

Board of Trustees of Port of Mormugaor Vs. Asia Foundations and Constructions Ltd. and ors.

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Court : Mumbai

Decided On : Jan-30-1991

Reported in : 1992(1)BomCR271

Judge : H.W. Dhabe and ; E.S. De'Silva, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 16 and 30; [Evidence Act, 1872](#) - Sections 90, 91 and 92

Appeal No. : First Appeal No. 27 of 1988

Appellant : Board of Trustees of Port of Mormugaor

Respondent : Asia Foundations and Constructions Ltd. and ors.

Advocate for Def. : V.V. Tulazapurkar and ; R.G. Ramani, Advs. for respondent No. 1

Advocate for Pet/Ap. : V.B. Nadkarni, Senior Adv., M.D. Siodia and ; G.V. Tamba, Advs.

Disposition : Appeal dismissed

Judgement :

H.W. Dhabe, J.

1. This is an appeal under section 39 of the Arbitration Act. The appellant which is an authority of the Port of Mormugao, invited tenders on 27-8-81 for construction of Multipurpose General Cargo Berth at Mormugao Port. Four persons including the respondent No. 1 had submitted their tenders pursuant to the tender notice. A meeting of all tenderers was held on 25- 9- 1981 for giving clarifications about the tenders. The respondent No. 1 Company had submitted its tender on 13-10-81 and the tender contract was awarded to it on 21-10-1981. The time for completion of the works contract was 96 weeks and the last date for its completion was thus 18-12-1983. However, there was delay in the completion of the work in question which was completed on 31-5-1984.

2. There were disputes between the parties about the payment in regard to the work executed by the respondent No. 1. In particular, the respondent No. 1 Contractor had claimed additional rates for construction of a temporary working platform for which, according to him, out of the total quantity of 294 linear metres only 33 linear metres work was executed by using Vasco beach sand and for the balance which was the major work, large quantity of murrum which was required to be brought from outside was used. The respondent No. 1-Contractor had claimed the full amount of Rs. 7 lakhs as per the contract for the additional approach to the working platform and the dispute was raised in that regard by the appellant that since he did not complete the additional approach as proposed in the plan, he was not entitled to the said contract amount. According to the respondent No. 1, he had moved the Engineer of the Appellant Board in accordance with the provisions of Clause 11.2.2.1 for the additional rate for the working platform, but he did not fix any additional rates for the same. Parties therefore referred the disputes between them to arbitration as provided in the contract between them. According to the clause of arbitration in the contract between them, each of them had to appoint one Arbitrator. Accordingly the appellant and the respondent No. 1 each appointed an Arbitrator of their choice. However, there was disagreement between the two Arbitrators appointed by them on certain matters referred to them. The whole dispute on all matters was therefore, referred to the Umpire by the Arbitrators who had to deal with the same de novo as per the agreement between the parties. It

may be seen that the respondent No. 2 Mr. A. Jayagopal, who was Chief Engineer (retired) in the Military Engineer Services was appointed as Umpire by the two Arbitrators. Parties submitted their respective cases before the Umpire. They also filed documents before him. The Umpire, i.e., the respondent No. 2 thereafter passed this Award on 25th August, 1986.

3. The Award passed by the respondent No. 2 was a non-speaking Award. The appellant challenged the said Award before the Civil Court by filing an application under section 30 of the Arbitration Act which was registered as Special Civil Suit No. 88 of 1986. The respondent No. 1 opposed the said application. After hearing the parties, the learned Civil Judge, S.D., Vasco-da-Gama by his order dated 18-11-1987 dismissed the said application under section 30 of the Arbitration Act. It appears that there was an application filed by the respondent No. 2 to make the Award the rule of the Court (Exh. 12) and the Court passed a separate order for making the Award the rule of the Court.

4. Feeling aggrieved by the order of the learned Civil Judge dismissing the application of the appellant under section 30 of the Arbitration Act, the appellant has preferred the instant appeal against the same in this court.

5. The learned Counsel for the appellant has restricted his submission only to two items of the Award. They are : (i) design and construction of temporary working platform which is claim 1 in the arbitration proceedings; and (ii) construction of additional approach to the working platform which is claim 4 in the said proceedings. Perusal of the application of the appellant under section 30 of the Arbitration Act and even the ground raised in this appeal would show that the principal contention raised on behalf of the appellant is that the respondent No. 2 ought to have passed a reasoned Award and his non-speaking Award is illegal without jurisdiction. The said question however stands now concluded by the decision of the Supreme Court in the case of Raipur development Authority and others v. M/s Chokhamal Contractors and others, in which although the Supreme Court has observed that the Government or the instrumentality of the State should include a clause that the Arbitrator or the Umpire should give a reasoned Award, in the absence of such a clause the Supreme Court has upheld the non-speaking

Award passed by the Arbitrator or the Umpire. The above contention raised on behalf of the appellant is no more-reintegrate in view of the above judgement of the Supreme Court.

6. Since the principal contention about the legality or otherwise of the non-speaking Award, stands thus concluded by the judgement of the Supreme Court, cited supra, the learned Counsel for the appellant has concentrated his submissions on the ground that there is an error apparent on the face of the Award passed by the Umpire. He has also urged that there is a legal misconduct on the part of the Umpire insofar as he did not decide the objection raised on behalf of the appellant that there was no scope for invoking Clause 11.2.2.1 because the subject matter for rates for construction of temporary working platform was fully covered by an express stipulation in the contract. The learned Counsel appearing for the respondent No. 1 apart from contesting the above contentions on merits, has urged before us that the said contentions were not raised by the appellant in the application filed under section 30 of the Arbitration Act. According to him the only question raised in the application under section 30 of the Arbitration Act was that the Umpire i.e. the respondent No. 2 should have been passed a reasoned Award. He has also urged that since the Award of the respondent No. 2 is a non-speaking Award, it is not open to us to interfere with the same.

7. In support of the plea that the only question raised by the appellant in his application under section 30 of the Arbitration Act and even in the memo of appeal in this Court is that the Award is illegal because it is not a reasoned Award, the learned Counsel appearing for the respondent No. 1 has taken us through the application filed by the appellant under section 30 of the Arbitration Act as well as the Memo of Appeal filed before us . Although there is some force in the above contention raised on behalf of the respondent No. 1, we propose to consider the contentions raised by the appellant before us because it appears that the said contention about the reasoned Award was principally highlighted by the appellant because at that time the matter was under consideration of a larger Bench of the Supreme Court in the above case.

8. In appreciating the contentions raised on behalf of the appellant it has to be borne in mind that there is very little scope for interference by the Court in a non-speaking Award i.e., an Award in which no reasons are given by the Arbitrator or the Umpire for his conclusions. Even otherwise, the scope for interference by the Court in a reasoned Award is itself very much restricted as is clear from the various decisions of the Supreme Court and the High Courts. It may be seen that it is only when any of the grounds under section 16 or 30 of the Arbitration Act are made out that the Court can interfere with the award of an Arbitrator or an Umpire. It has to be borne in mind that an Arbitrator is a Tribunal of parties' own choice and his adjudication therefore both on law and fact is final.

9. In considering the scope of the powers of the Court under section 30 of the Arbitration Act, the Supreme Court has observed in para 9 of its majority judgement in the case of Bungo Steel Furniture (Pvt) Ltd. v. Union of India, : [1967]1SCR633 , that if an Arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded , the award is not on that account vitiated. It is only when the Arbitrator proceeds to give reasons or to lay down principles on which he has arrived at his decision that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error of law is apparent on the face of the award itself. The majority judgement held that since there were no reasons indicated for granting damages for breach of contract, there was no error of law apparent on the face of the award.

10. What is an error of law apparent on the face of the award? Lord Dunedin in Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Company Ltd 50 I. A. 324 : A.I.R. 1923 P C. 66 observed as follows :

'An error in law on the face of the award means in their Lordship's view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgement, some legal proposition which is the basis of the award and which you can they say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is,

and then going to the contract on which the parties' rights depend to see if that contention is sound.'

Tucker. J., in *James Clark(Brush Materials) Ltd. v. Carters(Merchants)Ltd* (1944) 1 K.B.566, has pointed out that in determining whether the Award of an Arbitrator should be remitted or set aside on the ground that there is an error apparent on the face of it, the Court is not entitled to draw any inference as to the finding by the Arbitrator of facts supporting the award, but must take it at its face value. Accepting the above principles Ramaswamy, J., in the case of *Bungo Steel Furniture v. Union of India* cited supra, who has differed from the majority view in the said case not on principles but on the question whether there is an error of law apparent on the face of the award, an award is not invalid merely because by a process of inference and argument it may be demonstrated that the Arbitrator has committed some mistake in arriving at his conclusion.

11. In the case of *Firm Madanlal Roshanlal v. Hukumchand Mills*, : [1967]1SCR105 , the Supreme Court has in para 2 of its judgment, after observing that the award of the Arbitrator on both fact and law is final held that the Court cannot review his award and correct any mistake in his adjudication unless an objection to the legality of the award is apparent on the face of it. After quoting the passage from the judgment of the Privy Council in *Champsey Bhara & Co.* cited supra, the Supreme Court has held that in the case before it the Arbitrator gave no reasons for his award and that it did not find in the award any legal proposition which was the basis of the award, far less a legal proposition which was erroneous. It therefore, held that it was not possible to say from the award that the Arbitrator was under a misconception of law. Hence it rejected the contention that there was any error of law apparent on the face of the award. Following the above judgment, the Supreme Court has in the recent case of *Neelkantan & Bros. Construction v. Supdt. Engineer National Highways, Salem*, : AIR 1988 SC2045 , reiterated the proposition that where the Arbitrator gave no reasons for his award and there was no legal propositions which was the basis of the award, far less a legal proposition which was erroneous, the Court cannot review the award and correct any mistake in the adjudication of the Arbitrator.

12. The learned Counsel for the appellant has however contended before us that the non-speaking award can be interfered with if it appears on the face of the record that there is non-application of mind by the Arbitrator or the Umpire. In support of his above contention he has relied upon the recent judgment of the Supreme Court in the case of *Dandasi Sahu v. State of Orissa*, : 1970 CriLJ1369 . Further, according to him, even as regards the non-speaking award, if it can be spelt out that the finding of the Arbitrator or the Umpire is based upon any terms in the contract or any document which is incorporated by him in his Award, it is open to the Court to consider the question whether his finding is substantiated by the term of the contract or document upon which it is based. The learned Counsel for the appellant is fully aware of the limitations in the case of a non-speaking Award. His endeavour therefore has been before us to show that the contract in the instant case and in particular the terms contract relating to Claim No. 1 and Claim No. 4, are part of the Award passed by the Umpire and therefore, the submission is that we should look into those terms of the contract and determine whether the finding rendered by the learned Umpire upon the said question is in accordance with or within the said terms. In support of his above submissions, the learned Counsel for the appellant has heavily relied upon the case of *Continental Construction Co. Ltd. v. State of Madhya Pradesh* : [1988]3SCR103 , which is really the kingpin of his arguments in the instant appeal.

13. As regards the question of non-application of mind by the Umpire, it has to be seen that when the Umpire is not required to give any reasons for his award, the recitals in para 15 of his award showing what he has considered in making the award, apart from his high status and expertise in the field, would show that he has applied his mind to the relevant material on record in the Arbitration proceedings. These recitals would therefore satisfy the requirement in para 3 of the judgement of the Supreme Court in *Dandasi Sahu's* case cited supra, even in which the Supreme Court has observed that the Arbitrator need not give any reason and even if he commits a mistake either in law or in fact in determining the matter referred to him, where such mistake does not appear on the face of the award, the same cannot be assailed. The Supreme Court has further observed in the said judgement that in view of the limitations upon the powers of the Court in interfering with the award of the Arbitrator under sections 16 and 30 of the

Arbitration Act, the Court has to test the award with circumspection. It has then held in the facts of the said case that the amount awarded by the Arbitrator was so disproportionately high that it showed non-application of his mind amounting to legal misconduct. We shall consider the question of non-application of mind in this sense as urged on behalf of the appellant when we consider its case on Claim No. 1.

14. Turning now to the principal contention raised on behalf of the appellant, we have to see whether it can be said in the instant case that the whole contract or at any rate the contractual terms in relation to Claims 1 and 4 can be said to be incorporated in the award of the respondent No. 2. Before considering the factual submissions made on behalf of the appellant in this regard, we may first consider the law in this regard which is fairly well settled. We have already extracted a passage from the judgment of the Privy Council in the case of *Champsey Bhara & Co.* cited *supra*, which shows that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' right depend to see if that contention is sound it does not mean that the contract was incorporated in the award. Similarly, in the case of *Firm Saleh Mohamed v. Nathoomal* it was held that merely because a contract is referred to in the award simply to earmark the origin of the dispute between the parties it cannot be said that it is incorporated in the award and that the error in its construction would disclose an error of law apparent on the face of the award.

15. The Supreme Court has in its judgement in the case of *Allen Berry and Co. v. Union of India*, : [1971]3SCR282 , considered at length the question as to when any document or a contract can be said to be incorporated in the award. It has observed in para 6 that the principle is that the Court, while examining an award, will look at documents accompanying and forming part of the award. It has then laid down that a mere general reference to the contract in the award cannot be held to be incorporating it. (see para 9). In taking the above view the Supreme Court has referred to the conclusions of Diplock, L.J., in *Giacome Costa Fu Andrea v. British Italian Trading Co. Ltd.* (1962)2 All.E.R. 53, which are usefully reproduced below :-

'It seems to me, therefore, that, on the cases, there is none which compels us to hold that a mere reference to the contract in the award entitles us to look at the contract. It may be that in particular cases a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and by reading them together, find an error on the face of the award.'

16. The ratio of the judgement of the Supreme Court in Allen Berry and Co's case cited supra, is contained in para 9 of its judgement in the said case. It is held that a question whether a contract or a clause of it is incorporated in the award is a question of construction of the award and the test is whether the Arbitrator had come to a finding on the wording of the contract. If he has, then according to said judgment, he can be said to have impliedly incorporated the contract or clause in it whichever be the case. But a mere general reference to the contract in the award, according to it, cannot be held to be incorporating the contract in the award. The above principles about the incorporation of the contract in the award and the error in construing the same have not been departed from but are affirmed by the Supreme Court in the case of Continental Construction Company v. State of M.P. cited supra upon which heavy reliance is placed on behalf of the appellant. See para 7 of the judgement in the above case which refers to Allen Berry Co.'s case cited supra and others for its view.

17. Perusal of the judgement of the Supreme Court in the case of Continental Construction Co. Ltd. cited supra, shows that specific questions were referred to arbitration by the Court under section 20 of the Arbitration Act. The award of the Arbitrator was challenged under section 30 of the Arbitration Act on the ground that the Arbitrator had misconducted himself in not deciding the objection raised by the State Government regarding the legality of the claim of the contractor about the extra cost towards rise in prices of material and labour. The contention raised before the Supreme Court on behalf of the appellant was that since specific issues were framed and referred to the Arbitrator by the learned District Judge and

answered by the Arbitrator by a non-speaking award, there is no mistake of law apparent on the face of the record and the learned District Judge therefore, erred in setting aside the award by looking into terms of the contract which, it was submitted, neither formed part of the award nor appended to it. The Supreme Court affirmed the finding of the learned District Judge that the question regarding extra cost was a general question and not a specific legal question and hence the decision of the Arbitrator upon the said general question was not final one. It therefore, held that the learned District Judge was entitled to examine the said general question in the light of the contract between the parties.

18. It is clear from para 5 of the judgement of the Supreme Court in the above Continental Construction Co.'s case that if no specific issue of law is referred to the Arbitrator under section 20 of the Arbitration Act, the decision of the Arbitrator on that question is not final although it may be within his jurisdiction and it may be essential for him to decide the said question incidentally. It is this general question decided by the Arbitrator but upon which his decision is not final which can be examined by the learned District Judge in the light of the terms of the contract as held by the Supreme Court in paras 6 and 8 of its judgement. However, as regards the specific issues referred to the Arbitrator, the Supreme Court has affirmed the view of the Division Bench of the High Court, that the decision of the Arbitrator upon the said issues is final and the said issues cannot be reagitated before the Court. The above judgement is thus of no assistance to the appellant in the instant case since the Umpire has answered the disputes between the parties referred to him and his decision thereon in the instant case is final. Therefore unless it is shown that the contract or any term thereof was incorporated in the award made by him, no error of law apparent on the face of the award can be demonstrated by testing the award in the light of the contract or any term thereof. Para 7 of the judgement reiterates the test that mere reference to the contract in the award is not to be held as incorporating it. It is in the light of the above tests or principles that we have to consider the factual submissions made in this regard on behalf of the appellant.

19. The learned Counsel for the appellant has urged before us that since the Umpire has stated in para 15 of his award, which is not a part of its preamble, that

he has heard both the parties, has gone through the documents and exhibits in the Arbitration proceedings before him and has considered the arguments and the pleadings the contract between the parties must be held to be incorporated in his award. In our view, the recitals in para 15 of the award are general recitals to show that the Umpire has applied his mind to all the material on record so that it could not be said that his award suffers from non-application of mind which is one of the grounds on which his award can be set aside. It cannot be said that the actual findings rendered by the Arbitrator claim wise in his award also refer to the contract or any term in the contract merely because there is a general reference in para 15 of the award to the material on record. In the light of the decision of the Privy Council cited supra and the decision of the Supreme Court in Allen Berry and Co.'s case cited supra, such a contention has to be negated.

20. We then proceed to consider the question whether the findings of the Umpire on Claims 1 and 4 show that the contract or the relevant term of the contract stands incorporated in the said findings.

The findings of the Umpire on Claims 1 and 4 are as follows :-

CLAIMS OF CLAIMANT

'CLAIM 1: ADDITIONAL RATES FOR CONSTRUCTION WORKING PLATFORM WITH MURRUM (claim amount Rs. 40,41,430) Claim admitted. I hereby declare and award that the respondent shall pay claimant a sum of twenty four lakhs and fifty thousand only (Rs. 24,50,000/-).

CLAIM 4: ADDITIONAL APPROACH CONSTRUCTION OF CLAIM AMOUNT Rs. 7,00,000/-. Claim admitted. I hereby declare and award that the respondents shall pay claimants an amount of Rupees Seven lakhs only (Rs. 7,00,000/-).'

21. As regards Claim 1, the learned Counsel for the appellant has drawn our attention to the heading of the said claim to show that the words 'additional rates' for constructing the working platform with murrum would bring in the question whether the rates already stipulated in the contract covered the work of construction of platform with murrum or not. He has further emphasised that the

expression 'claim admitted', would mean that the additional rates are awarded by the Umpire. According to the learned Counsel for the appellant it would show that there is reference to the contractual terms by the Umpire when he admitted the claim of additional rates for construction of working platform with murrum. It is thus contended on behalf of the appellant that the contractual terms about the rates for constructing working platform are a part of the award and therefore, if the Umpire has relied upon the said terms in the contract, it is urged that his decision regarding Claim 1 can be tested with reference to the said terms of the contract and if there is any error of law therein apparent on the face of the record, the Court can interfere with the same.

22. Although the above submission made on behalf of the appellant is ingenious and attractive it is not possible for us to accept the same. A plain and natural reading of the finding on Claim 1 would not show that the Umpire has based his finding upon any contract or any document as such because no contract or any term thereof nor any other document is actually constructed and/or relied upon or even referred to by him in arriving at his finding on Claim 1. The test propounded by the Supreme Court in para 9 of its judgement in *Allen Berry and Co.'s case* cited supra is whether the Arbitrator has come to a finding on the wording of the contract. If he has, then according to the said test, the Arbitrator can be said to have impliedly incorporated in his award the contract or a term thereof as the case may be.

23. It is pertinent to see that admittedly the award in the instant case is a non-speaking award which means that no reasons are given by the Umpire in support of his award. It would also therefore, mean that he has not actually construed and/or relied upon or referred to any contract or any clause thereof for his finding on Claim 1. As observed by the Supreme Court in the case of *M/s. Sudershan Trading Co. v. Government of Kerala* : [1989]1SCR665 , it is not open to the Court to probe the mental process of the Arbitrator and speculate, where no reasons are given by the Arbitrator, as to what impelled the Arbitrator to arrive at his conclusion as he has not spoken his mind indicating why he has done what he has done. See also the case of *Hindusthan Construction Ltd. v. C. Rajasekhar Rao* : [1987]3SCR653 and the case of *Jivrajbhai Ujamshi Sheth and others v.*

Chintamanrao Balaji and others : [1964]5SCR480 . The Supreme Court has categorically held in M/s. Sudarshan Trading Co.'s case cited supra, that in the absence of any reasons for making the award, it is not open to the Court to interfere with the award which is also the view taken in the previous judgement of the Supreme Court hereinbefore referred to. Be that as it may, the incorporation of any contract or any clause thereof by the Arbitrator in his award must appear on the face of the award and by application of our mind and by reading in between the lines, we cannot cull out even in a reasoned award that the Arbitrator has in his mind the contract or a clause thereof in arriving at his conclusion and then to determine whether he has by its erroneous construction committed an error of law, apparent on the face of the record.

24. When the award of the Umpire in the instant case is a non-speaking award, it would mean that he has not actually constructed and/or relied upon or referred to any contract or any clause thereof in his award for his finding on Claim 1. It cannot be said from his award whether he had decided the objections, if any, of the appellant when he considered the claim about the additional rates made by the respondent No. 1 and granted the same partially. It would only mean that he has negated the objection raised on behalf of the appellant to the award of additional rates for constructing working platform which is the subject matter of the Claim 1. As already pointed out, it is not open to us to attempt to probe the mental process by which the Arbitrator has reached his conclusion when it is not disclosed in the award. Further, it may be seen that when he allowed the claim partially it would show that he has applied his mind to the material on record and the submissions of the parties. For all these reasons we cannot accept the contention raised on behalf of the appellant that the contract or at any rate its terms in relation to Claim 1 was a part of the award and that the Umpire has misdirected himself in not considering the objection raised by the appellant in regard to the same.

25. As regards Claim No. 4, it relates to the construction of additional approach to the working platform to be constructed by the respondent No. 1. It is clear from the finding including the title of Claim 4 that there is an uphill task for the learned Counsel for the appellant to contend that the contract or any term thereof for the additional approach is referred to and therefore, is a part of the finding of the

Umpire on Claim 4. The expression 'additional approach' by itself does not show whether a separate approach was to be constructed by the respondent No. 1 under the terms of the contract or whether the widening of the existing approach road was within its terms. The claim made is for Rs. 7 lakhs and the whole claim is granted by the Umpire. There is no intrinsic evidence in the award in relation of Claim 4 to show that the contract or any term thereof in relation of Claim 4 can be held to be impliedly incorporated in the same. The contention raised on behalf of the appellant in this regard that the contract or any term thereof is part of the award in relation to Claim 4 is therefore, negatived.

26. We next proceed to consider the question whether even assuming that in relation to these Claims 1 and 4 the contract or any clause thereof could be impliedly held as part of the award of the Umpire, there is still any error of law apparent on the face of the record which can call for interference of the Court under its limited jurisdiction under section 30 of the Arbitration Act. It is well settled that the jurisdiction exercised by the Court under section 30 of the Arbitration Act is not an appellate jurisdiction and it is only on the grounds covered under section 30 of the said Act that the award of the Arbitrator can be set aside. See. *Madanlal v. Hukumchand*, : [1967]1SCR105 , *N. Chellappan v. Secretary, Kerala Electricity Board*, : [1975]2SCR811 , *M/s. Neel Kantan P. Bros. v. Superintending Engineer*, : AIR 1988 SC2045 , and *Puri Construction Ltd. v. Union of India*, : AIR 1989 SC777 . If the view taken by the Arbitrator upon the construction of the contract is a possible view, then it cannot be said that he has committed any error apparent on the face of the record. See *Food Corporation of India v. Joginderpal* : [1989]1SCR880 .

27. The learned Counsel for the appellant has in relation to Claim 1 relied upon the language used in the Bill of Quantities with regard to the construction of temporary working platform which, according to him, leaves no scope for any other construction that except the rates prescribed in the said Bill of Quantities, the contractor is entitled to claim no other separate or additional rate for the said construction work. According to him, there is no scope for invoking Clause 11.2.2.1. of the contract in relation to this item. Item No. 1 in the Bill of Quantities which is in relation to Claim 1 in the award is extracted below in so far as it is

relevant to this question;

'Description Qty. Unit Rate AmountDesign and construct temp Rs. Rs.orary working platform withbeach sand from Vasco beachincluding sand bag theprotection all around temporary workingplatform or similar as indic-ated in drawing except wherenoted and sand bag rip rap generally as indicated indrawings on seaside oftemporary working plat-form. 294 1.m 16,700/- 49,09,800--do- but with sand from QuoteBaina beach, if required, rate with lead of about 3Kms. 1.m. 18,700/- ---only-do-but with murrum or rather approved earthbrought from outside. -do- 1.m. 19,700/- ='

28. The description of the items show that the temporary working platform has to be constructed with beach sand from Vasco beach and the total quantity required is 294 linear metres. The respondent No. 1 has quoted his rate for such a construction with beach sand from Vasco at Rs. 16,700/- per linear metre. It then appears that if for the said construction the sand from Baina beach is required, with lead of about 3 Kms, the rate quoted is Rs. 18,700/- per linear metre. However, if for the construction of the temporary working platform murrum or rather approved earth is brought from outside then the rate quoted by the Contractor is Rs. 19,700/- per linear meter. As already pointed out the submission is that out of the work of 294 linear metres, the work of 33 linear metres only was completed with sand from Vasco beach and for the remaining work the Contractor was required to use murrum, for which the payment was made to him at the rate of Rs. 19,700/- per linear metre as quoted by him.

29. In regard to claim in the award, the case of the respondent No. 1 Contractor is that there was an understanding between the parties that the major work of construction of the temporary working platform should be by use of sand from Vasco beach and marginally if the sand was required from Baina beach the same should be used or if some murrum was necessary to be used the same should be brought from outside. The case thus is that since the major work itself was done with murrum brought from outside, the rate quoted by the respondent No. 1 for use of murrum was not applicable as the major work with murrum involved substantial expenses for which additional rates were claimed by the Contractor before the

Engineer who did not grant the same and therefore the dispute in this regard was referred to arbitration.

30. The learned Counsel for the respondent No. 1 has relied upon Clause 11.2.2.1. of the contract for his claim of additional rates for construction of the temporary working platform substantially by the use of murrum. Clause 11.2.2.1 of the contract provides that if the nature of any amount of omission or addition relative to the whole of the contract work or any part thereof is such that in the opinion of the Engineer the rate or price contained in the contract for any item of the work is by reason of such omission or addition rendered unreasonable or inapplicable then a suitable rate or price can be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer can fix such other rate or price as shall in his opinion be reasonable or proper having regard to the circumstances. Relying upon Clause 11.2.2.1 it is urged that if it can be shown before the Umpire that the major work done with murrum for construction of the temporary working platform was an additional work within the meaning of Clause 11.2.2.1. and the nature and the amount of such work compared to the contract work about the construction of the temporary working platform was such that it rendered unreasonable or inapplicable the contract rates, it was open to the Umpire the said Clause 11.2.2.1 to fix suitable rates for the same despite the rates quoted in the Bill of Quantities.

31. The above contention raised on behalf of the respondent No. 1 raises the question of interpretation and effect of Clause 11.2.2.1. of the contract. In particular, the case set out by the respondent No. 1 in this regard involves the question whether the major work done with murrum can be said to be additional work within the meanings of Clause 11.2.2.1 and whether the rates fixed in Item No. 1 of the Bill of Quantities are thereby rendered unreasonable or impracticable to attract Clause 11.2.2.1 of the contract. The Supreme Court has held in the case of K.N. Co-op. D Bary Society v. Union of India, : AIR 1973 SC1338 , that where an Arbitrator is called upon to decide the effect of the agreement, he has really to decide a question of law i.e., of interpreting the agreement and hence his decision is not open to challenge. It is also well settled that merely because the Arbitrator has taken an erroneous view of law and fact, his award cannot be interfered with.

See N. Chellappa v. Kerala S.E. Board : [1975]2SCR811 . Looking to the scope of Clause 11.2.2.1 under which suitable rates different from the contractual rates for contract work can be fixed having regard to all the circumstances and if the existing rates for such work provided under the contract are rendered unreasonable or impracticable by reason of any omission or addition of contract work, it is a possible view that despite the provision of the rates under Item No. 1 in the Bill of Quantities, the Umpire can fix additional rates having regard to the circumstances brought before him. If so, it cannot be said that there is any error of law apparent on the face of the award committed by him.

32. The learned Counsel for the appellant has however submitted before us that the reading of the Bill of Quantities in regard to the item in question of construction of temporary working platform leaves no scope for grant of any other or additional rates in respect of the said work. He has placed reliance upon section 91 of the Evidence Act to show that no oral evidence is admissible to construe the said term and that the plain reading of the said term would negative the case of any additional work or rate. In appreciating the above submission it is material to see that the Evidence Act as such is not applicable to the arbitration proceedings. It is only the fundamental principles of evidence such as the principles of natural justice, etc. which are applicable to the arbitration proceedings and not the technicalities of the rules of evidence. Section 91 provides for the rule of the best evidence i.e., proof of the contract by the document itself if the contract is reduced to writing. Section 92 of the Evidence Act then provides for exclusion of oral evidence to contradict, vary, add to or subtract from the terms of the document adduced in evidence as per section 91 of the Evidence Act. However, there are exceptions carved out to the said rule and perusal of Proviso 6 to section 92 would show that the oral evidence is admissible even in the case of a written contract to show the manner in which a document is related to the existing facts. The language of Proviso 6 is wide enough to cover a case like this where the submission is that as understood by the parties the contractual rates were quoted by the respondent No. 1 for construction of the temporary working platform where major work of temporary working platform was done with sand from Vasco beach and if there was marginal necessity, work would be carried out with sand from Baina beach or with murrum.

33. In the case of Ganpatrao Appaji Jagtap v. Bapu Tukaram A.I.R. 1920 Bom. 143, looking to the wide scope of the Proviso 6 to section 92 of the Evidence Act it is observed by this Court that it is the despair of the Judges and the joy of lawyers. If the scope of Proviso 6 is wide then if in its discretion the Umpire is of the view that he can consider the oral evidence and the case of the respondent No. 1- Contractor that the intention or the understanding of the parties was that the major construction work should be with sand from Vasco beach and keeping the same in mind the rates were quoted by the respondent No. 1-Contractor, no exception can be taken to such an approach by the Umpire. At any rate since the technicalities of the Evidence Act are not applicable to the arbitrator proceedings even if there is some error in this approach, it cannot be said that there is an error apparent on the face of the record in considering the above case setout by the respondent No. 1 Contractor.

34. There is however, no merit in the submission made on behalf of the appellant that in no case the oral evidence can be adduced in relation to a contract which is in writing. As already pointed out, the exceptions are carved out in section 92 of the Evidence Act itself. In the case of P.L. Bapuswami v. N. Pattey Gounder : [1966]2SCR918 , the question was whether the document in question was mortgage by a conditional sale or a sale with condition for re-transfer. The Supreme Court held that the question is one of ascertaining the real character of a transaction which can be determined from the provision of the document viewed in the light of the surrounding circumstances of which oral evidence can be adduced. In the case of P.B. Bhatt and other v. V.R. Thakkar and others, : AIR1972 Bom365 , extrinsic evidence was held admissible to show the circumstances in which the document was executed so as to arrive at the true effect of the transaction to which the document related. It is also well settled that if it is the case of the other side that the transaction recorded in the document was never intended to be acted upon and that in fact there was some other agreement between the parties the oral evidence is admissible to show such a state of affairs, as held by the Supreme Court in the case of Smt. Gangabai v. Smt. Chhabubai : [1982]1SCR1176 .

34A. It is therefore, clear that no error of law apparent on the face of the award can be said to have been committed by the learned Umpire if he has considered

the case of the respondent No. 1-Contractor for additional rates in the light of Clause 11.2.2.1 of the contract and the aforesaid facts and circumstances brought before him by the respondent No. 1 to show in what circumstances the rates for construction of temporary working platform were quoted by the respondent No. 1. We cannot therefore, accept the above submission made on behalf of the appellant that Item No. 1 of the Bill of Quantities relating to the rates for construction of temporary working platform left no scope for any other or additional rate in respect of the said work.

35. As regards the Claim 4 about additional approach to the working platform, the submission is that the drawing or plan showing the location of the additional approach was itself a part of the contract. In fact the case is that the respondent No. 1- Contractor was allowed to revise his quotation from Rs 3,30,000/- to Rs. 7,00,000/- for the construction of the approach road because its site was shifted further from Vasco beach by about 120 mts. However, the Contractor did not construct any approach road as shown in the drawing and only widened the existing approach road by 2.2 metres from its existing width of 5.8 metres thus making it 8 metres. In fact the submission is that the respondent No. 1- Contractor was only entitled to actual expenses which had been incurred by him in widening the existing approach road by 2.2 metres. The case of the respondent No. 1 - Contractor in this regard is that no particular additional approach road to the working platform was mentioned in the contract and that the drawing or the plan alleged to be showing the location of the approach road was not a part of the contract. It is further the case of the respondent No. 1 that by widening the existing road by 2.2 metres throughout its length, and additional approach to the working platform within the meaning of the contract was actually constructed by the respondent No. 1 Contractor for which he was entitled to be paid the contract amount of Rs. 7 lakhs.

36. The question as to what the additional approach to the working platform is within the meaning of the contract is a mixed question of fact and law i.e., the construction of the relevant clause and/or item in the contract. If the learned Umpire takes a view that by widening the existing approach the respondent No. 1 has created approach to the working platform within the meaning of the clause of

the contract in regard to Claim 4 in the award, the said view taken by him is a possible view. At any rate, it cannot be said to be perverse. It cannot therefore be interfered with. There is no error of law apparent on the face of the award which can be said to be committed by the Umpire in recording his finding about Claim 4 in the award. The contention raised on behalf of the appellant that there are errors of law apparent on the face of the award in construing the contractual terms in regard to Claims 1 and 4 in the award therefore deserves to be rejected.

37. We are supported in the above view by the decision of the Supreme Court in the case of *State of Maharashtra v. M/s. Nav Bharat Builders*, : AIR 1991 SC111 . The said case involved the question of interpretation of the term of contract. The appellant contended that the rates for stoppage of work were provided for in the contract itself and therefore the Arbitrator had committed an error apparent on the face of the record in granting compensation which was not justified by the contractual rate. The submission on behalf of the Contractor in the said case was that the term in question in the contract related to the rates for temporary stoppage of work and not long stoppages. The award of the learned Arbitrator was upheld by the Supreme Court on the ground that the clause in the contract could be construed to mean rates for temporary stoppages of work and if the stoppages of work were longer, the Arbitrator could fix separate compensation for the same. In this view of the matter it was held that no error apparent on the face of the record was committed by the Arbitrator.

38. It is then submitted that the award amount in regard to Claim 1 is disproportionately excessive which would itself show non-application of mind by the Umpire and would vitiate his award on Claim 1 on this ground. In support, reliance is placed upon the decision of the Supreme Court in the case of *Dandasi Sahu v. State of Orissa*, : 1970 CriLJ1369 . In considering the question whether the award itself shows non-application of mind, the said award must be so disproportionately excessive that the inference of non-application of mind should be possible on the face of the award. In *Dandasi Sahu's* case cited supra the facts were that the Arbitrator had awarded a lumpsum of Rs. 25,00,156 when according to the Contractor the total value of the work not paid was Rs 12,15,653 and inclusive of interest the claim put forth by him was of Rs. 31,44,437. Taking into

consideration the principal claim and the fact that the Contractor was not entitled to interest for the period the arbitration proceedings were pending, the Supreme Court has held that the award amount of Rs. 25,00,156 was so disproportionately excessive that it could by itself show non-application of mind by the Arbitrator.

39. It may be seen that the question whether the award amount is disproportionately excessive or not has to be considered in the facts of each case. In the instant case the respondent No. 1- Contractor had claimed an additional amount of Rs. 40,41,430/- regarding the item in question of construction of the temporary working platform and the claim accepted by the learned Umpire is to the extent of Rs. 24,50,000/- only which is much below the claim made by the respondent No. 1- Contractor. Once it is found by him that because of the major work done by the Contractor by the use of murrum he was entitled to additional rates the Umpire had jurisdiction to fix such additional amount as is justified in his discretion for such work. Therefore, after taking into consideration all the relevant facts and circumstances place before him if the Umpire arrives at a particular finding in that regard it cannot be said that there is non-application of mind in the instant case by the Umpire, particularly when the amount awarded by him is much below the amount claimed by the respondent No. 1- Contractor. It is pertinent to see that the Umpire was a Chief Engineer, a man of high status and was an expert in his line. If he has considered and applied his mind to the relevant facts and documents on record the Award rendered by him cannot be challenged on the ground that it suffers from non-application of mind. The above contention raised on behalf of the appellant cannot therefore be accepted.

40. In the result the instant appeal fails and is dismissed with costs.

41. The learned Counsel for the appellant at this stage has prayed that the interim stay of the decree in the instant case which was granted by this Court on 25-4-1988 on the condition of depositing by the appellant, the half of the sum awarded by the Umpire should be continued for a period of eight weeks from the date of this order to enable the appellant to move the Supreme Court in this matter. The learned Counsel appearing for the respondent No. 1- Contractor has urged before us that the eight weeks time is too long a time. Since the request made on behalf

of the appellant is reasonable and taking into consideration the fact that the appellant has deposited half the amount awarded by the Umpire which the respondent No. 1- Contractor has also withdrawn, we direct that the interim stay granted on 25-4-1988 shall continue upto March 31, 1991.

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