

Union of India (Uoi) and anr. Vs. J.G. Engineers Pvt. Ltd.

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Overruled by : [J.G. Engineers Pvt. Ltd. vs. Union of India \(UOI\) and Anr.](#)

SooperKanoon Citation : sooperkanoon.com/135681

Court : Guwahati

Decided On : Feb-08-2005

Judge : D. Biswas, A.C.J. and B.P. Katakey, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 4, 10, 11, 12, 16, 16(2), 16(3), 16(4), 24, 28(2), 28(3), 34, 34(2), 34(3), 36 and 37(1); [Arbitration Act, 1940](#) - Sections 20 and 20(1); [Limitation Act, 1963](#) - Sections 5; Contract Act - Sections 73 and 74

Appeal No. : Arbitration Appeal No. 1 of 2004

Appellant : Union of India (Uoi) and anr.

Respondent : J.G. Engineers Pvt. Ltd.

Advocate for Pet/Ap. : A. Thakur, B. Deka and R. Goswami, Advs.

Disposition : Appeal allowed

Judgement :

B.P. Katakey, J.

1. This appeal under Section 37(1)(b) of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'the Act') has been preferred by the appellants against

the order dated 12.12.2003 passed by the learned Ad hoc Additional District Judge No. 2, Kamrup, Guwahati in Misc. (Arbitration) Case No. 590/2001 dismissing the application filed by the appellants under Section 34 of the Act praying for setting aside the arbitral award dated 05.09.2001 passed by the sole arbitrator Mr. C. Vaswani in the arbitral proceeding between the appellants and the present respondents.

2. The facts in brief of the present case, is that, a notice inviting tender was issued by the appellant authority for extension of 'Extension Passenger Terminal of Guwahati Airport, SH : Civil Works including Plumbing'. The work was awarded to the respondent on 26.03.1993 for Rs. 7,35,05,712.00. As per condition of contract, the work consisted of 3 phases, each phase was to be completed in 7 months and the entire job was to be completed within 21 months with the date of starting as 10.04.1994. The appellant authority on 29.08.1994 terminated the contract on the ground of failure of the respondent no. 2 to complete the 1st phase of the work within the stipulated period of 7 months' time. Against the said order of termination of said contract the respondent-contractor approached this Court in Civil Rule No. 3959/94 and this Court vide order dated 27.09.1994 quashed the order of termination of work dated 29.08.1994 and directed the respondent No. 1 to allow the contractor time up to the end of January 1995 for completion of 1st phase of the work. This Court further observed that in case the respondent-contractor is unable to complete the 1st phase of the work for any reason by the end of January 1995, they may approach for extension of time. Extension of time for completion of the work was thereafter provisionally granted without prejudice to the right of the authority to recover liquidated damages in accordance with the provisions of Clause 2 of the contract agreement to keep the agreement alive and further stipulated that the time still continue to be the essence of the contract. Since the work could not be completed by the respondent-contractor, a show cause notice dated 18.02.1996 was issued by the Executive Engineer under Clause 3 of the terms of the contract asking the respondent-contractor to show cause within 10 days as to why action under Clauses 3(a), 3(b) and/or 3(c) of the agreement shall not be taken against it on account of breach of contract on their part. The appellant authority thereafter vide notice dated 14.03.1996 upon consideration of the show cause reply dated 17.02.1996 determined/rescinded the contract on the ground of

delay in execution of the aforesaid work and failure on the part of the respondent to compete even the 1st phase of the work even after expiry of 35 months, though the entire work consisting of 3 phases was to be completed within 21 months. By the said order of determination of contract it has been made clear that the security deposit stands absolutely forfeited to the Government and such cancellation was without prejudice to the right of the Government to realize the excess amount by suit or otherwise. The respondent-contractor was also informed that the work executed by it will be measured up to 25.03.1996 for which the contractor was asked to be present in a joint measurement failing which the work will be measured unilaterally which will be final and binding. The authority thereafter imposed compensation on the respondent in terms of Clause 2 of the contract as well as executed the work through other agencies at the risk and cost of respondent in terms of Clause 3 of the contract. The respondent-contractor thereafter vide communication dated 11.06.1996 requested the Chief Engineer for appointment of arbitrator by invoking Clause 25 of the agreement, along with said communication a list of 13 claims was annexed. Since no arbitrator was appointed by the appellant authority, the respondent-contractor filed an application before this Court for appointment of arbitrator and during the pendency of which Mr. Vaswani was appointed as arbitrator by the appellant authority on 14.02.1997 which leads to closure of Civil Revision (Arbitration) No. 5/96 filed by the respondent-contractor under Section 11 of the Act. After appointment of the Vaswani as arbitrator, the appellant authority referred 8 claims out of 13 claims on 04.03.1997, which were requested to be referred by the respondent-contractor, for adjudication. Mr. Vaswani, who was the Chief Engineer, retired from service as Chief Engineer on attaining the age of superannuation on 13.09.1997 and hence the appellant authority on 16.12.1997 appointed Mr. B.K. Biswas as arbitrator. The respondent-contractor thereafter filed an application before the Calcutta High Court under Sections 11 and 12 of the Act which was numbered as A.P. No. 140/98 to confirm the jurisdiction of Mr. Vaswani as arbitrator or to appoint a fit, competent and independent person as sole arbitrator in terms of the arbitration agreement and also to refer all disputes for arbitration to the sole arbitrator. The Calcutta High Court vide order dated 20.08.1998 directed the appellant authority to pass appropriate order to enable the arbitrator to conclude the pending references

by holding that there was no justification in revoking the appointment of Mr. Vaswani as arbitrator. In pursuant to the said direction of the Calcutta High Court, the authority revived the appointment of Mr. Vaswani as sole arbitrator vide order dated 24.09.1998 to decide and make his award regarding claims of the contractor and the counter-claims of the Union of India which were referred to the arbitrator on 04.03.1997 and 16.12.1997 'subject to their admissibility under Clause 25 of the contract agreement'. During continuance of the arbitration proceeding the respondent-contractor filed application dated 17.09.1999 before the Calcutta High Court in A.P. No. 140/98 which was registered as G.A. No. 3949/99 praying for asking Mr. Vaswani, sole arbitrator to adjudicate all 13 claims preferred by the respondent-contractor. Calcutta High Court vide order dated 14.10.1999 by modifying the order dated 24.02.1999 directed that all claims reflected in Annexure D to the application under Section 11 of the Act should be adjudicated upon by the sole arbitrator, Mr. Vaswani. The appellant authority during continuance of the arbitration proceedings again on 28.04.2000 filed an application challenging the jurisdiction of the arbitrator apart from the earlier objection dated 30.12.1997. The arbitrator Mr. Vaswani on 05.09.2001 published the award, awarding a sum of Rs. 1,04,97,908 together with interest, which was amended vide order dated 22.09.2001 by making minor corrections. The respondent-contractor on 02.02.2002 filed application under Section 36 of the Act for execution of the award before the Calcutta High Court and the said Court on 13.02.2002 passed an interim order directing the Reserve Bank of India to set apart a sum of Rs. 1,82,06,298 from the account of Union of India. The appellant authority thereafter approached the Calcutta High Court challenging its jurisdiction for execution of the award and also for vacating the interim order which was rejected vide order dated 18.06.2002 and hence the appellant authority moved the Hon'ble Supreme Court by filing Special Leave Petition Nos. 18494-96 of 2002 and Hon'ble Supreme Court vide order dated 25.10.2002 initially passed a stay order on the judgment delivered by the Calcutta High Court. The Hon'ble Supreme Court on 15.11.2002 passed the final order in Civil Appeal Nos. 7309-7311/02 arising out of SLP (C) Nos. 18494-96 of 2002, by setting aside the proceedings in execution undertaken by the Calcutta High Court along with the order impugned and has further given the respondent-contractor the liberty of filing the execution application in an

appropriate Court. The appellant authority, in the meantime, on 12.12.2001 filed an application under Section 34 of the Act in the Court of the learned District Judge, Kamrup, Guwahati for setting aside the award of the arbitrator dated 05.09.2001, which was registered as Misc. (Arbitration) Case No. 590/2001. The said application was rejected by the learned Ad hoc Additional District Judge, Guwahati vide order dated 12.12.2003 and hence the present appeal has been filed by the appellant authority before this Court.

3. We have heard Mr. Aswini Thakur, learned Additional C.G.S.C. appearing on behalf of the appellants and also Mr. Niloy Dutta, learned senior counsel appearing on behalf of the respondent.

4. As stated above, a notice inviting tender was floated for 'Extension of Passenger Terminal of Guwahati Airport, SH : Civil Works including Plumbing'. The respondent-contractor was settled with the contract for the amount of Rs. 7,35,05,712.00 with date of starting of the work as 10.04.1993 and date of completion as 09.01.1995. The total works were divided in three phases being Phase-I, Phase-II and Phase-III and 7 months' time for each phase was allowed totalling 21 months for the entire job. Since the contractor did not complete even the first phase of the work in 35 months, the appellant authority rescinded the work finally on 14.03.1996, which leads to the initiation of the arbitral proceeding under the Act. The respondent-contractor's claim before the arbitrator was under 13 heads. Against the said claim the arbitrator awarded a sum of Rs. 1,04,97,908 with simple interest. The chart showing the particulars of claims, amount claimed by the contractor and amount awarded by the arbitrator is quoted below:

'Claim Particulars	Amount Claimed	Amount Awarded
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Claim No. 1	Rs. 11,26,518	Rs. 11,26,518
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Claim Nos. 2, 4 & 5	Rs. 65,64,544	Rs. 26,57,172
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Claim No. 3 Rs. 1,00,000 Rs. 1,00,000

Claim No. 6 Rs. 67,608 Rs. 67,608

Claim Nos. 7 & 8 of C-136 Rs. 25,57,295 Rs. 17,50,000

Claim No. 9 of C-136 Rs. 30,79,160 Rs. 8,75,000

Claim No. 10 of C-136 Rs. 18,01,701 Nil

Claim No. 11 of C-136 Rs. 54,03,669 Rs. 39,12,000

Claim No. 12 of C-136 Interest @ 18% (a) simple

p.a. on interest @ 9%

Rs. 2,38,86,198 p.a. on

w.e.f. 20.05.1996 Rs. 38,21,298

w.e.f. 14.9.1996

to 31.03.1997.

(b) simple

interest

@ 15% p.a. on

Rs. 1,03,58,298

w.e.f. 01.04.1997

to the date of

payment of the

sum awarded.

Claim No. 13 of C-135 Rs. 2,13,729 Rs. 39,610

Counter-claim No. 1 Rs. 1,46,69,227 Nil

Counter-claim No. 2 Rs. 56,84,998 Nil

Counter-claim No. 3 Rs. 75,00,000 Nil

Counter-claim No. 4 Rs. 1,00,000 Nil

TOTAL Rs. 1,04,97,908

Plus interest in terms of award in Claim No. 12'.

5. Mr. Thakur, learned Additional C.G.S.C. has submitted that the award dated 05.09.2001, which was corrected on 22.09.2001, passed by Mr. Vaswani as arbitrator as well as the order dated 12.12.2003 passed by learned Ad hoc Additional District Judge No. 2, Kamrup is bad in law on the following grounds:

(i) Mr. C. Vaswani after his retirement from service as Chief Engineer, on attaining the age of superannuation on 30.09.1997, ceased to be the arbitrator and cannot act as arbitrator in view of Clause 25 of the contract agreement and became incapacitated to arbitrate more so when the new arbitrator, namely Mr. B.K. Biswas was appointed by the appellant authority on 16.12.1997.

(ii) That Calcutta High Court having no jurisdiction to entertain any application under the provisions of the Act, the cause of action having arisen as well as the subject-matter of dispute having been within the jurisdiction of Gauhati High Court, order passed by Calcutta High Court directing the appellant authority to continue with the arbitral proceeding with Mr. C. Vaswani as arbitrator is a nullity, more so when the respondent-contractor from time to time approached the Gauhati High Court regarding the matter arising out of the contract and hence the award passed by the arbitrator is in conflict with public policy of India as contemplated under

Section 34(2)(b)(ii) of the Act.

(iii) The arbitrator exceeded the scope of arbitration in as much as, he passed the award relating to the matter excepted by the terms of the contract agreement and said matters being outside the purview of the arbitration, the award passed by the arbitrator is wholly illegal being contrary to the terms of contract and also the provisions of the Act. The Engineer-in-Charge having been accepted to be the final authority by the contractor, to decide about the determination/recession of contract on the ground of delay and/or failure to complete the work within the stipulated period of time; the validity of the order of determination/recession cannot be raised and decided by the arbitrator and consequently no award can be passed by the arbitrator.

(iv) The award passed by the arbitrator is also bad as the arbitrator cannot award anything towards anticipated profit, since the question of awarding anticipated profit may arise only when the arbitrator can decide the legality or validity of the order of determination of contract, which, in the present case, being an 'excepted matter', cannot be gone into by the arbitrator.

(v) The counter-claim of Union of India having been rejected by the arbitrator in total disregard of the agreed terms of contract and also on the basis of the decision given by him on the 'excepted matters', the arbitral award is bad in law being contrary to the provisions of the Act.

6. Elaborating the argument on the first and the second points raised, Mr. Thakur, learned Additional C.G.S.C. has taken the Court to Clause 25 of the contract agreement, which reads as follows:

'Clause 25--Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter of thing whatsoever in anyway arising out of or relating to the contract designs, drawings, specifications, estimates, instructions orders of these conditions or otherwise concerning the works or the execution or failure to execute the same whether

arising during the progress of the work or after the completion of abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, CPWD in charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said CPWD at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he has to deal with the matters to which the contract relates and that in the course of his duties as Government servant he has expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or administrative head as aforesaid at the time of such transfer or vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the CPWD as aforesaid should act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all. In all cases where the total amount of all the claims in dispute is Rs. 75,000 (Rs. seventy five thousand) and above the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the [Arbitration Act, 1940](#), or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes.

It is also a term of the contract, if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Government that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims. The arbitrator(s) may from time to time with consent of the

parties enlarge the time, for making and publishing the award.

The decision of the Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates for substandard work which may be decided to be accepted will be final and would not be open to arbitration.'

7. Mr. Thakur has submitted that Clause 25 has specifically laid down that no person other than the person so appointed can act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all. According to Mr. Thakur, Mr. Vaswani the original arbitrator appointed by the appellant authority retired from service as Chief Engineer on 30.09.1997 on attaining the age of superannuation thereby vacating the office of the Chief Engineer within the meaning of Clause 25 of the terms of the contract and hence Mr. Vaswani cannot act as arbitrator thereafter. The new arbitrator Mr. B.K. Biswas who was appointed on 16.12.1997 by the appellant authority in terms of Clause 25 of the contract agreement only had the jurisdiction to arbitrate between the parties. Mr. Thakur in support of his contention has placed reliance on the decisions of the Hon'ble Supreme Court in Union of India and Ors. v. Prabhat Kumar and Bros. and Anr. reported in : AIR 1994 SC649 and Jagat Ram Trehan & Sons v. Union of India reported in 2001(3) Arb. LR 41 (SC).

8. Mr. Thakur has further submitted that Mr. Vaswani was reappointed as arbitrator on 24.09.1998 in compliance with the direction issued by the Calcutta High Court on 20.08.1998 passed in A.P. No. 140 of 1998. The said reappointment of Mr. Vaswani being as per direction of the Calcutta High Court, which has no jurisdiction to entertain any application under Section 11 of the Act regarding appointment of arbitrator, the arbitrator cannot assume jurisdiction to arbitrate the dispute between the parties.

9. According to Mr. Thakur, the objection regarding the jurisdiction of Mr. Vaswani to arbitrate was taken on 13.12.1997 and thereafter again on 28.04.2000 as required under Section 16 of the Act, which the arbitrator has failed to consider. According to him, since the arbitrator has no jurisdiction to arbitrate the dispute between the parties, the arbitral award passed by said Mr. Vaswani as arbitrator is a nullity in the eye of law.

10. Countering the argument put forward by Mr. Thakur, the learned Additional C.G.S.C., Mr. N. Dutta, learned senior counsel for the respondent-contractor has submitted that the legality and validity of the order dated 20.08.1998 passed by Calcutta High Court cannot be questioned in an application under Section 34 of the Act and the present appellants not having challenged the said order before the appropriate Court, and the appellants also having reappointed Mr. Vaswani as arbitrator on 24.09.1998 in terms of the said order passed by the Calcutta High Court, they now cannot turn around and question the legality and validity of the order passed by the Calcutta High Court. Also it does not fit in the mouth of the appellants that the arbitral award passed by Mr. Vaswani is a nullity in the eye of law on that ground, in as much as, that the appellants have revived the appointment of Mr. Vaswani as arbitrator to arbitrate the dispute between the parties. The appellants having participated in the arbitral proceeding by filing a counter statement of facts and the counter-claim before Mr. Vaswani after he was reappointed, the appointment of Mr. Vaswani cannot be challenged by the appellants now.

11. Mr. Dutta has further submitted that in any case under Section 16 of the Act, the objection to the jurisdiction of an arbitrator to arbitrate the dispute is required to be taken by the party who objects his jurisdiction, not later than the submission of statements of defence.

12. The arbitrator, according to Mr. Dutta, though has the power to admit objection to his jurisdiction at a later point of time, after submission of statement of defence, the objector is to explain the delay in not approaching the arbitrator before submission of statement of defence. According to Mr. Dutta, the appellants on 04.03.1997 referred 8 claims out of 13 claims for adjudication by Mr. Vaswani as arbitrator, and the appellants only on 30.12.1997, after the 4 hearings conducted by Mr. Vaswani, objected to the jurisdiction of Mr. Vaswani to arbitrate the dispute between the parties on the ground that Mr. Vaswani retired from service as Chief Engineer on 30.09.1997 and Mr. B.K. Biswas was appointed as arbitrator in his place by the appellants and it is Mr. Biswas who can only arbitrate.

13. The further submission of Mr. Dutta is that Mr. Vaswani was reappointed on 24.09.1998 and the appellants have submitted the statement of counter-claim on 03.02.1999 and they only on 28.04.2000 filed the second application objecting the jurisdiction of the arbitrator to arbitrate the dispute between the parties. According to Mr. Dutta, the said objection having not been raised in time and there being no explanation for delay in raising such objection, as required under Section 16 of the Act, the appellants have waived their right to object to the jurisdiction of Mr. Vaswani to arbitrate the dispute.

14. Upon perusal of the materials of record, it is evident that the respondent-contractor initially filed an application under Section 11 of the Act before the Gauhati High Court, which was registered as Civil Revision (Arbitration) Case No. 5 of 1996, for appointment of an arbitrator to arbitrate the dispute between the parties, which proceeding came into an end because of the appointment of Mr. Vaswani as arbitrator on 14.02.1997, during the pendency of the said proceeding before this Court. After appointment of Mr. Vaswani as arbitrator, the appellants on 04.03.1997 referred 8 claims out of 13 claims raised by the respondent-contractor for adjudication by Mr. Vaswani as arbitrator. It is evident from the order dated 14.02.1997 that the Chief Engineer (NEZ), CPWD, Government of India appointed Mr. Vaswani, Chief Engineer (EZ), CPWD as sole arbitrator to decide and make his award regarding claims/disputes by the contractor and the counter-claims of the Government, subject always, however, to their admissibility under Clause 25 of the aforesaid agreement.

15. It also appears from the said order of appointment appointing Mr. Vaswani as arbitrator that he was not appointed as arbitrator by virtue of his holding the office of Chief Engineer, but was appointed by name. Clause 25 of the arbitration agreement, which has already been quoted above, also does not require the appellant authority to appoint a person as arbitrator by virtue of holding any office. Under the said clause, the Chief Engineer, CPWD in charge of the work at the time of dispute, can appoint any person as arbitrator to arbitrate the dispute between the parties. Mr. Thakur, the learned Additional C.G.S.C. has given emphasis on the requirement of Clause 25 of the contract agreement that the Chief Engineer is required to appoint another person to act as arbitrator, in case

the arbitrator already been appointed, has been transferred or vacated his office or being unable to act for any reason and submits that in the instant case, Mr. Vaswani having been retired from service on attaining the age of superannuation on 30.09.1997 has vacated his office as Chief Engineer and, therefore, he ceased to be an arbitrator from the date of retirement, for which Mr. Biswas was appointed by the authority to arbitrate the dispute. Therefore, according to Mr. Thakur, Mr. Vaswani cannot continue as arbitrator since he ceased to be an arbitrator to arbitrate the dispute and, therefore, the arbitral award passed by Mr. Vaswani is a nullity.

16. In *Union of India and Ors. v. Prabhat Kumar and Bros.* (supra), the Apex Court by taking into account the stipulation in the arbitration clause of the contract to the effect that arbitration is to be by an Engineer Officer, has held that on retirement of the said officer from service, he ceased to be an arbitrator. In *Jagat Ram Trehan* (supra), the Apex Court has held that arbitrator cannot pass an award after relinquishment of office as the arbitrator. But in the present case, as stated above, Mr. Vaswani was not appointed as arbitrator by virtue of his holding office as Chief Engineer (EZ) but was appointed by name. Clause 25 of the contract agreement also does not debar appointment of any person other than the Chief Engineer as arbitrator. The appellant authority in fact appointed Mr. Vaswani as arbitrator in terms of Clause 25 of the contract agreement and the words 'vacation of office' do not mean the retirement from the service as Chief Engineer, but it means the vacation of office as arbitrator. In the instant case, since Mr. Vaswani never at any point of time vacated the office as arbitrator. It also cannot be said that he ceased to be an arbitrator on his retirement from the post of Chief Engineer (EZ).

17. The appellant authority even after retirement of Mr. Vaswani as Chief Engineer accepted him as arbitrator and participated in the arbitral proceeding in 4 hearings consisting of more than 50 sittings, and it was only after 3 months from the date of retirement of Mr. Vaswani as Chief Engineer, the appellant authority on 30.12.1997 for the first time raised the objection about the jurisdiction of Mr. Vaswani to arbitrate on the ground that he retired from service. Sub-section (2) of Section 16 of the Act requires that a plea of jurisdiction of the arbitrator shall have to be raised not later than the submission of statements of defence. Sub-section

(4) of Section 16 of the Act also provides that the arbitrator may entertain such plea at a later point of time if it considers the delay justified.

18. For better appreciation Section 16 of the Act is quoted hereinbelow:

'16. Competence of arbitral tribunal to rule on its jurisdiction--

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.'

19. In the present case, the appellants for the first time on 30.12.1997 raised objection regarding the jurisdiction of arbitrator after 3 months from the date of superannuation of Mr. Vaswani from the post of Chief Engineer and after participating in 4 hearings of the arbitral proceeding before Mr. Vaswani. Moreover, after reappointment of Mr. Vaswani as arbitrator on 24.09.1998, in terms of the order passed by the Calcutta High Court on 20.08.1998, the appellants for the first time on 28.04.2000, i.e. almost after one and half years from the date of such reappointment objected to the jurisdiction of Mr. Vaswani. The said objection was filed by the appellants after conclusion of 32 hearings in the arbitration proceedings and also after more than one year from the date of submission of statements of counter-claims by the appellants on 03.02.1999. It is also evident from the objection to the jurisdiction raised by the appellant authority that the appellants have not stated anything in the said objection about the reasons in not approaching the arbitrator to rule on his jurisdiction before submission of counter-claim as required under Section 16 of the Act.

20. Section 4 of the Act provides that in the event of failure of the party to raise objection under the provisions of the Act without undue delay or, if a time limit is provided for stating that objection, within that period of time shall be deemed to have waived his right to so object.

21. For better appreciation, Section 4 is quoted hereinbelow:

'4. Waiver of right to object--A party who knows that--

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.'

22. In the present case, as already observed, the objection was not raised by the appellants on the jurisdiction of Mr. Vaswani to act as an arbitrator, within the time

allowed under Section 16(2) of the Act or without causing undue delay. The appellants in fact have raised the objection for the first time only on 30.12.1997 after participating in the arbitral proceeding conducted by Mr. Vaswani in 4 hearings consisting of more than 50 sittings, and the second objection was raised on 28.04.2000 after almost one and half years from the date of submission of statements of counter-claim and after conclusion of 32 hearings of arbitral proceeding. Therefore, the appellants cannot under the law object to the jurisdiction of Mr. Vaswani to continue as arbitrator on the ground of his retirement from service.

23. In *Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors.* reported in : [2002]1SCR1136 , the Apex Court while dealing with Section 4 and Section 16(2) of the Act has held that a challenge to the jurisdiction of an arbitrator under Section 16(2) must be taken not later than the submission of statements of defence and the party would be free if it so choose not to raise such challenge. The Apex Court has further held that a conjoint reading of the Sections 10 and 16 of the Act shows that an objection to the composition of the arbitral tribunal is a matter, which is derogable, because a party is free not to object within the time prescribed under Section 16(2) of the Act. If a party chooses not to so object there will be a deemed waiver under Section 4 of the Act.

24. The contention of Mr. Thakur, the learned Additional C.G.S.C. that the Calcutta High Court having no jurisdiction to entertain any application under Section 11 of the Act, cannot pass any order directing the appellant to continue Mr. Vaswani as arbitrator and, therefore, the award passed by Mr. Vaswani as arbitrator, also cannot be accepted at this stage, as the appellant, as already observed above, participated in the arbitral proceeding before Mr. Vaswani and the order of the Calcutta High Court has also not been challenged in any Court.

25. In view of the discussions made above, we are unable to accept the contentions raised by Mr. Thakur, the learned Additional C.G.S.C. in so far as it relates to Point Nos. I and II are concerned.

26. Having decided the Point No. II raised by the appellants against them, let us now consider the submission of Mr. Thakur, learned Additional C.G.S.C. relating to

Point No. III.

27. Mr. Thakur, the learned C.G.S.C. elaborating his argument on Point No. III has submitted that under the terms of contract total time allowed for completion of work in 3 phases was 21 months with a period of 7 months for each phase. The respondent-contractor having failed to complete the first phase even after expiry of 35 months, the Superintending Engineer had to enforce the provision of Clause 2 of contract agreement. In terms of Clause 2 of the contract agreement, the Superintending Engineer determined the compensation as Rs. 5,90,000 which was levied on the respondent-contractor. According to Mr. Thakur time being essence of contract and both the contractor and the appellants having entered into the contract which contains Clause No. 2 stipulating levy of compensation in the event of failure of the contractor to complete the work with all due diligence, the compensation was levied by the Superintending Engineer and the same having been quantified to be an amount not exceeding 10% of the estimated cost of works as shown in the tender, the said matter awarding compensation became final and cannot be the subject-matter of dispute in the arbitral proceeding. Mr. Thakur has further submitted that, even if, such dispute is referred to the arbitrator for arbitration, that will not estop the appellants from raising the question of arbitrability of the said claim by the arbitrator since the arbitrator is to pass award only in terms of the contract agreement as well as the provisions of the Act. According to Mr. Thakur the respondent-contractor and the appellants having agreed for levy of compensation under Clause 2 to the maximum indicated therein by the Superintending Engineer, the question of levy of compensation cannot be the subject-matter of arbitral proceeding, and hence no award can be passed by the arbitrator to pay the said amount, which would be contrary to the agreed terms of contract and the provisions of the Act.

28. Mr. Thakur has further contended that by Clauses 2 and 3 of the contract agreement the respondent-contractor had agreed that the decision of the Engineer-in-Charge shall be final and binding in so far as the determination of contract between the parties, in the event, the delay was caused by the contractor to complete the work. Clause 3(i) of the terms of contract also provides that--whether the contractor has caused the delay in completion of work or whether the

contractor has failed to complete the work by the date of completion, the Engineer-in-Charge shall be final authority and his decision in that regard shall be final and binding on the contractor. According to Mr. Thakur, the contract was awarded to the contractor on 10.11.1993, first phase of which was required to be completed by 26.03.1993 and the entire works consisting of Phase Nos. I, II and III were to be completed by 10.01.1995. Since the contractor even failed to complete the first phase of the work within the stipulated time, i.e. by 10.11.1993, the contract was terminated by the authority on 29.08.1994. The contractor thereafter approached the Gauhati High Court against the order of termination of the contract, by filing the Civil Rule No. 3959/94 and the High Court vide order dated 27.09.1994 while quashing the order of termination of the contract dated 29.08.1994 allowed the respondent-contractor time up to the end of January 1995 for completion of the first phase of the work with further observations that in event the same cannot be completed for any reason, application for extension may be filed before the appellant authority who has been given the liberty to pass necessary orders in accordance with law. According to Mr. Thakur, the respondent-contractor even could not complete the work by January 1995, and even after extended period given to the contractor by the authority. Thereafter the Executive Engineer had no alternative but to issue notice dated 08.02.1996 to the respondent-contractor to show cause within 10 days as to why the action under Clauses 3(a), (b) and (c) of the contract agreement shall not be taken against him on account of breach of contract on his part. The Engineer-in-Charge thereafter vide order dated 14.03.1996 determined/rescinded the contract on the ground of failure of the respondent-contractor to adhere to the programme given to him for completion of first phase of the work. The Engineer-in-Charge by the said order has also forfeited the security deposit and invoked the power under Clauses 3(a), (b) and (c) of the contract. According to Mr. Thakur, the respondent-contractor having accepted the Engineer-in-Charge to be the final authority to decide on the determination of contract and also about the delay or failure to complete the work in spite of stipulated period of time and also having accepted that the decision of the Engineer-in-Charge shall be final and binding on the parties, the arbitrator cannot under the terms of contract and the provisions of the Act pass an award to the effect that the determination/recession of contract by the appellant authority

was illegal on the ground that the respondent-contractor could not complete the work within the stipulated time on account of failure of the department to supply of necessary drawings, etc. in time. According to Mr. Thakur, the same being the 'excepted matter', no award can be passed by the arbitrator about the legality or otherwise of the recession of the contract and, therefore, the entire award passed by the arbitrator by holding that the recession of the contract was illegal and bad in law being contrary to the terms of contract entered into between the parties as well as provisions of the Act. It has further been contended by Mr. Thakur that the claim of contractor against Claim No. 1 in respect of Rs. 3,17,468.80 which has been recovered by the appellant authority for the work done by other agency at the risk and cost of the respondent-contractor in terms of the provisions as contained in Clause 3 of the contract agreement, cannot also be entertained by the arbitrator since it is an 'excepted matter'.

29. The further argument of Mr. Thakur is that awarding a sum of Rs. 2,19,050 towards the escalation of prices for the work done up to July 1995, is also contrary to the terms of the contract of agreement as contained in Clause 10(CC). According to Mr. Thakur, Clause 10(CC) of the contract agreement stipulates that the contractor shall be compensated for increase in the prices of the material only for the works done during the stipulated period of the contract and such compensation for escalation in prices shall be available to the contractor only when the contract is validly extended under Clause 5 of the contract without any action under Clause 2. According to Mr. Thakur, the Superintending Engineer who is the sole authority, to impose compensation under Clause 2 of the contract agreement and who having imposed the same for the period from 10.01.1995 to 14.03.1996, the contractor is not entitled to any escalation for that period and, therefore, no amount can be awarded towards the compensation for escalation in price, the same being an 'excepted matter' in terms of Clause 10(CC) of the contract agreement.

30. Mr. Thakur, the learned Additional C.G.S.C has further contended that since the validity of recession/determination of the contract cannot be gone into by the arbitrator in view of the agreed terms of contract as contained in Clause 3 of the contract agreement, the entire arbitral award passed by the arbitrator by holding

that the recession/determination of the contract was illegal, is bad in law being contrary to the agreed terms of contract vis-a-vis the provisions of the Act and, therefore, the entire arbitral award is to be set aside.

31. Mr. Thakur has also urged that the arbitrator cannot also pass any award for refund of the security deposit, against Claim No. 3, towards extra items against Claim No. 4, balance payment of escalation beyond July 1995 to the date of termination of contract, against Claim No. 5, amount towards extra for cutting, etc., against Claim No. 6 and also amount against Claim Nos. 7, 8, 9, 10, 11 which includes anticipated profit and hence there is no question for payment of any interest by the appellant authority.

32. Mr. Thakur, in support of his contentions, has placed reliance on the decisions of the Hon'ble Supreme Court in General Manager, Northern Railway and Anr. v. Sarvesh Chopra reported in : [2002]2SCR156 ; Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. reported in : [2002]1SCR728 ; Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in : [2003]3SCR691 and the decision rendered by the Delhi High Court in Hans Construction Co. v. Delhi Development Authority and Ors. reported in 1996(Suppl.) Arb. LR 420 (Del.).

33. Mr. Dutta, learned senior counsel appearing on behalf of the respondent has submitted that the contract agreement does not stipulate that the contractor has agreed to the conditions that the recession of the Engineer-in-Charge in the matter relating to the determination/recession of the contract on the ground of delay or failure of the contractor to execute the work within the stipulated time shall be final and binding, and hence the dispute relating to the legality and validity of the recession of the contract is arbitrable by the arbitrator. Mr. Dutta, relying upon the Clause 25 of the contract, has submitted that questions and disputes concerning the work or the execution or failure to execute the work, whether rescind during the progress of the work or after the completion or abandonment thereof, shall have to be referred to the sole arbitrator to be appointed by the Chief Engineer in charge of the work. According to Mr. Dutta, the question of determination/recession of the contract or failure to execute the work in time being the questions relating to the concerned work, the same is within the scope of

arbitration by the arbitrator in passing the award. The further argument of Mr. Dutta is that the appellant authority having referred the dispute relating to determination/recession of the contract to the arbitrator for arbitration, they have subjected themselves to the jurisdiction of the arbitrator and, therefore, cannot now question the arbitrability of the said recession of the contract, in an application under Section 34 of the Act.

34. Mr. Dutta has further contended that this Court cannot re-appreciate the evidence before the arbitrator and shall not interfere with the arbitral award by appreciating the evidence on record, unless the arbitrator acts mala fide or the award is not in terms of contract agreement or in terms of the provisions of the Act.

35. The further argument of Mr. Dutta is that there is a positive relinquishment or abandonment of the right so far as the adjudication of 'excepted matter' is concerned and the appellant authority having referred the said dispute regarding recession of the contract for arbitration, they now cannot raise the question of non-arbitrability of the recession of the contract. Mr. Dutta, in support of his contention, has placed reliance in the judgments passed by the Apex Court in Food Corporation of India v. Sreekanth Transport reported in : [1999]3SCR699 and M.K. Shah Engineers & Contractors v. State of M.P. reported in : [1999]1SCR419 .

36. Mr. Dutta has further contended that the ground relating to the arbitrability of the excepted matter having not been taken in the application within the time allowed under Sub-section (3) of Section 34, the said plea cannot be decided in an application under Section 34 of the Act, the same having been beyond the period of limitation prescribed under Sub-section (3) of Section 34. Mr. Dutta in support of his argument has placed reliance on the decision of the Apex Court in Union of India v. Popular Construction Co. reported in : AIR 2001 SC4010 and a decision of Bombay High Court in Vastu Invest & Holdings Pvt. Ltd., Mumbai v. Gujarat Lease Financing Ltd., Mumbai reported in 2001(2) Arb. LR 315 (Bom.) (DB).

37. Let us now consider about the points raised by Mr. Dutta regarding additional grounds relating to the arbitrability of excepted matter by the arbitrator, by way of amendment of Section 34 application beyond the period allowed under Sub-section (3) of Section 34.

38. The appellants on 12.12.2001 filed in petition under Sections 34(2) and (3) of the Act in the Court of the learned District Judge, Kamrup, Guwahati which is the Principal Civil Court, for setting aside the arbitral award dated 05.09.2001 passed by the arbitrator, i.e. within the time allowed under Sub-section (3) of Section 34. In the said application filed by the appellants, it has specifically been pleaded that the arbitrator has passed the award in relation to the excepted matters and as such the arbitration award is wholly illegal being violative of the terms of contract and the provisions of the Act. The said point was elaborated in the additional grounds taken by the appellants, which was filed beyond the period of limitation prescribed under Sub-section (3) of Section 34 of the Act. The relevant portion of the application filed under Section 34 of the Act on 12.12.2001 is extracted below:

'30. That this petition begs to answer to each of the claims of the Opposite Party No. 2 as hereunder:

Reg. Claim No. I--The claim amounting to Rs. 12,24,930 and later was revised as Rs. 11,26,518, against the claim the arbitrator has awarded Rs. 11,26,518. However, arbitrator awarded escalation amount Rs. 2,19,050 and Rs. 3,17,486 against risk and cost given on the basis of wrongful termination as concluded by the hon'ble arbitrator is not convening. Further, he has released against compensation for delay Rs. 5,90,000 under Clause 2 of the levy where Superintending Engineer is the Supreme Authority to levy compensation. In this respect we may refer Hon'ble Supreme Court of India in Civil Appeal No. 1524 of 1982 of Vishwanath Sood v. Union of India, decided on 24.01.1989 had observed that the Superintending Engineer in determining the rate of compensation chargeable will have to go into all aspects and determine whether there is any negligence on the part of the contractor or not. Hence not only the amount of compensation but also the ground on which compensation on levied are beyond arbitrator's jurisdiction vide Clause 2 read with Clause 25 (except otherwise provided in the agreement). The Hon'ble Delhi High Court in Hans Construction Co. v. Delhi Development Authority, 1996(Suppl.) Arb. LR 420 (Del.), related above views reversed the decision of the arbitrator and upheld the compensation levied by the Superintending Engineer. This proved beyond doubt that the arbitrator cannot re-appreciate or re-open the issue of delay in completion of work

or rescission of contract or levy of compensation because the Superintending Engineer being competent authority under Clause 2. Hence release of compensation of delay for Rs. 5,90,000 made by the arbitrator is a wrongful decision and here hon'ble arbitrator has gone beyond his jurisdiction and thus the award given by him is unwarranted and to be set aside....

XXX XXX XXX

It is relevant to mention that the hon'ble arbitrator has adjudicated upon the claims which is beyond his power and his excepted matter as provided under Clause 25 of the agreement. This is settled legal position by the Hon'ble Supreme Court that decision of Superintending Engineer regarding levy of compensation is final and not arbitrable. The hon'ble arbitrator has no jurisdiction to adjudicate upon the decision of the Superintending Engineer. Relying the case of Vishwanath Sood v. Union of India, : [1989]1SCR288 . On the basis of Hon'ble Supreme Courts decision there are number of cases by various Hon'ble Courts wherein the Hon'ble Courts had held that even the merit of decision of the Superintending Engineer cannot be looked into by the hon'ble arbitrator. The Hon'ble Court has also held that the remedy lies elsewhere and not to the hon'ble arbitrator.

In the case under reference the hon'ble arbitrator has gone beyond his jurisdiction by doing away with the decision of the Superintending Engineer levy of compensation under Clause 2 of the agreement. He has further held that the decision of the Superintending Engineer regarding levy of compensation is bad (para 2 at page 5, para 5 at page 18 and para 3 at page 19 of the award). He has disallowed the recovery of levy of compensation under Clause 2 and also disallowed the Counter-Claim No. 2 of the department by adjudication on the decision of levy of compensation which is contrary to settled legal position by the Hon'ble Court (supra). Therefore, in view of the settled legal position by the Supreme Court the proper courses open to the hon'ble arbitrator is not to interfere with the decision of levy of compensation under Clause 2 and he should have asked the parties to seek relief in the proper forum. Instead of doing this he has acted beyond his jurisdiction. Hon'ble Court may consider this counterclaim as per law.'

39. It is, therefore, abundantly clear that the point of arbitrability by the arbitrator was taken in the initial application under Section 34 of the Act, which was elaborated in the subsequent application filed by the appellants. Moreover, the respondent-contractor in the objection filed against the said application under Section 34 filed on 06.03.2003 has not raised any objection relating to the maintainability of the said additional grounds.

40. The Apex Court in *Union of India v. Popular Construction Co.* (supra), while dealing with the question whether the provisions of Section 5 of [Limitation Act, 1963](#) are applicable to an application challenging the award under Section 34 of the Act has held that the time limit prescribed under Section 34 to challenge the award is absolute and unextendable by the Court under Section 5 of the Limitation Act. The Apex Court has not dealt with the question as to whether the additional grounds taken subsequent to the filing of the application under Section 34 can be treated as a part of original application or whether the additional grounds taken beyond the period of limitation prescribed under Sub-section (3) of Section 34 is to be rejected as barred by time. Therefore, the decision rendered by the Apex Court in *Union of India v. Popular Construction Co.* (supra), is not applicable in the present case.

41. A Division Bench of the Bombay High Court in *Vastu Invest & Holdings Pvt. Ltd., Mumbai v. Gujarat Lease Financing Ltd., Mumbai* (supra), while dealing with an order passed by the learned Single Judge rejecting the chamber summons taken out for amendment of the petition filed under Section 34 of the Act by adding certain grounds has held that--no independent ground of challenge to the arbitral award can be entertained after the period prescribed under Sub-section (3) of Section 34 of the Act.

42. In the instant case, as already observed, the point regarding arbitrability of 'excepted matters' by the arbitrator was taken up in the first application under Section 34, which was filed within the time and the said point was only elaborated by subsequent application giving additional ground and, therefore, it cannot be said that the said point was not raised in the initial application. In any case amendment can even be allowed even after the relief is barred by the limitation, if

such amendment subserve cause of justice. Our view is fortified by the decision rendered by the Apex Court in *Pankaja and Anr. v. Yellappa (D)* by LRs. and Ors. reported in 2004 AIR SCW 4522. Para 14 of the said judgment passed by the Hon'ble Supreme Court is quoted below:

'14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.'

43. In this case the amendment was allowed by the learned Court below, which has not been challenged by the respondent. After amendment, therefore, the amended portions became the part of the original application under Section 34 of the Act. Hence, the contention of Mr. Dutta, in this respect, cannot be accepted and, therefore, rejected.

44. Let us now consider whether the arbitrability of determination/ recession of the contract has been excluded from the purview of arbitration by an arbitrator in terms of the contract agreement entered into between the appellants and the respondent-contractor, more particularly in terms of Clauses 2, 3 and 25 of the contract agreement.

45. For better appreciation, Clauses 2 and 3 of the contract agreement are quoted below:

'Clause 2--The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the tenth day after the date on which the order to commence the work is issued to the

contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for everyday that the work remains uncommenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed; three-eighths of the work, before one-half of such time has elapsed and three-fourths of the work before three-fourths of such time has elapsed. However for special jobs if a time schedule has been submitted by the contractor and the same has been accepted by the Engineer-in-Charge, the contractor shall comply with the said time schedule. In the event off the contractor failing to comply with this condition, he shall be liable to pay as compensation, an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete. Provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent of the estimated cost of the work as shown in the tender.

Clause 3--The Engineer-in-Charge may without prejudice to his right against the contractor in respect of any delay or inferior workmanship or otherwise or to any claims for damage in respect of any breaches of the contract and without prejudice to any rights or remedies under any of the provisions of this contract or otherwise and whether the date for completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases--

(i) If the contractor having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being preformed in any inefficient or otherwise improper or unworkman like manner shall (sic)....it to comply with the requirements of such notice for a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work so

that either in the judgment of the Engineer-in-Charge (which shall be final and binding) he will be unable to secure completion of the work by the date of completion or he has already failed to complete the work by that date.

(ii) If the contractor being a company shall pass a resolution or the Court shall make an order that the company shall be wound up or if a receiver or a manager on behalf of the creditor shall be appointed or if circumstances shall arise which entitle the Court or creditor to appoint a receiver or a manager or which entitle the Court to make a winding up order.

(iii) If the contractor commits breach of any of the terms and conditions of this contract. (iv) If the contractor commits any act mentioned in Clause 21 thereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the President of India shall have powers:

(a) To determine or rescind the contractor as aforesaid (of which termination or recession notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination or recession the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal of the Government.

(b) To employ labour paid by CPWD and to supply materials to carry out the works or any part of the work debiting the contractors with the cost of the labour and the price of the materials (of the amount of which cost and price certified by the Engineer-in-Charge shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respects in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract. The certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the contractor provided always that action under the Sub-clause shall only be taken after giving notice in writing to the contractor. Provided also that if the expenses incurred by the department are less than the amount payable to the contractor at his agreement rates, the difference should not be paid to the contractor.

(c) After giving notice to the contractor to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Engineer-in-Charge shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under this contract or on any other account whatsoever or from his security deposit or the proceeds of sales thereof or a sufficient part thereof as the case may be.

In the event of any one or more of the above courses being adopted by the Engineer-in-Charge the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any material or entered into any engagement or made any advances on account or with a view to execution of the work or the performance of the contract. And in case action is taken under any of the provisions aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work thereto or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.'

46. Clause 25 of the contract agreement begins with the words 'Except where otherwise provided in the contract'. The dispute concerning the works or the execution or failure to execute the work shall be referred to a sole arbitrator. Clause 2 of the contract agreement stipulates that time is the essence of contract and in case of failure to complete the work within the stipulated period of time, contractor shall be liable to pay compensation, to be determined by the Superintending Engineer whose decision shall be final. Clause 3 of the contract agreement stipulates that the Engineer-in-Charge without prejudice to his right against the contractor in respect of any delay, etc. and without prejudice to any rights or remedies under any of the provisions of the contract, may determine the contract, if in the opinion of the Engineer-in-Charge he is unable to secure completion of the work by the date of completion or the contractor has failed to

complete the work by that date. Both the parties have agreed that the judgment of the Engineer-in-Charge in that respect shall be final and binding.

47. From a conjoint reading of Clauses 2, 3(i) and 25 of the terms of contract agreement, agreed upon between the parties, it appears that the decision of Superintending Engineer levying compensation on the contractor for his inability to execute the work within time allowed and the judgment of the Engineer-in-Charge relating to the inability of the contractor to complete the work within the stipulated time, are final and binding on the parties, so also the order determining the contract under Clause 3 based on such judgment. The parties having accepted the said conditions as part of the contract cannot raise the dispute regarding the levy of compensation on the contractor for not completing the work in time and determination/recession of contract by the Engineer-in-Charge on the ground of failure of the contractor to complete the work within the stipulated date, same being the 'excepted matters'. In the instant case, as stated above, the contractor could not even complete the first phase of the work even after expiry of 35 months, which work he ought to have completed within seven months, i.e. by November 1993. For the failure of the respondent-contractor to complete even the first phase of the work within the stipulated period of time, the appellant authority had to levy compensation under Clause 2 and rescind the contract and award the contract to another contractor at the risk and cost of the appellants in terms of the Sub-clauses (a), (b) and (c) of Clause 3. It is also evident from the record that till the recession of the contract the respondent-contractor had completed the work of Rs. 3,57,84,903 and balance of Rs. 3,77,20,809 have to be done on the risk and the cost of the respondent-contractor since the contract was awarded to him for Rs. 7,35,05,712.

48. In the instant case, it is not in dispute that the contractor was to complete the first phase of the work by November 1993, which he could not complete even after expiry of 35 months, although the total period for completion of the entire work consisting of 3 phases was 21 months. The appellant authority by taking recourse to Clauses 2 and 3 of the contract agreement rescinded the contract for the failure of the contractor-respondent to complete the work in time.

49. In *Hans Construction Co. v. Delhi Development Authority* (supra), the Delhi High Court while considering similar clauses of contract agreement has held that in the matter of determining the question whether the contractor delayed the execution of the work and if so, what amount of compensation should be levied, falls within the jurisdiction of the Superintending Engineer and his decision cannot be tested by the arbitrator under Clause 25 of the agreement. Court in the said decision has further held that whenever in the agreement decision of a signated authority in a matter has been made final, the same has been taken out from the province of the arbitrator and the said bar is specific and explicit.

50. Hon'ble Supreme Court in *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.* (supra), has held that the competence of the arbitral tribunal to rule on its own jurisdiction under Section 16 was confined to the width of its jurisdiction but extended to deciding whether it had any jurisdiction at all. The Apex Court has further held that Section 34 of the Act gives a party adversely affected by an arbitral award the right to approach a Court to set it aside on the stated grounds, which includes the composition of the arbitral tribunal.

51. The Apex Court in *General Manager, Northern Railway and Anr. v. Sarvesh Chopra* (supra), while dealing with the question whether a particular dispute is an 'excepted matter' and whether the arbitrator can assume jurisdiction in regard to the excepted matters has held that in the event of claims arising within the ambit of 'excepted matters' question of assumption of jurisdiction by any arbitrator with or without intervention of the Court would not arise and if any award is passed in respect of a claim covered by 'excepted matter', which was referred to the arbitrator, the award is null and void and the reference to the dispute to the arbitrator is also invalid (*Food Corporation of India v. Sreekanth Transport* (supra); *Union of India v. Popular Builders* [reported as 2000(3) Arb. LR 522 (SC)]; *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor* [reported as 1999(3) Arb. LR 335 (SC)]; *Ch. Ramalinga Reddy v. Superintending Engineer* [reported as 1999(Suppl.) Arb. LR 440 (SC)] and *Alopi Parshad and Sons Ltd. v. Union of India* [reported as : [1960]2SCR793]). The relevant paragraph, i.e. Paragraph 10 of the said judgment is quoted below:

'10. It was next submitted by the learned counsel for the respondent that if this Court was not inclined to agree with the submission of the learned counsel for the respondent and the interpretation sought to be placed by him on the meaning of 'excepted matters' then whether or not the claim raised by the contractor is an 'excepted matter' should be left to be determined by the arbitrator. It was submitted by him that while dealing with a petition under Section 20 of the [Arbitration Act, 1940](#), the Court should order the agreement to be filed and make an order of reference to the arbitrator appointed by the parties leaving it open for the arbitrator to adjudicate whether a claim should be held to be not entertainable or awardable, being an 'excepted matter'. With this submission too we find it difficult to agree. While dealing with a petition under Section 20, the Court has to examine--(i) whether there is arbitration agreement between the parties, (ii) whether the difference which has arisen is one to which the arbitration agreement applies, and (iii) whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. The word 'agreement' finding place in the expression 'where a difference has arisen to which the agreement applies', in Sub-section (1) of Section 20 means 'arbitration agreement'. The reference to an arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or ministerially by the Court; it is a consequent of judicial determination, the Court having applied its mind to the requirements of Section 20 and formed an opinion, that the difference sought to be referred to the arbitral adjudication is one to which the arbitration agreement applies. In the case of Food Corporation of India, : [1999]3SCR699 , relied on by the learned counsel for the respondent, it has been held as the consistent view of this Court that in the event of the claims arising within the ambit of 'excepted matters', the question of assumption of jurisdiction by any arbitrator either with or without the intervention of the Court would not arise. In Union of India v. Popular Builders, Calcutta, : AIR 2000 SC3185 ; Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor, : AIR 1999 SC3275 ; Ch. Ramalinga Reddy v. Superintending Engineer, (1994) 5 SCALE 12 and Alopi Parshad and Sons Ltd. v. Union of India, : [1960]2SCR793 , this Court has unequivocally expressed that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract entered into between the parties would be liable to be set aside. In Prabartak

Commercial Corporation Limited v. Chief Administrator, Dandakaranya Project, : AIR 1991 SC957 , a claim covered by 'excepted matter' was referred to the arbitrator in spite of such reference having been objected to and the arbitrator gave an award. This Court held that the arbitrator has no jurisdiction in the matter and that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void.'

52. In Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (supra), the Apex Court has laid down the meaning and scope of the phrase 'Public Policy of India' occurring in Section 34(2)(b) of the Act by holding that where the validity of an award is challenged, there is no necessity of giving a narrower meaning to the term 'Public Policy of India' and wider meaning is required to be given so that the patently illegal award passed by the arbitral tribunal could be set aside. It has been held that if narrow meaning is given, some of the provisions of the Act such as Sections 28(2), 28(3) and 24 would become nugatory. In the said judgment Hon'ble Supreme Court has further held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of contract, it would be patently illegal and the same could be interfered under Section 34 of the Act. It has further been held in the said decision rendered by the Hon'ble Supreme Court that Section 34 read conjointly with other provisions of the Act indicates that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still, however, it could not be set aside by the Court, which if it held otherwise would be contrary to the basic concept of justice.

53. Mr. Dutta, learned senior counsel appearing on behalf of the respondent has placed reliance on the decision of the Hon'ble Supreme Court in M.K. Shah Engineers & Contractors v. State of M.P. (supra), wherein the Hon'ble Supreme Court has held that the plea of bar cannot be permitted to be set-up by a party which itself has been responsible for frustrating the operation thereof and it will be travesty of justice if the contractor for the fault of the authority is denied right to have recourse to the remedy of arbitration. The Apex Court has further held that if one party by its own conduct or a conduct of its officials disabled such preceding

steps being taken, it would be deemed that the procedural prerequisites were waived. The Apex Court on the basis of the facts of the said case, i.e. since the authority has acquiesced in the appointment of arbitrator and proceedings for settlement of dispute by arbitration, has held that the authority cannot be permitted to turn around and plead inability or non-maintainability of arbitration proceedings by referring to the clause of the contract.

54. In the instant case, as stated above, it is evident from the order dated 14.02.1997 that the appointment of arbitrator to arbitrate the claims/ disputes raised by the contractor was subject to their admissibility under Clause 25 of the contract agreement. Therefore, it cannot be said that the appellants herein has surrendered to the jurisdiction of the arbitrator and subjected itself to its jurisdiction. Hence the decision of the Hon'ble Supreme Court in M/s. M.K. Shah Engineers & Contractors (supra), is not applicable in the instant case.

55. The other case on which Mr. Dutta, the learned senior counsel has placed reliance is Food Corporation of India v. Sreekanth Transport (supra). In the said case the Hon'ble Supreme Court has not expressed any opinion as to whether initiation of a civil suit in the Civil Court does or does not amount to acceptance of arbitration or not. However, the Hon'ble Supreme Court on the facts of the said case has held that the Food Corporation, as a matter of fact, by instituting the civil suit, desired an adjudication of their claim including the 'excepted matters' and, therefore, the said act was treated as positive act on the part of the Food Corporation of India not to put any reliance on the clause relating to 'excepted matter' of the agreement. In the instant case as stated above, the order of appointing the arbitrator on 14.02.1997 was subject to admissibility of arbitration under Clause 25 of the contract agreement. The Hon'ble Supreme Court in the said judgment in Paragraph 3 has categorically held that the 'excepted matters' do not require any further adjudication since the agreement itself provides a named adjudicator and the parties themselves having decided to have the same adjudicated by a particular officer in regard to those 'excepted matters', the question of assumption of jurisdiction of any arbitrator with or without the intervention of the Court would not arise.

56. In *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor (supra)*, the Hon'ble Supreme Court has held that the arbitrator derives the authority from the contract and if he acts in manifest disregard to the contract, the award given by him would be an arbitrary one. In cases where there is no question of interpretation of any term of the contract, but of only reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has travelled beyond the terms of the contract are required to be gone into by the Court. It has further been held that the arbitrator may have jurisdiction to entertain the claim and yet he may not have jurisdiction to pass award for particular item in view of the prohibition contained in the contract. The Hon'ble Supreme Court in *Ch. Ramalinga Reddy v. Superintending Engineer (supra)*, has also held that when the arbitrator has made an award in respect of a claim which is, by the terms of the contract between the parties, plainly barred, Court will interfere with such award.

57. In the instant case, by reading Clauses 2, 3 and 25 of the contract agreement it is abundantly clear that the parties to the contract have accepted that the decision of the Superintending Engineer regarding quantification of the amount of compensation payable by the contractor in the event of his failure to execute the work in time as well as the decision of the Engineer-in-Charge as to determination/recession of the contract for failure to execute the work by the contractor within time, as final and binding. Therefore, the question regarding the determination/recession of the contract and reasons for such determination/recession as well as the compensation payable by the contractor for the delay in executing the work, are the 'excepted matters' which are beyond the scope of arbitration by the arbitrator. The arbitrator having derived his jurisdiction to arbitrate from the terms and conditions of the contract, is bound to adjudicate the dispute and pass an award in respect of the matters which have not been excepted by the contract. Even if such matters are referred to arbitration on the basis of the claim of the contract, an arbitrator cannot pass any award in respect of the said excepted matter, more so, when the order appointing the arbitrator contains a clause that the reference of the claim of the contractor is subject to admissibility of such matters in terms of the arbitration clause.

58. In the instant case the order of appointing arbitrator, as stated above, clearly indicates that the claims of the contractor were referred subject to their admissibility under Clause 25 of the contract. Therefore, the arbitrator has no power and authority to adjudicate the 'excepted matters' which are excluded from the purview of the arbitration by both the parties by accepting the Superintending Engineer as well as Engineer-in-Charge as the final adjudicator and hence the arbitrator cannot pass any award declaring determination/recession of the contract as bad and, therefore, also cannot pass any award awarding any amount for such determination/recession of the contract, even though the matter was referred to arbitrator, as the arbitrator has to pass the award strictly in terms of contract, as stipulated in Section 28(3) of the Act.

59. The claim of the respondent-contractor against Claim No. 1 was initially Rs. 12,24,930 which was later on revised as Rs. 11,26,518, which amount was withheld by the appellant authority. The respondent-contractor has claimed that amount against the payment withheld from the 34th R/A Bill. The arbitrator has awarded the entire claim of the respondent-contractor against the Claim No. 1 by holding that the termination of contract is bad and wrongful and, therefore, the amount of Rs. 3,17,468.80 which was deducted by the appellant authority from the amount payable to the contractor for the work done/to be done at the risk and cost of the claimant and also Rs. 3,17,468 for escalation was directed to be released. The arbitrator has also awarded Rs. 5,90,000 in favour of the contractor/respondent which amount was withheld by the appellant authority being the compensation payable by the contractor for his failure to execute the work in time in terms of Clause 2 of the contract agreement. The said amount of compensation payable under Clause 2 as well as amount to be recovered from the contractor for the work done at his risk and cost, being the 'excepted matters' vide Clauses 2 and 3 of the contract agreement, no award can be passed by the arbitrator directing payment of the said amount to the contractor. Therefore, the award by the arbitrator against Claim No. 1 is nullity, the same being beyond the scope of arbitration.

60. The arbitrator against Claim No. 3 of the respondent-contractor for refund of security deposit realised by the appellant authority by invoking the bank guarantee

submitted, awarded entire sum of Rs. 1.00 lakh to be paid by the appellant authority to the contractor/respondent by holding that the action of the authority to rescind the contract and levy the compensation under Clause 2 is incorrect. As discussed above, the question of determination /recession of the contract and levy of compensation being 'excepted matters' cannot be gone into by the arbitrator. The security deposit being the deposit taken by the authority for the purpose of ensuring due completion of work, the said security deposit is refundable only when the contractor has completed the work to the full satisfaction of the authority concerned and not otherwise. In the instant case, the respondent-contractor could not complete the work in time for which the contract was determined and also compensation was imposed, which were the 'excepted matters' and, therefore, cannot be gone into by arbitrator and hence the arbitrator also cannot pass any award for refund of the said security deposit of Rs. 1.00 lakh, which was forfeited in terms of the contract. The award of the arbitrator against Claim No. 3 is, therefore, bad in law and liable to be interfered with under Section 34 of the Act. The respondent-contractor is not entitled to the said amount, as the award of the arbitrator on that count is patently illegal.

61. The Claim No. 5 of the respondent-contractor was for Rs. 19,96,195 towards the balance payment of escalation of works executed till the date of termination of the contract as per Clause 10(CC) of the contract agreement.

62. Clause 10(CC) of the contract agreement stipulates that the contractor shall be entitled to escalation in the prices of materials only for the works done during the stipulated period of the contract including such period for which the contract is validly extended without any action under Clause 2 of the contract. The action under Clause 2 of the contract agreement was taken by the authority by imposing the compensation and the recession of the contract for the failure of the contractor to execute the work in time and, therefore, the contractor is not entitled to escalation in price of the material under Clause 10(CC) of the contract agreement, under which he has claimed that amount. The said clause being an agreed clause between the parties, both the parties are bound by that condition. The arbitrator cannot, therefore, award any amount towards escalation in the price of the material as claimed under Claim No. 5. Hence, the award passed by the arbitrator

against Claim No. 5 is a nullity being patently illegal because of Clause 10(CC) of the contract agreement.

63. The Claim No. 10 for Rs. 18,01,701 for compensation by way of recovery of unutilized proportionate expenses incurred on account of establishing site, setting up of infrastructure required for performance of full value of work which could not be achieved in view of the wrongful termination of the contract, was not awarded by the arbitrator and hence is not required to be gone into in the present appeal filed by the appellant authority.

64. The amount of Rs. 54,03,669 claimed by the respondent-contractor against Claim No. 11 for loss of anticipated profit @ 15% per annum on the value of the balance work, i.e. on Rs. 3,60,24,465.96, which according to the contractor could not be earned owing to termination of the contract.

65. Mr. Thakur, the learned Additional C.G.S.C. in the support of his Point No. IV, has submitted that the contract being validly determined and the determination of contract being an 'excepted matter', the arbitrator cannot go into the legality and validity of such recession of contract and consequently cannot also pass any award towards, anticipated profit. Mr. Dutta, the learned senior counsel, on the other hand, has submitted that when the arbitrator has found the recession of contract as bad and wrongful, the respondent is entitled to the amount towards the anticipated profit, which the respondent would have earned had the contract not been terminated. Mr. Dutta has also placed reliance on the decisions of the Hon'ble Supreme Court in *Md. Salamatullah v. Government of Andhra Pradesh* reported in : AIR 1977 SC1481 in *A.T. Brij Paul Singh and Ors. v. State of Gujarat* reported in : AIR 1984 SC1703 and in *Dwaraka Das v. State of M.P. and Ors.* reported in : [1999]1SCR524 .

66. The question whether the respondent is entitled to any award towards anticipated profit or not could be decided only when the arbitrator can pass an award declaring that the recession of the contract is bad. In the instant case, as already held, the question regarding determination/recession of the contract being an 'excepted matter', the same cannot be gone into by the arbitrator being outside the scope of arbitration and, therefore, the arbitrator cannot pass any award

towards the anticipated profit. The decision referred to by Mr. Dutta relates to entitlement of damages by the contractor, in the event of wrongful determination of contract, therefore, those are not applicable in the facts and circumstances of this case. The award passed by the arbitrator against Claim No. 11, therefore, is nullity.

67. In view of the discussion made above, the award passed by the arbitrator in respect of Claim Nos. 1, 3, 5, 10 and 11 are bad in law being contrary to the terms of the contract, which violates the provision of Section 28(3) of the Act as well as against the public policy of India. The same is, therefore, liable to be interfered with under Section 34 of the Act.

68. The next point of argument of Mr. Thakur is Point No. V, which relates to the counter-claim of the appellants before the arbitrator. Mr. Thakur has submitted that the counter-claims were rejected by the arbitrator in complete disregard to the agreed terms of contract, whereby it was agreed by the contractor that the Superintending Engineer shall levy the compensation in case the contractor fails to execute the work in time, as the time was the essence of the contract. It has further been contended that both the parties to the contract have agreed to the condition that the decision of the Superintending Engineer shall be final and binding. The further submission of Mr. Thakur is that the contractor has agreed to the condition that in the event of his failure to complete the work, the Engineer-in-Charge shall have the power to determine the contract and execute the work through other agencies at the risk and cost of the contractor and in that event he is bound to pay the difference of the cost incurred by the authority in executing the work. The arbitrator, according to Mr. Thakur, has rejected the counterclaims by holding that the order of recession of contract was bad and wrongful, which cannot be gone into by the arbitrator being an 'excepted matter' and in total disregard of the terms of contract and, therefore, the entire award is a nullity being contrary to terms of contract and violative of provisions of the Act. The said counter-claims having been illegally rejected, which is apparent on the face of the award, the entire award has to be set aside being patently illegal, though the claim of the respondent-contractor against Claim Nos. 2, 4, 6, 7, 8, 9 and 13 may not be the 'excepted matters', since the appellants are entitled to adjust the amount found to

be due to the respondent under those heads of claims against the amount payable to the appellants in respect of the counter-claims.

69. Mr. Dutta, the learned senior counsel for the respondent has submitted that when the arbitrator has given the reasons for rejection of the counter-claims of the appellants, the sufficiency of such reasons cannot be gone into by the Court. According to Mr. Dutta, the Court also cannot reappreciate the evidence on record for coming to a finding different from one recorded by the arbitrator.

70. There is no dispute about the legal position that the Court cannot interfere with an award passed by an arbitrator, by going into the sufficiency of the reasons given by the arbitrator in passing an award and also cannot re-appreciate the evidences and record a different findings, unless such award is passed in violation of the terms of contract or the provision of law or against the public policy of India. But, in the instant case, it is to be seen whether the arbitrator has rejected, the counter-claims of the appellants in total disregard to the agreed terms of the contract and on the basis of the findings given in respect of 'excepted matters'.

71. Counter-Claim No. 1 in respect of Rs. 1,46,69,277 towards the difference of cost between the contractual value of the contract awarded to the respondent and the work subsequently undertaken through other agencies, after the contract with the respondent was rescinded. The said amount was claimed in terms of stipulation in Clause 3 of the contract agreement. As already held the Engineer-in-Charge in terms of Clause 3 of the agreement can rescind the contract for the inability of the contractor to execute the work in time and the said decision is agreed to be final and binding on the parties to the contract. Therefore, the legality or validity of such determination/ recession of the contract by the Engineer-in-Charge cannot be the subject-matter before the arbitrator, the same being the 'excepted matter'. The Clause 3 of the contract agreement further stipulates that the authority shall complete the unfinished work at the risk and cost of the contractor. Clause 3(b) of the contract agreement further stipulates that the amount of cost and price certified by the Engineer-in-Charge shall be final and conclusive against the contractor. Clause 4 of the contact agreement provides that in any case in which any of the powers conferred upon the Engineer-in-Charge by

Clause 3, which became exercisable but not exercised, non-exercise thereof shall not constitute a waiver of any of the conditions and such powers shall, notwithstanding, be exercisable in the event of any future case of default by the contractor and the liability of the contractor for compensation shall remain unaffected.

72. In the present case, the arbitrator has rejected the Counter-Claim No. 1 of the appellant authority on the sole ground that the recession of contract by the authority was wrongful and, therefore, the appellant authority is not entitled to the said amount. This Court has already recorded the finding hereinabove, that the question of legality or validity of the order of recession of contract is outside the scope of arbitration, that being the 'excepted matter' and, therefore, the rejection of the counter-claim of the appellant authority by the arbitrator, on the ground that recession of contract was wrongful, is patently illegal, the same being contrary to the agreed condition of contract, which is, therefore, also violative of Section 28(3) of the Act.

73. The appellant's Counter-Claim No. 2 before the arbitrator was for Rs. 56,84,990 being the amount of compensation levied under Clause 2 of the contract agreement, by the Superintending Engineer. The said counter-claim was also rejected by the arbitrator being wholly improper and wrongful as the compensation was levied from 10.01.1995 though the time for execution was extended up to 31.07.1995 without levying any compensation.

74. In Clause 2 of the contract agreement, both the parties, namely appellants and the respondent-contractor have agreed that the time is the essence of the contract and in the event of failure of the contractor to complete the work within the stipulated period of time, the contractor is to pay compensation, an amount equal to one per cent and which amount shall not exceed ten per cent of the estimated cost of the work as shown in the tender, as decided by the Superintending Engineer, whose decision shall be final. Clause 4 of the contract agreement, as stated above, also stipulates that non-exercise of any power shall not amount to waiver and the liability of the contractor for compensation remain unaffected.

75. The wordings in Clause 2 of the contract agreement, regarding liability of the contractor to pay compensation in the event of failure to execute the work, are unambiguous and the contractor knew the consequence of violating the terms of contract. The parties to the contract have expressly agreed that in the event of failure to execute the work in time, a pre-estimated liquidated damage is payable by the contractor for such breach. Clause 2 of the contract agreement further stipulates that the decision of the Superintending Engineer, in this regard, shall be final. This being the position, the matter relating to the amount fixed by the Superintending Engineer is an 'excepted matter' and, therefore, cannot be gone into by the arbitrator. The arbitrator has rejected the said counter-claim of the appellants on the ground that the decision of the Superintending Engineer was wholly improper and wrongful and being without proper application of mind, which on the face of Clause 2 of the contract agreement is patently illegal. The decision of the arbitrator being contrary to the agreed terms and conditions of the contract, is violative of Section 28(3) of the Act, as the arbitrator has to pass the award in accordance with the terms of the contract. Hence, the Court can interfere with such award under Section 34 of the Act.

76. The other two counter-claims, i.e. Counter-Claim Nos. 3 and 4 of the appellants were in respect of the amount paid by the authority to the contractor, through whom the work was completed, towards escalation amount and cost of arbitration, respectively. The arbitrator has rejected the Counter-Claim No. 3 solely on the ground that the recession of the contract was found by him as bad and wrongful and, therefore, the appellant is not entitled to the said amount. The said decision of the arbitrator is also patently illegal in view of the fact that, as already held, the arbitrator cannot go into the question of legality or validity of the recession of contract, the same being an 'excepted matter'. Hence the award passed by the arbitrator is on the face of it illegal being contrary to the agreed terms of the contract.

77. In this connection, reference may be made to the decision of the Hon'ble Supreme Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (supra), wherein it has been held that the arbitrator is to decide the matter in accordance with the terms of the contract and if the arbitrator passes an award in violation of

the terms of contract, the same is on the face of it erroneous and in violation of Section 28(3) of the Act. The Court, in that event, shall have jurisdiction to interfere with the said award. The Apex Court in the said judgment by taking into account the provisions of Sections 73 and 74 of the Contract Act has held that if the compensation named in the contract for breach is genuine pre-estimate of loss, which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of providing such loss or such party is not required to lead evidence to prove actual loss suffered and on the other hand the burden is on the other party to lead evidence for providing that no loss is likely to occur for such breach.

78. In this case also, the loss to be suffered in case of breach, was a genuine pre-estimated loss, which the contractor is to pay as compensation for such breach. The contractor at the time of executing the contract knew about the said liability. The arbitrator, by ignoring the agreed terms of contract and also the legal provision has passed the award rejecting the counter-claim of the appellants thereby committing legal misconduct. The entire award passed by arbitrator is, therefore, required to be interfered with and liable to be set aside since the appellants would have entitled to adjust the amount payable to the respondent against Claim Nos. 2, 4, 6, 7, 8, 9 and 13, had the arbitrator not rejected the counter-claims by committing patent illegality and legal misconduct. Therefore, the learned arbitrator is required to reconsider the counter-claims of the respondents and to pass an award by making necessary adjustment of the amount payable to the claimant/contractor against Claim Nos. 2, 4, 6, 7, 8, 9 and 13 in terms of the finding recorded by this Court.

79. In view of the above, the appeal filed by the appellants is allowed. The award passed by the arbitrator on 05.09.2001 and corrected on 22.09.2001 as well as the order dated 12.12.2003 passed by the learned Ad hoc Additional District Judge No. 2, Kamrup, Guwahati in Misc. (Arbitration) Case No. 590/2001, are set aside. The arbitration proceeding is remitted back to the learned arbitrator for reconsideration of the counter-claims of the respondents and for passing an award by making necessary adjustment of the amount payable to the contractor/claimant against his Claim Nos. 2, 4, 6, 7, 8, 9 and 13 in terms of the finding recorded by

this Court. Considering the facts and circumstances of the case, we leave the parties to bear their own cost.

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