

Prasad and Co. Vs. the Superintending Engineer and ors.

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Court : Andhra Pradesh

Decided On : Jul-05-1995

Reported in : 1995(3)ALT537; 1996(1)ARBLR692(AP)

Judge : D.H. Nasir and ;P. Venkatarama Reddi, JJ.

Acts : Arbitration Act - Sections 8 and 39; [Constitution of India](#) - Article 299(1);
Indian Contract Act

Appeal No. : C.M.A. No. 1156 of 1989

Appellant : Prasad and Co.

Respondent : The Superintending Engineer and ors.

Advocate for Def. : C.V. Rajeev Reddy, Adv.

Advocate for Pet/Ap. : P.R. Ramachandra Rao and ;P.L. Narasimham, Adv.

Judgement :

P. Venkatarama Reddi, J.

1. This appeal under Section 39 of the Arbitration Act is directed against the judgment and decree passed by the II Addl. Judge, City Civil Court, Hyderabad in O.P. No. 124/84 which is an application filed under Sections 30 and 33 of the Arbitration Act by respondents 1 and 2 herein objecting to the award dated

1.10.1983 made by the arbitrator. The impugned judgment is a common Judgment in the aforesaid O.P. and O.S. No. 1514/83 filed by the arbitrator under Section 14(2) of the Act. The arbitrator a retired Chief Engineer was appointed by the court on an application under Section 8 of the Arbitration Act. The award was partly set aside in so far as Claim No. 3 was concerned and the rest of the award was made the Rule of the court. The court awarded interest at 6% per annum from the date of decree till the date of realisation.

2. The details relating to the disputed claims are :

Claim No. 2. - Payment for the extra leads for rubble, sand metal. Amount of claim : Rs. 14,69,423/- and the claim was partly allowed for Rs. 10,63,651/-.

Claim No. 3. - Payment of escalation charges : As against the claim of Rs. 47,00,000/-, the amount partly allowed was Rs. 4,60,419/-.

Interest was allowed at 8.25% from 22.10.1982 i.e., from the date of entering upon reference.

3. The learned Addl. Judge, City Civil Court upheld the objection of the Government in regard to the award of escalation charges holding that the agreement did not contain a clause providing for escalation of rates. Thus, the award was set aside in so far as Claim No. 3 is concerned. The contractor has therefore come up in appeal which is C.M.A. No. 1156/89. In that appeal, the State Government has filed a Memo of Cross-Objections questioning the judgment in so far it affirmed the award on Claim No. 2 including interest thereon from the date of reference.

4. We will first take up claim No. 3 which is the subject-matter of C.M.A. No. 1156/89.

5. Now, before proceeding further, certain undisputed facts may be stated. Tenders for were called for construction of Kalyani Dam including masonry spillway and Gravity Dam near Tirupathi. Pursuant to Tender notification, tenders were received by the respondents in April, 1972. The period of currency of tenders was extended upto 30.9.1972. After the tender was accepted, the site was handed

over to the contractor on 22.1.1973 even before a formal Agreement was concluded. The stipulated period of completion of the work was three years from the date of handing over of the site. The Agreement was executed on 18.4.1974 preceded by certain K2-agreements for a portion of the work. The contract was treated to have been closed by Government on 20.3.1976 and no further work was executed beyond that date.

6. We will now take up Claim No. 3. The contractor's case is that there was abnormal delay in finalising the tender, handing over of the site and concluding the Agreement. The tenders were quoted and accepted on the basis of the Standard Schedule Rates (S.S.R.) of 1970-71 and he cannot be compelled to work as per the good old rates based on S.S.Rs. of 1970-71. There was a steep escalation in costs of material and labour and the respondent was although representing to the Department for payment of extra rates which was not rejected.

7. The case of respondent was that the contractor was bound by the terms of the agreement and there was no provision for payment of extra rates during the currency of the contract period or the extended period. The contractor ought to have anticipated the escalation in costs and quoted his rate accordingly. In fact, a certain percentage over and above the Standard Schedule Rate was quoted by the contractor. There was no hindrance to carry out the work as the site was handed over in January, 1973 and the non-conclusion of the Agreement could not have come in the way of progress of the work.

8. Relying upon certain observations of the Supreme Court in *M/s. Hind Builders v. Union of India* : [1990]2SCR638 , Mr. P. R. Ramachandra Rao, learned counsel for the appellant has contended that the non-speaking award passed by an experienced engineer should not have been interfered with by the court below and the arbitrator must be presumed to have considered all the relevant factors including the abnormal rise in cost during the span of four years. It is also pointed out that as against the claim of Rs. 47 lakhs, the arbitrator awarded only a sum of Rs. 4.60 lakhs which is quite reasonable. The State having extracted the work from the contractor and derived the benefit, should not have denied the liability to pay even the amount awarded by the arbitrator.

9. Mr. Rajeev Reddy, Government Pleader appearing for the learned Advocate General has referred to various decided cases of this court and of the Supreme Court and submitted that the claim being outside the purview of the Agreement, it was liable to be rejected. Accordingly, the court below did not commit any error in setting aside the award in so far as Claim No. 3 is connected. It is submitted that even a non-speaking award is not immune from challenge if the arbitrator travelled beyond the scope of the contract and awarded a sum not contemplated by the contract between the parties.

10. Having regard to the authoritative pronouncements of the Supreme Court as well as of this court, we find no substance in the appellant's contention and we are of the view that the judgment of the lower court setting aside the award vis-a-vis Claim No. 3 is unassailable.

11. Before we proceed to examine the rival contentions, it is necessary to bear in mind that the award in question is a non-speaking award and the scope for interference with a non-speaking award is far more limited than it is in relation to a speaking award. Unless there is any legal proposition which is enunciated in the award itself or the documents incorporated in it, the award cannot be said to have been vitiated by a legal error apparent on the face of it. The legal error must be something which is transparent from the award itself. In the case of non-speaking award, it is hardly possible to find such a transparent nor patent error writ large on the face of the award. In order to find out whether there is an apparent error on the face of the award, normally it is not permissible to refer even to the terms of the Agreement because a non-speaking award would not have made any reference to such terms. An exception, however, is carved out by the decided cases paving the way for looking into material not appearing on the face of the award. That exception comes into play where a dispute as to the jurisdiction of arbitrator arises.

12. This principle is well established by a catena of decisions starting at least with *M/s. Sudarsan Trading Co. v. Govt. of Kerala* : [1989]1SCR665 . In *Associated Engineering Co. v. Govt. of A.P.* : [1991]2SCR924 , it was observed :

'A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot

widen is jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would liable to be set aside.

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself. *Bunge & Co. v. Dewar & Webb* ((1921) 8 Lolyd's Rep. 436 (KB)).'

It was also pointed out in that case that 'an arbitrator who acts in manifest disregard of the contract acts without jurisdiction'. However, 'If he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.'

13. These, then, are the various considerations that ought to be kept in view while deciding this matter.

14. It is common ground that the Agreement does not make any provision for extra payment by reason of escalation of costs in the course of execution of work. In fact, in the claims statement, it is the case of the contractor that before conclusion of the Agreement, he sought for inclusion of rate escalation clause but the Government did not convey its decision in the matter. No doubt, as observed by Hansaria, J. speaking for the Supreme Court in *Tarapore & Co. v. State of M.P.* : [1994]1SCR1012 , mere lack of specific provision permitting the claim in question does not oust the jurisdiction of the arbitrator. It is however, necessary to bear in mind another pertinent observation made by the Supreme Court in the aforementioned case. The broad contention that whatever, is not excluded specifically by the contract can be the subject matter of claim by the contractor, was rejected by the Supreme Court stating that 'such proposition will mock at the

terms agreed upon'. Then it was observed :

'Parties cannot be allowed to depart from what they had agreed. Of course, if something follows as a necessary concomitant to what was agreed upon, the court can assume that too, as a part of the contract, between the parties.'

15. Applying the above observation of the Supreme Court to the instant case, we do not find anything in the Agreement which, even by necessary implication, it could be construed that the escalation in rates was provided for within or beyond the stipulated period of completion. The provision as to escalation of rates does not follow as a necessary concomitant to what was agreed upon, to borrow the expression of the Supreme Court; nor can it be considered to be an implied term of the contract. In *Superintending Engineer, Somasila Project Circle v. B. Balaiah* (C.M.A. No. 786/86 dated 1.12.1988), a Division Bench of this Court consisting of Jeevan Reddy, J. (as he then was) and Bhaskar Rao, J. dealt with the aspect whether the claim on account of escalation of cost of labour, material, etc. could be regarded as an implied term of the contract. It was held :

'The question is whether a contractor is entitled to lay a claim on account of escalation in the prices of materials, or on account of rise in wages, when it is not provided by the contract. As stated above, in the case of a formally drafted and extremely elaborate contract, running into hundreds of pages as the one in the present case, there is no room for any such claim, nor can it be held that it is an implied term. On the contrary, it must be presumed that the parties did not agree upon any such stipulation and therefore did not choose to incorporate it in the agreement. Since the arbitrator is the creature of the agreement/contract between the parties, he must operate within the confines of the agreement. No doubt, he can also go into the question of breach and award of compensation/damages on account of breach or termination, as the case may be. But that does not mean that he can award amounts on account of items or claims not provided for by the contract. He is not the monarch of what all the surveys.

So, holding, the claim for escalation was rejected and the award set aside. In *Chief Engineer, Panchayat Raj v. B. Balaih* (1985 (1) ALT 34 (NRC) = 1985 (1) APLJ 224), K. Ramaswamy, J. (as he then was) speaking for the Division Bench

expressed the view that in view of the mandate contained in Article 299(1) of the Constitution, an implied term in the contract cannot be pleaded.

16. In *Continental Construction Co. Ltd. v. State of M.P.* : [1988]3SCR103 , the claim for extra cost towards rise in price of material and labour was rejected by the Supreme Court, after referring to the terms of the agreement, the Supreme Court observed that the High Court was right that the District Judge was entitled to examine the contract in order to find out the legality of the claim of the appellant regarding extra rate. That was a case of speaking award. In that case, there was a specific provision in the agreement which provided that the contractor had to complete the work inspite of rise in the prices of material and also labour charges as the rate stipulated in the contract. Though the ratio of this judgment may not in terms apply for the present case, some of the observations made by the Supreme Court are quite opposite. The Supreme Court reiterated the principle laid down in *M/s. Alopri Prasad v. Union of India* : [1960]2SCR793 , to emphasis that under the general law of contract, the parties are not entitled to ignore the agreed terms of contraction on account of unexpected turn of events such as abnormal rise in prices. It was observed :

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

17. In *Thawards v. Union of India* : [1955]2SCR48 , the Supreme Court observed that 'the arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks it just and reasonable'.

18. It is significant to notice that in the present case, the work was done only for a period of two months beyond the stipulated period of completion of the work, because, as already noticed, the contract was admittedly closed on 20-3-1976. Even if there was escalation of material cost and labour charges, it cannot be a ground to seek additional rate on the ground of equity or otherwise. We would like to clarify that we are not concerned here with a case where the contract had to be performed with a delay on account of breach of promises on the part of the Department. Assuming that there was some delay in handing over the site, the appellant proceeded with the execution of the contract and it is not his case that he gave any notice reserving his right to claim compensation under the third limb of Section 55 of the Contract Act. This was considered to be one of the grounds to reject the claim for escalation charges by a Division Bench of this court in *State of A.P. v. Associated Engineering Enterprises* : AIR 1990 AP294 .

19. In *Chief Engineer, Panchayat Raj Dept. v. B. Balaiah* (supra) decided by a Division Bench consisting of Seetharam Reddy, J. and K. Ramaswamy, J. apart from rejecting the plea of implied term, K. Ramaswamy, J. speaking for the Bench, pointed out that the claim for escalation is not a dispute coming within the purview of arbitration clause (PS 73). The following pertinent observation was made at paragraph 10 :

'The respondent himself is not relying upon the contract to claim escalation charges. So, by no stretch of imagination can it be said that the claim for escalation is a matter or thing arising under Clause 73 of MDSS.'

This decision was cited with approval by a Division Bench consisting of Jeevan Reddy, J. and Bhaskar Rao, J. in *C.M.A. No. 786/86*. The judgment was again referred to and followed by the Division Bench consisting of Jeevan Reddy and Neeladri Rao, JJ. in *Government of A.P. v. P. V. Subba Naidu* (1990 (1) ALT 54). It was explained therein that despite the judgment of the Supreme Court in *P. M. Paul v. Union of India* : [1989]1SCR115 and *Sudarshan Trading Co. v. Govt. of Kerala* (supra) the decision in *Balaiah's case* (supra) is still good law. We must notice that a different note was struck by a Division Bench of this Court in *State of A.P. v. R. V. Rayanim* (1988 (1) APLJ 536). Therein, the Division Bench allowed

the claim put forward by the contractor on account of statutory increase in the minimum wages. The Division Bench held that the question whether statutory escalation of wages would be a ground for awarding extra rate is a matter for interpretation and therefore, an error apparent on the face of the award cannot be made out. The decision in Balaiah's case (supra) was distinguished in the following terms :

'But we are told that leave has been granted by the Supreme Court and an appeal is pending. In the Division Bench case it does not appear that the claim was the result of a statutory escalation of prices.'

In C.M.A. No. 786/86, the learned Judge, disapproved the point of distinction brought out by the Division Bench in State of A.P. v. R. V. Rayanim (supra), in the following terms :

'With respect, we are not satisfied just because leave has been granted by the Supreme Court against the Bench decision in Chief Engineer, Panchayat Raj Dept. v. B. Balaiah (1985-1 APLJ 224) the decision loses its efficacy or its binding nature. The distinction sought to be made between statutory escalation and non-statutory also does not appeal to us.'

It may be noted that the above judgment of the High Court was the subject matter of appeal before the Supreme Court in State of Andhra Pradesh v. R. V. Rayanim : [1990]1SCR54 . No doubt, the Supreme Court affirmed the judgment of this court, but it was on a different ground. The agreement that the claim on account or escalation of costs contrary to the agreed terms cannot be put forward, was not answered by the Supreme Court. Their Lordships affirmed the judgment on the ground that even in the said claim on account of escalation was rejected, the award itself cannot be said to be vitiated because the award was for a lumpsum and there were many other claims on account of which the arbitrator could have awarded the amount.

20. That apart, Clause (PS) 59 APDSS' which forms part of the agreement is another inseparable obstacle in the way of the appellant. Clause 59 lays down :

'59. Delays and extension of time : No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except as hereinafter defined. Reasonable extension of time will be allowed by the Executive Engineer or by the Officer competent to sanction the extension for unavoidable delays; such as may result from causes which, in the opinion of the Executive Engineer, are undoubtedly beyond the control of the contractor. The Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, as twenty five percent in excess of the actual working period so lost.'

Relying on the provision in the Agreement, the claim for compensation or escalation or payment extra amount over and above the contracted rates was negatived by this court at least in three decisions. (Vide State of A.P. v. Associated Engineering Enterprises (supra); C.M.A. No. 786/86 dated 1.12.1988 and C.M.A. No. 998/84 dated 19.8.1989. The last decision was a case in which the claim was made for extra payment on account of escalation of costs for the work done beyond the agreement period. One of the grounds alleged by the contractor was delay in handing over the site free of crops. The other grounds pleaded were found to be totally irrelevant. The learned Judges, relying, inter alia, on P.S. 59 or APDSS, rejected the claim. The claims of the contractor in the present case is still worse. He wants escalation over and above the agreed rates even during the currency of the agreement period.

21. The matter is no longer in doubt in view of the recent judgment of the Supreme Court in Ch. Ramalinga Reddy v. Superintending Engineer ((1994) 5 SCALE 67). The view taken by the Division Bench of this court consisting of Jeevan Reddy and Neeladri Rao, JJ. in C.M.A. No. 1148/86 was affirmed except insofar as the item relating to interest is concerned. In that case, the claim for payment of extra rate even for the work done beyond the agreement period was held to be unsustainable. The three-Judge Bench of the Supreme Court referred to Clause 59 of APDSS and held that in the light of specific provision, such a claim was inadmissible. The learned Judges distinguished P. M. Paul's case (supra) stating that there was no such clause in the contract. Referring to Sudarsan Trading Co. case (supra), Bharucha, J. speaking for the Bench observed :

'It was there observed that there are two different and distinct grounds involved in many cases concerning the setting aside of arbitration awards. One is that there is error apparent on the face of the award and the other is that the arbitrator exceeded his jurisdiction. In the later case the court can look into the arbitration agreement but in the former, it cannot. An award may be set aside on the ground that the arbitrator had exceeded his jurisdiction in making it. In the case before us, the arbitrator was required to decide the claims referred to him having regard to the contract between the parties. His jurisdiction, therefore, is limited by the terms of the contract. Where the contract plainly barred the appellant from making any claim, it was impermissible to make an award in respect thereof and the court was entitled to intervene.'

Again at para 19, while referring to the observations made in *Jagodia (Overseas) Pvt. Ltd. v. Industrial Developmental Corporation of Orissa Ltd.* : [1993]1SCR229 . That the court should be very circumspect about setting aside an award reached by an arbitrator, the learned Judge observed :

'We agree, but circumspection does not mean that the court will not intervene when the arbitrator has made an award in respect of a claim which is, by terms of contract between parties, plainly barred.'

We may add that *Ramalinga Reddy's case* (supra) is also a case of non-speaking award. The Supreme Court upheld the High Court's Judgment setting aside the award treating it as an instance of the arbitrator exceeding his jurisdiction. The same is the case here.

22. There is one more decision which we may usefully refer to in *Associated Engineering Co. v. Government of Andhra Pradesh* (supra), the Supreme Court held that the claim for escalation in labour charges otherwise than in terms of the formula prescribed by the contract was not contemplated by the contract and the umpire travelled outside the permissible territory and exceeded his jurisdiction in making the award on the items not provided for in the contract. This was considered to be an error going to the root of his jurisdiction. It was observed that evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus

exceeded his jurisdiction.

23. Applying the ratio of the aforementioned judgments, we are of the view that the lower court was perfectly justified in setting aside the award with regard to claim No. 3 as it did not fall within the scope of the contract.

24. Before concluding discussion on claim No. 3, we may refer to the decision of the Supreme Court in *M/s. Hind Builders v. Union of India* (supra), on which the appellant's Counsel has relied. The relevant observations are at paragraph 11 :

'It is difficult to say, by merely reading the terms of contract that the arbitrators have erroneously interpreted the terms of the contract. It is not without significance that the departmental officers did not dispute the rate of the claim. Equally, the arbitrators were experienced engineers and would not have passed, what is now said to be, an astounding claim without thought. It is difficult to assume that all these persons have overlooked, that the contractor had already been paid at Rs. 18/- under item 4.09(a) especially when it is so stated on the face of the claim. This, therefore, is not a case where the arbitrator can be said to have ignored or overlooked a term of the contract; on the contrary, they have acted upon a particular interpretation of certain clauses of the contract on which two views are possible.'

The reliance placed on the observation 'that the arbitrators who were experienced engineers would not have passed the award without thought' is, in our opinion, misconceived. These observations cannot be divorced from the context and setting in which they were made. We cannot understand these observations as laying down a broad proposition that wherever an experienced arbitrator is appointed to decide a dispute between the parties, it must be presumed that he has acted rightly and within the limits of the task assigned to him. The case on hand is not a case involving interpretation of the terms of the contract on which two views are possible, nor is a case in which the awards is being faulted on the ground that some material was not considered by the arbitrator.

25. In the light of the above discussion, we affirm the judgment of the lower court in setting aside the award concerning claim No. 3.

26. The next item in dispute is Claim No. 2. The award of Rs. 10.64 lakhs against this claim is disputed in the Cross-objections filed by the government. The contractor has claimed payment for extra leads for rubble, sand and metal. The government's case is that there is no provision in the agreement for payment towards extra leads as the rate quoted in all inclusive. One of the disputed items in the agreement, insofar as it is relevant, reads as follows :

'(5) 1082-cum, Random Rubble masonry in cement mortar (1 : 4) with 20% replacement of cement by fly ash for the first 1.98 meters (0'-6') upstream face from the face of the drainage gallery including all leads, lifts, etc., complete.'

Reliance is also placed on proforma tender condition No. 8, according to which, the Government will not, after acceptance, of a contract rate, pay any extra charge for leads or for any other reason in case the contractor is found later on to have misjudged the materials available. Reliance is placed by the learned Government Pleader on a Division Bench Judgment of this court in C.M.A. Nos. 880 and 913/85 dated 1st March, 1989. The case of the respondent-contractor is that contrary to the sources mentioned in the 'leads statement' appended to Agreement, the respondent was required to procure materials viz., sand, stone and metal from different places which were located at a far more distance than the notified source. In the rejoinder statement, the contractor has referred to details and the letters of the Executive Engineer specifying the new sources from which the material could be obtained. No doubt, in the object petition filed in the lower court by the respondents they denied this allegation stating that the material at the quarry site specified in the agreement was always available and the contractor was specifically informed that he will not be entitled to any amount towards extra leads. This is a disputed question of fact. The award being a non-speaking award containing no discussion or reasons, it is not possible to speculate on the reasons which might have weighed with the arbitrator in reaching the conclusion he did. We cannot reappraise the evidence. Reading the relevant item in the agreement together with tender Condition No. 8 and the leads statement which also forms part of the agreement, it is not possible to state that the arbitrator committed an error of jurisdiction by going against the contractual terms. We are of the view that if we have to find fault with the award vis-a-vis Claim No. 2, we must enter into the

domain of interpretation of the contract, which, it is well settled, the court is not entitled to do. In *Hindustan Construction Co. v. State of J&K*; : AIR 1992 SC2192 , the Supreme Court observed :

'Even if, in fact, the arbitrator had interpreted the relevant clause of the contract in making their award on the impugned items and even if the interpretation is erroneous, the court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract. Whether the interpretation is right or wrong, the parties will bound; only if they set out their line of interpretation in the award and that is found erroneous can the court interfere.'

In *Associated Engineering Co. case* (supra) it was observed :

'If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdiction error. Such error going to his jurisdiction can be established by looking into material outside the award.'

In *State of Orissa v. Lal Brothers* : AIR 1988 SC2018 , the Supreme Court pointed out that :

'An award is not valid merely because by a process of interference and argument, it may be demonstrated that the arbitrator has committed some mistake in arriving at this conclusion.'

In *Food Corporation of India v. Jogindra Paul* : [1989]1SCR880 , by applying the test whether the construction placed by the arbitrator was conceivable or possible, the Supreme Court declined to interfere with a reasoned award.

27. Keeping these principles in view, it is difficult to say that in the light of the terms and conditions of the agreement in including the leads statement, the claim for extra leads falls patently outside the contract or to use the expression in *Associated Engineering Co. case* (Supra), 'files in the face of the contract'. When the Department itself mentioned the sources from which the materials have to be secured and also mentioned the distance and the tendered rates were evidently worked out on that basis, it is doubtful whether the contractor is debarred from

claiming an extra amount even if the said sources are changed at the instance of or with the approval of the Department. As we observed already, it is not for us to go into the question whether or not the version of the contractor is factually correct in this regard. Suffice it to notice that there was a dispute on that aspect and the arbitrator was competent to go into the dispute. If he had committed any error in arriving at a finding fact, the award is not liable to be interfered with. So also, with regard to the interpretation of the relevant contractual provisions, there is scope for doubt. When doubt exists, the benefit thereof shall go in favour of the party in whose favour the award is passed. For these reasons, we cannot, in the instant case, say that an error of law is transparent from the award or that the arbitrator had exceeded his jurisdiction by travelling beyond what was authorised by the contract.

28. We do not think that reliance could be placed on the Division Bench judgment in C.M.A. Nos. 880 and 913 of 1985 dated 1.3.1989. There, we do not find any reference to the leads statement (which is appended to the present agreement). There is no indication in the judgment that the contractor pleaded that in the course of execution of the contract, specified source had to be changed leading to lot of difference in the leads. On the other hand, the observations in the judgment categorically indicate that it was a case of misjudging by the contractor and such situation squarely fell within the embargo laid down in the second part of tender condition No. 8. The learned Judges observed :

'Evidently, in this case, the contractor has misjudged the availability of sand in the specified river. It is not even alleged by him that he realised even before entering into contract that adequate quantity of sand is not available in the river specified and/or that he made a complaint to that effect to appropriate authorities. Evidently, this is a case where discovery of inadequacy of the material was made only after entering into the agreement. Such a case is squarely covered by the tender condition No. 8 and no such claim can be entertained.'

The claim of the contractor stands on a different footing in the case on hand, and in our considered view, the ratio of that judgment cannot be applied to the present case.

29. The last item of dispute is as regards award of interest from the date of reference. It is the contention of the learned Government Pleader appearing for the learned Advocate General that pendente lite interest ought not to have been awarded in view of the recent judgment of the Supreme Court in Durga Ram Prasad v. Government of A.P. : (1995)1SCC418 . The arbitrator awarded interest at 8.25% on the amounts payable to the contractor from the date of the reference i.e., 22.10.1982 to the date of decree or actual payment whichever is earlier. The learned Government pleader submits that the arbitrator has no jurisdiction to award interest for any period prior to the passing of the award in view of Clause 69 of APDSS which forms part of the Agreement, which reads as follows :

'P.S. 69 : Interest on money due to the contractor : (a) No omission by the Executive Engineer or the sub-divisional officer to pay the amount due upon certificates shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee fund or payments in arrear, nor upon any balance which may, on the final settlement of his accounts, be found to be due to him.'

The learned Government Pleader also relied on a Division Bench Judgment of this court consisting of Jeevan Reddy and Bhaskar Rao, JJ. in A.A.O. 992/88 dated 15.11.1988 in which it was held that the arbitrator has no power to award pendente lite interest except in a case where the dispute in a pending suit, instead of being adjudicated by the court, is referred to arbitration for decision.

30. In reply, Mr. P. R. Ramachandra Rao, learned Counsel for the appellant referred to the decision, in Superintending Engineer, TNUDP Madras v. A. V. Rangaraju : AIR1994 Mad217 . We may at once point out that in the said case, the Madras High Court upheld the grant of interest from the date of award and hence it is not of any help to the appellant.

31. To resolve the controversy, it is necessary to refer first to the Constitution Bench judgment in Secretary Irrigation Department, Govt. of India v. G. C. Roy : [1991]3SCR417 . The Supreme Court, on a conspectus of several decisions, laid down certain principles with the following preface :

'We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest.'

Principles (i), (iv) and (v) laid down therein deserve to be noticed :

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, C.P.C. and there is no reason or principle to hold otherwise in the case of arbitrator.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. The awards : [1955]2SCR48 has not been followed in the later decisions of this court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal Rule as they appear to, on first impression. Until Jena's case : [1988]1SCR253 , almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.'

Following the path set by the Constitution Bench G. C. Roy's case (supra) onwards, granting interest pendente lite were upheld in a number of cases, (Vide Hindustan Construction Co. Ltd. case (supra), Jugal Kishore v. Vijayendra (supra), State of Orissa v. B. N. Agarwal (supra) Ch. Ramalinga Reddy case (supra) and an unreported decision of this court in C.M.A. No. 1553/89. In Jugal Kishore, case

(supra) His Lordship Jeevan Reddy, J. in a separate but concurring judgment explained that G. C. Roy's case (supra) cannot be understood as overruling Jena's case insofar as it dealt with the arbitrator's power to award interest for the reference period. The learned Judge observed that :

'the conclusions in para 44 only relate to the power of the arbitrator to award interest pendente lite.'

In the penultimate para, the learned Judge guardedly said :

'So far as the matter before us is concerned, it is a reference in a pending suit. In such cases the arbitrator has all the powers of the court in the matter of awarding interest.'

If the reference is not in a pending suit, as in the present case, what would be the position has not been elaborated. The distinction pointed out by the some learned Judge in State of A.P. v. Krishnaiah Naidu (A.A.O. No. 292 of 1988 dated 15.11.1988 = 1989 (2) Arb. LR 421), was perhaps in therefore front of his mind while making those.

32. In a recent case Ch. Ramalinga Reddy v. State of A.P. (supra) interest for the period commencing from the date of reference to the date of award was allowed by the Supreme Court following G. C. Roy's case (supra). That case arose out of the Division Bench Judgment of this court to which Jeevan Reddy, J. (as he then was) was a party. The High Court disallowed the interest pendente lite, but the Supreme Court allowed the appeal in this aspect based on the concession made by the learned counsel for the respondent-State.

33. However, in our view, the matter is no longer res integra and it is concluded by a recent judgment of the Supreme Court in Durga Ram Prasad v. Government of A.P. (supra). His Lordship K. Ramaswamy, J. speaking for the Bench analysed the legal position under Clause 69 of MDSS (similar to Clause 69 of APDSS) and pointed out that the last limb of Clause 69 would indicate that there should be final settlement of the account and upon its settlement, if it is found due and payable to the contractor, on such amount also, the contractor is not entitled to the payment

of interest as contracted under Clause 69 of the MDSS'. Having observed thus, the following question was posed by the learned Judge :

'When such is the position, whether the contractor is entitled to payment of interest on mere making a claim and reference made to the arbitrator and whether the arbitrator gets jurisdiction to award interest on the amount due from the respective dates on which the payments were withheld by the engineer concerned ?'

After disapproving the view taken by the learned Single Judge of this court in *APSRTC v. P. Ramana Reddy* (1989 (1) ALT 195), the learned Judge observed at paragraph 4 :

'The very dispute is whether the appellant is entitled to the payment of the amount pursuant to the contract. The claim of the State appears to be that the appellant has not constructed the godown in accordance with the specifications and that, therefore, they withhold the payment. Unless the dispute is resolved and the amount is found due, the contractor is not entitled to the payment of it. Thereon, the interest in terms of Clause 69 of the MDSS is contracted out. When such be the position, then mere reference does give jurisdiction to the arbitrator to award interest prior to reference.'

There appears to be a typographical error in the last sentence extracted above. Obviously the word 'not' between 'does' and 'give' was omitted. The Supreme Court then explained that in *G. C. Roy's case* (supra) the Constitution Bench was concerned with the case of pendente lite interest and that the ratio therein had no application to the case on hand. It was observed that the ratio in *Jena's : [1988]1SCR253* case, was still good law in regard to interest prior to the commencement of arbitration proceedings. It was then observed :

'Accordingly, we are of the view that the contractor is not entitled to payment of interest in terms of Clause 69 of MDSS for the period anterior to the reference for arbitration untill the final settlement of the amount due to the contractor of his account is determined.'

The above observation may convey the impression that only the interest for the reference period was held to be inadmissible. However, the immediately following sentence coupled with the observations in paragraph 4 (extracted above) would make it clear that interest upto the date of award was disallowed by the Supreme Court.

The crucial sentences are these :

'in this case, that dispute was determined by the arbitrator in his award. Therefore, from the date of with holding till the date of award, the appellant is not entitled to the payment of interest. The arbitrator has no jurisdiction to arbitrate that dispute.'

It may be noticed that the Supreme Court in G. C. Roy's case (supra) made it clear that they were dealing with a situation where the agreement was silent as to the award of interest. But, in the face of the prohibition contained in Clause 69, which was referred to and relied on by the Supreme Court in Durgaram Prasad's case (supra), the ratio of the decision in G. C. Roy's case (supra) cannot be applied and even pendente lite interest cannot be awarded, not to speak of interest for prerule period. This, in effect, is the ratio of the latest decision in Durgaram Prasad case (supra). We need not therefore consider the question as to what would be the position under the interest Act, 1978 which has come into effect by the date of award. In view of this, the award directing payment of interest should have been set aside as being, without jurisdiction, as pointed out by the Supreme Court in Durgaram Prasad's case (supra) and the court below should have directed payment of interest on the amounts payable to the respondent under the award from the date of award till the date of actual payment.

34. Finally, we shall refer to the plea of limitation raised by the learned Government Pleader. It is, contended that the contract came to a close in March, 1976 and the contractor sought for arbitration much later. He filed an application for appointment of an arbitrator only in the year 1981. Therefore, it is contended that the claims are clearly, barred by time. The learned Government Pleader has not been able to show to us that the plea of limitation was, in fact, urged before the arbitrator. The counter to the claim-statement, admittedly, does not refer to such plea. This plea, obviously must have been raised for the first time before the court.

The point of limitation which is a mixed question of law and fact was not put in issue before the arbitrator. It is, therefore not possible to say that the award is vitiated by an error of law apparent on the face of it. It is also pertinent to refer to the argument advanced by the learned Counsel for the contractor with which the trial court agreed. It was submitted that the Executive Engineer rejected the claim on 3-11-1978. The contractor, then, addressed a letter to the Executive Engineer on 6-3-1979 requesting him to communicate orders referring the claim for arbitration. As there was not favourable response, the contractor had to file an application under Section 8 of the Arbitration Act. The factual existence of the above correspondence has not been challenged. So, the plea of limitation is not indefensible, even if such plea was raised before the arbitrator. Hence, we cannot find fault with the award on the ground that time barred claims were entertained by the arbitrator.

35. In the result, the award passed by the arbitrator and the decree of the court shall stand modified by directing that the respondent/Cross-Objector shall pay to the appellant a sum of Rs. 10,63,651/- with interest at 8.25% from the date of award till the date of decree and at 6% (as directed by the lower court) from the date of decree till the date realisation.

36. C.M.A. No. 1156/89 is dismissed and Cross-Objections are partly allowed. There shall be no order as to costs in both.

37. Appeal dismissed.