any interim order and recorded a statement that the appellant would participate in the arbitration proceedings under protest. The appeal filed against it stood dismissed by an order on 18-12-1991. In the meanwhile, the suit was treated as a petition under Section 33 of the Arbitration Act, 1940 which stood dismissed on the ground that the arbitration clause bound the parties. The arbitrators published an award on 29-7-1992 awarding damages amounting to US $ 6,76,000 including pre-award interest but did not award post-award interest. The appellant filed an appeal to the Appeal Board of the London Metal Exchange seeking to set aside the award as also dispensation of deposit. Since the London Metal Exchange rejected the request for waiver of deposit, the appeal could not be pursued. Thereafter, a petition was filed in the Bombay High Court by the respondent under the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as "the Act") for enforcement of the award. The High Court allowed the petition and granted the certificate under Article 134-A of the Constitution. The High Court, while disposing of the petition, awarded interest @ 15 per cent for the post-award period until payment. This order is in challenge before us.

3. Shri K.K. Venugopal, learned Senior Advocate appearing for the appellant raised three contentions. The first contention is to the effect that the foreign award could be enforced if it is in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule to the Act applies as per Section 2(*a*) of the Act and inasmuch as the Schedule pertains to the Convention on the Recognition and Enforcement of Foreign

Arbitral Awards*, otherwise known as the New York Convention. It is submitted that the arbitration in the present case is not pursuant to an agreement in terms of Article II of the Schedule to the Act. Shri Venugopal submitted that an agreement has to be in writing under which the parties undertake to submit to arbitration any differences which have arisen in respect of any legal relationship arising out of a contract or otherwise and capable of settlement by arbitration and the expression "agreement in writing" would include an arbitral clause in a contract or an arbitration clause signed by the parties or contained in the exchange of letters or telegrams. He submitted that in the present case there being no written contract either in contract bearing No. S-142 or contract bearing No. S-336 because the contracts were signed by the respondent but not signed by the appellant and thus resulting in only an oral agreement between the parties for supply of goods; such an agreement cannot be termed to be one made in writing, to attract paras (1) and (2) of Article II of the Schedule to the Act and that there has been no exchange of letters or telegrams between the parties so as to include the arbitral clause. In this context, he referred to the decisions of different courts reported in the *Yearbook Commercial Arbitration*, 1977, Vol. II. Referring to the decision in the Court of Oberlandesgericht Dusseldorf on 8-11-1971 between a Dutch seller and a German buyer (*Yearbook Commercial Arbitration*, 1977, Vol. II, p. 237) wherein it was held that Article II of the Convention requires the arbitration agreement to be in writing and signed by the parties, including an exchange of letters or telegrams. In any case, therefore, a declaration in writing of both sides is required. A one-sided confirmation does not suffice and that the lack of a declaration in writing by the other party cannot be cured by his appearance before the arbitrator. Enforcement can, therefore, be granted under the New York Convention. In a case decided by the United States District Court between *Sen Mar, Inc. (US)* v. *Tiger Petroleum Corpn. N.V.*[1] in which the respondent had contended that the purported arbitration clause does not satisfy the Convention's writing requirement, which defines in Article II(2), a writing as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters". It was held that the respondent's responsive telexes are not only devoid of arbitration language, they also disavow the entire contents of the petitioner's 17th July telexes. Shri Venugopal next referred to the decision of the Italian Court of Appeal in *Finagrain Compagnie Commerciale Agricole et Financiere S.A.* v. *Patano Snc (Italy)*[2]. In that case, the three contracts were concluded for sale of colza seed oil. One of the contracts was concluded in writing, was signed by the parties and contained a specific reference to FOSFA Contract No. 54 and the arbitration clause contained therein. The other two contracts were concluded through telexes sent to the parties by a broker and not signed by them. The telexes also referred to FOSFA Contract No. 54 which had the

* **Ed.**: The Convention came into force on 7-6-1959.

1 (1993) 18 Yearbook Commercial Arbitration 493

2 (1996) 21 Yearbook Commercial Arbitration 571

arbitration clause. In those circumstances, the Court granted enforcement to Award No. 2912 which was based on the contract signed by the parties, but found that no valid arbitration agreement under the Convention had been concluded as to the further two contracts and, therefore, denied enforcement of the other two awards pertaining to the rest of the two contracts. Shri Venugopal next relied upon the decision of the Swiss court in *Gaetano Butera (Italy)* v. *Pietro e Romano Pagnan (Italy)*[3]. The Court of Appeal considered that the validity of the arbitration clause had to be determined by the Italian law under which the clause would have had to be in writing. But on appeal against the decision of the Court of Appeal, the Supreme Court stated that no valid agreement existed because the terms of the New York Convention had not been applied. It was noticed therein that the arbitral clause was inserted in writing in the contract of sale and was completed by the reference to the Arbitration Rules of the LCTA. This reference was not a reference, which is invalid according to Italian case-law. In the case under consideration, however, the arbitration agreement was contained and explicitly mentioned in the sales contract itself. The reference had as sole object the procedural regulation of the arbitration and, therefore, validly completed the arbitral clause mentioned above as it ascertained the existence and the specific contents of that regulation. But the Supreme Court, however, held that the arbitral clause was null and void because it was signed only by the seller who invoked the clause. Shri Venugopal referred to another decision of the Italian court in Corte Di Cassazione in *Begro B.V.* v. *Ditta Voccia & Ditta Antonio Lamberti*[4]. The court interpreted Article II, paras (1) and (2) of the Convention, as requiring a specific agreement to submit to arbitration signed by the parties or contained in an exchange of letters or telegrams. According to the court, such a specific agreement could not be found in an arbitration clause printed on the contract form and signed by the parties and, therefore, held the arbitration clause to be without effect. Shri Venugopal next referred to the decision of Corte Di Cassazione in *Societa Atlas General Timbers* v. *Agenzia Concordia Line*[5]. It was held therein that the validity of the arbitral clause in question had to be judged under the New York Convention. According to Article II, para (2) of the Convention, the arbitration clause in writing means "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". This provision, therefore, requires clearly the signature as a minimum element for the effectiveness of the contract containing the arbitral clause. The court concluded that not the arbitration clause itself, but the contract in which it is contained must be signed by both parties under Article II, para (2) of the Convention. The court examined whether the requirement was met in the present case and found that the signature of the agent of the carrier was not sufficient since his power of attorney was not in writing and that the signature of the other party was also lacking and his

3 (1979) 4 Yearbook Commercial Arbitration 296
4 (1978) 3 Yearbook Commercial Arbitration 278
5 (1978) 3 Yearbook Commercial Arbitration 267

endorsement does not replace the signature, since the former concerns only a transfer of title, whilst the latter is necessary for the formation of the contract.

4. In reply Dr A.M. Singhvi, learned Senior Advocate appearing for the respondent submitted that this contention is not available to the appellant inasmuch as the Bombay High Court had already decided the case when a suit had been filed by the appellant and that the conclusion reached by the Bombay High Court while dismissing the suit treating the same as an application filed under Section 33 of the Arbitration Act, 1940 amounts to res judicata and, therefore, it is not open to the appellant to urge that point again in these proceedings. He further submitted that the correspondence between the parties and the conduct of the appellant clearly establish that there existed an arbitration clause between the parties and, therefore, there was full compliance with Article II, paras (1) and (2) of the Convention which forms part of the Schedule to the Act. He submitted that the definition of what constitutes a written arbitration agreement given in Article II(2) can be deemed to be an internationally uniform rule which prevails over any provision of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable. The courts in the contracting States have generally affirmed the uniform rule character of Article II(2). The Italian courts formed an exception to this general affirmation as they determined the formal requirements for the arbitration agreement on the basis of a municipal law which they found applicable according to Italian conflict of rules and even the Italian Supreme Court has in recent decisions affirmed the uniform principle of Article II(2) as well and has placed reliance upon certain decisions of other courts in support of the proposition made by him.

5. This Court in *Renusagar Power Co. Ltd.* v. *General Electric Co.*[6] held that the New York Convention controls the proceedings in arbitration. Even the plain language of Section 2(*a*) of the Act makes it clear that the Act is applicable in respect of a foreign award made in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies and the terms of the Convention are available in the Schedule to the Act. Article II, paras (1) and (2) pertain to this aspect of the matter and they read as under:

"*Article II*

(1) Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

(2) The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is

6 1994 Supp (1) SCC 644

explained by para (2) of Article II. If we break down para (2) into elementary parts, it consists of four aspects. It includes an arbitral clause (*1*) in a contract containing an arbitration clause signed by the parties, (*2*) an arbitration agreement signed by the parties, (*3*) an arbitral clause in a contract contained in exchange of letters or telegrams, and (*4*) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the bank which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23-4-1990 in which there is a reference to the two contracts bearing Nos. S-142 and S-336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. Maybe, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard.

7. Shri Venugopal seriously objected to this line of approach on the basis that what we are spelling out is only a course of conduct on the part of the appellant and not a written agreement emanating out of a contract or correspondence between the parties. When the appellant and the respondent agreed to deal in certain goods, certain terms had to be agreed between them. Those terms were set out in the contracts referred to as S-142 and S-336. If those are the two contracts pursuant to which the appellant is trading with the respondent, the conclusion is obvious that those terms are reduced to writing and acknowledged by reason of opening of letters of credit of which reference is made in these two contracts. It would be illogical to contend that those letters of credit though not addressed to the respondent would indicate that they were not acting in pursuance of the contracts (S-142 and S-336) with the respondent and now it is not possible for the appellant to wriggle out of the same. It cannot be said that what is agreed to by them is only regarding the supply of goods and not in regard to other terms. Therefore, the contention advanced by Shri Venugopal in this connection stands rejected.

8. Dr Singhvi, however, contended that the scheme of the Act would indicate that the agreement need not be signed by the parties at all nor even para (2) of Article II of the Schedule would arise for consideration at all.

According to him, under Section 2(*a*) of the Act, if there is an award in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, the court has jurisdiction to enforce the same and each contracting State shall recognise an agreement in writing which does not refer to any signature by the parties nor refer to exchange of letters or telegrams and, therefore, submitted that even in the absence of the signatures of the parties or exchange of letters an agreement in writing simpliciter if the contract contains such arbitration clause is enough to hold that the arbitration clause is binding on the parties. His contention is that there is an agreement in writing though not signed by both the parties but by the course of conduct between the parties it can be spelt out that such an agreement in writing is enough and he further submitted that para (2) of Article II only explains the meaning of the expression "agreement in writing" which includes contracts or agreements signed by parties or contained in exchange of letters or telegrams. If really, as contended by Dr Singhvi, the position is clear, then there is no need for para (2) of Article II at all. Para (1) of Article II would have been enough. When the expression "agreement in writing" is sought to be explained and indicates that it may be in the nature of a contract then obviously the parties have got to sign the same or it may be in the nature of exchange of letters or telegrams, an agreement similarly signed by the parties or resulting as a consequence of exchange of letters or telegrams. Therefore, when the position is not that clear, we would not wish to hazard a decision on this aspect of the matter but rest our conclusion on the principle applicable to the facts emerging in the case and not widen the scope of consideration in this case.

9. Shri Venugopal next contended that the decision in Arbitration Suit No. 2963 of 1991 which was treated as an arbitration petition under Section 33 of the Arbitration Act, 1940 made on 20-1-1992 by the Bombay High Court holding that there is an arbitration agreement between the parties and the petition having been dismissed is binding on the parties and, therefore, clearly the principle of res judicata would be applicable to them and thus it is no longer open to the appellant to raise this contention all over again. Shri Venugopal submitted that the occasion to recognise or enforce a foreign award would arise only on an award being passed which is sought to be recognised or enforced in terms of the Act. It is only in those circumstances that such consideration could be made and not earlier and, therefore, he submitted that the principle of res judicata would not be attracted at all inasmuch as the Bombay High Court had no jurisdiction to deal with a question prior to determination of the rights of the parties because the Act is applicable to an award made on differences between persons not considered as domestic awards and, therefore, an application under Section 33 of the Arbitration Act, 1940 and consideration of the same will not amount to a decision in the case as to be binding on the parties, much less can such a decision be treated as a bar on further proceedings on the principle of res judicata. This Court in *Renusagar case*[6] had occasion to consider the schemes of the provisions of the Act and the Arbitration Act, 1940. It was

noticed therein that the schemes of the Act and the Arbitration Act, 1940 materially differ on several aspects and an examination was made of Sections 3, 4 and 7 of the Act in comparison with Sections 32, 33 and 34 of the Arbitration Act, 1940 to bring out such differences. However, it was noticed that the scheme under Sections 3 and 7 of the Act contemplates that questions of existence, validity or effect of the arbitration agreement differ in cases where such an agreement is wide enough to include within its ambit such questions which could be decided by the arbitrators but their determination is subject to the decision of the court and such decision of the court can be had either before the arbitration proceedings commence or during their pendency if the matter is decided, or can be had under Section 7 of the Act after the award is made and filed in the court and is sought to be enforced by the parties thereto. Thus this Court made it clear that the existence, validity or effect of an arbitration agreement can be determined by the court at three stages: (*1*) before the arbitration proceedings commence, (*2*) during their pendency, and (*3*) after the award is made and filed in the court. If that is so and the question in this regard was raised before the court in a proceeding and that aspect was determined by the court, it cannot be said that such decision is not binding on the parties. Independent of application of the principle of res judicata, we have arrived at the conclusion that we can spell out the existence of an arbitration clause between the parties in terms of the New York Convention to result in an arbitration and that further gets reinforced by the decision of the High Court in the original suit inasmuch as that High Court took the view that there is an arbitration agreement between the parties which is enforceable.

10. In the light of this discussion, we are firmly of the view that the appellant cannot any longer challenge the existence of an arbitration agreement between the parties and such an agreement was not covered by the New York Convention.

11. This Court in *Renusagar case*[6] examined the scope of enquiry in proceedings for recognition and enforcement of a foreign award under the Act and after referring to the concepts in private international law, the Geneva Convention of 1927 and the New York Convention on Arbitration of 1958, held that it is limited to the grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

12. Shri Venugopal next contended that the award is contrary to public policy of India and Reserve Bank of India had issued certain circulars imposing restrictions on imports and, therefore, attracted the force majeure clause. The question of what is the "public policy" has been considered by this Court in *Renusagar case*[6] by interpreting the words in Section 7(1)(*b*)(*ii*) of the Act to mean "public policy of India and not of the country whose law governs the contract or of the country of the place of arbitration" (SCC Headnote). In doing so, this Court took note of the fact that under the Arbitration (Protocol and Convention) Act, 1937 the expression "public

policy of India" had been used, whereas the expression "public policy" is used in the Act; that after the decision of this Court in *V.O. Tractoroexport* v. *Tarapore & Co.*[7] Section 3 was substituted to bring it in accord with the provisions of the New York Convention on Arbitration of 1958 which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration; that to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of double exequatur; that the scope of enquiry is restricted before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon; that enlarging the field of enquiry to include public policy of the country whose law governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation. Therefore, it was held that the words "public policy" are intended to broaden the scope of enquiry so as to cover the policy of other countries, that is, the country whose law governs the contract or the country of the place of the arbitration. In the absence of a definition of the expression "public policy", it is construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced and this Court referred to a large catena of cases in this regard. Therefore, we will proceed on the basis that the expression "public policy" means public policy of India and the recognition and enforcement of foreign award cannot be questioned on the ground that it is contrary to the foreign country public policy and this expression has been used in a narrow sense must necessarily be construed as applied in private international law which means that a foreign award cannot be recognised or enforced if it is contrary to (*1*) fundamental policy of Indian law; or (*2*) the interests of India; or (*3*) justice or morality. Shri Venugopal strongly attacked the correctness of the conclusions reached by the arbitrators on the effect of force majeure clause.

13. In the award it is stated:

> "... Under the force majeure clause the respondents did not have the right to cancel April 1991 and May 1991 quota under Contracts Nos. S-142 and S-336 and neither by the same reasoning did the seller have the right to close out the June through November 1991 quotas against Contract No. S-142 and the June quota against Contract No. S-336.
>
> It may be seen as a commercial oversight, nevertheless the force majeure clause as it is constructed in both contracts, would require both parties to maintain the contracts in being for an indefinite period of time until the force majeure clause had ended, failing alternative arrangements between the parties for delivery and payment."

14. Further, the arbitrators had held that having considered the March 1991 Reserve Bank of India's circular imposing restrictions on the imports of

7 (1969) 3 SCC 562 : (1970) 3 SCR 53

certain categories of goods due to difficult balance of payments position prevailing at the relevant time and letter of credit of Rs 25 lakhs and above should be referred by the local bank branch to the head office for prior approval and in excess of Rs 50 lakhs and above should be referred by the banks to the Controller, Exchange Control Department, Central Office, Reserve Bank of India, for clearance, and there is no time-limit so far as these restrictions are concerned. The arbitrators noticed that the restrictions set by Reserve Bank of India had created a situation in which the appellant had difficulty in arranging the opening of letters of credit so as to conform to the terms of the contract although it could be noted that many applications were submitted by the appellant to Bank of Baroda after the contractual deadline; that several shipments were made against the letter of credit opened after the contractual deadline; that thus it has been established by the documentary evidence to both Contracts Nos. S-142 and S-336 that declaration of force majeure clause was present, though belatedly. The arbitrators ultimately concluded that Reserve Bank of India's directives interfered with Contracts Nos. S-142 and S-336 which would have the effect of delaying the opening of the letters of credit by the buyer under the specified contracts. The arbitrators were of the opinion that the force majeure clause had no limitation on the period of suspension of the contract while the execution was affected by a valid force majeure; that it had been accepted by both the parties and that the restriction and requirements imposed by Reserve Bank of India's directives must be construed as having caused interference in and/or hindrance to the execution of the contract timewise; that though time had been considered to be of the essence condition, the inclusion of the force majeure clause which provided no time-limit to the suspension of the contract caused by conditions envisaged herein, though unusual, it was accepted that the earlier contracts would be negotiated and executed successfully by the parties to the dispute.

15. The view taken by the arbitrators on the effect of the force majeure clause in the light of Reserve Bank of India's directives is a plausible view and cannot be ruled out as impossible of acceptance, and, therefore, the question of substituting our view for that of the arbitrators would not arise. Question of public policy would have arisen if there was complete restriction on the implementation of the terms of the contract. There was no such restriction imposed. But, on the other hand, certain restrictions were imposed which could have been worked out by resorting to appropriate measures in terms of the contract as held by the arbitrators. In that view of the matter, we do not think any question of public policy as such arises for consideration in a situation of this sort. The argument is almost a red herring and does not constitute a valid reason for interference with the award. Therefore, we reject the contentions raised on behalf of the appellant.

16. It is lastly contended that the interest awarded by the arbitrators needs interference and gave a break-up of the details. Interest has been awarded from the period prior to reference in 1991 and after reference till

termination of the proceedings before the arbitrators, pendente lite and after decree. This Court in *Renusagar case*[6] held that award of such interest after the Interest Act, 1978 is permissible, however, on the facts of the case the High Court not having given a direction to the payment of interest pendente lite did not modify that part of the order.

17. We do not find that it is appropriate to modify the award made by the arbitrators or the decree passed pursuant to it as no exceptional circumstances arise. The fact that there is fluctuation in the exchange rate is no reason for us to interfere with the same.

18. The appellant having failed on all points, we dismiss this appeal, however, with no order as to costs.

(2001) 7 Supreme Court Cases 740

(BEFORE G.B. PATTANAIK, S. RAJENDRA BABU, D.P. MOHAPATRA, DORAISWAMY RAJU AND SHIVARAJ V. PATIL, JJ.)

DANIAL LATIFI AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA .. Respondent.

Writ Petitions (C) No. 868 of 1996 with Nos. 996, 1001, 1055, 1062, 1236, 1259, 1281 of 1986, TCs (C) Nos. 22 of 1987, 86, 68 of 1988, 276-77 of 1987, Crl. A. No. 702 of 1990, SLPs (Crl.) Nos. 655 of 1988, 596-97 of 1992, WP (C) No. 12273 of 1984, SLP (Crl.) No. 2513 of 1994, Crl. As. Nos. 508, 843 of 1995, 102-03 of 1989, 292 of 1990 and SLPs (Crl.) Nos. 2165 of 1996, 3786 and 2462 of 1999†,
decided on September 28, 2001

A. **Muslim Women (Protection of Rights on Divorce) Act, 1986 — Held, valid on basis of construction bringing it within constitutional principles — "Reasonable and fair provision and maintenance" under S. 3(1)(a) is not limited for the iddat period; it extends for the entire life of divorced wife, unless she remarries — Clarified that the emphasis in the section is not on the nature or duration of such "provision" or "maintenance", but rather on the time "within" which the arrangement for their payment should be finalised and executed — To construe provisions of the Act as less beneficial than provisions of Chapter IX CrPC and hold husband liable to pay maintenance only for the iddat period would result in unreasonable discrimination against divorced Muslim women and would render the Act violative of Arts. 14, 15 and 21 — Petitions challenging validity of Act dismissed — Interpretation of Statutes — Basic rules — Determination of legislative intent — Applied — Constitution of India — Arts. 14 and 15 — Held, not violated by Muslim Women (Protection of Rights on Divorce) Act, 1986 as interpreted by Supreme Court**

† Under Article 32 of the Constitution of India

(2003) 8 Supreme Court Cases 168

(BEFORE V.N. KHARE, C.J. AND S.B. SINHA, J.)

UNION OF INDIA .. Appellant;

Versus

V. PUNDARIKAKSHUDU AND SONS AND ANOTHER .. Respondents.

Civil Appeals Nos. 8337-39 of 1997†, decided on September 9, 2003

Arbitration Act, 1940 — Ss. 30(a), 33, 15 and 16 — Misconduct on the part of arbitrator — Part of the award inconsistent with the rest — Non-consideration of relevant facts; consideration of irrelevant facts — Contract for construction work stipulating completion of the work by the specified date — Arbitration agreement entitling the principal, in case of contractor's default but not otherwise, to terminate the contract and get the work completed through another agency and to claim compensation for the resultant extra expenditure — Contract period expiring and the principal although not granting any further extension, terminating the same two long months later — Both the parties making claims and counter-claims — The principal, while admitting some (1654 days) delay on its part in accepting the designs during the period preceding the date fixed for completion of the work, contending that it was not at fault thereafter — Arbitrator awarding a certain sum in favour of the principal and another sum in favour of the respondent — Held, in view of non-extension of the date for completion of work, held, the same was the date relevant for determining the rights and obligations of the parties — Held further, after awarding damages to the contractor, which could be done only on finding the principal to have committed breach of the terms of contract, the awarding of any sum in favour of the principal was inconsistent therewith and amounted to a misconduct on the part of the arbitrator — Moreover, the attainment of finality by the award in favour of the contractor would operate as res judicata in the present case — Therefore, the award could not be even remitted back under S. 16 to the arbitrator — Hence, appeal dismissed — Arbitration and Conciliation Act, 1996, S. 34 — Constitution of India, Art. 136 — Res judicata — Practice and Procedure — Res judicata — Civil Procedure Code, 1908, S. 11

The appellant and the respondent herein entered into a contract for construction of an auditorium complex for a certain sum. Clause 54 of the contract enabled the appellant to terminate the contract and get the work completed through another agency and entitled it to lay a claim for the extra expenditure involved to complete the incomplete items of work left out by the respondent. However, clause 54 stipulated that it could be invoked only if the contractor "fails to complete the works, work order and items of work, with individual dates for completion, and clear the site on or before the date of completion". Thus, it required the "failure" to be on the part of the contractor and not by reason of acts of omissions and commissions of the appellant herein. The work commenced on 16-3-1979 and was to be completed on 15-3-1981. Subsequently the scope of work was increased and consequently the contract

† From the Judgment and Order dated 6-1-1997 of the Madras High Court in CMAs Nos. 364, 366 and 367 of 1995

amount was enhanced to Rs 85.10 lakhs and the date for completion of the work was extended to 31-12-1982. The appellant, although did not further extend that date, terminated the contract only on 28-2-1983. Disputes having arisen, the respondent invoked the arbitration agreement and the claims and counter-claims of the parties were referred to the arbitrator. The respondent submitted a claim for a total sum of Rs 23,59,534.72 comprising twenty-three claims whereas the claim of the appellant herein amounted to Rs 90,58,167.42 comprising eight claims. The sole arbitrator awarded a sum of Rs 14,31,463 in favour of the respondent and a sum of Rs 33,95,000 in favour of the appellant herein. The award was filed in the District Court. The respondent filed two suits seeking setting aside the part of award which was in favour of the Government and also seeking decree and judgment directing the Government to pay him Rs 14,31,463. The Government also filed a suit for a decree and judgment in terms of the award for a sum of Rs 33,95,000 with interest. Upholding the objections of the respondent herein the District Judge held that: (*i*) as the arbitrator made an award in favour of the respondent presumably upon finding that the appellant herein was responsible for causing delay in completion of the contract; the award made in favour of the appellant was inconsistent therewith, (*iii*) the appellant herein had admittedly caused 1654 days' delay in accepting the designs and as the said admission was not taken into consideration by the arbitrator, that part of the award was vitiated, and (*iv*) the arbitrator having awarded compensation to the respondent on various items, the award made in favour of the appellant was not sustainable. Upholding that decision, the High Court further held that the contract could not have been terminated after the date of completion of work. The appellant then filed the instant appeals. The appellants herein also filed an SLP against the award made in favour of the respondent but the same was dismissed. The appellant contended that the appellant could be blamed for making delay in the matter and completion of job till 1982 but not for the delay caused beyond 31-12-1982. The appellant further submitted that the award was a non-speaking one and the District Judge had no jurisdiction to analyse the materials on record as if it were an appellate court.

Dismissing the appeals, the Supreme Court

Held :

It is not the case of the appellant that the contractor was allowed to work after 31-12-1982 on grant of further extension for the completion of the work. The rights and obligations of the parties were, thus, required to be considered as on the said date and not thereafter. The fact that there had been a delay of 1654 days on the part of the appellant in accepting the designs and there had been an amendment of the schedule of the work stands admitted. (Para 22)

As the question was as to which of the parties was responsible for delay in causing completion of the contract job, the arbitrator could not have arrived at a finding that both the parties committed breach of the terms of contract which was ex facie unsustainable being wholly inconsistent. An action in terms of clause 54 could be taken recourse to in its entirety or not at all. If one part of the award is inconsistent with the other and furthermore if in determining the disputes between the parties the arbitrator failed to take into consideration the relevant facts or based his decision on irrelevant factors not germane therefor, the arbitrator must be held to have committed a legal misconduct. (Para 23)

The arbitrator, as rightly held by the courts below, has committed a legal misconduct in arriving at an inconsistent finding as regards breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable. (Para 30)

Bharat Coking Coal Ltd. v. *Annapurna Construction*, (2003) 8 SCC 154; *Union of India* v. *Jain Associates*, (1994) 4 SCC 665; *Dandasi Sahu* v. *State of Orissa*, (1990) 1 SCC 214, *followed*

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

K.P Poulose v. *State of Kerala*, (1975) 2 SCC 236 : AIR 1975 SC 1259; *Associated Engg.* v. *Govt. of A.P.*, (1991) 4 SCC 93; *Hindustan Steelworks Construction Ltd.* v. *C. Rajasekhar Rao*, (1987) 4 SCC 93; *Municipal Corpn. of Delhi* v. *Jagan Nath Ashok Kumar*, (1987) 4 SCC 497, *referred to*

The appellant while accepting the award made in favour of the first respondent must be held to have accepted the finding that it committed a breach of contract and the said finding has attained finality and would operate as res judicata. Moreover, the appeal preferred by the appellant against the award of the arbitrator made in favour of the first respondent herein has been dismissed. (Paras 32 and 33)

Sheodan Singh v. *Daryao Kunwar*, AIR 1966 SC 1332 : (1966) 3 SCR 300; *Premier Tyres Ltd.* v. *Kerala SRTC*, 1993 Supp (2) SCC 146, *followed*

Badri Narayan Singh v. *Kamdeo Prasad Singh*, AIR 1962 SC 338 : (1962) 3 SCR 759 : 23 ELR 203, *referred to*

As the appellant failed to get that part of the award which was made by the arbitrator in favour of the first respondent set aside, the basic conclusion of the High Court cannot be faulted. The Court upon setting aside the whole award could have remitted back the matter to the arbitrator in terms of Section 16 of the Act or could have appointed another arbitrator, but at this juncture no such order can be passed as the award in part has become final. (Para 35)

Therefore, the impugned judgment does not suffer from any legal infirmity. (Para 36)

H-M/ATZ/28940/C

Advocates who appeared in this case :

N.N. Goswami, Senior Advocate (C.V.S. Rao and Ms Anil Katiyar, Advocates, with him) for the Appellant;

M.N. Rao, Senior Advocate (A. Subbarao, A.P. Jyothish, A. Chandra Mohan, Ms Deepthi K. and Amar Jyothi, Advocates, with him) for the Respondents.

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

1. (2003) 8 SCC 154, *Bharat Coking Coal Ltd.* v. *Annapurna Construction* 176*d*, 177*b*
2. (1994) 4 SCC 665, *Union of India* v. *Jain Associates* 177*c*
3. 1993 Supp (2) SCC 146, *Premier Tyres Ltd.* v. *Kerala SRTC* 179*c-d*
4. (1991) 4 SCC 93, *Associated Engg.* v. *Govt. of A.P.* 176*f*
5. (1990) 1 SCC 214, *Dandasi Sahu* v. *State of Orissa* 174*b-c*, 177*c*, 177*e-f*
6. (1989) 2 SCC 38, *Sudarsan Trading Co.* v. *Govt. of Kerala* 173*h*, 176*f*, 178*a-b*
7. (1987) 4 SCC 497, *Municipal Corpn. of Delhi* v. *Jagan Nath Ashok Kumar* 178*e-f*
8. (1987) 4 SCC 93, *Hindustan Steelworks Construction Ltd.* v. *C. Rajasekhar Rao* 178*c*

9. (1975) 2 SCC 236 : AIR 1975 SC 1259, *K.P. Poulose* v. *State of Kerala* 175*c*, 177*b*, 177*c*
10. AIR 1966 SC 1332 : (1966) 3 SCR 300, *Sheodan Singh* v. *Daryao Kunwar* 179*c*
11. AIR 1962 SC 338 : (1962) 3 SCR 759 : 23 ELR 203, *Badri Narayan Singh* v. *Kamdeo Prasad Singh* 179*e*

The Judgment of the Court was delivered by

S.B. SINHA, J.— The appellant and the first respondent herein entered into a contract for construction of an auditorium complex at Willington Nilgiris for a sum of Rs 64,79,982.95. The work commenced on 16-3-1979 and was to be completed on 15-3-1981. However, there had been an amendment to the said agreement owing to increase in the scope of work. An extra time of six months was also given to the contractor in terms of the said amendment. The time for completion of the contract was extended from 16-9-1981 to 30-6-1982 and 1-7-1982 to 31-12-1982. The contract amount was also increased, because of the aforementioned amendment therein owing to increase in the scope of work, to Rs 85.10 lakhs. Although the period of contract was over and the appellant did not grant any further extension, the same was purportedly terminated by the appellant herein on 28-2-1983 i.e. after the due date for completion of work, namely, 31-12-1982. Disputes and differences having arisen, the arbitration agreement was invoked by Respondent 1 and the claims and counter-claims of the parties were referred to one Brigadier M.M.L. Sharma who was appointed by the Engineer-in-Chief of the appellant. Before the arbitrator the first respondent submitted a claim for a total sum of Rs 23,59,534.72 comprising twenty-three claims whereas the claim of the appellant herein amounted to Rs 90,58,167.42 comprising eight claims.

2. The sole arbitrator awarded a sum of Rs 14,31,463 in favour of the first respondent and a sum of Rs 33,95,000 in favour of the appellant herein. The award was filed in the District Court of Nilgiris.

3. Original Petition No. 29 of 1986 was filed by Respondent 1 herein under Sections 15, 16, 30 and 32 of the Arbitration Act praying to vary, modify or set aside Claim 1 under '*B*' claim of the Government in the award dated 6-2-1986 and confirm the award in Claim '*q*' of the contractor made including the interest and decree in favour of the petitioner or in the alternative, to set aside the award dated 6-2-1986.

4. Original Suit No. 31 of 1986 was filed by the first respondent for passing a judgment and decree in terms of the award passed in favour of the plaintiff in Claims Serial No. '*A*' of the contractor by the second defendant and directing the first respondent (*sic* defendant) to pay the plaintiff Rs 14,31,463 whereas Original Suit No. 47 of 1986 was filed by the Union of India for a decree and judgment in terms of the award for a sum of Rs 33,95,000 with interest at 18% per annum with costs.

5. The learned District Judge upheld the said objections of the first respondent holding: as the arbitrator made an award in favour of the first respondent presumably upon arriving at a finding that the appellant herein

was responsible for causing delay in completion of the contract; the award made in favour of the appellant must be held to be inconsistent therewith.

6. It was further held that the appellant herein "pushed in" some calculation sheets on the last date of hearing which was accepted by the arbitrator without assigning any reason and without prior intimation to the first respondent which amounted to misconduct on the part of the arbitrator. The Court further took into consideration the fact that the Union of India admittedly caused 1654 days' delay in accepting the designs and as the said admission was not taken into consideration by the arbitrator, that part of the award was vitiated.

7. The District Judge further held that having regard to the fact that the arbitrator had awarded compensation to the first respondent on various items including Claim A towards additional amount claimed due to escalation in prices of materials and men at 25% of the work done at the contract rates, loss sustained due to underutilisation of cantering and shuttering materials, loss sustained due to underutilisation, compensation for loss sustained on overheads due to prolongation of work, the impugned award cannot be sustained.

8. The learned District Judge furthermore laid emphasis on the claim towards extra expenditure incurred in dismantling of work done due to delays in decisions wherefor a sum of Rs 12,500 was awarded stating:

> "... Therefore it is clear that there was a delay on the part of the department in taking decisions. Because of the delay in taking decisions, the arbitrator has awarded the amount for delay solely on the part of the contractor. I failed to understand why the sole arbitrator should have awarded Rs 12,500 under Claim V(*a*) of the contractor."

9. Referring to clause 54 of the contract, the District Judge said:

> "... Therefore Condition 54 makes it abundantly clear that if there was any default on the part of the contractor the Union of India has got every right to impound the materials of the contractor, and at any time sell the materials and appropriate the proceeds towards any losses. Curiously enough under Claim VI the arbitrator has passed an award stating that the materials should be returned to the contractor. The approximate costs of the materials has been given as Rs 3,71,000 by the contractor. Once again, it has to be stated that if the sole arbitrator has come to the conclusion that the default was on the part of the contractor, he is not justified in directing the Union of India to hand over the materials. Since he has come to the conclusion that the Union of India is responsible for the breach of contract, the sole arbitrator has directed the Union of India to return the materials as the Union of India cannot take recourse under Condition 54 of the General Conditions of the Contract IAFW 2249. In the background of this we have now considered the amount awarded to the Union of India under Claims 1, 2 and 4; under Claim 1 Rs 33,64,000 has been awarded by the sole arbitrator towards extra expenditure involved to complete the incomplete item of work left

by the defaulting contractor. Once again going back to contractor's claim under Claim 6(*n*) it is clear that the findings of (end of the original's 31st page) the arbitrator under Claim V of '*A*' claim of the contractor and Claim 1 of '*B*' of the Government of India is inconsistent. Since the arbitrator has already come to the conclusion that the breach of contract was due to the first respondent and has directed the Union of India to return the materials to the contractor, the sole arbitrator should not have awarded Rs 33,64,000 towards excess expenditure involved to complete the incomplete items of work left by the defaulting contractor. On the face of it, the arbitrator's award of Rs 33,64,000 under Claim 1 of '*B*' claim of the Government is not sustainable.

Since the award of Rs 33,95,000 by the sole arbitrator is inconsistent and is a misconduct, the order of the arbitrator in respect of Claim 1 of '*B*' claim of the Union of India in the award dated 6-2-1986 has to be set aside."

10. Aggrieved thereby three appeals being AAO No. 364 of 1995, AAO No. 366 of 1995 and AAO No. 367 of 1995 were filed by the appellant against the order of the District Court dated 21-2-1994 in OP No. 29 of 1986, OS No. 31 of 1986 and OS No. 47 of 1986 respectively.

11. By reason of the impugned judgment dated 6-1-1997 the said appeals were dismissed.

12. It, however, appears that the appellants herein also filed SLPs (Civil) Nos. ... 8317-18 of 1997 arising out of the judgment and order dated 6-1-1997 in Appeals Nos. 242 and 243 of 1995 of the High Court of Madras questioning the award made in favour of the first respondent herein. The same was dismissed by this Court by an order dated 24-11-1997.

13. Mr N.N. Goswami, the learned Senior Counsel appearing on behalf of the appellant would submit that the High Court as also the District Judge committed a manifest error in setting aside the award made by the arbitrator in favour of the appellant insofar as it failed to take into consideration that the award was a non-speaking one.

14. The learned counsel would contend that the appellant could be blamed for making delay in the matter and completion of job till 1982 but no finding has been arrived at nor could be arrived at on the basis of materials on record that thereafter it was at fault. No material has been shown in the impugned judgments which support the views taken by the courts below that the appellant was responsible for the delay caused beyond 31-12-1982. Mr Goswami would urge that the District Judge had no jurisdiction to analyse the materials on record as if it has an appellate jurisdiction over the award of the arbitrator. The learned counsel would contend that the jurisdiction of the High Court in setting aside an award being limited, the impugned judgments cannot be sustained. In support of the said contention, strong reliance has been placed on *Sudarsan Trading Co.* v. *Govt. of Kerala*[1].

1 (1989) 2 SCC 38

15. Mr M.N. Rao, the learned Senior Counsel appearing on behalf of the respondent, per contra, would submit that a finding of fact has been arrived at to the effect that the award of the arbitrator was inconsistent. The learned counsel would submit that while considering the validity or otherwise of an award the court is not precluded from considering the totality of the circumstances. It was pointed out that having regard to the fact that the appellant admitted the delay of 1654 days on its part, the same ought to have been taken into consideration by the arbitrator, which was relevant for resolution of the dispute between the parties. The claims raised by the appellant based on the purported breach of contract on the part of the first respondent herein must be held to be mala fide. The learned counsel has placed strong reliance in support of his contention on *Dandasi Sahu* v. *State of Orissa*[2].

16. The short question which arises for consideration in these appeals is as to whether the District Judge and the High Court, Madras exceeded their jurisdiction in passing the impugned judgments.

17. It is not in dispute that the claims and counter-claims of the parties centred around determination by the arbitrator as to whether the appellant or the first respondent had committed a breach of contract. The power of the appellant to terminate the contract and to put forth the claim for extra expenditure involved to complete the incomplete items of work left out by the first respondent revolved around the issue as to whether it was a defaulter or not. The appellant could terminate the contract and get the work completed through another agency entitling it to lay the said claim, but its justifiability therefor indisputably would depend upon the interpretation of clause 54 of the contract. The said clause empowers the appellant to cancel the contract, only if the contractor "fails to complete the works, work order and items of work, with individual dates for completion, and clear the site on or before the date of completion". Thus, the "failure" must be on the part of the contractors and not by reason of acts of omissions and commissions of the appellant herein.

18. The following was furthermore contained in the said clause:

> "The Government shall also be at liberty to use the materials, tackle, machinery and other stores on site of the contractor as it thinks proper in completing the work and the contractor will be allowed the necessary credit. The value of the materials and stores and the amount of credit to be allowed for tackle and machinery belonging to the contractor and used by the Government in completing the work shall be assessed by the GE and the amount so assessed shall be final and binding.
>
> In case the Government completes or decides to complete the works or any part thereof under the provision of this condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the contractor under the condition shall consist of the cost or estimated cost (as certified by GE) of materials purchased or required to

2 (1990) 1 SCC 214

be purchased and/or the labour provided or required to be provided by the Government as also the cost of the contractor's materials used with an addition of such percentage to cover superintendence and establishment charges as may be decided by the CWE, whose decision shall be final and binding."

19. The said clause could, thus, be invoked only on default on the part of the contractor and not otherwise.

20. Apart from the findings of the District Judge, as noticed hereinbefore, the High Court also came to the conclusion that the contract could not have been terminated after the date of completion of work holding:

> "... Misconduct as defined under Section 30 is not a moral lapse. If the arbitrator on the face of the award arrives at an inconsistent conclusion, it would also amount to misconduct as per the decision reported in *K.P. Poulose* v. *State of Kerala*[3]. Therefore, the finding of the learned District Judge that there is an inconsistent conclusion by the arbitrator who has admitted the delay on the part of the Government in my opinion is well founded. It is more so, when the Government has not chosen to set aside that portion of the award which implies that there is delay on the part of the Government."

21. The High Court further opined:

> "Clause 54 of the agreement provides for utilisation of the materials, machinery, tackle etc. for completion of the incomplete work and sell the same at any time and appropriate the sale proceeds towards the loss which may arise from the cancellation of the contract. In the case on hand, the cancellation of the contract is after the expiry of the time contended for completion of the contract. The materials, machineries etc. were ordered to be returned to the contractor or pay the costs of the same to the contractor. The non-utilisation of the materials has not been taken into consideration by the arbitrator. It is contended that no payment was made for the machineries and the contractor was at liberty to take in back the machineries and therefore the non-utilisation of the materials cannot be said to be a conduct which would absolve the liability of the Government. But, this contention is not tenable since when the contractor has attempted to remove the materials on the work it has been prevented and a complaint has also been lodged with the police. Therefore, awarding certain sum towards loss sustained by the Government on account of the delay said to have been committed by the contractor, is inconsistent with the award granted in favour of the contractor to get back the materials or value thereof from the Government. When the order of the arbitrator is inconsistent, it amounts to a misconduct. Therefore, the learned District Judge has rightly set aside Claim 1 under '*B*' claim of the Government and I am of the opinion that it is not a matter to be interfered with by this Court."

3 (1975) 2 SCC 236 : AIR 1975 SC 1259

22. It is not the case of the appellant that the contractor was allowed to work after 31-12-1982 on grant of further extension for the completion of the work. The rights and obligations of the parties were, thus, required to be considered as on the said date and not thereafter. The fact that there had been delay of 1654 days on the part of the appellant in accepting the designs and there had been an amendment of the schedule of the work stands admitted.

23. The question as to whether one party or the other was responsible for delay in causing completion of the contract job, thus, squarely fell for consideration before the arbitrator. The arbitrator could not have arrived at a finding that both committed breaches of the terms of contract which was ex facie unsustainable being wholly inconsistent. Clause 54 of the contract could be invoked only when the first respondent committed breach of the terms of the contract. An action in terms thereof could be taken recourse to in its entirety or not at all. If one part of the award is inconsistent with the other and furthermore if in determining the disputes between the parties the arbitrator failed to take into consideration the relevant facts or based his decision on irrelevant factors not germane therefor; the arbitrator must be held to have committed a legal misconduct.

24. In *Bharat Coking Coal Ltd.* v. *Annapurna Construction* (CA Nos. 5647-48 of 1997, dt. 29-8-2003)[4] this Court noticed: (SCC pp. 161-62, paras 19-22)

> "*19.* So far as these items are concerned, in our opinion, the learned sole arbitrator should have taken into consideration the relevant provisions contained in the agreement as also the correspondences passed between the parties. The question as to whether the work could not be completed within the period of four months or the extension sought for on one condition or the other was justifiable or not, are relevant facts which were required to be taken into consideration by the arbitrator.
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> *20.* It is now well settled that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract.
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> *21.* In *Associated Engg.* v. *Govt. of A.P.*[5] this Court clearly held that the arbitrators cannot travel beyond the parameters of the contract. In *Sudarsan Trading Co.* v. *Govt of Kerala*[1] this Court has observed that an award may be remitted or set aside on the ground that the arbitrator in making it had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has been determined outside the award, whatever might be said about it in the award by the arbitrator. This Court further observed that an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.
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> *22.* There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power

4 (2003) 8 SCC 154
5 (1991) 4 SCC 93

apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

25. It was held that if the arbitrator has committed a jurisdictional error, the court can intervene. This Court in *Bharat Coking Coal Ltd.*[4] noticed its earlier decision in *K.P. Poulose* v. *State of Kerala*[3] wherein it was observed that the case of legal misconduct would be complete if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring the very material documents which throw abundant light on the controversy to help a just and fair decision.

26. In *Union of India* v. *Jain Associates*[6] this Court upon following *K.P. Poulose*[3] and *Dandasi Sahu*[2] held: (SCC p. 671, para 8)

"*8.* The question, therefore, is whether the umpire had committed misconduct in making the award. It is seen that Claims 11 and 12 for damages and loss of profit are founded on the breach of contract and Section 73 encompasses both the claims as damages. The umpire, it is held by the High Court, awarded mechanically, different amounts on each claim. He also totally failed to consider the counter-claim on the specious plea that it is belated counter-statement. These facts would show, not only the state of mind of the umpire but also non-application of the mind, as is demonstrable from the above facts. It would also show that he did not act in a judicious manner objectively and dispassionately which would go to the root of the competence of the arbitrator to decide the disputes."

27. In *Dandasi Sahu*[2] this Court held that the award suffering from non-application of mind by the arbitrator is liable to be set aside. It was held: (SCC p. 220, para 5)

"In this connection we have to keep in mind that we are concerned with a situation where the arbitrator need not give any reason and that even if he commits a mistake either in law or in fact in determining the matter referred to him, where such mistake does not appear on the face of the award, the same could not be assailed. The arbitrator, in the case of a reference to him in pursuance of an arbitration agreement between the parties, being a person chosen by parties is constituted as the sole and the final judge of all the questions and the parties bind themselves as a rule to accept the award as final and conclusive. The award could be interfered with only in limited circumstances as provided under Sections 16 and 30 of the Arbitration Act. In this situation we have to test the award with circumspection. Even with all these limitations on the powers of court and probably because of these limitations, we have to hold that if the amount awarded was disproportionately high having regard to the

6 (1994) 4 SCC 665

original claim made and the totality of the circumstances it would certainly be a case where the arbitrator could be said to have not applied his mind amounting to legal misconduct."

28. In *Sudarsan Trading Co.*[1] this Court clearly held that the court can look to the agreement where the question arises as to whether an award may be remitted or set aside on the ground that the arbitrator in making it has exceeded its jurisdiction. Drawing distinction between the disputes as to the jurisdiction of the arbitrator and the dispute as to in what way that jurisdiction should be exercised, this Court opined: (SCC pp. 53-54, para 29)

"*29.* The next question on this aspect which requires consideration is that only in a speaking award the court can look into the reasoning of the award. It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in *Hindustan Steelworks Construction Ltd.* v. *C. Rajasekhar Rao*[7]. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In absence of any reasons for making the award, it is not open to the court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator. See the observations of this Court in *Municipal Corpn. of Delhi* v. *Jagan Nath Ashok Kumar*[8]."

29. In that case the Court was concerned with the first issue and not the second one wherewith we are concerned herein. In the fact situation obtaining therein the Court distinguished a large number of authorities placed before it holding: (SCC p. 56, para 31)

"But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

30. Such is not the position here.

31. In this case the District Judge as also the High Court of Madras clearly held that the award cannot be sustained having regard to the inherent

7 (1987) 4 SCC 93
8 (1987) 4 SCC 497

inconsistency contained therein. The arbitrator, as has been correctly held by the District Judge and the High Court, committed a legal misconduct in arriving at an inconsistent finding as regards breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable being self-contradictory.

32. The Union of India while accepting the award made in favour of the first respondent must be held to have accepted the finding that it committed a breach of contract and the said finding has attained finality and would operate as res judicata in view of the decision of this Court in *Sheodan Singh* v. *Daryao Kunwar*[9].

33. Furthermore, as noticed hereinbefore, the appeal preferred by the appellant against the award of the arbitrator made in favour of the first respondent herein has been dismissed.

34. In *Premier Tyres Ltd.* v. *Kerala SRTC*[10] this Court held: (SCC pp. 148-49, paras 4-5)

> "4. ... The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from.
>
> 5. Mention may be made of a Constitution Bench decision in *Badri Narayan Singh* v. *Kamdeo Prasad Singh*[11]. In an election petition filed by the respondent a declaration was sought to declare the election of appellant as invalid and to declare the respondent as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed:
>
> > 'We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect.' "

9 AIR 1966 SC 1332 : (1966) 3 SCR 300
10 1993 Supp (2) SCC 146
11 AIR 1962 SC 338 : (1962) 3 SCR 759 : 23 ELR 203

35. As the appellant failed to get that part of the award which was made by the arbitrator in favour of the first respondent set aside, the basic conclusion of the High Court cannot be faulted. The Court upon setting aside the whole award could have remitted back the matter to the arbitrator in terms of Section 16 of the Act or could have appointed another arbitrator, but at this juncture no such order can be passed as the award in part has become final.

36. For the reasons aforementioned, we are of the opinion that the impugned judgment does not suffer from any legal infirmity. These appeals are, therefore, dismissed. No costs.

(2003) 8 Supreme Court Cases 180

(BEFORE DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.)

STATE OF RAJASTHAN .. Appellant;

Versus

RAJA RAM .. Respondent.

Criminal Appeals Nos. 815-16 of 1996†, decided on August 13, 2003

A. **Criminal Trial — Appeal against acquittal — Interference by appellate court — Scope — Held, reappreciation of evidence in such appeal permissible where admissible evidence has been ignored — Appellate court can interfere only when there are compelling or substantial reasons for doing so — If the impugned judgment is clearly unreasonable, held, it is a compelling reason for interference — Possibility of two views — The view favourable to the accused, held, should be adopted — Presumption of innocence — Held, is further strengthened by acquittal — Appreciation of evidence — Appellate court's approach — Duty and power of court in an appeal against acquittal, restated — Constitution of India — Art. 134 — Appeal against acquittal — Interference — Permissibility — Penal Code, 1860 — S. 302 — Criminal Procedure Code, 1973 — Ss. 386 and 378**

Held :

Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by the appellate court considering the appeal against the judgment of

† From the Judgment and Order dated 29-2-1996 of the Rajasthan High Court in DB Murder Reference No. 3 of 1995 in DB Crl. As. Nos. 395 and 404 of 1995 : 1996 Raj Cri Cas 356

(2006) 13 Supreme Court Cases 779

(BEFORE DR. AR. LAKSHMANAN AND ALTAMAS KABIR, JJ.)

FOOD CORPORATION OF INDIA .. Appellant;

Versus

A.M. AHMED & CO. AND ANOTHER .. Respondents.

Civil Appeals Nos. 5244-46 of 2003†, decided on October 31, 2006

A. **Contract — Contractual obligations and rights — Price/Escalation of costs — Compensation for, when permissible — Works contract — Wage escalation occurring due to term in contract requiring payment of statutory minimum wages on hike in the minimum wage — Entitlement to compensation for — Contract Act, 1872 — S. 56 — Term in contract incorporating statutory standard — Change in statutory standard during currency of contract — Burden of — Party on whom falls — Arbitration and Conciliation Act, 1996 — S. 34 — Power of arbitrator to award compensation for cost escalations during currency of contract — Scope — Words and Phrases — "Escalation"**

B. **Contract — Contractual obligations and rights — Price/Escalation — Compensation for, when permissible — Works contract — Escalation in costs incurred by contractor due to delay in execution of contract by employer — Effect — Contract Act, 1872 — Ss. 53, 54 and 73 — Arbitration and Conciliation Act, 1996 — S. 34**

C. **Contract — Contractual obligations and rights — Price/Escalation — Compensation for, when permissible — Agreement as to higher rates — Inference of, from conduct of parties — Promisee holding out promise of paying higher rates — Promisor performing on basis thereof — Works contract — Employer holding out assurance that it would pay higher rates due to statutory wage escalation — Contractor performing contractual works based thereon — Entitlement to compensation for higher costs incurred — Contract Act, 1872 — S. 62 — Arbitration and Conciliation Act, 1996 — S. 34**

The respondent claimant was awarded the contract for carrying out the work of clearing, forwarding, stevedoring, etc. from the ports at Tuticorin for the period from 8-4-1981 to 7-4-1983. During the currency of the contract w.e.f. 30-8-1981, the wages of the workmen employed in the cargo handling were sharply increased to almost threefold consequent upon a settlement arrived under Section 12(3) of the Industrial Disputes Act. The State Government notified the same in the gazette on 1-9-1981. In view of the statutory increase in the wages payable to the port labourers, the claimant made various representations to FCI to revise the rates in respect of the contract besides pointing out that the claimant would be constrained to discontinue the work as the work at the contracted rates would result in large loss. According to FCI, the tender agreement did not provide for any escalation clause and also stated that other than the rates agreed between the parties, the contractor would not be entitled to any other payments.

† From the Judgment and Final Order dated 13-8-2002 of the High Court of Judicature at Madras in OSAs Nos. 157-59 of 1997

The arbitrator passed the award awarding a sums of about Rs 57 and Rs 23, lakhs under Claims (*i*) and (*ii*) respectively with interest @ 9% p.a. from 8-8-1989 till date of the award and future interest @ 12% p.a. till date of decree or realisation. Thereafter, a Single Judge of the High Court made the award as rule of court and passed a decree in terms of the award. FCI preferred an appeal which was dismissed by the Division Bench. On special leave petitions being filed thereagainst, the Supreme Court remanded the matter to the High Court for disposal on merits. The Division Bench, after dismissing the objections filed by FCI, passed a decree in terms of the award together with interest @ 12% p.a. from the date of the decree till the date of the payment. Aggrieved by the dismissal of the appeal by the High Court, FCI had preferred these appeals.

Partly allowing the appeals, the Supreme Court

Held :

Escalation is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. The claimant firm is entitled to be paid the said compensation, in view of Clause 7 of the contract dealing with payment of wages. The said clause provides that contractors shall pay not less than minimum wages to the workers engaged by them on either time-rate basis or piece-rate basis on the work. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so. (Paras 11, 12 and 32)

Hyderabad Municipal Corpn. v. *M. Krishnaswami Mudaliar & Mudaliar*, (1985) 2 SCC 9; *P.M. Paul* v. *Union of India*, 1989 Supp (1) SCC 368 : AIR 1989 SC 1034, *relied on*

State of Orissa v. *Sudhakar Das*, (2000) 3 SCC 27; *S. Harcharan Singh* v. *Union of India*, (1990) 4 SCC 647; *Associated Engg. Co.* v. *Govt. of A.P.*, (1991) 4 SCC 93; *Rajasthan State Mines and Minerals Ltd.* v. *Eastern Engg. Enterprises*, (1999) 9 SCC 283; *Ramachandra Reddy & Co.* v. *State of A.P.*, (2001) 4 SCC 241; *State of Rajasthan* v. *Nav Bharat Construction Co.*, (2002) 1 SCC 659, *cited*

The contract period was from 8-4-1981 to 7-4-1983, for a period of two years. Wage revision came into effect from 1-9-1981. From 7-9-1981 to 28-2-1984, the contractor made various representations during the currency of the contract. In the correspondence with the claimant firm subsequent to the wage revision settlement, FCI agreed to pay the expenditure incurred on account of wage revision. The committee constituted by FCI recommended allowing the escalated rates specified therein, supplementing with details. Furthermore, Joint Manager of FCI on being asked to look into the matter had recommended inter alia that there is definitely a necessity for escalating the rates of the present contractors. FCI in its replies to the repeated representations of the respondent contractor in this regard kept requesting the respondent to not stop the work while the decision on the payment of escalated rates was pending with it. Thus, it

is seen that the claimant was acting and carrying on the contract work without bringing any stoppage of work from 25-1-1982 incurring heavy loss, as it was thus made to believe that it would be adequately compensated. FCI did not allow the contractor to discontinue the contract work during the currency of the contract promising that the revision of wages is under their consideration. (Paras 13, 15, 18, 17 and 23)

The Corporation had raised a specific question before the arbitrator that escalation in rates claimed by the contractor could not be granted for the simple reason that the agreement did not provide for any grant of the escalated rates during the tenure of contract and hence no enhanced rates other than the rates agreed upon can be granted. The arbitrator specifically rejected the above contention on the basis of the subsequent acceptance of responsibility by FCI. The arbitrator has not misconducted himself and the award has been passed in consonance with the principles of natural justice. The High Court has also upheld the award of arbitrator rightly holding that there is no error apparent of fact or law on the face of the record. (Paras 14, 24 and 25)

D. **Arbitration and Conciliation Act, 1996 — Ss. 16, 8, 11 and 34 — Arbitrability of issue determined in proceedings for appointment of arbitrator — Said determination attaining finality — Effect — Jurisdiction of arbitrator in respect of the said issue, held, cannot be challenged in arbitration proceedings themselves — Arbitration Act, 1940 — Ss. 13, 8 and 30 — Practice and Procedure — Res judicata — Applicability**

The issue of jurisdiction of the arbitrator to go into the claim of the claimant towards compensation and neutralisation of the extra expenditure incurred on account of statutory wage revisions had already concluded in the earlier proceedings arising out of the application filed by the claimant firm under Section 20 of the Arbitration Act, 1940 for appointment of the arbitrator. FCI in the said proceedings specifically contended that there was no escalation clause in the contract, the claim of the claimants for compensation on account of wage revision should not be referred to arbitration and that the said claim was non-arbitrable. However, the subordinate judge before whom the application had come up had rejected the said contention holding that the said claim was arbitrable. On appeal filed by FCI before the High Court the High Court also confirmed the same by order. The Supreme Court also dismissed a special leave petition thereagainst. Thus, FCI is barred by res judicata from raising the same issue again in the present proceedings. (Para 10)

[**Ed.**: Though the arbitration in this case was governed by the 1940 Act, *See also Shortnote L* in *SBP case*, (2005) 8 SCC 618.]

E. **Arbitration and Conciliation Act, 1996 — S. 31 — Interest that may be awarded**

The subject-matter relates to the performance of the contract between the period from 8-4-1981 to 7-4-1983. 23 years and odd have already elapsed since the contract period and that the contractor is being prevented by FCI to receive the monies spent by him as awarded by the arbitrator. It is also seen from the records that the quantum claimed by the respondents was never disputed by FCI and it is an admitted fact that the wage revision came into force w.e.f. 1-9-1981 and the contractor firm had paid the workers revised wages from 1-9-1981.

Having considered the totality of the circumstances, it would be just and proper to award interest @ 9% p.a. throughout instead of 12% as awarded by the arbitrator for the period in question. The balance amount together with interest at 9% p.a. shall be paid by FCI within 2 months from the date of this order failing which the said balance amount shall carry interest @ 12% from the date of its being due till realisation. In view of this order in this judgment, the bank guarantee furnished by the respondent contractor shall stand discharged.

(Paras 26 and 33)

D-M/35226/S

Advocates who appeared in this case :

K. Mohan, Senior Advocate, Additional Solicitor General (Ajit Pudussery and K. Vijayan, Advocates) for the Appellant;

R. Anand Padmanabhan and G. Ramakrishna Prasad, Advocates, for the Respondents.

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

1. (2002) 1 SCC 659, *State of Rajasthan* v. *Nav Bharat Construction Co.* 785*b*, 792*c-d*
2. (2001) 4 SCC 241, *Ramachandra Reddy & Co.* v. *State of A.P.* 785*a-b*
3. (2000) 3 SCC 27, *State of Orissa* v. *Sudhakar Das* 784*f*
4. (1999) 9 SCC 283, *Rajasthan State Mines and Minerals Ltd.* v. *Eastern Engg. Enterprises* 785*a*
5. (1991) 4 SCC 93, *Associated Engg. Co.* v. *Govt. of A.P.* 784*g-h*
6. (1990) 4 SCC 647, *S. Harcharan Singh* v. *Union of India* 784*g*
7. 1989 Supp (1) SCC 368 : AIR 1989 SC 1034, *P.M. Paul* v. *Union of India* 793*g-h*
8. (1985) 2 SCC 9, *Hyderabad Municipal Corpn.* v. *M. Krishnaswami Mudaliar & Mudaliar* 793*a-b*

The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J.— The appellant Food Corporation of India (hereinafter called "FCI") preferred the above appeals against the judgment and final order dated 13-8-2002 passed by the Division Bench of the High Court of Judicature at Madras in OSAs Nos. 157-59 of 1997 whereby the High Court dismissed the appeals filed by FCI and passed a decree in terms of the award together with interest @ 12% p.a. from the date of the decree till the date of the payment.

2. The present dispute and differences arise out of a contract relating to the work of clearing, stevedoring, forwarding, exporting, handling and transport and delivery of foodgrains, sugar, flour, for the users, gift, hospital/suppliers and other commodities and gunny-twine bales imported at the port of Tuticorin at the FCI storage godowns in and around Tuticorin for a period of two years from the date of contract i.e. 8-4-1981 in pursuance of Work Order No. SPC 1(1)/80 dated 20-4-1981 issued by the Senior Regional Manager, FCI, Madras. The respondent contractor/claimant submitted his offer on 20-2-1981 along with covering letter. On 7-4-1981, a communication was issued by FCI to the claimant accepting their offer which had been reduced through negotiation to 397% ASOR. According to FCI, a perusal of the said tender document shows that in addition to cargo handling work at the port, the respondent contractor had to perform various other

duties including unloading of foodgrains from railway wagons, machine-stitching of foodgrain bags, loading into trucks and other vehicles, etc. etc. According to FCI, the tender agreement did not provide for any escalation clause and also stated that other than the rates agreed between the parties, the contractor would not be entitled to any other payments. On 1-9-1981, the Tamil Nadu Government issued a notification in the gazette notifying the settlement arrived at between the port users and cargo handling labour of Tuticorin Port regarding implementing of the settlement dated 4-1-1981. The respondent, by his letter dated 7-9-1981 to FCI, pointed out the revision of wages and asked FCI to review its case for revision of rates and pass necessary orders for revising the rates. The claim for escalation made by the respondent was rejected by FCI by its letter dated 14-3-1984. The respondent filed OP No. 49 of 1986 in the Subordinate Court, Tuticorin for appointment of an arbitrator in the dispute regarding escalation. The said court passed an order appointing an arbitrator in the matter. The High Court of Madras modified the order passed by the subordinate court and directed the Managing Director of FCI to appoint an arbitrator in terms of contract between the parties. The special leave petition filed against the aforesaid order was dismissed by this Court on 5-5-1989. The special leave petition was filed by FCI being aggrieved by the finding that the dispute between the parties was an arbitrable dispute, since the only question to be determined was payment of escalation which was not provided for in the contract, therefore, it could not have been referred to arbitration.

3. Following the dismissal of the special leave petition, FCI appointed Respondent 2, Mr B.S. Hegde, Joint Secretary and Legal Advisor, Government of India as sole arbitrator. Respondent 1 filed statement of claim raising several claims. FCI filed a counterclaim. The arbitrator, on 10-4-1992, passed the award awarding a sum of Rs 57,10,517 and Rs 22,84,207 under Claims (*i*) and (*ii*) respectively with interest @ 9% p.a. from 8-8-1989 till date of the award and future interest @ 12% p.a. till date of decree or realisation.

4. FCI filed OP No. 350 of 1992 under Section 14(2) of the Arbitration Act praying for a direction to the arbitrator to file the award before the High Court so as to enable it to challenge the same. Respondent 2 filed the award before the Sub-Court, Tuticorin on 30-6-1992. The claimant filed a petition before the subordinate court for making the award rule of court and a decree in terms of the award. The Division Bench of the Madras High Court in appeal preferred by FCI against the dismissal of OP No. 350 of 1992 directed withdrawal of the OP filed before the Tuticorin Court to the High Court. FCI, upon being informed by the Registry of the High Court regarding transfer of OPs and their re-numbering as OPs Nos. 441 and 441-A of 1993, filed objections to the award under Sections 30 and 33 of the Arbitration Act which was numbered as OP No. 697 of 1993. A learned Single Judge of the High Court dismissed the objections filed by FCI by holding the same to be

time-barred and made the award as rule of court and passed decree in terms of the award. FCI preferred an appeal to the Madras High Court which was dismissed by the Division Bench of the said Court on 14-7-1997. The High (*sic* Supreme) Court, vide judgment and order in Special Leave Petitions Nos. 21377-79 of 1997, set aside the dismissal and remanded the matter back to the Division Bench of the High Court for disposal on merits. The Division Bench, after dismissing the objections filed by FCI, passed a decree in terms of the award together with interest @ 12% p.a. from the date of the decree till the date of the payment. Aggrieved by the dismissal of the appeal by the High Court, FCI preferred the above appeals.

5. We heard Mr K.K. Mohan, learned Senior Counsel and Additional Solicitor General appearing for the appellant and Mr R. Anand Padmanabha, learned counsel for Respondent 1.

6. Mr K.K. Mohan, learned Senior Counsel appearing for the appellant, made the following submissions:

1. In the absence of an escalation clause in the contract, the arbitrator could not have awarded any amount towards escalation and, therefore, the arbitrator has erred in awarding and the courts below in upholding the escalation awarded by the arbitrator;

2. The High Court completely erred in not noticing that Clause 7 of the contract deals with payment of minimum wages and this is different from the wage increase in the present case which is not minimum wages but are wages prescribed through settlement and, therefore, erred in holding that there was an implied provision in the contract to pay the wages;

3. The High Court ought not to have taken into account the ex gratia payment made by the Corporation to bypass the absence of the escalation clause and in holding that despite the absence of escalation clause, the contractor would be entitled to escalation;

4. Relying on the judgment of this Court in *State of Orissa* v. *Sudhakar Das*[1] it was submitted that in the absence of any escalation clause, an arbitrator cannot assume any jurisdiction to award any amount towards escalation and, therefore, that part of the award which grants escalation charges is clearly not sustainable and suffers from patent error;

5. Relying on the judgment of this Court in *S. Harcharan Singh* v. *Union of India*[2] for the proposition that only when there is provision for variation the arbitrator can award escalation and since there was no such clause the arbitrator has exceeded his jurisdiction;

6. Associated Engg. Co. v. *Govt. of A.P.*[3] was relied on for the purpose that the award in question was rendered beyond the limits of

1 (2000) 3 SCC 27
2 (1990) 4 SCC 647
3 (1991) 4 SCC 93

contract and that the arbitrator cannot depart from the contract and award;

7. He placed strong reliance on *Rajasthan State Mines and Minerals Ltd.* v. *Eastern Engg. Enterprises*[4] for the very same proposition that the award cannot be against the stipulation in the contract;

8. Ramachandra Reddy & Co. v. *State of A.P.*[5] was cited for the proposition that the escalation in rates of labour and materials can only be granted on the basis of agreement;

9. He also relied on *State of Rajasthan* v. *Nav Bharat Construction Co.*[6] for the proposition that award of 9% interest for the period 8-8-1989 to 10-4-1992 and 12% interest for the future is excessive. He placed strong reliance on para 8 of the said judgment wherein this Court reduced the rate of interest from 18% and 15% to 6% throughout;

10. He also drew our attention to the award passed by the arbitrator, orders passed by the different courts and also the relevant clauses in the agreement with reference to the appointment of wages, etc.;

11. Concluding his argument, Mr Mohan submitted that the High Court has completely erred in not noticing that the award suffers from the gross errors apparent on the face of the record and that the arbitrator has not gone into the evidence as to the amount of enhanced wages actually paid by the respondent to the workers and has merely awarded an assumed amount without giving any reason as to how the amount was arrived at.

7. Mr Anand Padmanabha, learned counsel, made the following submissions by way of reply to the arguments advanced by the appellant's counsel:

1. There is no specific bar to the claim for escalation being made and that the conduct of FCI when it requested the claimant to continue their work would amount to promissory or equitable estoppel.

2. The claim for escalation is justifiable on the ground that the claimant could never have anticipated the sudden wage increase and other statutory obligations imposed by the Government under any stretch of imagination while tendering for the work as early as February 1981. It is further submitted that the claimant had quoted for the work based on the then prevailing wages at the time of tender (*sic*) who by providing them with a marginal increase for feasibility of execution.

3. The statutory obligation to pay higher wages arose under the notification published in the Tamil Nadu Gazette (Extraordinary) published in Part 6 Section 3-a dated 1-9-1981 marked as Exhibit C-5.

4 (1999) 9 SCC 283
5 (2001) 4 SCC 241
6 (2002) 1 SCC 659

4. The above claim of unawareness of increase in wages consequent to Tuticorin being declared as a major port entailing higher wages on a par with wages being paid to dock labour in other major ports.

5. Owing to the enormous losses that mounted up, the claimants had represented the matter to FCI reiterating the grave and disastrous monetary losses sustained by them and requesting for relief by neutralising the increased operational cost and its payment. Thereafter, FCI had appointed a series of committees who had gone into the requests made and although the committees have recognised the need to neutralise the increase of extra costs incurred by the claimants on labour, as it has occasioned by an order of the Government, but to the dismay of the claimant, no adequate relief was granted by FCI. Various representations were made by the claimants to the official hierarchy of FCI as early from 7-9-1981, 6-11-1981, 23-12-1981 during the currency of the contract and thereafter effective persuasion continued since then. Notwithstanding the fact that the FCI hierarchy was fully convinced to be just and proper in neutralising these losses, it was only marginally met with by the Zonal Manager (South) who had reimbursed a paltry sum as an interim relief and recommended for sanction of appropriate escalation to be granted. Although the claimants were given the sanguine hope for their entitlement as genuine and reasonable, no final decision was taken during the tenure of contract including extended period of three months which the claimant was called upon to continue for the storage operations.

6. Large amounts were expended by the claimants to meet this extra cost incurred to pay the new wage structure and additional benefits given to labour as per the directives of the Government. The unexpected expenditure incurred by the wage hike, necessitated immediate requirement of enormous outlay which crippled the claimants' resources. Consequently, the claimants had to raise additional funds from private sources at exorbitant interest to meet these contingencies. Instead of resorting to a cease-work out of frustration of contract by a supervening event which was not within the contemplation of the parties at the time of entering into the contract, the claimants had carried on with the work effectively making enhanced wage payments in sizable amounts on the strength and faith of the assurance given by the FCI hierarchy. The huge expenditure incurred in mobilising resources at exorbitant interest to meet the emergent situation had created additional burden on the claimants by way of accumulation of interest alone, owing to the indecisions of FCI in settling this matter. Therefore, the claimants have claimed to 10% contractor's profit or interest as damages as the case may be on the amounts claimed for reimbursement. Ever since 7-9-1991, various representations submitted by the claimants seeking redressal of their grievances, the matter remained pending for want of final decision. Although the claims of the claimants were justified and had every reason for granting the same as recommended by the FCI officials at different levels, of late, it has been turned down and denied to the claimants.

Therefore, disputes and differences had arisen between the parties to the subject contract.

7. The claimants acted upon and carried on the work on the strength and faith of the assurance given by FCI to meet the claimants' demand and in the interest of smooth working of the contract and in order to avoid the stoppage of work a decision was taken to grant enhanced rates w.e.f. 1-9-1981.

8. We have carefully considered the rival submissions with reference to the records, pleadings, judgments and with reference to the rulings cited by both the sides.

9. This Court, while issuing notice dated 13-12-2002 in the special leave petition passed the following order:

"*Order*

Learned Attorney General argues that there is no clause providing for escalation to reimburse the expenses incurred by the contractor in the contract agreement. In spite of the same the arbitrator has awarded escalation in expenses.

Issue notice on SLPs as also on the prayer for interim relief."

10. In our opinion, the argument of the learned Senior Counsel for FCI that there is no clause in the contract providing for escalation to reimburse the expenses and, therefore, the arbitrator had exceeded his jurisdiction has no substance. The issue of jurisdiction of the arbitrator to go into the claim of the claimant towards compensation and neutralisation of the extra expenditure incurred on account of statutory wage revisions had already concluded in the earlier proceedings arising out of the application filed by the claimant firm under Section 20 of the Arbitration Act for appointment of the arbitrator. FCI in the said proceedings specifically contended that there was no escalation clause in the contract, the claim of the claimants for compensation on account of wage revision should not be referred to arbitration and that the said claim was non-arbitrable. However, the learned Subordinate Judge, Tuticorin by order dated 16-2-1987 in OP No. 49 of 1986 rejected the said contention holding that the said claim was arbitrable. On appeal filed by FCI before the High Court the High Court also confirmed the same by order dated 1-3-1989 in CMA No. 291 of 1987. This Court also dismissed Special Leave Petition No. 5213 of 1989 filed by FCI by order dated 5-5-1989. Thus, FCI is barred by res judicata from raising the same issue again in the present proceedings.

11. Even on merits, the claimant firm is entitled to be paid the said compensation, in view of Clause 7 of the contract dealing with payment of wages.

Payment of wages to workers

12. The contractors shall pay not less than minimum wages to the workers engaged by them on either time-rate basis or piece-rate basis on the

work. Minimum wages both for the time-rate and for the piece-rate work shall mean the rate(s) notified by the appropriate authority at the time of inviting tenders for the work. Where such wages have not been so notified by the appropriate authority, the wages prescribed by the Senior Regional Manager as minimum wages shall be made applicable. The contractors shall maintain necessary records and registers like wage-book and wage-slip, etc., register of unpaid wages and register of fines and deductions giving the particulars as indicated in Appendix VI. The minimum wages prescribed for the time being for piece-rate and time-rate workers are as indicated below:

"(*1*) *Time rate*

Worker (male): Rs 5.50 (Rupees five and paise fifty only per day)

Worker (female): Rs 5.50 (Rupees five and paise fifty only per day)

(*2*) *Piece rate*

Workers: Rs 5.50 (Rupees five and paise fifty only per day)"

13. It is also submitted that in the subsequent correspondence with the claimant firm also FCI agreed to pay the expenditure incurred on account of wage revision. In this regard, the learned arbitrator after elaborately considering the correspondence between the parties has found in the impugned award as follows:

"Whatever may be the arguments now put forth by the respondents, from the admitted facts, it is borne out and evident that the respondents had accepted their responsibility to compensate the extra expenditure sustained by the claimants. Having not made any reservations about its responsibility to neutralise the extra expenditure of the claimants by enhancing the contract rates, the respondents had accepted its liability after an exhaustive study of the matter, including the aspects of the arguments now put forth by the respondents and finally accorded sanction for enhancement in the contract rates. Since the relief was meagre and inadequate, the claimants again appealed for the balance due to them which too was not protested or denied but on the contrary was acted upon. The respondents sincerely wanted to know the actual expenditure incurred by the claimants and its bona fides, for which purpose the District Officers at Tuticorin were deputed in October 1981 for verification of payment vouchers and other relevant records connected with the discharge of one vessel prior to 1-9-1981 and one after 1-9-1981. This aspect is very relevant and has a direct bearing on the issues relating to Claims I and II.

It is borne out from the records and argued by the claimants *that soon after the completion of the claimant's contract, the next contract was awarded by the Food Corporation to a stevedoring agency for 1297% ASOR for port operations alone (vide Ext. C-24) as against the claimants' rate of 397% ASOR for port as well as godown and railhead operations combined, which was offered prior to the introduction of the new working pattern and increased wages in labour rates.* According to

the claimants, the tenders for godown operations were separately called for and was awarded by the Food Corporation at a rate of 777% ASOR which was the lowest tender received. The percentage and the figures of this statement submitted by the claimants are accepted to be correct by the respondent FCI. The claimants reiterated that this will be ample justification and testimony to prove and establish the rates that prevailed for the port operations and godown operations in Tuticorin at the time of execution of the work by the claimants and thereafter. The rates are reflected in terms and ASOR by virtue of the acceptance of these percentage by the Food Corporation for the subsequent years' work obtained as the lowest offer on the competitive tenders invited by the Food Corporation. It was also stated that the other users of Tuticorin Port viz. M/s SPIC and Railways had also accepted the revised notification as mandatory and binding on all port users being statutory in character and accordingly had reimbursed the difference by way of escalated rates fully neutralising the excess expenditure incurred by its contractors. The claimants had also produced documents by way of exhibits to this effect as certificates issued by the respective organisations for having reimbursed the difference of escalated rates. The respondents do not dispute these aspects, but state that the payment by other port users cannot fasten them with any similar liabilities nor is it binding on them."

(emphasis supplied)

14. We have carefully perused the award. The award, in our view, is not vitiated by any error of fact or law on the face of the record and the arbitrator has not committed any misconduct within the meaning of the Act. The High Court has also in para 19 of the impugned judgment correctly dismissed the objection raised by FCI on the issue of absence of any escalation clause in the contract while rendering the following finding, Raviraja Pandian, J. speaking for the Bench, held:

> "From the payment of wages clause (clause 1) of the letter referred to above and also of the fact that, a committee of the high officials of the appellant has been constituted to go in depth of the factual position as to the payment of wage hike as per the Notification dated 1-9-1981 and the further fact that, the committee has gone into and submitted a report as to the actual payment and also the interim payment made by the appellant would clearly prove that, the appellant had by the abovesaid actions been alive to the circumstance of payment of enhanced wages considered the just demand of increase of rates and not stick to his stand that there was no escalation clause in the agreement and as such the claim of the respondents was not maintainable. Hence, we are of the view that, the learned counsel for the appellant is not well placed in the contention that, the arbitrator has misconducted himself and passed an award for escalation of price without there being any clause for escalation in the contract and the same has to be rejected and is rejected."

15. The respondent claimant was awarded the contract for carrying out the work of clearing, forwarding, stevedoring, etc. from the ports at Tuticorin for the period from 8-4-1981 to 7-4-1983. During the currency of the contract w.e.f. 30-8-1981, the wages of the workmen employed in the cargo handling were sharply increased to almost threefold consequent upon the settlement arrived under Section 12(3) of the Industrial Disputes Act. The State Government notified the same in the gazette on 1-9-1981. In view of the statutory increase in the wages payable to the port labourers, the claimant made a representation dated 7-9-1981 to FCI to revise the rates in respect of the contract besides pointing out that the claimant would be constrained to discontinue the work as the work at the contracted rates would result in large loss. The claimant again wrote a letter on 23-12-1981 to FCI detailing the handling cost in view of the revised wage pattern and for early order on the representation. In the said letter, the claimant has also mentioned that it had offered its explanations on 22-12-1981 to the committee appointed by FCI and visited FCI in this behalf. The committee constituted by FCI made a report dated 15-1-1982 to FCI after inspecting the place of contract and after examining the issue. The said committee recommended for allowing the escalated rates specified therein, supplementing with details. The first respondent wrote another letter on 19-1-1982 expressing anguish over the non-grant of relief claimed and inability to carry on the works from 25-1-1982 as notified in the letter dated 25-12-1982. FCI in its reply dated 21-1-1982 stated as follows:

> "The committee's report is under examination. *You are requested not to bring about any stoppage in the work as contemplated by you as this will complicate matters.*" (emphasis supplied)

16. The claimant was also served a phonogram dated 23-1-1982 which reads thus:

> "Your request for escalation of rates is under consideration of the Zonal Manager. *Pending decision, request continue work without stoppage.*" (emphasis supplied)

17. The claimant was acting and carrying on the contract work without bringing any stoppage of work from 25-1-1982 incurring heavy loss, as it was thus made to believe that it would be adequately compensated.

18. While the matter stood so, FCI appointed Mr P.N. Chinnaswamy, Joint Manager, New Delhi to look into the matters relating to the demand of the contractor for increase in rates consequent upon the implementation of the settlement arrived at between the representatives of port users and cargo handling labour in Tuticorin which is effective from 1-9-1981. Mr Chinnaswamy in his report dated 17-2-1982 under the head "*Final Recommendations*" stated as follows:

> "*There is definitely a necessity for escalating the rates of the present contractors.* Contractors were not aware of the definite shape of matters to take place when they submitted their tender initially in February 1981. Enhanced rates of payment have become statutory as the scheme has also

been published in the gazette consequent upon settlement of 31-8-1981. He recommended for 962% over SOR for the operations at the new port and 1108% over SOR for the operations at the old port at Tuticorin instead of 397% ASOR originally agreed for both the ports."

(emphasis supplied)

19. The claimant did not get any response from FCI even though after the report of Mr P.N. Chinnaswamy, a letter dated 24-2-1982 was sent to FCI that it would become impossible for the contractor to continue the work if the issue was not settled as FCI did not keep the promise that the issue would be settled by 4-3-1982.

20. FCI by its letter dated 28-3-1982 communicated the contractor as follows:

> "With reference to your telephonic information given, that you will be stopping the work from Monday, 29-3-1982 at the port and at godowns in the absence of a decision on your demand for escalation of rates, please be informed that, our regional office at Madras has already taken up the matter with Head Office, New Delhi and a decision is awaited. *In the meantime please arrange to continue the work at the port as well as at the godowns without any interruption.*" (emphasis supplied)

21. However, FCI by its letter dated 13-4-1982 accorded sanction of 488% of ASOR instead of 397% ASOR in relation to old port operations and which would work out to an increase of 91% only and 430% of ASOR instead of 397% of ASOR for the operations at new port and which would come to an increase of 31% only.

22. The claimant accepted the same under protest and without prejudice by its letter dated 17-4-1982 and requested FCI, New Delhi for review of the decisions of the above grant of marginal relief.

23. It is seen from the records that the contract period was from 8-4-1981 to 7-4-1983, for a period of two years. Wage revision came into effect from 1-9-1981. From 7-9-1981 to 28-2-1984, the contractor made various representations during the currency of the contract. FCI did not allow the contractor to discontinue the contract work during the currency of the contract promising that the revision of wages is under their consideration. It is stated by the contractor that they had handled about 1.68 lakh metric tons of foodgrains at both the ports incurring huge loss and after the contractor had completed the performance of the contract FCI by its letter dated 14-3-1984 informed the contractor that the request for escalation of rates had not been agreed to by their Head Quarters, New Delhi which compelled the contractor to approach the court for redressal of its grievances.

24. The Corporation had raised a specific question before the arbitrator that escalation in rates claimed by the contractor could not be granted for the simple reason that the agreement did not provide for any grant of the escalated rates during the tenure of contract and hence no enhanced rates other than the rates agreed upon can be granted. The learned arbitrator

specifically rejected the above contention on the basis of the subsequent acceptance of responsibility by FCI.

25. In our view, the arbitrator has not misconducted himself and that the award has been passed in consonance with the principles of natural justice. The High Court of Madras has also upheld the award of arbitrator rightly holding that there is no error apparent on the face of the record.

26. As already noticed, the subject-matter relates to the performance of the contract between the period from 8-4-1981 to 7-4-1983. Now that 23 years and odd have already elapsed since the contract period and that the contractor is being prevented by FCI to receive the monies spent by him as awarded by the arbitrator. It is also seen from the records that the quantum claimed by the respondents was never disputed by FCI and it is an admitted fact that the wage revision came into force w.e.f. 1-9-1981 and the contractor firm had paid the workers revised wages from 1-9-1981.

27. It was argued by Mr Mohan that the award of interest @ 9% for the period 8-8-1989 to 10-4-1982 and 12% for the future is excessive and in support of the said contention *Nav Bharat Construction Co.*[6] was relied on. During the pendency of the appeal, this Court while granting special leave directed FCI to deposit 50% of the awarded amount which cannot be withdrawn by the respondent contractor. It is stated in IAs Nos. 4-6 of 2003 that FCI had deposited only a sum of Rs 39,97,362 on 22-8-2003 which is 50% of the principal amount in the award and that FCI had not deposited 50% of the total amount awarded which includes the principal amount of Rs 79,94,724 and interest @ 9% p.a. from 8-8-1989 till date of publication of the award i.e. 10-4-1992 and future award @ 12% p.a. till the date of realisation. Therefore, an application was moved to pass appropriate orders directing FCI to deposit the balance of the amount as per the directions of this Court dated 25-7-2003. In clarification of the order dated 25-7-2003, this Court directed FCI to deposit half of the amount awarded by the arbitrator with interest and permitted the contractor to withdraw the said amount on furnishing bank guarantee of a nationalised bank to the satisfaction of the Registrar of this Court. 3 months' time was granted for depositing the amount.

28. Pursuant to the Court's order, an amount of Rs 1,04,10,664 has been deposited and kept in FD and the same is renewed from time to time. Accordingly, the amount has been released to the contractor on their submitting the bank guarantee to cover the entire amount. However, it was alleged that the bank guarantee submitted on 12-8-2005 has since expired on 15-8-2006 and that the contractor has not taken steps to submit fresh bank guarantee to cover the amount. The contractors are liable for the consequences thereof. In the circumstances, FCI prayed for a direction to produce fresh bank guarantee or to renew the existing bank guarantee so that the amount is secured as per the directions of this Court. On 31-8-2006, the

6 *State of Rajasthan* v. *Nav Bharat Construction Co.*, (2002) 1 SCC 659

contractor filed extended bank guarantee and the validity of the same is up to 15-2-2007.

29. Two judgments of this Court on escalation and legal misconduct of the arbitrator can be beneficially referred to, followed and applied to the case on hand.

30. The first judgment is in *Hyderabad Municipal Corpn.* v. *M. Krishnaswami Mudaliar & Mudaliar*[7]. The only question argued by the counsel for Hyderabad Municipal Corporation was that the respondent contractor was not entitled to claim 20% extra over and above the rates originally agreed upon between the parties under the contract. Under the contract, drainage work in question was entrusted to the respondent and under the terms of the contract the work was to be completed by the contractor within a period of one year. Admittedly, at the instance of the Executive Engineer, PWD due to financial difficulties/less budget having been provided for in the year in question, therefore the respondent contractor was requested to spread over the work for two years more, that is to say to complete the same in three years but the contractor was agreeable to spread over the work for two years as suggested on condition that extra payment will have to be made to him in view of increased rates of either material or wages. The Government did not intimate to the contractor that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates. In fact, no reply was sent by the Government and a studied silence was maintained by the Government in regard to the contractor's demand for extra payment, in spite of several reminders in that behalf, till the contractor actually completed the work during the spread-over period. After completion of work, the contractor submitted his final bill claiming 20% extra over and above the rates originally agreed upon between the parties. The Government stated that he was not entitled to increased rates. The High Court, after considering the correspondence exchanged between the parties has taken the view that the Government was liable to make extra payment for the work done as there was no dispute that the rates of material, etc. had increased during the extended period of two years and the contractor was entitled to such extra payment. This Court, after considering the relevant material on record, was also of the view that both in equity and in law the contractor is entitled to receive extra payment and the High Court was right in deciding the question in contractor's favour. This Court held that the liability to make this extra payment has been properly saddled on the Municipal Corporation.

31. The second judgment is in *P.M. Paul* v. *Union of India*[8]. In this case, the dispute that was referred to the arbitrator was as to who is responsible for the delay, what are the repercussions of the delay in completion of the building and how to apportion the consequences of the responsibility. The

7 (1985) 2 SCC 9

8 1989 Supp (1) SCC 368 : AIR 1989 SC 1034

arbitrator found that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under the claim. He accordingly allowed the same. Counsel appearing for the Union of India submitted before this Court that the arbitrator had granted a sum of Rs 2 lakhs as escalation charges and cost in the absence of escalation clause was not a matter referred to the arbitrator. In other words, it was urged that the arbitrator had travelled beyond his jurisdiction in awarding the escalation cost and charges. This Court in paras 11 and 12 of the judgment held thus: (SCC p. 372)

> "*11.* It is well settled that an award can only be set aside under Section 30 of the Act, which enjoins that an award of an arbitrator/umpire can be set aside, inter alia, if he has misconducted himself or the proceeding. Adjudicating upon a matter which is not the subject-matter of adjudication, is a legal misconduct for the arbitrator. The dispute that was referred to the arbitrator was, as to who is responsible for the delay, what are the repercussions of the delay in completion of the building and how to apportion the consequences of the responsibility. In the objections filed on behalf of the respondent, it has been stated that if the work was not completed within the stipulated time the party has got a right for extension of time. On failure to grant extension of time, it has been asserted, the contractor can claim difference in prices.
>
> *12.* In the instant case, it is asserted that the extension of time was granted and the arbitrator has granted 20 per cent of the escalation cost. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. The arbitrator has noted that Claim I related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9-5-1980 for the work under phase I, and from 9-11-1980 for the work under phase II. The total amount shown was Rs 5,47,618.50. After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20 per cent of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done."

The above two cases, in our opinion, squarely apply to the facts and circumstances of the case on hand.

32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the

contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion.

33. In our opinion, having considered the totality of the circumstances, we feel that it would be just and proper to award interest @ 9% p.a. throughout instead of 12% as awarded by the arbitrator for the period in question. The amount already received by the claimant will be adjusted towards the entire claim and the balance amount together with interest at 9% p.a. shall be paid by FCI within 2 months from the date of this order failing which the said balance amount shall carry interest @ 12% from the date of its being due till realisation. In view of this order in this judgment, the bank guarantee furnished by the respondent contractor shall stand discharged. The Supreme Court Registry is directed to do the needful immediately.

34. The impugned judgment of the High Court is modified accordingly. The appeals are thus partly allowed as above leaving the parties to bear their own costs.

(2006) 13 Supreme Court Cases 795

(BEFORE ASHOK BHAN, TARUN CHATTERJEE AND MARKANDEY KATJU, JJ.)

COMMISSIONER OF CENTRAL EXCISE, CHENNAI-I .. Appellant;

Versus

ITC LTD. .. Respondent.

Civil Appeal No. 1833 of 2006†, decided on September 12, 2006

Excise — Appeal to Supreme Court — Pleadings — New plea — Valuation — Captively consumed goods — Senior departmental representative conceding before CESTAT that principles laid down in CAS-4 were applicable in determining the value of captively consumed goods — CESTAT remitting the matter to the original authority for disposing of the same accordingly — Revenue, without raising such a point in the appeal, contending before the Supreme Court that the concession so made by the senior departmental representative before CESTAT was illegal and impermissible — Such a contention disallowed to be raised for the first time before Supreme Court and the concession made before CESTAT not allowed to be retracted at this stage — However, findings recorded on the basis of that concession directed not to be treated as precedent in future — Central Excise Act, 1944 — S. 35-L(b) — Constitution of India — Art. 136 — New plea — Not permissible (Para 7)

ITC Ltd. v. *CCE*, (2004) 175 ELT 860 (CESTAT), *referred to*

H-M/35164/S

† **Ed.**: On appeal from **(2005) 190 ELT 119 (Tri)**

16. In the case of *P. T. Thomas vs. Thomas Job, (2005) 6 SCC 478,* it has been observed by the Supreme Court that an award of Lok Adalat is as equal and on at par with a decree on compromise and will have the same binding effect and be conclusive. In the present case, the question involved is that whether a Lok Adalat has a jurisdiction to pass a decree on a point on which the parties have not arrived at a compromise or settlement. The answer, obviously, is negative and, accordingly, the case of *P. T. Thomas* (supra) has no applicability.

17. Moreover, the respondent No. 4 has already stated in Paragraph 8 of reply that half of the amount deposited by the Life Insurance Corporation has been paid to the petitioner. Grant of 50% of the amount of life insurance to the petitioner clearly suggests that degree of dependency of the petitioner is different than that of other respondents and is not equal. Effect of this aspect has also not been taken into consideration.

18. In the result, the petition stands allowed. The direction of equal proportionment contained in Paragraph 2 of Annexure P-7 is, hereby, set aside. Simultaneously, the order contained in Annexure P-5 of the learned First MACT, Seoni is, also set aside. It is further directed to decide the apportionment of the amount of compensation of Rs. 5 lacs awarded as compensation by the Lok Adalat amongst the claimants, in accordance with law afresh. No order as to costs.

Petition allowed.

SECTION 34 OF ARBITRATION ACT, 1940 AND SECTION 8 OF ARBITRATION AND CONCILIATION ACT : SCOPE

(J. K. Maheshwari, J.)

CHARANJIT KAUR (SMT.) *Applicant.*

vs.

S. R. CABLE through its partner SANJAY MAHORE *Non-applicant.*

Arbitration Act (10 of 1940), S. 34 and Arbitration and Conciliation Act (26 of 1996), S. 8 — *Distinction and scope of section 34 of the old Act and section 8 of the new Act.*

It is apparent that section 8 of the New Act has some departure from section 34 of the old Act. Section 34 gives power to stay the legal proceedings where there is an arbitration agreement by vesting a discretion to the judicial authority; while section 8 mandates the judicial authority under the statute to refer the matter for arbitration if it is covered by the arbitration agreement and applied for at the first instance submitting the statement on the substance of the dispute. Thus, on commencement of the new Act the judicial authority is mandatorily required to refer the dispute in terms of the arbitration agreement, and such award shall remain unhampered by any proceedings in the Court under section 8(3) of the new Act. Therefore, the hallmark of the difference of section 34 of the old Act and section 8 of the new Act is of vesting the discretion to the judicial authority for stay, but under the new Act it is mandatory to refer the parties as per agreement. Under the old Act it is a stay of the proceedings but under the new Act the proceedings shall be terminated and the award shall remain unhampered. (Para 13)

Civil Rev. No. 139 of 2008 decided on 24-6-2008. (Indore)

माध्यस्थम् अधिनियम (1940 का 10), धारा 34 तथा माध्यस्थम् एवं सुलह अधिनियम (1996 का 26), धारा 8 — पुराने अधिनियम की धारा 34 तथा नये अधिनियम की धारा 8 में विभेद एवं व्याप्ति । (पद 13)

For applicant : *B. L. Pavecha, Senior Counsel* assisted by *Amit Agrawal*
For non-applicant : *A. K. Sethi*, assisted by *Rahul Sethi*

List of cases referred :

1. *Smt. Kalpana Kothari vs. Smt. Sudha Yadava and others, AIR 2002 SC 404* (Paras 5, 10)
2. *Rashtriya Ispat Nigam Ltd. and another vs. Verma Transport Co., (2006) 7 SCC 275* (Paras 6, 11)
3. *P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others, (2000) 4 SCC 539* (Paras 6, 7, 9)
4. *Ramkrishna Theatre Ltd. vs. M/s General Investments and Commerce Corpn. Ltd., AIR 2003 Karnataka 502* (Paras 7, 12)
5. *Mukta Sharma vs. U. P. Industrial Corporation Association Ltd. and another, AIR 2002 P and H 232* (Paras 7, 12)

ORDER :— This order shall also govern disposal of Civil Revision No. 136 of 2008.

Both the revisions are filed under section 115 of the Code of Civil Procedure, 1908 assailing the orders passed by the learned XI Civil Judge, Class-1, Indore rejecting the application of section 8 of the Arbitration and Conciliation Act, 1996 read with Order VII, Rule 11 of Civil Procedure Code, filed by the applicant.

2. The facts which are not in dispute that petitioner, a multi-media system operator, has entered into an agreement with non-petitioner on 1-6-2006, whereby the cable lines belongs to them had taken by non-petitioner for operation for the period of three years with effect from 1-4-2006 as per the terms and conditions specified in the agreement. Clause 14 of the said agreement provides for arbitration to a dispute, if any, arises between the parties, which may be decided in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or by the Arbitrator Mahilpalji and Manish Dixitji, and their decision shall be agreeable to the both parties.

3. On arising some dispute of title, petitioner had filed a suit on 4-2-2008 for declaration and permanent injunction, wherein the relief for temporary injunction was refused by the trial Court and the appeal against the said order was also dismissed. However, the plaintiff has moved an application under Order 23, Rule 1 of Civil Procedure Code for withdrawal of the suit on 31-3-2008, but on the same date non-petitioner/defendant has filed the counter-claim against plaintiff; the trial Court has passed the order and permitted to withdraw the suit filed by plaintiff-petitioner, however, the counter-claim filed by defendant/non-petitioner remain pending. On the next date i.e. 9-4-2008 petitioner has moved an application under section 8 of the Arbitration and Conciliation Act, 1996 read with sections 7 and 11 of the Civil Procedure Code, inter alia contended that as per Clause 14 of the agreement, the counter-claim cannot be continued and the parties may be directed to refer under the Arbitration and Conciliation Act for settlement of their disputes. The reply to the said application was filed on 22-4-

2008 stating that because the petitioner had withdrawn his suit remaining unsuccessful in getting injunction even on having the knowledge of the arbitration clause, however, on behest of petitioner such an application is not entertainable. It is further stated that once the plaintiff has filed his statement of substance and filed the suit, on objecting by defendant, the injunction was refused, ex consequentia the said suit was withdrawn by them. Now while trying counter-claim of defendant, application under section 8 of the Act, to refer the parties for arbitration, is not entertainable, because it is amounting to approbate and reprobate the relief, which is not permissible, and the plaintiff is now estopped to take such plea.

4. By passing the order impugned on 5-5-2008, learned trial Court has rejected the application of petitioner filed under section 8 of the Arbitration and Conciliation Act, and recorded the finding that he has waived his right to raise the objection to refer the parties to resolve the dispute as per arbitration clause specified in arbitration agreement. It is further held that because his application for temporary injunction was rejected by the trial Court in his suit, however, on withdrawal of the said suit and on entertaining the counter-claim such objection is not entertainable.

5. Shri B. L. Pavecha, learned senior counsel has argued that the compliance of section 8 is peremptory to a judicial authority before whom action is brought to challenge, in a case, if it is the subject-matter of the arbitration agreement. It is further argued by him that the counter-claim was filed by the non-applicant on 31-3-2008 i.e. the date of withdrawal of the suit and the said counter-claim is required to be tried as suit. Thus, on the next date i.e. 9-4-2008 the application under section 8 of Arbitration and Conciliation Act was filed by him referring Clause 14 of the agreement and put forth that the dispute is arbitrable. Thus, petitioner had submitted the statement on the substance of the dispute, in the first instance on filing the counter-claim, therefore, the judicial authority before whom the lis is pending is mandatorily required to refer the parties for arbitration, departure on the plea of waiver or on the ground of approbate or reprobate the relief is not permissible. Reliance has been placed on a judgment of the Apex Court in the case of *Smt. Kalpana Kothari vs. Smt. Sudha Yadava and others,* reported in *AIR 2002 SC 404*. While advancing the argument it is submitted that the Arbitration and Conciliation Act, 1996 was introduced after repealing the Arbitration and Conciliation Act, 1940. In the old Act section 34 gives powers to stay the legal proceedings, while section 8 of new Act confers powers to refer the parties to Arbitration, terminating the proceedings pending before the judicial authority. Under section 34 it was a discretion vested with the Court to stay the legal proceedings if the Court is having reason to believe after satisfying himself. While in the Act of 1996 it is mandatory to the judicial authority to refer the parties to arbitration where there is an arbitration agreement, and if party so applies, on submitting his first statement on the substance of the dispute. In the present case on the first instance after entertaining the counter-claim petitioner has applied under section 8 of the new Act to refer the parties for arbitration under agreement, however, the Court is having no option, except to refer the parties to take recourse under Arbitration and Conciliation Act. It is peremptory on the Court to refer the parties for arbitration

without having any departure from the statutory provisions, however, learned trial Court has committed an error much less jurisdictional, while rejecting the application.

6. Shri Pavecha, senior counsel has further placed reliance on a judgment in the case of *Rashtriya Ispat Nigam Ltd. and another vs. Verma Transport Co.*, reported in *(2006) 7 SCC 275*, and argued that petitioner has never waived his right to invoke the arbitration clause, and on entertaining the counter-claim on the first statement of the substance an objection under section 8 of the Arbitration and Conciliation Act was before the judicial authority. So far as filing of the plaint and denial of injunction is concerned, it was the action on the suit filed by him and the said suit is not in existence due to withdrawal on 31-3-2008; now the counter-claim of defendant has to be treated as suit, therefore, at the first instance application was filed, in terms of the agreement dated 1-6-2006 referring the arbitration clause which cannot be rejected applying the principle of waiver. Shri Pavecha has further relied upon the judgment of Apex Court in the case of *P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others*, reported in *(2000) 4 SCC 539* and argued that as per section 8(1) of the Arbitration and Conciliation Act the power of the Court can be exercised, if there is an arbitration agreement, and a party to the agreement brings an action in a Court against the other party, which is a subject-matter of the arbitration agreement. On applying by other party for referring the parties to arbitration, on submitting his first statement on the substance of the dispute; the Court is mandatorily required to refer them for arbitration without departure. Thus, the Court must peremptorily require to comply the provisions of section 8 of the Arbitration and Conciliation Act. In view of the judgments of the Apex Court it is prayed that the impugned order is liable to be set aside.

7. On the other hand Shri A. K. Sethi, learned senior counsel appearing for non-petitioner, has placed reliance on a judgment of Karnataka High Court in the case of *Ramkrishna Theatre Ltd. vs. M/s General Investments and Commerce Corpn. Ltd.*, reported in *AIR 2003 Karnataka 502* and argued that on due consideration of the judgment of *P. Anand Gajapathi Raju* (supra) and on availability of arbitration agreement, when a party has waived his right by filing the plaint now on entertaining the counter-claim as per his objection he cannot be permitted to approbate or reprobate the relief, under the guise of objection under section 8 of the Arbitration and Conciliation Act. In support of the said contention he has further placed reliance on the judgment of Punjab and Haryana High Court in the case of *Mukta Sharma vs. U. P. Industrial Corporation Association Ltd. and another*, reported in *AIR 2002 P and H 232*. On the basis of those judgments it is argued that once the petitioner has opted to invoke the jurisdiction of the Civil Court by filing the suit; on filing the counter-claim by the non-petitioner-defendant, the application under section 8 Arbitration and Conciliation Act is not entertainable and the Court below has rightly rejected the said application. Shri Sethi has also referred the provisions of section 34 of the old Arbitration Act, whereby the discretion is vested with the Court to stay the proceedings and to refer the parties to arbitration on recording its satisfaction. He has further argued that by reading sub-sections (1) and (3) of section 8 of the New Act, the word "shall" cannot be used in mandatory sense; he argues that even

under the New Act the discretion is vested in a Court to refer the parties for arbitration if so applies, at the first instance by submitting statement of claim, therefore, it is not always mandatory to the Court to refer the parties for arbitration. The finding recorded by the trial Court of waiving the right by petitioner to invoke arbitration clause, as per agreement cannot be said to be unreasonable in the facts and circumstances of the present case, accordingly prayed for dismissal of revision petitions by upholding the order under challenge.

8. After having heard learned counsel appearing for the parties and to appreciate the arguments as advanced relying on the provisions of section 34 of Arbitration Act, 1940 (old Act) and Arbitration and Conciliation Act, 1996 (new Act) and to find out the legislative intent, it is necessary to quote those provisions, which reads under :—

Arbitration and Conciliation Act, 1940 (Old Act)	Arbitration and Conciliation Ordinance, 1996 (New Act)
Section 34. *Power to stay legal proceedings where there is an arbitration agreement.* Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.	**Section 8.** *Power to refer parties to arbitration where there is an arbitration agreement.* (1) A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

9. The comparative reading impliedly draw the distinction and scope of the both sections. Section 34 of old Act gives power of staying of the legal proceedings, while section 8 of new Act gives power to the Court to refer the parties for arbitration as an imperative, if there is an arbitration agreement. Under

section 34 either party may file an application to stay the legal proceedings before filing of the written statement or taking any other step in the proceedings. It further confer discretion to the Court for recording its satisfaction to stay the legal proceedings, but at the same time under section 8 if there is an arbitration agreement, and a party at his first instance submits his statement on the substance of dispute, the Court is duty bound to refer the parties for arbitration. Thus, in the new Act, in place of staying the legal proceedings, the Court has to terminate proceedings by referring the parties to arbitration and the said award shall remain unhampered as specified under sub-section (3) of section 8 of the Act. In the aforesaid contingencies, the Court is bound to enforce the spirit of section 8 mandatorily without any exception. In the said context the authorities cited by learned senior counsel appearing for the parties required to be appreciated. The Apex Court while dealing the issue in the case of *P. Anand Gajapathi Raju and others* (supra) in the year 2000 has observed that the language of section 8 is peremptory, therefore, it is obligatory for the Court to refer the parties to arbitration in terms of the arbitration agreement, if there is an arbitration agreement; and a party to the agreement brings an action in the Court for reference, as the subject-matter of the action is the same as the subject-matter of the arbitration agreement; and applies at first instance to submit his statement on the substance of the dispute.

10. In the case of *Smt. Kalpana* (supra) Hon'ble the Supreme Court while dealing with the scope of section 34 of the old Act and section 8 of the new Act observed that the old Act provides for filing of an application to stay legal proceedings initiated by any party and arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts of settlement of the dispute otherwise than in accordance with the arbitration clause by constituting the existence of arbitration clause, thereon the authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision in accordance with the arbitration agreement but the applicant, who applies for stay is ready and willing to do for things necessary to the proper conduct of arbitration. The said proceedings having nothing to do with actual reference of the arbitration of the disputes because it was left to be taken care of under sections 8 and 20 of the old Act. It is further observed that striking the contrast to the said scheme underlying the provisions of the old Act, in the new Act, 1996 there is no provision corresponding to section 34 of the old Act. Section 8 of the new Act mandates judicial authority before which an action has been-brought in respect of the matter, which is the subject-matter of an arbitration agreement, in such a case it shall refer the parties to arbitration if a party to such an agreement applies not later when submitting his first statement. The provisions of the new Act do not envisaged the specific obtaining of any stay as under the old Act. For the reason that not only the discretion to make reference is mandatory but notwithstanding pending of the proceedings before the judicial authority or making of an application under section 8(1) of the new Act, the arbitration proceedings are enabled under section 8(3), to remain continue unhampered by pendency of proceedings. The Apex Court has further observed that the new Act constitutes a

recourse and to avail the avenues to go into arbitration under the arbitration agreement. The plea of estoppel having no application to deprive the applicant of the legitimate right to invoke comprehensive provisions of the mandatory character of section 8 of the New Act and if the matter relating to the dispute referred to arbitration in terms of the arbitration agreement.

11. In an another case of *Rashtriya Ispat Nigam Ltd.* (supra) the Supreme Court has dealt with the issue of waiver of right to invoke the arbitration clause in the context of the expression "the first statement of substance of the dispute" contra distinguished to "'written statement". It was held that if an application is filed before actually filing the first statement on the substance of the dispute the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the Court, however, it may be gathered from the material, whether the party moving an application under section 8 has filed its first statement on the substance of the dispute or not, if not the application is not maintainable. The Court has further held that merely disclosure of the defence while praying for injunction would not necessarily mean to waiver; which relates to the supplemental and incidental proceedings. The waiver to opt for under the arbitration agreement on the part of the defendant to the lis can be gathered from the facts and situation obtaining in each case.

12. The judgments relied upon by other side of Karnataka High Court in the case of *Ramkrishna Theatre* (supra) as well as the judgment of Punjab and Haryana High Court in the case of *Mukta Sharma* (supra), having no application to the facts of the present case. In those cases, the dispute was of ejectment, whereunder by issuing notice, as per the arbitration agreement plaintiff/landlord had made a request to defendant/tenant to go into arbitration, which was not acceded to and refused in reply to the notice, but on filing the suit by the landlord an objection was raised by tenant to refer the dispute for arbitration and the suit may be dismissed. In the said context the principle of waiver was upheld by the High Court. But in the present case there is no refusal by petitioner to refer the dispute to arbitration, thus, the factual scenario of the case in hand is entirely different.

13. In view of the foregoing, it is apparent that section 8 of the New Act have some departure from section 34 of the old Act. Section 34 gives power to stay the legal proceedings where there is an arbitration agreement by vesting a discretion to the judicial authority; while section 8 mandates the judicial authority under the statute to refer the matter for arbitration if it is covered by the arbitration agreement and applied for at the first instance submitting the statement on the substance of the dispute. Thus, on commencement of the new Act the judicial authority is mandatorily required to refer the dispute in terms of the arbitration agreement, and such award shall remain unhampered by any proceedings in the Court under section 8(3) of the new Act. Therefore, the hallmark of the difference of section 34 of the old Act and section 8 of the new Act is of vesting the discretion to the judicial authority for stay, but under the new Act it is a mandatory to refer the parties as per agreement. Under the old Act it is a stay of the proceedings but under the new Act the proceedings shall be terminated and the award shall remain unhampered.

14. In the context office said legal position the facts of the present case required to be appreciated. It is undisputed that an arbitration agreement dated 1-6-2006 was entered in between the parties, wherein Clause 14 provides for arbitration, as per the provisions of Arbitration and Conciliation Act, 1996. Undisputedly, applicant had filed a suit for declaration and permanent injunction on 4-2-2008, wherein the relief of temporary injunction was refused, later on 31-3-2008 the suit was permitted to be withdrawn by the Court. But because on the same date counter-claim was filed by the defendant/non-petitioner, which was entertained treating it as suit, therefore, on the first date i.e. 9-4-2008 petitioner has applied under section 8 of the Arbitration and Conciliation Act to refer the parties for arbitration. The said application was rejected by the order impugned upholding the plea of waiver and presuming that the action of petitioner is amounting to approbate or reprobate the relief. In the present case the suit filed by applicant was withdrawn on 31-3-2008 in view of an arbitration agreement entered between the parties. When the counter-claim of the defendant was entertained by the Court, then immediately on the next date i.e. 9-4-2008, petitioner has filed an application under section 8 of the New Act showing his unequivocal intention questioning the maintainability which was rejected by the order impugned. So far as refusal of the application of temporary injunction is concerned, it is suffice to say those are supplemental or incidental proceedings and the part of the main suit, which was already withdrawn and not the part of the present proceedings, therefore, on such basis, wherein no written statement was filed till withdrawal the plea of defendant of waiver cannot be accepted. It is the trite law that merely withdrawal of the suit without decision on merit, the subject-matter on the pretext does not debar the plaintiff to take defence for the subject-matter. The principle of *res judicata* applies to bring a fresh suit for the same cause of action, thus, in view of the foregoing it is clear that immediate on the next date of entertaining the counter-claim of the defendant, petitioner has submitted his objection under section 8 of the New Act to refer the parties for arbitration under the Arbitration agreement. Therefore, it qualifies the expression specified under section 8 i.e. "first statement on the substance of the dispute" However, in the facts and circumstances of the present case, the rejection of objection of the petitioner, upholding the plea of waiver cannot be sustained and the findings recorded by the learned trial Court in the order impugned is liable to be set-aside.

15. Accordingly and in view of the discussion as made herein above the order impugned dated 5-5-2008 passed in both the cases rejecting the application under section 8 of the Arbitration and Conciliation Act is set aside, and the dispute, if any between the parties is hereby referred in terms of arbitration agreement. In consequence thereto the suit or the counter-claim of defendant pending in the trial Court be treated as consigned to record. In the facts and circumstances of the case, parties to bear their own costs.

Order accordingly.

CS (COMM) 12/2019

Himachal Sorang Power Private Limited v. NCC Infrastructure Holdings Limited

2019 SCC OnLine Del 7575

In the High Court of Delhi at New Delhi
(BEFORE RAJIV SHAKDHER, J.)

Himachal Sorang Power Private Limited and Another ..... Plaintiffs;
v.
NCC Infrastructure Holdings Limited ..... Defendant.

CS (COMM) 12/2019
Decided on March 13, 2019, [Reserved on: 6.2.2019]

Advocates who appeared in this case :

Mr. Sandeep Sethi, Sr. Advocate with Ms. Padmaja Kaul, Mr. Ketan Gaur and Mr. Praharsh Johrey, Advs.

Mr. Nakul Dewan with Dr. Amit George, Mr. Jai Sahai Endlaw, Ms. Neelu Mohan, Ms. Nooreen Sarna and Mr. Shivansh Soni, Advocates.

The Judgment of the Court was delivered by

1. RAJIV SHAKDHER, J.

I.A. No. 291/2019

Prefatory facts:

2. The applicants before me are plaintiffs in a suit instituted by them for declaratory and permanent injunctive reliefs. In effect, the reliefs sought against the defendant both in the suit and the interlocutory application is to injunct the defendant from commencing arbitration proceedings.

3. The defendant, it appears, seeks to commence arbitration proceedings for claiming "incentive payments" under Clause 14 of the Securities Purchase Agreement dated 19.9.2012 (in short 'SPA'). The plaintiffs via this suit and/or the instant interlocutory application seek to resist the arbitration action initiated by the defendant on the plea that it is, *inter alia*, barred by *res judicata*.

4. It is the plaintiff's stand that the controversy with respect to the reliefs which were claimed or could have been claimed was set at rest between the parties herein, which included its parent company, that is, NCC Limited (in short 'NCC') by virtue of an earlier award dated 24.1.2018.

5. For the sake of convenience, hereafter, I would be referring to the parties in the following manner:

6. Plaintiff No. 1, that is, Himachal Sorang Power Private Limited would be referred to as 'HSPL'; Plaintiff No. 2, that is, TAQA India Power Ventures Pvt. Ltd. would be referred to as 'TAQA'; and the Defendant, that is, NCC Infrastructure Holdings Limited would be referred to as 'NCCL'.

7. Furthermore, unless the context requires me to state otherwise, the two plaintiffs and the defendant will be, collectively, referred to as parties.

8. Before I proceed further, it may be necessary to delve into the background in which the present proceeding has been instituted.

9. NCCL along with NCC, and an entity by the name: IL&FS Energy Development Company Limited (in short 'IL&FS') incorporated HSPL as a Special Purpose Vehicle (in short 'SPV').

10. HSPL was awarded a run of the river Power Project by the Government of Himachal Pradesh (hereafter referred to as 'Power Project'). This Power Project was required to be set up on the Sorang tributary of the Sutlej river.

11. Notably, the equity stake of each of the shareholders in HSPL was as follows:

(i) NCCL held 94.92% of the shares; (ii) NCC held 0.08% of the shares; and (iii) the balance 5% shares were held by IL&FS.

12. The Power Project was required to have a generation capacity of 100 Mega Watt ('MW').

13. In order to execute the Power Project, between 2007-2010, HSPL entered into several sub-contracts. It appears that Abu Dhabi National Energy Company PJSC, an Abu Dhabi based company, which is in the business of generation, transmission and distribution of power in India (and is the holding company of TAQA) was exploring ways and means of investing in suitable projects.

14. It is in this background that in 2011, IL&FS approached NCCL and its holding company i.e. NCC, to invest in HSPL's Power Project.

15. This resulted in the SPA being executed between TAQA, NCCL, NCC and IL&FS. Broadly, the SPA envisaged that TAQA would purchase in two tranches the equity shares of the aforementioned three shareholders and in addition thereto, the entire lot of Fully Convertible Debentures (FCDs) held by NCCL and IL&FS.

16. It is not in dispute that TAQA has paid the entire consideration in respect of the equity shares and FCDs to NCCL, NCC and IL&FS.

17. The disputes, it appears, arose on account of the purported breach of certain material conditions and consequently, the purported violation of rights and obligations, which had been conferred on the parties under the SPA. The material conditions around which the disputes swirled were, broadly, as follows:

(i) Insofar as NCCL and NCC were concerned, they were required to complete the works in all respects qua the Power Project by 31.3.2013. Under the SPA, this date is described as the Wet Commissioning Date (WCD). As would be evident, even though the SPA was executed at an earlier point in time, TAQA did not take over the responsibility of completing the Power Project as it was, perhaps, nearing completion, apart from other commercial and practical reasons which may have deterred it from taking a step in that direction.

(ii) The cost of the Power Project was capped at INR 890 Crores.

(iii) Clause 1.1 of the SPA provided that any cost overrun beyond INR 756 Crores would be borne by NCCL and NCC. Importantly, the figure of INR 756 Crores was arrived at after making adjustments qua the following:

(a) INR 40 Crores which had been paid by NCCL, NCC and IL&FS as Sellers' Subordinate Loan (SSL) to HSPL.

(b) INR 81.67 Crores which was paid by TAQA towards cost of achieving WCD by subscribing to FCDs at the time of initial acquisition of shares.

(c) INR 12.33 Crores which IL&FS was required to contribute towards achieving WCD.

18. It appears, even though IL&FS did not contribute the aforementioned amount, TAQA agreed to factor in the said amount in order to enable determination of project cost and cost overrun amounts as provided in the SPA.

19. Pertinently, if one were to take into account the aforementioned adjustments and add them up with INR 756 Crores, it would result in arriving at a cumulative figure of INR 890 Crores, which was the sum at which, as indicated above, the project cost was capped.

20. Importantly, under the SPA, any sum expended in excess of the capped project cost of INR 890 Crores was required to be reimbursed by NCCL and HSPL.

21. The record shows that the Power Project could not be made operational by 31.3.2013, as required under Clause 9.1.1 read with Clause 10.2.1 of the SPA. Given this circumstance, HSPL and TAQA served a pre-arbitration notice dated 4.7.2014 on NCCL and NCC, adverting therein to their claims, which, according to them, required adjudication via arbitration. In other words, via this notice, Clause 14 of the SPA was triggered by HSPL and TAQA.

22. NCCL vide reply dated 2.8.2014, repelled the assertions made in HSPL's and TAQA's notice. This apart, NCCL alluded to their counterclaims. Pertinently, while referring to its counterclaims, NCCL also made a specific claim for incentive payments.

23. Given this background, HSPL and TAQA on 31.12.2014, proceeded to file their Notice of Arbitration (NOA) with the Singapore International Arbitration Centre (in short 'SIAC').

24. It appears that TAQA, thereafter, issued a step-in notice dated 5.3.2014 and took control of the Power Project from NCCL. This was followed by HSPL and TAQA serving upon NCCL and NCC, the NOA, which they had filed with SIAC on 31.12.2014.

25. Via this notice, HSPL and TAQA indicated the name of their nominee Arbitrator. NCC and NCCL responded to the aforementioned notice vide their reply dated 23.1.2015. This was followed by a communication dated 30.1.2015, whereby, NCCL and NCC indicated the name of their nominee Arbitrator.

26. On 23.4.2015, the Registrar of Court of Arbitration, SIAC, acting in her capacity as the President under the relevant SIAC Rules, appointed the Presiding Arbitrator, who, in fact, had been nominated by the two co-arbitrators (hereafter referred to as '1st Arbitral Tribunal').

27. The record shows that thereafter, HSPL and TAQA filed their Statement of Claim (SOC) on 20.7.2015 (as amended by Amendment by the SOC dated 06.9.2016). In response thereto, both NCCL and NCC filed their respective Statement of Defence (SOD) on 15.9.2015. It would be important to note that NCCL in its SOD also included its counterclaim.

28. Evidently, NCCL filed an application with the 1st Arbitral Tribunal for amendment of its counterclaims. The amendment sought was confined to introduction of an additional relief, which was referred to as d(A).

29. The 1st Arbitral Tribunal vide its order dated 12.11.2015, allowed the application, which resulted in the first amendment being brought about by NCCL in its Statement of Counterclaims. Thus, the first amended Statement of Counterclaims was lodged on 3.6.2016.

30. The record also shows that NCCL moved yet another application dated 18.7.2016 for amending its counterclaims. Via this application, leave was sought for incorporation of counterclaims referred to as (g), (h) and (i).

31. This application was also allowed by the 1st Arbitral Tribunal vide its order dated 2.9.2016. Resultantly, NCCL filed its second amended Statement of Counterclaims dated 7.9.2016.

32. HSPL, in turn, was given liberty to file its SOD to the amended counterclaims. Consequently, the SOD to the counterclaims dated 15.9.2015 followed by an additional SOD to the amended counterclaims dated 7.9.2016 was filed by TAQA and HSPL.

33. In the interregnum, while the arbitration proceedings were in progress before the 1st Arbitral Tribunal, TAQA successfully tested and commissioned Unit-1 of the Power Project.

34. The record reveals that the last date on which oral submissions were heard by the 1st Arbitral Tribunal was 26.1.2017. Thereafter, it appears, the 1st Arbitral Tribunal gave an opportunity for filing opening submissions and written submissions as also

cost submissions.

35. On 2.6.2017, the 1st Arbitral Tribunal closed the proceedings in terms of Rule 28.2 of the SIAC Rules for consideration of the matter and rendering the award.

36. It appears that two days before the closure of the arbitral proceedings, that is, on 30.5.2017, NCCL and NCC wrote to HSPL that they neither had nor did they intend to lodge claims under the SPA other than those which had already been submitted to the 1st Arbitral Tribunal.

37. The 1st Arbitral Tribunal, as indicated at the very outset, rendered its award on 24.1.2018.

38. HSPL and TAQA having obtained an award, whereby, certain sums were awarded in its favour, moved this Court by way of an enforcement petition on 9.3.2018, being: OMP(EFA)(COMM.) No. 1/2018. Besides this, it appears, contempt proceedings have also been filed by HSPL and TAQA against NCCL.

39. NCCL had on its part laid a challenge to the award dated 24.1.2018 by initiating proceedings in the Singapore High Court. It appears, HSPL and TAQA have acted likewise.

40. Furthermore, during the course of the arguments, I was informed by the counsel for parties that the Singapore High Court has rejected the petitions of both sides.

41. Continuing with the narrative, on 1.10.2018, NCCL sent a communication to HSPL and TAQA seeking data qua Annual Deemed Generation and Metered Generation, if any, qua the Power Project to buttress its claim for incentive payments under the SPA. This communication, in fact, set the stage for the second round of litigation between the parties.

42. HSPL and TAQA vide their reply dated 12.10.2018 repelled the assertion made by NCCL in its notice dated 1.10.2018. In their reply, HSPL and TAQA have sought to repel the claim for incentive payments both on the ground of maintainability as well as on merits.

43. Undeterred, on 28.12.2018, NCCL filed their NOA with SIAC.

44. It is in this backdrop that on 8.1.2019, HSPL and TAQA received intimation from SIAC that NCCL had initiated the Second (2nd) arbitration proceedings. This communication of SIAC was suggestive of the fact that the arbitration proceedings initiated by NCCL is deemed to have commenced from 31.12.2018.

45. Alarmed by this development, HSPL and TAQA lodged the instant action, which came up before this Court for the first time on 10.1.2019. On that date, I had issued notice both in the suit as well as in the captioned interlocutory application. Furthermore, I had indicated that any steps taken henceforth in the arbitration proceedings initiated by NCCL would be subject to further orders of this Court in the present proceedings. In addition thereto, I had also laid emphasis on the fact that if any response was issued by HSPL and TAQA to SIAC in the context of their having received a communication that the arbitration proceedings qua them had commenced, the same would be without prejudice to their rights in the instant proceedings. The notice was made returnable on 18.1.2019.

46. On 18.1.2019, Mr. Nakul Dewan, Advocate, instructed by Dr. Amit George, Mr. Jai Sahai Endlaw, Ms. Neelu Mohan, Mr. Rishabh Dheer and Mr. Shivansh Soni, Advocates, entered appearance on behalf of NCCL.

47. Given the urgency in the matter, NCCL was given time to file its reply by 21.1.2019 *vis-a-vis* the captioned application. On the other hand, HSPL and TAQA were given time to file their rejoinder(s) by 23.1.2019. The matter was fixed for hearing on that very date, that is, 23.1.2019.

48. Since NCCL had filed its reply only on 22.1.2019, a request was made on behalf

of HSPL and TAQA that the matter be postponed to 25.1.2019 to enable them to file their rejoinder(s) by 24.1.2019. The request was acceded to.

49. Thereafter, arguments in the matter were heard on 25.1.2019, 5.2.2019 and 6.2.2019. Orders in the application were reserved on 6.2.2019 upon conclusion of oral submissions by counsel for parties.

Submissions of Counsel

50. Arguments on behalf of HSPL and TAQA were addressed by Mr. Sandeep Sethi, learned Senior Counsel, instructed by Ms. Padmaja Kaul, Mr. Ketan Gaur and Mr. Praharsh Johrey, Advocate, while submissions on behalf of NCCL were advanced by Mr. Nakul Dewan.

51. Broadly, the submissions made by Mr. Sethi can be paraphrased as follows:

(i) NCCL has attempted to lay claim to incentive payments, which purportedly arises out of the SPA. The claim made by NCCL is barred by principles of *res judicata*, waiver, and abandonment. The reason as to why NCCL's claim for incentive payments would encounter the abovestated legal impediments would be evident if one were to closely examine the conduct of NCCL before and during the progress of the 1st arbitration proceedings. In this behalf, reference was made to HSPL and TAQA's pre-arbitration notice dated 4.7.2014 and the reply thereto dated 2.8.2014 filed by NCCL, by which, *inter alia*, NCCL laid a claim for incentive payments.

(ii) Furthermore, reliance was also placed on communication dated 30.5.2017 addressed by NCCL and NCC to HSPL, whereby, NCCL and NCC appear to have conveyed to HSPL that they had no other claims under the SPA other than those qua which the matter was under consideration (at the relevant point in time) before the 1st Arbitral Tribunal.

(iii) Despite NCCL amending its statement of counterclaims, not once but twice, it chose not to make any claim for incentive payments.

(iv) Given these circumstances, NCCL's attempt, once again, at initiating arbitration proceedings on the same cause of action should not be permitted as it was vexatious, time consuming, and would involve expenses which HSPL and TAQA could well avoid.

(v) The aforesaid submissions were buttressed by referring to paragraphs 23, 25, 27, 28, 47(i)(d) and 132 of NCCL's SOD in the 1st arbitration proceedings.

(v)(a) Based on the assertions made in these paragraphs, it was contended that NCCL had argued before the 1st Arbitral Tribunal that if it were to find that NCCL was in breach of its obligations in achieving the WCD and thus, was required to indemnify HSPL and TAQA in respect of Cost Overrun payments, its liability qua them was capped under the SPA and in ascertaining the cap amount, the following had to be taken into account:

(a) SSL; (b) Incentive Payments; (c) CER payment; and (d) Security Bond (I).

(v)(b) These adjustments had been quantified by NCCL at 30% of the purchase consideration. In this context, it was submitted that out of the four areas of adjustments referred to above, NCCL had, in fact, raised a counterclaim *vis-a-vis* only two aspects, that is, SSL and refund of encashed Security Bond (I).

(v)(c) The argument, thus, was that since the counterclaim was made for SSL and refund of encashed Security Bond (I), NCCL could have made a counterclaim for incentive payments as well, which, as the record would show, it failed to put forth in the 1st arbitration proceedings. As a matter of fact, it was contended that NCCL, instead of making a counterclaim, proceeded to treat incentive payments as a cap on its liability.

(vi) The relief sought for by NCCL for the payment of SSL in the sum of INR 26,66,66,667/- was based on the same cause of action and rationale which forms the basis of NCCL now lodging a claim for incentive payments.

(vi)(a) The basis for lodging a claim for SSL was that the Power Project would achieve the WCD by 31.3.2013; NCCL alone would bear the burden of any or all Cost Overrun Payments; and lastly, SSL would be paid only on the achievement of the Final Completion Date.

(vi)(b)In this behalf, reference was made to Clauses 9.1, 9.1.1, 9.1.4 and 9.8.1. Reference was also made to paragraph 14 of NCCL's Statement of Counterclaims in the 1st arbitration proceedings.

(vii) NCCL's stance that its cause of action for laying a claim to incentive payments could not have arisen till such time the 1st Arbitral Tribunal had returned a finding as to when in the given circumstances the WCD could actually have been achieved, is fallacious and contrary to established principles of law.

(vii)(a) The fact that the 1st Arbitral Tribunal in paragraph 254 and 255 of its award observed that the WCD could have been achieved by April, 2014 or latest by June, 2014 could not have given rise to a fresh cause of action, in law, in favour of NCCL. Findings returned by Arbitral Tribunals via awards and likewise, by Courts via judgments rendered by them cannot give rise to a fresh cause of action qua those who are parties to such awards and/or judgments.

(vii)(b) NCCL could have, if it wanted, laid a claim for incentive payments on account of Deemed Generation in the 1st arbitration proceedings itself. Had such a claim been made, the 1st Arbitral Tribunal, if found fit, would have allowed for incentive payments from April, 2014 or June, 2014. NCCL having failed to do so, it cannot be given, in a manner of speech, a chance to have a second bite at the cherry.

(viii) Given the aforesaid circumstances, NCCL should be restrained from burdening HSPL and TAQA with the costs and other attendant hassles of a second arbitration proceedings. In this behalf, balance of convenience is squarely in favour of HSPL and TAQA. In case the second (2nd) arbitration proceedings are allowed to continue, HSPL and TAQA would not only incur significant costs, but would also lose its right to choose its nominee Arbitrator, if it fails to act in that behalf by 25.1.2019. In this connection, reference is made to Rule 11.2 of the SIAC Rules.

(ix) Furthermore, the fresh claim made for incentive payments is also barred by limitation if regard is had to the following milestones.

(x) Under the SPA, the WCD was required to be achieved by 31.3.2013; TAQA stepped in to take over the project on 5.3.2014. NCCL issued its notice to lay claim to incentive payments only on 28.12.2018.

(xi) On merits as well HSPL and TAQA have a good case inasmuch as under Clauses 8 and 9 of the SPA, entitlement to incentive payments would arise only upon commissioning of the Power Project; an event which never occurred. Under the SPA, NCCL is to bear the burden of Cost Overrun payments, qua which the 1st Arbitral Tribunal awarded a sum in excess of INR 90 Crores in favour of HSPL.

(xii) Given the aforesaid facts and circumstances, the Arbitration Agreement obtaining between the parties, which is incorporated in Clause 14 of the SPA has been rendered inoperative and/or incapable of being performed.

52. In support of his contention, learned counsel has relied upon the following judgments:

i) *McDonald's India Pvt. Ltd.* v. *Vikram Bakshi*, 2016 (4) ArbLR 250 (Delhi);

ii) *Ramasamy Athappan* v. *The Secretariat of the Court, ICC*, 2008 SCC OnLine Mad

789;

iii) *C.G. Holdings* v. *Ramasamy Atthappan*, 2011 SCC OnLine Mad 1078;

iv) *Satish Kumar* v. *Surinder Kumar*, (1969) 2 SCR 44;

v) *National Insurance Company* v. *Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267;

vi) *Republic of India through Ministry of Defence* v. *Agusta Westland International Ltd.*, 2019 SCC OnLine Del 6419;

vii) *World Sports Group (Mauritius) Limited* v. *MSM Satellite (Singapore) PTE. Limited*, (2014) 11 SCC 639;

viii) *Chloro Controls India Pvt. Ltd.* v. *Seven Trent Water Purification Inc.*, (2013) 1 SCC 641;

ix) *Union of India* v. *Vodafone Group PLC United Kingdom*, 2018 SCC OnLine Del 8842;

x) *Excalibur Ventures LLC* v. *Texas Keystone Inc*, [2011] EWHC 1624 (Comm); and xi) *K.K. Modi* v. *K.N. Modi*, (1998) 3 SCC 573

53. On the other hand, Mr. Dewan made the following submissions:

(i) NCCL which held shares in HSPL transferred the same to TAQA for a sum of INR 278.33 Crores. Under the SPA, NCCL was to bear the burden of Cost Overrun payments and pay the same to HSPL if it went over the threshold of INR 890 Crores.

(ii) NCCL had covenanted under the SPA that HSPL would complete the Power Project by 31.3.2013. While NCCL in consonance with Clauses 6.4.1.(b) and (c) and 6.6 of the SPA had received the sale consideration in respect of shares held in HSPL, which it sold to TAQA, the Cost Overrun payments beyond the threshold, adverted to above, had to be paid by NCCL after due adjustments were made. In this behalf, reliance was placed on Clauses 9.7, 9.8.1 and 9.10. The contention was that if adjustments were not made, which included sums owed towards incentive payments, the same had to be remitted to NCCL.

(iii) The liability of HSPL and TAQA to pay monies to NCCL towards incentive payments arose out of Clause 8 read with Clause 10.4.2 of the SPA. Incentive payments were deferred consideration as they were dependent on deemed generation of electricity by the Power Project after the Final Completion Date. It was suggested that incentive payments were envisaged as deferred consideration as there was a difference in the projection of water flow. In this behalf, reliance was placed on the term sheet, the extracts from the due diligence reports, draft project report and e-mails dated 5.4.2012 and 27.3.2012.

(iv) In terms of Clause 9.7 of the SPA, if TAQA or HSPL was to issue a Cost Overrun payments notice, then, NCCL was required to make payments within a period of 14 days of the receipt of the said notice. In case NCCL failed to make the payments towards Cost Overrun, HSPL was required to adjust SSL to the extent of the Cost Overrun. If Cost Overrun exceeded the SSL, HSPL had the option to, *inter alia*, reduce and/or adjust the incentive payment.

(v) In this case, though, Cost Overrun payments exceeded the SSL, HSPL neither adjusted the incentive payments from the SSL, nor did it make adjustments to that extent from the cost overrun payments. This omission on the part of HSPL conferred a positive right on NCCL to receive an incentive payments after the Final Completion Date.

(vi) The award dated 24.1.2018 partially allowed the claims of HSPL and TAQA in terms of Clause 9.10 of the SPA. The 1st Arbitral Tribunal via the said award dated 24.1.2018, *inter alia*, held that the WCD could have been achieved latest by 30.6.2014. Notably, the 1st Arbitral Tribunal held that there was, in fact, no breach of the SPA by NCCL even though the WCD had not been reached by

31.3.2013. Thus, on account of failure of HSPL and/or TAQA in making incentive payments, based on the findings of the 1st Arbitral Tribunal in respect of the WCD, NCCL was forced to issue the NOA dated 28.12.2018 by which it sought to commence the 2nd arbitration proceedings.

(vii) The assertions made by HSPL and TAQA can be examined and adjudicated upon by a 2nd Arbitral Tribunal, which in law has primacy in this behalf. There is, in law, no fetter on a 2nd Arbitral Tribunal in determining issues which are related to the purported inoperability of the Arbitration Agreement. This exercise can be conducted by a 2nd Arbitral Tribunal either under Rule 28.2 or Rule 29 of SIAC Rules.

(viii) Furthermore, any jurisdictional challenge can then be tested before the concerned Court in Singapore under Section 10 of the International Arbitration Act (CHAPTER 143A).

(ix) The cause of action for laying a claim qua incentive payments could have arisen only after the 1st Arbitral Tribunal had determined the WCD. This position has also been accepted by HSPL and TAQA by making an assertion to that effect in paragraph 3.3(e) of the plaint. Since, HSPL and TAQA did not adjust the incentive payments while raising its claims for cost overrun payments, a positive cause arose in favour of NCCL to lay claim to incentive payments after determination of the WCD by the 1st Arbitral Tribunal.

(x) It was emphasized that HSPL and TAQA had not made due adjustments as required under the SPA. There was, therefore, no occasion for NCCL to raise a claim with respect to incentive payments in the SOD or in the Statement of Counterclaims lodged with the 1st Arbitral Tribunal.

(xi) In other words, the stand taken was that the claim for incentive payments now made was not barred by the principles of *res judicata* or constructive *res judicata* and that it was open for NCCL to raise such a claim as it was based on a separate and distinctive cause of action. In support of this submission, it was stressed that the claim now made for incentive payments would require evidence, which would be different from the evidence laid in the 1st arbitration proceedings.

(xii) Furthermore, it was contended that on the basis of the same rationale and logic, it could not be suggested that NCCL had abandoned its claim for incentive payments. The argument was that under the SPA, HSPL and TAQA were obliged to reduce and/or adjust their Cost Overrun claim.

(xiii) In this context, what was sought to be put forth was that a mere reference to incentive payments claim in a schedule attached to NCCL's letter dated 2.8.2014 would not constitute an abandonment in law. Abandonment requires a more resolute stand than a mere reference in respect in a pre-arbitration notice. Abandonment cannot occur when a claim has not legitimately arisen.

(xiv) The argument advanced on behalf of HSPL and TAQA that the claim for incentive payments had been waived in view of what was stated in communication dated 30.5.2017 was unsustainable for the following reasons: (i) First, TAQA was neither addressed nor mentioned even though it was jointly and/or severally liable in these proceedings. (ii) Second, the contents of communication dated 30.5.2017 cannot be construed as waiver in respect of a claim *vis-a-vis* which cause of action had not been arisen at that point in time.

(xv) Likewise, in respect of argument advanced that the claim for incentive payments was barred by limitation, it was submitted that the cause for such a claim had not arisen, as suggested, on 5.3.2014, when TAQA stepped in to take over the Power Project. In this context, it was submitted that the step-in right available to TAQA was unrelated to the Final Completion Date/WCD. The argument was that limitation for incentive payments could commence only from

the date of the award.

(xvi) Qua the aspect of inoperability of the Arbitration Agreement, it was argued that arbitration agreements are not extinguished merely because arbitration qua one set of disputes stands concluded. It was stressed that the same Arbitration Agreement can operate *vis-a-vis* new claims as is sought to be done in the instant case by NCCL.

(xvii) In support of its stand, NCCL relied upon the following judgments:

a) *Kusum Ingots & Alloys Ltd.* v. *Union of India*, (2004) 6 SCC 254;

b) *Alka Gupta* v. *Narender Kumar Gupta*, (2010) 10 SCC 141;

c) *Himachal Pradesh Financial Corporation* v. *Anil Garg*, (2017) 14 SCC 634;

d) *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of Uttar Pradesh*, (1979) 2 SCC 409;

e) *Sonell Clocks and Gifts Limited* v. *New India Assurance Company Limited*, (2018) 9 SCC 784;

f) *Dolphin Drilling Limited* v. *Oil and Natural Gas Corporation Limited*, (2010) 3 SCC 267;

g) *Soumitra Kumar Sen* v. *Shyamlal Kumar Sen*, (2018) 5 SCC 644;

h) *Mcdonald's India Private Limited* v. *Vikram Bakshi*, (2016) 232 DLT 394;

i) *GMR Energy Limited* v. *Doosan Power Systems India Power Systems India Private Limited*, 2017 SCC OnLine Del 11625

j) *GMR Energy Limited* v. *Doosan Power Systems India Private Limited*, Order dated 14.11.2017, passed in CS (Comm.) 447/2017 before the High Court of Delhi.

k) *Malini Ventura* v. *Knight Capital Pte. Ltd.*, (2015) SGHC 225;

l) *Union of India* v. *Khaitan Holdings (Mauritius) Limited*, judgment dated 29.01.2019, paased in CS (OS) 46/2019 before the High Court of Delhi.

Analysis and Reasons

54. Having heard the learned counsel for the parties and perused the record, to my mind, the central issue which emerges in respect of this matter is as to whether or not NCCL could continue with the 2nd or a new arbitration. It is HSPL's and TAQA's submission that NCCL could have or ought to have raised its claim for incentive payments in the 1st arbitration proceedings.

55. The fact that NCCL did not do so, according to HSPL and TAQA, the continuation of the 2nd arbitration is barred by law. In support of this submission, on behalf of HSPL and TAQA, principles such as *res judicata*, waiver, and abandonment have been put forth.

56. It was also contended that the arbitration agreement, which subsisted between the parties, (based on which the 1st arbitration proceedings was commenced, which concluded in an Award), had become inoperative and/or incapable of being performed.

57. This stand taken on behalf of HSPL and TAQA is sought to be supported on facts by adverting to various circumstances, which preceded the commencement of the 1st arbitration proceedings as also on the defences raised in the 1st arbitration proceedings, which were considered and dealt with by the 1st Arbitral Tribunal while rendering its Award.

58. Insofar as the events which preceded the commencement of 1st arbitration proceedings are concerned, reference was made to the reply dated 02.08.2014 concerning the pre-arbitration notice dated 04.07.2014, served by HSPL and TAQA on NCCL and NCC. In the reply dated 2.8.2014, concededly, in Appendix B at serial No. 6, a claim on account of loss of incentive payments to the extent of INR 28,34,10,000 was made by NCCL.

59. The other communication, on which reliance was placed by HSPL and TAQA was the communication dated 30.05.2017. This communication was addressed by NCCL and NCC, *inter alia*, to its creditors, who had given notice of invocation of the pledge. The communication was also marked to HSPL and a prospective transferee company, one, Greenko Energies Private Limited, to whom, the pledged securities were intended to be transferred.

60. In this communication, NCCL and NCC indicated to its creditors that apart from the monies claimed by them from HSPL i.e. in two separate and independent arbitrations which included the 1st arbitration proceedings, they did not have any other claim against HSPL.

61. Likewise, reliance was placed by HSPL and TAQA on NCCL's pleadings filed before the 1st Arbitral Tribunal. The stand taken was that despite NCCL amending its counterclaims, not once, but twice, it chose not to make a claim for incentive payments. Reference was also made to certain specific paragraphs (to which I have alluded to hereinabove) in NCCL's SOD filed in the 1st arbitration proceedings.

62. Besides this, the stand of NCCL, which, according to HSPL and TAQA, was rejected by the 1st Arbitral Tribunal was also brought to fore. In particular, it was emphasized that HSPL and TAQA had indicated in no uncertain terms that its liability qua cost overrun payments was capped under the SPA and that in ascertaining the cap amount, adjustments, *inter alia*, had to be made qua incentive payments.

63. The contention was that NCCL had quantified the adjustments at 30% of the purchase consideration and that, in fact, it had raised a counterclaim qua two out of four amounts i.e. SSL and encashed Security Bond (I); a contention which was rejected by the 1st Arbitral Tribunal.

64. In other words, the contention was that the cause of action for adjustments of SSL and encashed Security Bond (I), if at all, was the same as which pertained to incentive payments. This argument was sought to be buttressed by referring to the fact that the basis for lodging a claim for SSL was the same as that which is now sought to be projected *vis-a-vis* incentive payments.

65. The record also discloses that NCCL does not dispute the fact that it did refer to incentive payments in Appendix B annexed to its communication dated 02.08.2014 or that it did take a stand *vis-a-vis* its creditors in the communication dated 30.05.2017 that its claims *vis-à-vis* HSPL were confined to those which were the subject matter of the 1st arbitration proceedings.

66. The record also shows that the WCD, which was to be achieved by 31.03.2013, could not be achieved. As a matter of fact, there is no dispute that the Power Project did not get completed. What is also not disputed by NCCL is that it was liable to bear the burden of Cost Overrun payments beyond the threshold amount pegged at INR 890 crores, *albeit*, after adjustments being made in consonance with the provisions of the SPA.

67. Variance in the respective stands taken by parties, thus, falls in a narrow compass, which is that, according to NCCL, incentive payments were deferred consideration, which were dependent on Deemed Generation of electricity by the Power Project after the Final Completion Date had been achieved. In this behalf, NCCL places reliance on Clauses 9.0, 9.7 and 9.8.1 of the SPA. NCCL buttresses this stand by contending that since Costs Overrun payments exceeded the threshold amount, HSPL and/or TAQA was required to either return the amount or make the requisite adjustments. Since adjustments had not been made, a positive right had accrued in favour of NCCL to receive incentive payments after the Final Completion Date.

68. In this regard, it was further stated on behalf of NCCL that the claim for incentive payments could have arisen only after the 1st Arbitral Tribunal determined the WCD. The fact that this stated position was correct was sought to be demonstrated

by relying upon paragraph 3.3 (e) of the plaint filed in the accompanying suit.

69. What was, thus, sought to be re-emphasized was the fact that since HSPL and TAQA had not adjusted the incentive payments, there was no occasion for NCCL to have raised the claim either in the SOD or file a counterclaim in respect of the same in the 1st arbitration proceedings.

70. With this foreground, what needs to be considered by me is whether I should grant an injunction, restraining NCCL from continuing with the 2nd arbitration proceedings.

71. The principles of law, which have been invoked by HSPL and TAQA to buttress its stand, are *res judicata*, waiver, and abandonment.

72. I must state at the outset that this is not a case of *res judicata* as there has been, in the given facts and circumstances, no determination by the 1st Arbitral Tribunal qua the issue pertaining to incentive payments. At best, what could be said in favour of HSPL and TAQA, is that, this is a case of constructive *res judicata*.

73. In order to appreciate this submission one would have to first of all briefly touch upon the doctrine of *res judicata*, as constructive *res judicata* is only a derivative of the former. The doctrine of *res judicata*, in a nutshell, gets triggered when the issue (s) raised in the subsequent proceeding are those which have been decided and have attained finality, in an earlier proceeding. The reason why the law places a bar on reopening or reagitation of issues which have attained finality is, as it does not want the affected party to be vexed twice over qua the same cause. [see *Kiran Tandon* v. *Allahabad Development Authority*, (2004) 10 SCC 745; and *Escorts Farms Ltd., Previously Known as M/s. Escorts Farms (Ramgarh) Ltd.* v. *Commissioner, Kumaon Division, Nainital, U.P.*, (2004) 4 SCC 281]

74. The doctrine has its roots in public policy. It, therefore, bars raising of an issue in a subsequent proceeding, which is directly and substantially in issue in an earlier proceeding between the same parties or between the parties claiming or litigating under the same title. Pertinently, the decision on which reliance is placed to invoke the doctrine of *res judicata* should be a decision of a Court of competent jurisdiction. It would, however, matter little if it is a Court of limited jurisdiction, that is, it is not competent to try the subsequent action or the action in which the issue has been raised subsequently. [See explanation VIII to Section 11 of the Code of Civil Procedure, 1908 (in short "CPC") - principles analogous thereto should apply in arbitration proceedings].

75. Since, clearly, as indicated above, there was no decision on incentive payments, the bar, if any, which HSPL and TAQA can, if at all, claim is that NCCL could have or ought to have raised the issue of incentive payments. To my mind, what, in effect, HSPL and TAQA appear to contend is that NCCL should be estopped from raising the issue of incentive payments in the 2nd arbitration proceeding. The plea appears to be in the nature of an "estoppel by accord". [See *Bhanu Kumar Jain* v. *Archana Kumar*, (2005) 1 SCC 787/paras 29 to 32].

76. It is precisely in this context that Mr. Sethi also contended that the arbitration agreement between the parties had become inoperative or in the alternative is incapable of being performed.

77. It was Mr. Sethi's contention that if he is correct in submitting that the doctrine of *res judicata* applies, then, the arbitration agreement had become inoperative or incapable of being performed.

78. In support of this plea, Mr. Sethi had cited several judgments including the judgment of Division Bench of this Court in *McDonalds case*.

79. I shall be dealing with the judgments cited by Mr. Sethi including *McDonald's case* in the latter part of my judgment.

80. Suffice it to say, for the moment, that since the doctrine of *res judicata* simpliciter would not apply, this plea *sensu stricto*, as adverted to above, is unsustainable.

81. As to whether constructive *res judicata* would apply in this case, one would have to examine whether the issue at hand concerning incentive payments is a mixed question of fact and law and, therefore, would require, if not, a full-blown trial at least a mini-trial. If it does, then, perhaps, this Court is not the appropriate forum to deal with this plea.

82. This is, especially so, as what HSPL and TAQA, in effect, seek in terms of relief, both in the interlocutory application and the suit, is an anti-arbitration injunction. The Courts, ordinarily, have been very slow in granting injunctions whereby arbitration proceedings are brought to a standstill. The fundamental reason for this appears to be that the parties by entering into a contract would have necessarily agreed, as in this case, that all issues connected with or arising from the agreement entered into between them, would be tried by an Arbitral Tribunal duly constituted in terms of the agreement and, therefore, any sort of injunction granted by the Court would tantamount to aiding breach of the arbitration agreement.

83. Having said so, Courts have, in certain situations, granted injunctions where proceedings are vexatious and/or oppressive.

84. As indicated above, the width and amplitude available to the Court in an anti-arbitration agreement is much narrower as against where an anti-suit injunction is sought in a matter before it. NCCL has relied upon several documents to demonstrate, as I understand, that there was uncertainty with regard to discharge data and, therefore, there was an element of deferred consideration factored in the agreement obtaining between the parties, which included the incentive payments. Thus, the contention was that only when a clearer picture emerged with regard to water flow data would a cause of action have arisen for lodging a claim for incentive payments. In support of this plea, NCCL has relied upon the following documents: (i) term sheet dated 27.12.2011, executed by TAQA, NCCL and IL&FS; (ii) draft technical due diligence report dated March, 2012, prepared by SNC Lavalin; (iii) technical due diligence report dated August, 2012, prepared by SNC Lavalin; (iv) detailed project report dated April, 2005-Chapter 5; (v) e-mail dated 12.4.2012 addressed by NCCL to TAQA; (vi) e-mail dated 27.03.2012 issued by TAQA to JSL and (vii) e-mail dated 24.01.2012 from IL&FS to, one, Ms. Padma C. Rao.

85. The moot question, which arises, is that, would I, therefore, prevent commencement of the 2nd arbitration proceeding, if a trial is required as to whether or not NCCL could have awaited the decision of the 1st Arbitral Tribunal and, then, lodged a claim for incentive payments.

86. The instant Power Project is undisputedly a hydroelectric power project. The generation of electricity would necessarily depend upon Hydrology. Significantly, NCCL, *inter alia*, relies upon the Technical Due Diligence report to demonstrate that Sorang river flows were overestimated[1]. The aspect cannot be brushed aside lightly at this stage.

87. The other submission, which has been advanced quite vigorously on behalf of NCCL, is that even according to HSPL and TAQA, NCCL and NCC would be entitled to incentive payments as per the formula given under the SPA, once the Final Completion Date was achieved. NCCL contends that the 1st Arbitral Tribunal has arrived at a conclusion via its Award dated 24.01.2018 that the Power Project could have been completed latest by 30.06.2014 and that there was no breach of the SPA by NCCL only because of the fact that the WCD could not be achieved by 31.03.2013.

88. In order to buttress this submission, learned counsel, *inter alia*, relies upon the following:

(i) The observations made in paragraph 196 (xv) by the 1st Arbitral Tribunal in the Award dated 24.01.2018:

(ii) The assertions made by HSPL and TAQA in paragraph 3.3(e) of the plaint.

Paragraph 196(xv) of the Award dated 24.01.2018

"(xv) The undertaking by NCCIHL to achieve WCD by 31 March 2013 under Clause 10.2.1 is subject to the condition 'unless otherwise permitted by the purchaser'. If WCD is not achieved by 31 March 2013 and TAQA permits NCCIHL to continue in control of the construction and commissioning of the project as provided in Clause 10.2.1, there is no breach of warranty or covenant by NCCIHL, by reason of not achieving the WCD by 31 March 2013. When TAQA opts to take over control of the construction and commissioning of the Project, the liability of NCCIHL to achieve wet commissioning would cease and replaced by its liability to bear the expense incurred for TAQA/HSPL for achieving final completion."

Plaint Paragraph 3.3(e)

"3.3 (e) For the purpose of this suit, it is important to note that (only) if the Defendant achieved Wet Commissioning Date of the Project by 31 March 2013 (amongst fulfillment of other obligations under the SPA) and after achievement of Final Completion Date, if the Project generated more than 400 million kWh annually (none of which were, in fact, achieved), the Defendant would be entitled to Incentive Payment as per a formula provided under the SPA."

89. The aforesaid assertion made in the plaint and the observations of the 1st Arbitral Tribunal would show that the failure of NCCL to achieve the WCD by 31.03.2013 would only entail that it would have to indemnify TAQA for consequential losses caused under Clause 11.5 of the SPA. This aspect is also borne out upon reading the findings returned by the 1st Arbitral Tribunal in paragraph 310[2] read with its summary of the result against claim (d)[3] recorded in paragraph 390 of the Award dated 24.01.2018.

90. Therefore, NCCL appears to have pitched its case for a 2nd arbitration proceedings on its interpretation of Clauses 8 and 9 of the SPA read with observations made in paragraph 254(3) and 255 of the 1st Arbitral Tribunal's Award dated 24.01.2018.

91. Briefly put, NCCL's case appears to be that since the Final Completion Date could not be achieved, the incentive payments could be worked out on the basis of the Annual Deemed Generation, which in turn, is ascertainable solely on the basis of water discharge as set out in Schedule 3 of the SPA.

92. According to NCCL, in terms of Clause 3.1 of Schedule 3, TAQA was required to measure the water level data w.e.f. 28.02.2013. It is NCCL's case that TAQA proceeded on the basis that annual generation of electricity would be approximately 400 million kWh and therefore went on to reduce the purchase price from INR 480 crores to INR 360 crores with the balance amount to be paid as incentive payments in accordance with Clause 8 of the SPA.

93. Thus, as per NCCL, since the 1st Arbitral Tribunal has returned a finding that the WCD could have been achieved at the very earliest in April, 2014, it was entitled to incentive payments in the event of water being available to sustain Annual Deemed Generation of electricity of more than 400 million kWh. The payments, according to NCCL, were required to be made for a period of five (5) years.

94. In the alternative, NCCL takes the stand that if the WCD is taken as 30.06.2014 then the period of five (5) years will have to be taken from that date.

95. It is in this context that NCCL says that via its communication dated 01.10.2018, sent to HSPL and TAQA, while claiming incentive payments under Clause 8 of the SPA, it had requested them to furnish information concerning the Annual

Deemed Generation and Metered Generation, if any, of the Power Project for each year commencing from April, 2014. NCCL claims that the actual measurement data, having not being supplied by HSPL and TAQA, it was unable to calculate the exact amount of its claim. However, NCCL appears to have now, based on historical data of 30 years, made an estimate, which is that, for the relevant period, Annual Deemed Generation of electricity would be in excess of 535 million kWh and, therefore, it would be entitled to claim monies in excess of INR 180 crores.

96. Given the aforesaid broad stand taken by the parties, I would be slow in holding, at this juncture, that the commencement of 2nd arbitration proceedings ought to be injuncted. The submission advanced on behalf of HSPL and TAQA that NCCL had, in fact, made a claim for incentive payments, as reflected in its communication dated 02.08.2014 (which was addressed to TAQA with a copy to HSPL), would not have me hold that since it was not followed through, it necessarily fell within the ambit of constructive *res judicata*. At times, initial bravado or, should I say, exuberance with regard to a possible claim that one party wishes to raise against another gets scaled down or excluded or excised upon sober cogitation in the matter.

97. Therefore, the fact that incentive payments were not included, though, counterclaims were amended twice over, would also not carry much weight in determining as to whether or not I should permit continuation of 2nd arbitration proceedings. My approach with regard to the contents of letter dated 30.05.2017 would, thus, be the same.

98. The reason that I take this line is on account of the provisions made in Rules 28.2 and 29.1 of the SIAC Rules. Briefly, Rule 28.2 enables an Arbitral Tribunal to rule, *inter alia*, not only on its own jurisdiction but also with regard to existence, validity or scope of the arbitration agreement.

99. Likewise, under Rule 29.1, a party can apply to an Arbitral Tribunal for early dismissal of a claim on the ground that it is manifest that the claim is without merit and/or is outside the jurisdiction of the Arbitral Tribunal. If, as is contended before me on behalf of HSPL and TAQA that the 1st Arbitral Tribunal, while adjudicating upon the claim and counterclaims raised has gone over the very same set of facts and grounds which are now sought to be trotted out by NCCL in support of the claim for incentive payments, it could seek a decision in terms of Rule 28.2 and/or Rule 29 of the SIAC Rules.

100. It would be, in my view, for the 2nd Arbitral Tribunal to fix the kind of hearing it wishes to have based on its sense of the nature and scope of the controversy at hand.

101. Insofar as this Court is concerned, a decision cannot be taken as to whether the second action would be barred on the ground of constructive *res judicata* without a trial. To my mind, it is undoubtedly a mixed question of fact and law. Thus, at this stage, to say that the arbitration agreement is inoperative and/or incapable of being performed would be, metaphorically speaking, putting the cart before the horse.

102. The other ground which was taken was that this was a case of waiver or abandonment also does not impress me. Waiver, as is ordinarily understood, occurs when a party gives up a claim, privilege, or right voluntarily i.e. consciously with knowledge of relevant facts. Abandonment, likewise, occurs when there is a relinquishment of a right or interest with the intention of the party concerned to never claim the same. (See: Black's Law Dictionary, 7th Edition, pages 1574 and 1). 52.1 In the instant case, the facts, as set out above, would show that it is NCCL's case that since it is still unaware of the actual data with regard to water flow (and at the commencement of the 1st arbitration with regard to when the WCD could have been achieved), it could not have waived or abandoned its right and/or interest.

103. *Prima facie*, these pleas, at this juncture, have merit.

104. For the same reason, I would be disinclined to accept the submission made on behalf of HSPL and TAQA that NCCL's claim was barred by limitation since TAQA had exercised its right of step-in on 05.03.2014. If the stand taken by NCCL before me is accepted in the 2nd arbitration proceedings, the fact that TAQA stepped in qua the Power Project on 05.03.2014 may not have much significance.

105. At this juncture, I may refer to judgment of the High Court of Justice Queen's Bench Division Commercial Court in the matter of *Nomihold Securities Inc and Mobile Telesystems Finance SA*, [2012] EWHC 130 (Comm.).

106. The facts obtaining in *Nomihold*'s case are somewhat *pari materia* to the instant case. In that case, the learned Judge was called upon to rule on two applications. First application was filed by the claimant— Nomihold to injunct the defendant (referred to in the judgment as MTSF) to discontinue or take all steps within its power to discontinue two arbitrations which had been triggered before the London Court of International Arbitration ('LCIA'). Second, to rule upon a counter-application filed by the defendant/MTSF to stay Nomihold's application. Nomihold's case for injunction was pivoted on the fact that there had been a prior arbitration, which had resulted in an Award, and, therefore, the new arbitration triggered by the defendant/MTSF was barred by *res judicata* or at least on that basis the defendant/MTSF was precluded from raising a fresh claim on the ground of issue estoppel.

107. In that light, the learned Judge also considered the argument of the claimant— Nomihold, which was also, incidentally, an argument advanced by Mr. Sethi, that the second arbitration was initiated to avoid enforcement of the Award. On the other hand, the defendant/MTSF's stand before the Court was that it had complaints with regard to money laundering which required adjudication in the second or new Arbitration.

108. The following observations, being opposite, are extracted hereafter:

"39. Mr. Flynn contended that in this case the "matter" is to be characterised by the fact that Nomihold's essential complaints in its application are the re-arbitration complaints, and submitted that the parties agreed in the arbitration agreements that disputes and controversies about complaints of this kind should be arbitrated.

40. I accept that, if the New Arbitrations proceed, the tribunals would have power to reject MTSF's claims on the basis that they had merged in the Award because of res judicata or on the basis that MTSF has been precluded by issue estoppel from arguing disputed questions upon which its claims relied. (In H.E. Daniels Ltd. *v.* Carmel Exporters and Importers Limited, *[1953] 2 QB 242 Pilcher J recognised that a tribunal might reject a claim that is debarred by the rule in* Conquer *v.* Boot.) *The application of the principle in* Henderson *v.* Henderson *to the circumstances of this case needs more consideration, although it was not disputed before me that, in proper cases, an arbitral tribunal could apply the principle or an analogous one to dispose of a case before it.*

41. The principle of Henderson *v.* Henderson *applies typically when a litigant in court proceedings complains about matters that could and should have been raised in earlier litigation. During and after the hearing before me there emerged an issue between the parties about whether MTSF's money laundering complaint could have been determined in the First Option Agreement Arbitration. Mr. Flynn submitted that it was only by agreement between the parties that the Tribunal took it upon itself to determine the SPA issue and it did not encompass the money laundering complaint: that complaint could not have been determined in the First Option Agreement Arbitration unless both parties and the Tribunal had so agreed. Nomihold argued that MTSF knew before the SPA Arbitration was brought the evidential basis for its money laundering complaint and could have raised it, had it*

wished to do so, in the SPA Arbitration from the start; that the First Option Arbitration included all disputes between the parties about whether the SPA was invalid and not performed; and that, had MTSF raised the money laundering complaint, the Tribunal would certainly have decided it. I do not need to decide this difference, I do not have all relevant material about any agreement between the parties that led to the Tribunal assuming the burden of deciding the SPA Issue, and in view of my decisions on the applications, I do not comment upon the merits of it: it might fall to be determined in the New Arbitrations and I should not trample upon such questions. However, in these circumstances I shall say something about the principle of Henderson *v.* Henderson *in the context of arbitral proceedings.*

42. The issue between the parties is whether MTSF can raise in the New Arbitrations matters that, as Nomihold asserts, it could and should have raised in the First Option Agreement Arbitration if it wished to raise them at all. The rule that a party will not be permitted to raise an issue that he could and should have raised in an earlier reference is well established and indeed ante-dates Henderson *v.* Henderson: *see* Smith *v.* Johnson, *(1812) 15 East 213. However, where the previous dispute was determined in arbitration, the principle of* Henderson *v.* Henderson *has a narrower application than where it was determined in court proceedings: Mustill & Boyd, Commercial Arbitration (1989) 2nd Ed. p.412.* ***The consensual nature of arbitration means that a tribunal determines disputes referred to it by the parties****. It is because of this, as Mance LJ explained in* Sun Life Assurance Co. of Canada *v.* Lincoln National Life Insurance Co, *[2004] EWCA Civ 1660, that the principle of* Henderson *v.* Henderson *applies in relation to previous arbitrations only if all parties to subsequent litigation (or their privies) have also been parties to the earlier reference (whereas the principle of* Henderson *v.* Henderson *can apply where the parties to the earlier and subsequent litigation are different: see* Dexter *v.* Vieland-Boddy, *[2003] EWCA Civ 14 at para 49).*

43. Similarly, as it seems to me, in so far as the principle of Henderson *v.* Henderson *is to be regarded as an aspect of the courts' power to control abuse of process (see* Glencore International AG *v.* Exter Shipping Ltd., *[2002] CLC 1090 at para 35), there is room for debate whether the consensual nature of arbitration gives scope for a tribunal to decide that the reference agreement to which it is itself a party (together with proper consequences of the reference) is an abuse of its own process. For present purposes it suffices to say that, at least where the question is whether a complaint could and should have been raised in an earlier reference, the principle recognised in* Smith *v.* Johnson *is available to a subsequent tribunal as a basis for rejecting the complaint, because it would be entitled to reject a complaint on the basis that it had been abandoned and the* Smith *v.* Johnson *principle is an aspect of the principle of abandonment:* Excomm Limited *v.* Guan Guan Shipping (Pte) Limited *(The "Golden Bear"), [1987] 1 L.LR 330, 343.*

44. I agree with Mr. Flynn's submission, therefore, that, if the New Arbitrations proceed, the arbitrators in them would be entitled to determine Nomihold's contention based upon estoppel per rem judicatam, issue estoppel and what it calls the principle of Henderson *v.* Henderson *(and might more exactly be called the doctrine of* Smith *v.* Johnson*). I cannot see, and it was not suggested, that there is any relevant difference between the ambit of the powers available to tribunals in the New Arbitrations to dispose of claims and the power that a court would have to dispose of complaints on the basis of argument such as Nomihold's re-arbitration complaints including the principle in* Henderson *v.* Henderson.

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50. As I have said, it is Nomihold's case that the New Arbitrations are part of what it calls MTSF's "enforcement war" to avoid the enforcement of the Award, and

to challenge it in ways not contemplated by either the arbitration agreements or the 1996 Act; and that they are collateral attacks on the Award (such as described by Toulson LJ). It submits that, if this is so, the challenge to the New Arbitrations falls within the purview of the court's supervisory jurisdiction to protect the Award and to support its enforcement. I agree with that submission, and so, in my judgment, to the extent that the adjudication of Nomihold's application involves determining the re-arbitration complaints, the court is not precluded by the arbitration agreements from determining them for that purpose. They are not matters "to be referred to arbitration", notwithstanding they in themselves are matters properly to be determined in a reference when raised in another context.

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In what circumstances will the court make an anti-arbitration injunction?

55. Mr. Flynn acknowledged that there are circumstances in which the court will make an anti-arbitration injunction, but he submitted that the court will not restrain a party from having a matter arbitrated before a tribunal if there is no dispute that the parties are subject to a valid and binding arbitration agreement that a tribunal should determine a matter of that kind. He analysed the authorities relied upon by Mr. Beltrami with a view to demonstrating that since the 1996 Act the court has never made an anti-arbitration injunction in these circumstances, and I accept his analysis of them. I have referred to the Sheffield United case upon which Mr. Beltrami particularly relied and I accept that in that case there was a dispute about whether the parties had agreed to arbitration before the CAS.

56. However, although the court apparently has not proceeded to make an order in the circumstances to which Mr. Flynn refers, there is authority that the court may do so. In Elektrim *v.* Vivendi Universal SA, *[2007] EWHC 571 (Comm) it was conceded that in these circumstances section 37 of the 1981 Act "constitutes a very residual power to intervene in an arbitration": see para 48(1). In his judgment Aikens J said this (at para 51):*

> *"I do not intend to explore generally the question of whether the court has any jurisdiction at all under section 37 of the SCA to grant either interim or final injunctions to restrain arbitrations that are subject to the 1996 Act. I must assume that there is such a jurisdiction, given the comments of the Court of Appeal in the cases of* Cetelem SA *v.* Roust Holdings Ltd. *[2005] 1 CLC 821 at para. 74 per Clarke LJ; and* Weissfisch *v.* Julius *[2006] CLS 424 at para. 33(v) per Lord Phillips CJ. Nonetheless, I must consider whether the jurisdiction is wide enough to provide a base on which an injunction might be granted on the facts of this case."*

57. On the basis of Aikens J's judgment and Intermet FCZO *v.* Ansol Limited, *[2007] EWHC 226 in which Gloster J assumed that the court has power to grant an order to restrain the continuance of an arbitration, Jackson J said this in* J. Jarvis & Sons Ltd. *v.* Blue Circle Dartford Estates Ltd, *[2007] EWHC 1262 (TCC) at para 39: "It is clear from two decisions of the Commercial Court (with which I respectfully agree) that the jurisdiction does survive [the enactment of the 1996 Act], but its exercise will be even more sparing than before".*

58. I do not, I think, need to set out the observations of Clarke LJ and Lord Phillips CJ to which Aikens J referred. Aikens J recognised that in view of them he should assume that the court may in proper circumstances restrain a party from having a matter arbitrated before a tribunal despite there being no dispute that the parties are subject to a valid and binding arbitration agreement that the tribunal should determine such matters. In view of the decisions of Aikens J, Gloster J and Jackson J, a fortiori I should so assume. ***However, the authorities emphasise the caution with which the court should intervene to restrain arbitral***

proceedings, and this is also emphasised by section 1 of the 1996 Act: see above.

59. Reference was made before me to the doctrine of Kompetenz-Kompetenz, the general principle that every court is entitled to examine its own jurisdiction (West Tankers Inc *v.* Allianz Spa *(Case C-185/07) [2009], ECR 1-663, [2009] AC 1138 at para 57), and the similar principle recognised with regard to the powers of arbitral tribunals* (Dallah Co. *v.* Ministry of Religious Affairs of Pakistan, *[2010] UKSC 46 at paras 84-85). It does not necessarily mean that tribunals have exclusive power or jurisdiction to do so, but, given the consensual nature of arbitration, its application is necessarily subject to the parties' agreement. Under the 1996 Act, the tribunal's jurisdiction to rule upon its own substantive jurisdiction is enshrined in section 30 and the court's power to determine it circumscribed by section 32, but these sections are not directly relevant for present purposes. Here the parties agreed to references under the rules of the LCIA, including rule 23.4 to which I have referred. It suffices to say that Mr. Flynn did not argue that it would be a breach of rule 23.4 or contravene that doctrine of Kompetenz-Kompetenz to grant Nomihold's application.*

Is an anti-arbitration order just and convenient, and should the court exercise its discretion?

60. This leads to the question whether it is just and convenient to grant the order sought by Nomihold and whether I should exercise my discretion to grant it.

61. Nomihold argues that its application should be granted because it achieved the Award after a thorough and extensive arbitral process; because it is clear that MTSF has acted in breach of contract and threatens to do so, and it is starkly obvious that the New Arbitrations are an abuse; because damages are an inadequate remedy given that MTSF is not, as it accepts, in a position to satisfy the Award; and because the New Arbitrations are merely a device deployed by MTSF in the so-called enforcement war.

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63. I must ask myself whether in these circumstances it would be right to restrain MTSF from pursuing the New Arbitrations. They raise the money laundering complaint that was not considered in the Award because it was not an issue presented to the Tribunal. On its face it is a complaint of the kind that the parties agreed should be determined by LCIA arbitration. If the New Arbitrations proceed, the tribunals appointed to them will have adequate powers to determine the re-arbitration complaints. I say no more about the complaints themselves other than that they do not seem to me as straightforward as Mr. Beltrami submitted, but the tribunals could adopt procedures to deal with the re-arbitration complaint as a preliminary issue. It is for them to decide whether to do so.

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65. I do not overlook the costs that will be incurred in the New Arbitrations, even if Nomihold seeks and obtains a preliminary determination of its re-arbitration complaints, but this concern is to be assessed in the context of the sums involved in this dispute and its history.

66. I have said enough to make it clear that the court would make an order of the kind sought by Nomihold only in unusual circumstances. I am not persuaded that the facts of this case justify the exceptional order sought. I do not consider that it would be just or convenient to make it, and I would decline to exercise my discretion to do so."

(emphasis is mine)

109. [Also see another judgment of High Court of Justice Queen's Bench Division Commercial Court in the matter of *Amtrust Europe Limited* V. *Trust Risk Group SpA*,

[2015] EWHC 1927 (Comm.)].

110. This brings me to the judgments cited on behalf of HSPL and TAQA. The judgment in *McDonald's case* and the judgment of Single Judge in *Ramasamy*'s case were cited to demonstrate that injunction could be granted where the doctrine of *res judicata* applied or arbitration agreement had become incapable of being performed. I must indicate herein that the Division Bench of this Court in *McDonald's case*, while adverting to this aspect of the matter, does state in so many words that the principles governing anti-suit injunction may not necessarily apply to anti-arbitration injunction (See paragraphs 37 and 48 of the judgment). Furthermore, the Division Bench while adverting to the decision rendered in *Excalibur Venture LLC* v. *Texas Keystone Inc.*, 2011 EWHC 1624 (Comm.) made the following observations; which is also a judgment cited by Mr. Seth:

> *"48. It is pertinent to note that this case, that is, Excalibur (supra) stresses upon the difference of approach between a normal anti-suit injunction and an injunction restraining arbitration proceedings. We are also in agreement with this view. There must be a distinction between an anti-suit injunction and an anti-arbitration injunction. The principles which apply to an anti-suit injunction will not necessarily apply to an anti-arbitration injunction. It is further important to note that the exceptional cases where arbitrations could be injuncted upon holding that the arbitration proceedings would be oppressive or unconscionable were regarded as those circumstances which would include the situation where the very issue was whether or not the parties had consented to the arbitration or where there was an allegation that the arbitration agreement was a forgery just as in the case of* Albon *(supra). It is clear that none of these exceptional circumstances arise in the present case."*
>
> (emphasis is mine)

111. In *Ramasamy's case*, the learned Single Judge granted an injunction for the reason that defendants No. 6 and 10 in that case, against whom injunction was sought by the plaintiffs, had instead of invoking the arbitration agreement, had taken recourse to multiple forums, which included institution of half a dozen police complaints and, therefore, had made the arbitration agreement inoperative.

112. It is this judgment which was upheld by the Division Bench of Madras High Court in *C.G. Holdings Private Limited's case*.

113. To my mind, these cases are clearly distinguishable.

114. Insofar as the judgment in *Satish's case* is concerned, the same also would have no application. Briefly, the question before the Court was whether an Award given under the Arbitration Act, 1940, which, in effect, brought about partition of immovable property of value exceeding Rs. 100/- required registration under Section 17 (1)(b) of the Indian Registration Act, 1908 (in short "Registration Act"). This question was considered by the Supreme Court in the context of two full Bench decisions rendered by the Patna High Court and Punjab and Haryana High Court. There, High Courts took the view that an Award did not require registration under the scheme of Arbitration Act, 1940 unless a decree was passed in terms of the Award. In other words, the Award, according to these judgments, had no legal effect till a decree was passed in terms of the Award. Thus, according to the Full benches of the Patna High Court and the Punjab and Haryana High Court, the Award simpliciter would not require registration as it fell within the ambit of the exception mentioned in Section 17 (2)(vi) of the Registration Act.

115. The Supreme Court, however, based on its own judgment in the matter of *Uttam Singh Dugal & Co.* v. *Union of India* (where it held that the Award, once drawn up, has some legal force and was not a mere waste paper and if that be so, if it purports to or affects property within the meaning of Section 17(1)(b) of the

Registration Act), held that an Award even before it morphed into a decree required to be registered.

116. It is in this context that the Court observed that, once, an Award is passed, the rights and liabilities of the parties in respect of the claims raised, can be determined only on the basis of the Award. To my mind, this judgment can have no application to the facts obtaining in the instant case for the reasons given hereinabove.

117. The judgment in the case of *National Insurance Company* would also have no application to the facts obtaining in the present case as that case dealt with the aspect of discharge of a contract on account of issuance of a full and final settlement receipt and/or accord and satisfaction. Clearly, that situation does not obtain in the instant case.

118. The judgment in *Republic of India through Ministry of Defence* v. *Agusta Westland International Ltd.'s case* was placed on record only to highlight the fact that a suit for anti-arbitration injunction was maintainable. This judgment emphasized the fact that while this power is available, it is to be exercised sparingly. One can hardly quibble with this proposition of law, which is also the observation made by me in the foregoing paragraphs of my judgment.

119. Likewise, the Supreme Court in its judgment rendered in *World Sports Group*'s case, *inter alia*, came to the same conclusion, which is that the Court is not emasculated of its power to grant injunction wherever it deems fit.

120. Insofar as the judgment rendered by the Supreme Court in *Chloro Controls India Pvt. Ltd.* was concerned, reliance was placed on paragraph 131 which notices the principles statutorily set forth in Section 45 of the 1996 Act. The Court observes that one has to keep in mind, the provisions of Section 45 (where it applies), if one were to permit continuation of arbitration proceedings.

121. The judgment in *Vodafone* was cited for the same reason. Reliance was placed on paragraphs 110 and 111 of the judgment.

122. In the instant case, I have not been able to come to a conclusion that the arbitration agreement has been rendered null and void, inoperative or incapable of being performed. These expressions were used by Mr. Sethi in the context of very same facts which were put forth to expound the bar of *res judicata*, waiver, and abandonment. Since, I have held that a trial would be required the same reasoning would hold *vis-à-vis* this submission as well. Therefore, these judgments would have no applicability to the instant case.

123. The judgment of the Supreme Court in *K.K. Modi*'s case would also not be applicable to the facts obtaining in the instant case. Observations made in paragraph 44 of this judgment, on which reliance was placed, *inter alia*, advert to re-agitation of issues which have already been decided. The Court, *inter alia*, observes that disputes which fall within the ambit of doctrine of *res judicata*, their re-agitation would amount to abuse of the process of the Court.

124. The question raised is whether at this juncture it is just and convenient to injunct the 2nd Arbitration proceeding by labeling it as an abuse of process, which clearly is a mixed question of law and fact and would require trial.

125. Since I have come to the conclusion that under the relevant SIAC Rules, the 2nd Arbitral Tribunal could adjudicate upon this aspect, it cannot be said at this stage, especially, in the context of arbitration proceedings that triggering of 2nd arbitration proceedings is an abuse of process.

126. The jurisdiction, to my mind, as alluded to above, with regard to constructive *res judicata* and other legal pleas could justly and conveniently be adjudicated upon by the 2nd Arbitral Tribunal. Therefore, in my opinion, no case is made out for injunction by this Court.

Parameters for grant of anti-arbitration injunctions

127. Thus, if I were to attempt an encapsulation of the broad parameters governing anti-arbitration injunctions, they would be the following:

i) The principles governing anti-suit injunction are not identical to those that govern an anti-arbitration injunction.

ii) Court's are slow in granting an anti-arbitration injunction unless it comes to the conclusion that the proceeding initiated is vexatious and/or oppressive.

iii) The Court which has supervisory jurisdiction or even personal jurisdiction over parties has the power to disallow commencement of fresh proceedings on the ground of *res judicata* or constructive *res judicata*. If persuaded to do so the Court could hold such proceeding to be vexatious and/or oppressive. This bar could obtain in respect of an issue of law or fact or even a mixed question of law and fact.

iv) The fact that in the assessment of the Court a trial would be required would be a factor which would weigh against grant of anti-arbitration injunction.

v) The aggrieved should be encouraged to approach either the Arbitral Tribunal or the Court which has the supervisory jurisdiction in the matter. An endeavour should be made to support and aid arbitration rather than allow parties to move away from the chosen adjudicatory process.

vi) The arbitral tribunal could adopt a procedure to deal with "re-arbitration complaint" (depending on the rules or procedure which govern the proceeding) as a preliminary issue.

128. Therefore, for the foregoing reasons, I find no merit in the captioned application. It is, accordingly, dismissed.

129. It, however, goes without saying that the nothing stated hereinabove, would impact the decision on merits by the 2nd Arbitration Tribunal. The 2nd Arbitral Tribunal would be free to consider all pleas raised before it by the parties, including those raised before me, in the mode and manner deemed fit.

130. There shall, however, be no order as to costs.

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[1] 2 HYDROLOGY

Although stream gauging of Sorang Khad is being done since 1996, the quality of the available discharge data is questionable. The observed discharge data shows an average run-off depth of around 3500mm which does not correlate with the precipitation characteristics of the project area. Incidentally, similar rivulets exist on either side of Sorang with almost parallel disposition. These streams are Babha Khad on the upstream of Ghanvi Khad on the downstream. These streams have been gauged for several years and hydro power stations exist on both of them. Analysis of the available data shows run-off depths of 2179 mm on Ghanvi 1861mm on Bhaba. In contrast, the measured discharge in Sorang khad yield a runoff of 3614 mm for the concurrent period. It is apparent that Sorang flows have been overestimated.

[2] 310. Clause 9.1.1 of the SPA sets out one of the assumptions made by the Parties. Clause 9.1.1 is not a provision which requires performance of any obligation by NCCIHL. Therefore, the question of 'breach' of 9.1.1 as such does not arise. However, Clause 10.2.1 contains a covenant by NCCIHL undertaking to achieve WCD by 31 March 2013 and therefore, failure of NCCIHL to achieve WCD by 31 March 2013 would entitle TAQA to be indemnified for the losses caused as a consequence, under Clause 11.5 of the SPA.

[3] 390. The Tribunal awards the Claimants as follows:

Claim (d) Nil Relief Sought: Declaration that the Respondents are in breach of Clause 9.1.1 read with Clause 10.2.1 of the SPA.

Award: It is declared that NCCIHL failed to achieve Wet Commissioning by 31.3.2013, and therefore TAQA is entitled to be indemnified for the losses under Clause 10.2.1 read with Clause 11.5. [vide paragraph 310 of the Award]. It is declared that NCC is not liable to indemnify HSPL under Clause 10.2.1 of the SPA [vide paragraph 127 of the Award].