**State of Andhra Pradesh and anr. Vs. P.L. Raju and Company**

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**SooperKanoon Citation** : sooperkanoon.com/426420

**Court** : Andhra Pradesh

**Decided On :** Jul-21-1995

**Reported in** : 1996(1)ALT144; 1996(2)ARBLR629(AP)

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

**Acts** : Arbitration Act - Sections 8, 30 and 33; Indian Contract Act - Sections 19 and 73

**Appeal No.** : C.M.A. No. 1801 of 1989 with C.R.P. No. 3611 of 1988

**Appellant** : State of Andhra Pradesh and anr.

**Respondent** : P.L. Raju and Company

**Advocate for Def.** : M.R.K. Chaudhary, Adv.

**Advocate for Pet/Ap.** : Govt. Pleader

**Judgement** :

**P. Venkatarama Reddi, J.**

1. The C.M.A. and the C.R.P. are filed by the State of Andhra Pradesh against the common judgment in O.S. No. 830 of 1985 and O.P. 313 of 1985 on the file of the II Additional Judge, City Civil Court, Hyderabad respectively, O.S. No. 830/85 was filed by the respondent under Sections 14 and 17 of the Arbitration Act to make

the Award dated 31.5.1985 a Rule of the Court and to pass a decree in terms thereof. O.P. 313/85 was filed by the appellants under Sections 30 and 33 of the Arbitration Act to set aside the Award. The suit was decreed and the Government was directed to pay the amount awarded by the arbitrator together with interest at 18% per annum from the date of reference till the date of realisation. O.P. No. 313/88 was dismissed.

2. The respondent is a contractor. The contract was to construct a high-level causeway across Alair river at KM 31/4-6 of Torruru-Voligonda road. Nalgonda district. The work was awarded to him pursuant to the acceptance of the respondent's tender. An agreement was entered into in this behalf on 10.2.1978. The site was handed over to him on the same day. The value of the work, as per the agreement was Rs. 22 lakhs. A period of 18 months was stipulated for completion of the work. It is not in dispute that on 10.7.1979, the contractor expressed his inability to proceed with the work when certain supplemental items as per the revised foundation designs were included in the scope of the contract. By that time, according to the appellants, the respondent did not keep up the expected progress of work. By a letter dated 18.6.1980, the respondent requested the Superintending Engineer to settle the accounts and arrange for payment of the amount due to him. Invoking Clause 60 of the preliminary specifications to A.P.D.S.S. (A.P. Detailed Standard Specifications) the contract was cancelled by the Executive Engineer on 7.2.1981 and the same was ratified by the Superintending Engineer on 9.3.1981. Therefore, the respondent requested the arbitrators named in the agreement to enter on a reference to adjudicate the disputes in relation to the contract. As there was no response, the respondent moved the court under Section 8 of the Arbitration Act for appointment of an Arbitrator. Initially, the arbitrators named in the Agreement were appointed. On their refusal to act, the respondent once again approached the court by filing O.P. 122/83 praying for the removal of the named-arbitrators and for appointment of a sole arbitrator to fill up the vacancy. By an order dated 30.1.1984, the III Additional Judge, City Civil Court removed the named arbitrators and appointed Sri C. K. Mohan Rao, Chief Engineer (Retired) as the sole arbitrator to decide the dispute between the parties. Accordingly, the said arbitrator entered on the reference on 7.3.1984 and passed his award on 31.5.1985. The arbitrator passed a non-

speaking award. However, he specified the amounts allowed by him under each claim, the total amount awarded was a sum of Rs. 6,07,605/- with interest at 18% from the date of reference i.e., 7.3.1984 till the date of payment or decree whichever was earlier. Thus, the award is not a lumpsum award but it is an itemwise award. The documents filed by the parties are set out in the index. However, on a perusal of the index, we do not get the details of the documents filed excepting a few. The learned II Additional Judge held that it was not open to him to determine whether the conclusions arrived at by the arbitrator were right or wrong in the absence of any reasons contained in the award. He also held that O.P. 313/85 was not barred by limitation. In the result, the award was made the Rule of the court over-ruling the objections of the State Government.

3. Arguments were addressed before us by the learned Government Pleader with reference to three principal items/claims. They are Items 1A, 6A and 7A, the amounts awarded towards damages with reference to the aforementioned three main claims under Claim Nos. 1B, 6B and 7B are also the subject-matter of challenge in this appeal and revision. In addition, there is a contest with regard to award of interest from the date of reference till the date of award.

4. Now we will take up the disputed claims for consideration :

Claims 1A and 7A : These two claims go together. Under Item 1A, the claim is for the payment of the 'balance amount due' as per the Agreement. The amount claimed is Rs. 1,19,093/-. Under item 7A, refund of the following amounts is claimed : ----------1. Earnest money deposit Rs. 27,450 2. Security deposit Rs. 17,300 3. Withheld amounts Rs. 1,23,861 ----------Total Rs. 1,69,611----------

5. It is common ground that the balance amount mentioned in Claim 1A and the withheld amount mentioned in Claim 7A represent the amounts withheld from time to time out of the running bills at a certain percentage with a view to ensure due performance of the contract, under PS 68. The withheld amount under Claim 7A(3) represents the withheld amount to be released after the observation period' of six months or so.

6. The learned Government Pleader argues that by virtue of the determination of the contract under P.S. 60 of the A.P. Standard Specifications (forming part of the agreement), the delay occasioned by the default or neglect on the part of the contractor carries with it the consequence laid down therein viz., forfeiture of security deposit, the amount withheld under P.S. 68 and the value of such work as may have been executed but not paid for or such proportional sums as shall be assessed by the Executive. Engineer. Clause 60 in so far as it is relevant reads as follows :

'P.S. 60 : Delays in commencement of progress or neglect of work and forfeiture of earnest money, security deposit and withheld amounts :

(a) Time shall be considered as of the essence of the contract. If, at any time the Executive Engineer shall be of the opinion that contractor is delaying commencement of the work or violating any of the provisions of the contract or is neglecting or delaying the progress of the work as defined by the tabular statement 'Rates of Progress' in the 'Articles of Agreement' he shall so advise the contractor in writing and at the same time, demand compliance. If the contractor neglects to comply with such demand within seven days after receipt of such notice, it shall then, or 'at any time' thereafter, be lawful for the Executive Engineer to determine the contract, which determination shall carry with it the forfeiture of the security deposit and the total of the amount withheld under Clause 68 below, together with the value of such work as may have been executed and not paid for, or such proportion, of such total sums, as shall be assessed by the Executive Engineer.'

It is contended in the face of P.S. 60, the arbitrator has no jurisdiction to direct refund of any of the amounts claimed under Items 1A and 7A. It is difficult to accept the extreme arguments put forward by the learned Government Pleader. The substratum of P.S. 60 is founded on the fact that the contractor has violated the provisions of the contract or neglected or delayed the progress of the work. The determination of the contract proceeds on the premise that there was a breach on the part of the contractor. It is not and it cannot be seriously disputed that the arbitrator while adjudicating Claims 1A and 7A has to necessarily decide

whether there was a breach and the termination of the contract was justified. An absolute right of forfeiture irrespective of whether there is a breach or not is obviously not conferred or contemplated by P.S. 60. The claim statement and the counter disclose varying versions about the circumstances leading to breach of contract because one party is throwing the blame on the other. The determination of this basic issue, though not specifically referred to in the award, is incidental to the determination of the claim if not sine qua non for such determination. No doubt, the award being a non-speaking award, the finding of the arbitrator on the question whether the contractor committed breach or not and whether the termination of the contract was justified under P.S. 60 is not to be found in the award. Nevertheless, the irresistible conclusion that should follow from allowing the claims such as 1A and B and 7A and B is that the contractor did not commit breach and the amounts should not be forfeited under the later part of P.S. 60(c). In other words, the finding as to absence of breach of the contract by the respondent is implicit and the underlying basis of the award. An identical question arose for consideration before a Division Bench of this court consisting of Jeevan Reddy, J. (as he then was) and Neeldadri Rao, in Government of A.P. v. E.C. Tehno Industries (1989 (2) ALT 320). It was held :

'It is true that in the case before us the main issue was as to who is guilty of breach of contract Each party was accusing the other of breach. It is equally true that the arbitrator did not frame an issue with respect to the said aspect, nor did he record his opinion/finding thereon but, in our opinion, the said finding is implicit in his award. The very fact that he has rejected the Government's claim altogether and awarded several amounts under various claims to the respondent shows that, according to him, the breach of contract was on the part of the Government. Unless he was of that opinion, he could not have awarded the several amounts which he did under various heads/claims in favour of the respondent-contractor.'

The learned Judges relied upon a Division Bench decision of the Madras High Court in Xavier v. Chidambaram (1974 (1) MLJ 241). As was the case with the award in the above decision, the award in the present case shall be presumed to be an award made 'de promisis' disposing of finally all matters in difference.

7. Viewed from this angle, it cannot be said that the arbitrator exceeded this jurisdiction or committed an error of law apparent on the face of the record in directing the refund of the amounts which, according to the appellant, are liable for forfeiture. Incidentally it may be mentioned that it is not the case of the State that the loss on account of premature termination of the contract was ascertained by the department and the amount available with it is liable to be adjusted against the loss incurred by the State under Clause (c) of P.S. 60.

8. There is another way of looking at the problem. Assuming, that the view expressed above with regard to the scope and interpretation of P.S. 60 is not the only view to be taken but an alternative view is reasonably possible, the court cannot interfere with the award. If the award is based on a view which is plausible or possible, the award cannot be disturbed. The arbitrator has an undoubted jurisdiction to contract and if in exercise of that jurisdiction he commits an error and takes a view which may not be correct on the true construction of the contract, it is still not amenable to interference if the said construction and the resultant conclusion arrived at was 'conceivable or possible'. That is how the Supreme Court put it in Food Corporation of India v. Joginderpal Mohinderpal : [1989]1SCR880 . The same view was reiterated in a recent case State of Rajasthan v. Puri Constructions Company Limited : (1994)6SCC485 . One more case may be useful to highlight, the point. In Executive Engineer, Irrigation, Balimala v. Abnaduta Jena : [1988]1SCR253 , the question was whether interest for the preference period and pendente lite could be awarded by the arbitrator. It was argued that the court was not entitled to go behind the award which was a non-speaking award and to disallow the interest. This contention was repelled by the Supreme Court. The following passage indicates the approach to be adopted :

'If the arbitrator could not possibly have awarded interest on any permissible ground because such ground did not exist, it would be open to the court to set aside the award relating to the award of interest on the ground of an error apparent on the record. On the other hand, if there was a slightest possibility of entitlement of the claimant to interest on one or other of the legally permissible grounds, it may not be open to the court to go behind the award and decide whether the award of interest was justifiable.'

In the instant case too, there being a good reason to take the view that on a mere determination of the contract under P.S. 60(a), the amounts due either in the form of security deposits or in the form of withheld bill amounts, irrespective of facts and circumstances, do not stand automatically forfeited, the award vis-a-vis this claim is not vitiated.

9. Whether the contractor neglected or delayed the performance of the work and thereby committed breach turns on the merits of the case and it cannot be said that the arbitrator could not have possibly reached that conclusion on the material before him and proceeded on the basis that there was no neglect or breach on the part of the contractor. It is not possible to go into the merits of the award. Vide Puri Construction Private Limited v. Union of India : AIR 1989 SC777 . A perusal of the preamble to the award read with the index forming part of the award would show that the arbitrator went through the plethora of documents filed before him and took into account the arguments and pleadings of both parties. When the award does not speak out, it is not possible to speculate what reasons would have weighed with the arbitrator in arriving at the conclusion he did. (See the dicta in State of Orissa v. M/s. Lall Brothers : AIR 1988 SC2018 ). On the question of breach, we find no legal proposition in the award which can be said to be patently erroneous. We therefore see no reason to set aside the award in regard to claims 1A and 7A to the extent they are allowed by the arbitrator.

10. Next we shall consider the allied claims, viz., 1B and 7B. Under Claim No. 1B, a sum of Rs. 1,08,850/- was claimed towards damages upto the date of reference for non-payment of the amount claimed under Claim No. 1A. The arbitrator awarded Rs. 75,000/- under this head. Under Claim 7B, an amount of Rs. 1,15,415/- was claimed towards damages upto the date of reference for the non-payment of the amounts mentioned under Claim 7A. The arbitrator awarded a sum of Rs. 91,590/- under this head. As is evident from the claims-statement, the respondent-contractor laid these claims on the footing that he was entitled to compensation for the loss sustained on account of the department's failure to release the amounts mentioned in items 1A and 7A. The learned Government Pleader has invited our attention to the detailed statement accompanying the claim statement wherein the contractor worked out the compensation claimed. These

statements would show that the compensation was worked out calculating the interest at 18% per annum on the amounts withheld from 9.2.1979 to 7.3.1984 in the case of Claim No. 1A and from 9.3.1980 to 7.3.1984 in the case of Claim No. 7A. The learned Government Pleader submits that in effect and in substance, the contractor claimed interest by way of damages which is not admissible in law. In support of this contention, he has cited the judgment of the Privy Council in Bengal Nagpur Rly. Company Limited v. Ruttanji Ramji (AIR 1938 PC 67.), of the Supreme Court in Union of India v. Watkins Mayor & Company : AIR 1966 SC275 , and Union of India v. S. S. H. Syndicate, Poona : [1976]3SCR504 . In the last case, Fazal Ali, J. speaking for the Bench, while pointing out the distinction between award of interest by way of damages and the element of interest being applied as a measure to assess the damages, observed that the plaintiff did not claim interest on any quantified amount. The learned Government Pleader also placed reliance on the recent judgment of the Supreme Court in Brijendranath Srivastava v. Mayank Srivastava : AIR 1994 SC2562 and Duragaram Prasad v. Government of A.P. : (1995)1SCC418 , wherein the claim for interest was disallowed upto the date of award relying upon P.S. 69 of APDSS. We are not inclined to accept the contention advanced by the learned Government Pleader. We, see no warrant to dub the damages or compensation awarded by the arbitrator as interest and then apply the ratio of the decisions cited by the appellant's Counsel. The award is a non-speaking award. It only specifies the amount of damages awarded upto the date of reference. It does not spell out the details as to how and in what manner the figure was arrived at. There is no knowing whether the arbitrator worked out the damages as per the statements accompanying the claims, assuming that it is permissible to look into such statements. It may be noted that the amounts awarded by the arbitrator under these claims viz., 1B and 7B are not the same as worked out and claimed by the contractor. In such circumstances, it cannot be taken for granted that the arbitrator adopted the same methodology of estimating the damages. It is impermissible for us to make a guess on the principle or formula adopted by the arbitrator to work out the damages on this count. Even accepting the ratio of the decisions cited by the learned Government Pleader, we find no error apparent on the face of the award in regard to Claim Nos. 1B and 7B.

11. It is apposite to refer to the decision of the Supreme Court in Bungo Steel Furniture v. Union of India : [1967]1SCR633 . In that case, the High Court set aside the award on the ground that the Umpire had acted contrary to the principles recognised in law for assessing compensation. The decision of the High Court was reversed by the Supreme Court holding that the view of the High Court was opposed to the principles which apply to the exercise of the powers of a court to set aside the Award. It was observed in conclusion :

'In the circumstances, it has to be held that the Umpire, in fixing the amount of compensation, had not proceeded to follow any principle, the validity, of which could be tested on the basis of laws applicable to breaches of contract. He awarded the compensation to the extent that the considered right in his discretion without indicating his reasons. Such a decision by the Umpire or an arbitrator cannot be held to be erroneous on the face of the record.'

These observations apply with equal force to the case on hand.

12. The learned Government Pleader relied on the decision in E.C. Techno Industries case (supra) and contended that the claim for compensation is barred under Section 73 of the Contract Act. We are unable to agree. In E.C. Techno Industries case (supra), the arbitrator awarded a sum of Rs. 4.98 lakhs as compensation on account of breach of contractual obligation in respect of various claims. Apart from holding that such claim was not covered by the order of reference made by the court under Section 20(4) of the Arbitration Act, it was held that the claim of that nature was too remote and therefore not admissible under Section 73 of the Contract Act. Though we do not find much of reasoning, we are inclined to think that the said conclusion was reached by the learned Judges by reasons of the nature of claims involve therein. The major claim allowed by the arbitrator was 'loss of profit due to breach of contract'. Again, compensation was claimed for the same reason. The other two major claims which were accepted were : (i) payment towards cost of sand and materials taken over by the department on termination of the contract and (ii) for payment of extra overhead expenditure incurred by the claimant due to paucity of funds with the Department. These claims are not comparable to the claims under items 1A and 7A by which

the contractor claimed refund of specific amounts withheld by the Department despite the conclusion of the contract. The damages awarded to make good the loss to the claimant on account of non-return of the deposits and other sums due to him cannot be said to be too remote.

Claim Nos. 6A and 6B

13. Under Claim No. 6A, the contractor claimed extra expenditure incurred for bailing out water upto date of reference. Against the amount of Rs. 1,15,776/- claimed under this head, the arbitrator awarded a sum of Rs. 86,341/-. Under Claim No. 6B, an amount of Rs. 1,12,708/- was claimed towards 'consequential damages' upto date of reference for the non-payment of the above amount. The arbitrator awarded Rs. 54,390/- under this head towards damages. The learned Government Pleader argued that the rate stipulated in the agreement is inclusive of the cost of bailing out water and no extra payment is therefore, provided for under the terms of the contract. On the other hand, such extra payment would be in the teeth of the provisions of the contract. The respondent having voluntarily signed the agreement without any demur is bound by the contractual rate and he cannot claim anything more on the alleged ground of certain unforeseen circumstances. He has also drawn our attention to the relevant conditions in the Tender Schedule according to which the contractor was expected to apprise himself of the site conditions etc. before submitting the tender. It is pointed out by the learned Government Pleader that the award in respect of this item, though non-speaking, cannot be sustained in law either because of jurisdictional error committed by the arbitrator or error of law apparent on the face of the award.

14. The case of the contractor is that in respect of Item No. 1 of Schedule 'A' to the Agreement viz., earth work excavation in sand or loose soils, separate payment should have been made at the standard schedule rates (SSR) applicable for bailing out water while carrying out earth work. This claim is founded on the basis of the language employed in Schedule 'A' to the Tender. Against Item-1, it is specifically mentioned as 'not under water'. Accordingly he quoted the rates. It is also the case of the contractor though not put forward in the claim statement that the Agreement dated 19.1.1978 and the letter dated 10.2.1978 both of which were

signed by him on 10.2.1978 are not binding on him. Therefore, it is contended that the deletion of the word 'not under water' at the time of entering into agreement has to be ignored. It was alleged in the rejoinder that the consent given by the contractor to sign the Agreement and the letter as prepared by the Department was not a free consent but was the result of undue influence. It may be stated that the plea of undue influence or the like was never raised at any time before reference or even at the point of time when the claim statement was filed. Realising the legal position that the question whether the agreement is valid or vitiated by reason of lack of free consent is not 'a matter or thing arising under the contract' within the meaning of arbitration clause contained in P.S. 73 of the Agreement and also having regard to Section 19 of the Indian Contract Act rendering such contract only voidable at the option of the party, the learned Counsel for the contractor, Mr. M. R. K. Choudary did not stress the point that the arbitrator would have gone into the question of undue influence or coercion in signing the Agreement. However, the learned Counsel in an apparent bid to rescue the respondent from the predicament in which he was placed by singing the Agreement, put forward the following argument with reference to Claim No. 6A.

There is no bar under the Agreement prohibiting the contractor from claiming additional expenditure incurred for bailing out water. Whether the contractor is entitled for payment for dewatering in the set of circumstances disclosed by him, is a dispute that can be decided by the arbitrator and such dispute is not extraneous to the scope of the contract. Tender Schedules clearly mention that the rate for the relevant item of earth work excavation is applicable for the work carried out without encountering water. It is on the basis of this express stipulation under the tender schedule that he worked out the rates and submitted the tender. The tender Committee accepted the tender and sent a communication to that effect on 17.12.1977. Just before signing the Agreement, the respondent was required to execute the agreement deleting the words 'not under water'. The Superintending Engineer has no power to modify the tender and the conditions thereof without the knowledge of the Tender Committee and hence the agreement incorporating the modified tender schedule is non set in the eye of law. Even assuming that the inclusive rate specified in the Agreement read with the modified Tender schedule is valid and binding, it does not preclude an extra being claimed where the

magnitude of water encountered is such that could not have been anticipated in the beginning in spite of site inspection. It is only de-watering which is normally incidental to the earth work excavation that attracts the inclusive rate. In the present case, the contractor had to work continuously under water right from the inception. The arbitrator is competent to take all these circumstances into account, interpret the contractual terms and give an award. The award being a non-speaking one not disclosing any legal error apparent on the face of it, it is not open to the court to guess the reasons where there are none found in the award and then find fault with the supposed reasoning. It is not permissible for the court to look into the Agreement, documents and pleadings to discover an error which is not apparent on a perusal of the award. Only the award has to be looked into. The court cannot substitute its own evaluation of the material on record to that of the arbitrator. The learned Counsel relied upon the case law especially to stress the limited scope of interference with a non-speaking award.

15. We may at the outset point out that some of the arguments advanced on the factual aspects have no foundation in the pleadings or in any of the documents. For instance, it was not the case of the contractor that the Superintending Engineer had no power to enter into an agreement at variance with the acceptance given by the Tender Committee. If such plea was taken before the Arbitrator or the court below, the other side would have had the opportunity to rebut the same. Secondly, it is nowhere stated in the pleadings that extraordinary or unanticipated quantity of water was encountered by the contractor in the course of execution of work which was not incidental to the work under taken by him. No details in this regard are disclosed. This is again a question of fact which cannot be entertained for the first time. We are therefore of the view that above two submissions on the factual aspects should be eschewed from consideration.

16. Before proceeding further, it is necessary to refer to the relevant item in the Tender Schedule and in the Agreement.

Item (1) of Schedule 'A' to the Tender reads as follows :

----------Quantity Description Rate Amount ----------7,700 Earth work

excavation and depositing 50 38,500Cum. on bank or as directed with an initiallead of 10M. and lift of 2M. In sand orloose soils. wet land not under waterfor foundations.----------

In paragraph 7 of the Foot Note to Schedule 'A' It is stated :

'All the rates quoted in Schedule 'A' shall be inclusive of training streams, preparing and maintaining the service roads, and dewatering charges etc. No separate payment will be made to contractor on these amounts ...'

In Schedule 'A' to the Agreement dated 10.2.1978, the description of the item was amended so as to be in conformity with the condition stipulated in Para 7 of the Foot Note to Schedule 'A' of Tender, as well as specification No. 308.5.2(g) of A.P. Standard Specifications which will be referred to hereinafter.

Item (1) of Schedule 'A' attached to the Agreement which is the disputed item, reads as follows :

----------Quantity Description Rate Amount----------7,700 Earth work excavation and depositing 40 30,800on bank or as directed with an initiallead of 10M. and lift of 2M. In sandincluding bailing out water etc.complete foundations.----------

The rate for executing the above work had also been reduced to Rs. 40 admittedly on the basis of certain negotiations held.

Thus, it may be noticed that the words 'not under water' was deleted and the words 'including bailing out water etc. complete' were incorporated. The contractor has admittedly signed against the correction/additions.

17. Specification No. 308 of the A.P. Standard Specifications which forms part of the Agreement deals with excavation and foundations. Specification 308.5.2(g) provides that the rate for excavation shall include the following and no extra payment shall be made :

'(a) *** *** *** ***

(b) *** *** *** ***

(c) *** *** *** ***

(d) *** *** *** ***

(e) *** *** *** ***

(f) *** *** *** ***

(g) All dewatering required during excavation, unless provided for separately in the agreement.'

18. One of the General Conditions attached to Schedule 'D' of the Tender reads as follows :

'(1) Tenderers when submitting the tenders, should certify in the tender that they have actually inspected the site and alignment of work and have examined before tendering the nature and extent of various kinds of soil at various depths and have based their tenders on such examination by them.'

It may be noticed that there was an apparent inconsistency between (1) of Schedule 'A' and the foot-note thereto. That inconsistency was removed at the time of entering into the Agreement.

19. Thus, going by the plain terms of the Agreement, Schedules A, D and Specification No. 308.5.2(g) of A.P. Standard Specifications, it is crystal clear that the rate agreed upon covers the charges for bailing out water or dewatering. The payment of extra rate for bailing out water is not contemplated by the Agreement and in fact, by necessary implication it is prohibited. The claim thus put forward by the contractor undoubtedly files in the face of the contract, to borrow the expression used by Kochu Thommen, J. in Associated Engineering Co. Government of Andhra Pradesh : [1991]2SCR924 .

20. The learned Counsel reminds us of the principle that the reference to agreement or other documents is not permissible in the case of a non-speaking award and we must look to the award only to see whether the arbitrator, to put it in

the words of the Privy Council in Champsey Bhara and Compmay v. J.B. Spinning & Weaving Company Limited (AIR 1923 PC 66), had 'tied himself' down to some legal proposition which, when examined, appears to be unsound. Our attention was invited to the observations in Bungo Steels v. Union of India (supra), Hindustan Steel Works Construction Limited. v. C. Rajasekhara Rao : [1987]3SCR653 , M/s. Sudarshan Trading Company v. Government of Kerala : [1989]1SCR665 , and State of A.P. v. R. V. Rayanim : [1990]1SCR54 , Suffice it to refer to the observations at paragraph 6 in Rayanim's case that only in a speaking award, the court can look into the reasoning of the award. It is not open to the court to probe the mental process of the arbitrator and speculate where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

It is true as pointed out by the Supreme Court in Hindusthan Construction Company case (supra), the scope of the court's jurisdiction in interfering with a non-speaking award on the ground of an error apparent on the face of the award is extremely limited and subject to the limits laid down by the Privy Council in Champsey Bhara's case (supra). A non-speaking award contains no reasoning which can be declared to be faulty, as observed at para 7 in the above case. We are also aware that from a mere general reference to the contract in the award, it is not to be held that the contract is incorporated into it (Vide observations in Allen Berry and Company Private Limited v. Union of India : [1971]3SCR282 ). If so, the reference to the Agreement/contract is not permissible to deduce an error of law on the face of the award. If this principle stands alone, perhaps it would not have been open to us to see the relevant provisions of the contract in order to find out whether the award is within the limits and parameters set out in the contract. But then, however, there is another principle which is by now fairly well-settled that widens the scope of interference by the court in the case of a non-speaking award. That principle should be equally taken note of and given effect to. We shall not focus our attention to that principle which was succinctly stated in the judgment of the Supreme Court in Sudarshan Trading Company case (supra). It was observed by Sabyasachi Mukharji, (as the then was) speaking for the Bench at para 30 :

'..... it appears to us that there are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.'

Again at para 31, it was said :

'The Award may be remitted or set aside on the ground that the arbitrator in making it had exceeded his jurisdiction and evidence of matters not appearing on the face of it will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which was to be determined outside the award-whatever might be said about it in the award by the arbitrator. See in this connection the observations of Russell on the Law of Arbitration, 20th Edn. 427 ..... It has to be reiterated that an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

Referring to Halsbury's Laws of England (4th Edn. Vol. 2, para 622) it was then observed :

One of the misconducts enumerated is the decision by the arbitrator which is not included in the agreement or reference. But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction .....

But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decisions, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do.'

The judgment of the Kerala High Court was set aside on the ground that it had fallen into an error in deciding the question on interpretation of the contract which admitted of two possible interpretations. Again, it was stressed in Associated Engineering Company v. Government of Andhra Pradesh (supra), 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.'

At paragraph 29, it was observed :

'The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence.'

Number of authorities were cited in support of the proposition so laid down. The same principle was reiterated by the Supreme Court in Managing Director, J&K; Handicrafts v. M/s. Good Luck Carpets : AIR 1990 SC864 . It was observed therein :

'If there is any challenge to the award on the ground that the arbitrator had no jurisdiction to make the award with regard to a particular item inasmuch as it was beyond the scope of reference, the only way to test the correctness of such a challenge is to look into the agreement itself. In our opinion, looking into the agreement for this limited purpose is neither tantamount to going into the evidence produced by the parties nor into the reasons which weighed with the arbitrator in making the award. It cannot be disputed that the jurisdiction of an arbitrator flows from the reference, nor can it be disputed that a reference, can only be made with regard to such disputes which are contemplated by the agreement containing the arbitration clause. If what is to be found out is whether the award is without jurisdiction being beyond the scope of reference, there can be no doubt that the agreement containing the arbitration clause has to be looked into for that limited purpose.'

The proposition so laid down paves the way for us to look into the relevant provisions in the Agreement which we have already noticed. In unequivocal terms, the contract says that the rate agreed upon the disputed item (Item (1) of Schedule 'A') is inclusive of cost of bailing out water which, of course, is necessarily involved in the execution of the work, viz. reach work excavation in sandy soil. By necessary and obvious implication, the payment of extra rate for bailing out water

is excluded under the terms of the contract. When that is the position, the arbitrator must be deemed to have exceeded his jurisdiction.

22. It is now well settled that where an arbitrator gives an award contrary to the plain terms of the contract or de hors the provisions of the contract, it will be a case of excess of jurisdiction and not merely an error in the exercise of jurisdiction. Two judgments of the Supreme Court in the appeals arising from the judgment of the court dealing with Agreements more or less similar nature entered into with the Government of Andhra Pradesh, deserve notice. In Associated Engineering Co. v. State of Andhra Pradesh (supra) the award that fell for consideration was an award in which reference was made to the particular items for clauses in the Agreement. In respect of some of the claims, it appears, brief reasons were also given. The High Court set aside the award in respect of three claims on the ground that those claims were not supported by the Agreement between the parties and that the arbitrator travelled outside the contract in accepting those claims. The Supreme Court while upholding the judgment, set aside the award as regards Claim No. II also. The Supreme Court made the following significant observations which apply in all force to the case on hand :

'These four claims are not payable under the contract. The contract does not postulate in fact it prohibits-payment of any escalation under Claim No. III for napa-slabs of Claim No. VI for extra lead of water or Claim No. IX for flattening of canal slopes or Claim No. II for escalation in labour charges otherwise than is terms of the formula prescribed by the Contract. This conclusion is reached not by construction of the contract but by merely looking at the contract. The Umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction.'

At paragraph 27, it was clarified that :

'An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency ..... A conscious disregard of the law or the provisions of the

contract from which he had derived his authority vitiates the award.'

Then at paragraph 29, 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 jurisdictional error. Such error going to his jurisdiction can be established by looking into the material outside the award ....'

Then it was observed at para 30 :

'In the instant case, the Umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area .....

His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions to the contrary.'

The Supreme Court concluded with the following observations at para 31 :

'In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ULTRA FINES COMPROMISSI.'

It may be mentioned that Jeevan Reddy, J. speaking for the Division Bench in Government of A.P. v. P. V. Subba Naidu (1989 (2) APLJ 362), spoke more or less in the same language in extending the power of judicial review to a non-speaking award and set aside the award in regard to the very same disputed item viz., bailing out of water in excavation work which, by co-incidence was Item (1) of Schedule 'A' in that case also.

23. A very recent judgment of the Supreme Court in Ch. Ramalinga Reddy v. Supdt. Engineer (1985 (3) SCALE 67), clinches the issue in favour of the Government and against the contractor. There also, one of the items claimed and allowed in the award was for extra cost due to bailing out water'. The Supreme Court referred to Clause 11 of Schedule VIII of the Special Conditions of the contract (which is more or less similar to Clause (1) of the General Conditions forming part of and included in Schedule 'D' to the tender) which says that the tenderer was expected before quoting his rate to inspect the site and carry out such investigation as may be necessary to enable him to correctly evaluate the work and that the successful tenderer would be presumed to have satisfied himself as regards the nature and location of work, magnitude of possible see page, etc. before arriving at his rates. The Supreme Court also referred to Clause (6) or Part VII of the General Conditions which stated that no extra payment will be made for bailing out water. Rejecting the claim of the contractor with regard to this item as well as another item for extra rate for excavation of rocks, the Supreme Court held :

'Having regard to these terms of the contract between the parties, it is difficult to accept the submission that the appellant had encountered hard rock due to a tank nearby which had not been disclosed in the tender document and that is why he was entitled to the extra rates as claimed. The High Court was right in pointing out that the contract expressly stated that no payment would be made on account of the lack of acquaintance of the contractor with the work site, he having been deemed to have satisfied himself in respect thereof before having quoted the rates. The arbitrator was bound by the contract between parties and to decide the claims referred to him in the light thereof. His award being found to be contrary to the plain terms of the contract, it was liable to be set aside to that extent.

At paragraph 19, the Supreme Court rejected the arguments of the learned Counsel for the appellant-contractor that the court should be very circumspect about setting aside an award reached by an arbitrator in the following items :

'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 the terms of

contract between parties, plainly barred.'

Thus, the said judgment of the Supreme Court is a complete answer to the respondent's contention. That was also a case of non-speaking award. It is argued that there is no specific Clause such as Clause 6 of the General Conditions of contract which stated that no extra payment will be made for bailing out of water, but Condition No. 7 of the foot-note to Schedule 'A' of the Tender extracted above is in similar language. So also, the language of item-I of Schedule 'A' and the other specifications in the agreement referred to above. In awarding certain amount under this claim, the arbitrator clearly exceeded the jurisdiction in the sense in which it was understood in the cases aforementioned. The arbitrator is not a conciliator and he cannot ignore the law or misapply it in order to do what he thinks is just and reasonable (Vide Continental Construction Company Limited v. State of M.P. : [1988]3SCR103 . The terms of the contract which is foundation of rights and liabilities of parties cannot be thrown to winds and the matter be decided according to his whims.

24. In this context, it is useful quote the following observations in the judgment of the Supreme Court in M/s. Alopi Parshad v. Union of India : [1960]2SCR793 .

'Granting that the Agents had incurred this additional expenditure under the head establishment and contingencies', when the contract expressly stipulated for payment of charges at rates specified therein, we fail to appreciate, on what ground, the arbitrators could ignore the express covenants between the parties and award to the Agents amounts which the Union of India had not agreed to pay to the Agents.'

In Continental Construction Company (supra), the Supreme Court repelled the argument that in the case of a non-speaking award, the terms of the contract cannot be looked into. It was held that in view of the specific clauses in contract, the appellant was not legally entitled to claim extra cost towards rise in prices of labour and materials within and beyond the contract period. The decision of the High Court setting aside the award was upheld. It was observed at paragraph 6 :

'It was argued on behalf of the appellant that since specific issues were framed and referred by the District Judge to the arbitrator, the same had been answered by a non-speaking award, there is no mistake of law apparent on the face of record and the District Judge erred in setting aside the award by looking into the terms of the contract which it was submitted, neither formed part of the award nor appended to it. We are unable to agree. This being a general question, in our opinion, the District Judge rightly examined the question and found that the appellant was not entitled to claim for extra cost in view of the terms of the contract and the arbitrator misdirected himself by not considering this objection of the State before giving the award.'

In some cases which we have come across, error of law apparent on the face of the record has been understood in the narrow sense in which the Judicial Committee viewed it in the context of a non-speaking award. An award contrary to law or contractual terms has been characterised as an award vitiated by error or law apparent on the face of the award (Vide Executive Engineer, Balimala v. Abhaduta Jena (supra). Whether such approach could be adopted so long as the proposition laid down by the Judicial Committee stands unshaken by a long line of authorities, is a matter on which we do not propose to express any opinion. But, one thing is clear - The dividing the between 'excess of jurisdiction' and 'error apparent on the face of the award' seems to be not so clear-cut as to exclude the possibility of overlapping.

25. G. N. Ray, J. speaking for the Bench in State of Rajasthan v. Puri Construction Company Limited : (1994)6SCC485 , indicated the recent trends in the judicial scrutiny of awards passed by the arbitrators. It was observed at page 502.

'As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get the undesirable immunity. In recent times, error in law and fact in passing an award has not been given the wide immunity as enjoyed earlier by expanding the import and implication of 'legal misconduct' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of

justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration.'

26. We may, before closing the discussion on this aspect, refer to an observation in M/s. Sudarshan Trading Company (supra) which is likely to give rise to some misconception as to true legal position. It was observed at paragraph 31 :

'Whether a particular amount was liable to be paid or damages liable to be sustained was a decision within the competency of the arbitrator in this case. By purporting to construe the contract, the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised.'

We must clarify that this passage cannot be taken to mean that a particular clause in the contract cannot be looked into at all in order to see whether a non-speaking award is within the jurisdiction of the arbitrator. As point out by the Division Bench in P. V. Subba Naidu case (supra), the passage only suggests that the jurisdiction of the arbitrator cannot be assailed by coming to a conclusion on a construction of the contract. A little later, the Bench referred to the passage in Sudarshan Trading Company (supra) wherein it was categorically observed :

'In so far as the court held therein that an arbitrator deciding a dispute under the contract is bound by the contract, the court is right.'

It was then pointed out by Jeevan Reddy, J. that this decision did not lay down a principle contrary to what was stated in Continental Construction Company Limited case (supra).

27. We must, at the same time, clarify that we are quite conscious of the well-settled legal position that the court cannot interpret a contractual provision and interfere with the award on the proposition that the interpretation that might have been placed by the arbitrator is not correct. As pointed out in Sudarshan Trading Company (supra) the Court cannot embark upon an interpretation of the contract

in order to find fault with the arbitrator's approach. The principle was reiterated in Hindusthan Construction Company Limited v. State of J&K; : AIR 1992 SC2192 . In that case, the Jammu and Kashmir High Court looked into the evidence on the assumption that it forms part of the award, placed its own interpretation of certain clauses in the agreement and set aside a non-speaking award on the ground of error apparent on the face of the record. The three-Judges Bench of the Supreme Court reversed the judgment of the High Court holding that there was neither an error apparent on the face of the award nor was an instance of jurisdiction. What was said in paragraph 8 is quite apposite :

'Even if, in fact, the arbitrator had interpreted the relevant clauses 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 be bound, only if they set out their line of interpretation in the award and that is found erroneous can the court can interfere.'

In the concluding part, the Supreme Court though considered it unnecessary to express a view on the true scope of contract, referred to the relevant clauses of the contract and observed :

'We only wish to say that, even reading the clauses and the award side by side it is difficult to say that the arbitrator's interpretation is erroneous on the face of it.'

In Sudarshan Trading Company case (supra), the following significant observations were made at page 902.

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

In Food Corporation of India v. Joginderpal Mohinderpal (supra), while dealing with a reasoned award, the Supreme Court observed :

'The arbitrator had construed the effect of Clause (g)(i) of the contract as mentioned hereinbefore. It cannot be said that such a construction is a construction which is not conceivable or possible. If that is the position, assuming even for the argument that there was some mistake in the construction, such a mistake is not amenable to be corrected in respect of the award by the court.'

The same view was expressed in the recent case of Puri Construction Company Limited case (supra).

28. A conspectus of the decided cases especially the more recent ones reveals that a non-speaking award is no longer an impregnable frontier.

29. Thus, applying the aforesaid principles to the instant case, we are unable to say that there is any question of construction of the contract that arises here. If the relevant provisions of the contract are susceptible of two interpretations and even if a semblance of doubt was created in our mind with regard to the scope and effect of provisions, we would have, following the salutary principles laid down in the aforementioned cases, refrained from interfering with the award. If another interpretation was possible or plausible, we could have said that the arbitrator who was competent to interpret the contract had not exceeded his jurisdiction by interpreting it wrongly. But the various clauses in the agreement speak in one and only tone viz., that the extra rate is not admissble for bailing out water encountered during the execution of the work. The learned Counsel for the respondent has not enlightened us as to what doubt could be there in regard to interpretation of the contract. The only possible view-point suggested by him was that the 'inclusive rate' is not applicable if water of unexpected and unusual magnitude had been encountered, has no factual foundation as it was never the case of the contractor. The very fact that the contractor had taken the stand in the rejoinder that his signatures to the agreement were obtained under duress, is itself a definite pointer that as per the Agreement, he was not entitled to any extra rate. Thus, viewed from any angle, the award is liable to be set aside in regard to this item. i.e., Claim No. VI-A. When once the claim under VI-A cannot be sustained, the claim under

VI-B does not arise at all. Hence the award must fall both in regard to Item VI-A and Item VI-B.

Interest

30. The last item in dispute is about the interest. The arbitrator awarded interest at 18% on the amounts payable to the contractor from the date of reference i.e., 7.3.1984 to the date of decree or actual payment which ever is earlier.

31. 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 arrears, nor upon any balance which may, on the final settlement of his accounts, be found to be due to him.'

The learned Government Pleader strongly relied on the recent judgment of the Supreme Court in Durga Ram Prasad v. Government of A.P., (supra). He also relied upon a Division Bench judgment of this court in A.A.O., No. 292/82 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 arbitrator for decision. He also contends that the terms of Section 3 of the Interest Act, 1978 have not been satisfied in this case and therefore, pendente lite interest should not have been awarded.

32. On the other hand, the learned counsel for the respondent Mr. M. R. K. Choudary, has drawn our attention to the Constitution Bench decision of the Supreme Court in Secretary, Irrigation Department, Government of India v. G. C. Roy : [1991]3SCR417 , and four other subsequent decisions wherein pendente lite interest awarded to the contractor was upheld (vide Hindusthan Construction

Company case (supra), Jugal Kishore v. Vijayendera : AIR 1993 SC864 ), State of Orissa v. B. N. Agarwala : AIR 1993 SC2521 and Ch. Ramalinga Reddy v. Superintending Engineer, (supra). The learned Counsel submits that whatever may be the dispute with regard to prior interest, the power to award pendente lite interest cannot be doubted any longer.

33. We had to consider the very same issue in a case recently decided by us (vide judgment dated 5.7.1995 in C.M.A. No. 1156/89). Reference was made to G. C. Roy case (supra) and other decisions of the Supreme Court allowing pendente lite interest following that judgment. Then, we referred to the latest case-Durga Ram Prasad case (supra) and concluded as follows :

'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 pre-reference period. This in effect, is the ratio of the latest decision in Durgaram Prasad's case (supra).

34. Sri M. R. K. Choudary, learned Counsel for the respondent contended that the prohibition under Clause 69 would only apply in relation to amounts due during the currency of contract. This argument is in the line with the view taken by a learned Single Judge of this Court (Kodanda Ramayya, J) in APSRTC v. P. Ramanareddy (1989 (1) ALT 195). Therein it was held that Clause 69 cannot be construed as imposing a total prohibition on awarding interest but it operates during the running period of the contract and the period of six months thereafter, which is known as 'observation period'. It can be contended with much force that this interpretation is atleast possible or plausible. Where two interpretations of a contractual provision are reasonably possible, the arbitrator in preferring an interpretation which may not be in conformity with the interpretation placed by the court, cannot be said to have committed a patent error of law much less can it be said that he had exceeded the jurisdiction. This line of argument was not put forward before their Lordships of the

Supreme Court and therefore, the Supreme Court had no occasion to consider the same. Even then, the judgment of the Supreme Court in Durga Ram Prasad's case is binding on us and we would respectfully follow the same. It is well settled that the binding effect of the Supreme Court's decision cannot be whittled down merely because a point which should have been raised but not raised did not come up for consideration before the Supreme Court.

35. Thus, following the decision of the Supreme Court in Durga Ram Prasad (supra) and of this Bench in C.M.A. No. 1156/1989 : 1995(3)ALT537 , we negative the claim for interest for the period between the date of reference and the date of award and hold that the award directing payment of interest should have been set aside as being without jurisdiction and the court below should have directed payment of interest only from the date of award.

36. In the result, the appeal and revision are partly allowed. We set aside the award in so far as Claim No. VI-A and Claim No. VI-B are concerned and also the award of interest from the date of reference till the date of award. In consequence thereof, the judgment and decree of the lower court will stand modified and there shall be a decree against the appellant/petitioner for payment of a sum of Rs. 2,88,704/- with interest at 18% per annum from the date of award i.e., 31.5.1985 till the date of realisation. There shall be no order as to costs in both.

37. Appeal and Revision partly allowed.