Superintending Engineer, Irrigation Department and anr. Vs. Progressive Engineering Co. and ors.

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Court : Andhra Pradesh

Decided On : Aug-09-1996

Reported in : 1997(2)ALT701

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

Acts : Arbitration Act, 1940 - Sections 14, 17, 30 and 33; Contract Act - Sections 14 and 15; Indian Penal Code

Appeal No. : A.A.O. No. 811 of 1989 and CRP No. 1622 of 1989

Appellant : Superintending Engineer, Irrigation Department and anr.

Respondent : Progressive Engineering Co. and ors.

Advocate for Def. : R. Ramanujam, Adv. for Respondent No. 1

Advocate for Pet/Ap. : Adv. General

Disposition : Appeal dismissed

Judgement :

P. Venkatarama Reddi, J.

1. This C.M.A. and C.R.P. arise out of a common judgment delivered by the second Additional Judge, City Civil Court, Hyderabad. The C.M.A. is filed under Section 39 of the Arbitration Act against the order in O.P.No. 4 of 1986. The said O.P. was filed by the State of Andhra Pradesh represented by Superintending Engineer, Irrigation Circle-III, Nizamabad under Sections and 33 of the Arbitration Act objecting to the Award passed and praying the Court to set aside the award dated 27-9-1985.

2. The C.R.P. arises out of the judgment and decree in O.S. No. 1242 of 1985. The suit was filed by the respondent herein under Sections 14 and 17 of the Arbitration Act praying the Court to direct the Arbitrators (defendants 3 to 5) to file their award into Court and to make the award the rule of the Court and also to award interest at 18% per annum from the date of the decree.

3. The O.P. was dismissed by the learned second Additional Judge, City Civil Court and the suit was decreed passing a decree in terms of the award and granting interest @ 12% per annum from the date of the decree till the date of realisation.

4. The relevant facts are these:-

The fist respondent-firm was awarded a contract to execute the work of 45 'Obstruction Removal in the Upstream of Bed Regulator of Nizamsagar Project' from Ch. 29.50 to Ch. 31.00. Agreement in this behalf was entered on 8-3-1978. The value of the contract was Rs. 34.89 lakhs equivalent to 23.52% excessover the estimated rates based on the S.S.R. (Standard Schedule of Rates) of 1977-78. The site was handed over on 12-3-1978. The stipulated date for completion of the work was 12 months from the date of handing over the site. The contract work prolonged well beyond the agreement period and it was ultimately cancelled by the appellants on 13-4-1984 invoking Clause 61 of the APDSS forming part of the Agreement. By that time, according to the respondent, he did about 95% of the work in the area handed over to him which works out to Rs. 25 lakhs in terms of value as against the contract value of Rs. 35 lakhs, (vide para 6.9 of the claim statement). This, he claimed to have done during the short working periods available in the three seasons of 1978, 1979 and 1980. It is stated in the same

para that the work was continued upto 15 August, 1980. These averments in para 6.9 have not been refuted by the appellants. By their letters dated 16-9-1980 (Annexure 2 to claim statement) and 19-9-1980, the contractor requested the Superintending Engineer and Chief Engineer to close the contract and arrange for release of all amounts due to him, apart from compensating him for losses. The respondent also made a request to refer the matter for arbitration, if the Department was not agreeable.

5. After a protracted correspondence, the disputes were referred to a panel of Arbitrators who were Government officials, as per the terms of the agreement. They are defendants 3 to 5 in the suit and respondents 3 to 5 in the O.P. The contractor claimed Rs. 24.22 lakhs and also interest at 18% per annum from the date of submitting the claim statement to the date of actual payment. It preferred seven claims. The Arbitrators entered upon reference on 29-11 -1984 and passed the impugned Award on 27-9-1985. Claim Nos. 1,2,4 and 5 were rejected. It may be stated that under claim No. l which is a major claim, the contractor sought for reimbursement of losses on account of idle machinery and equipment, loss of advances paid to labourers etc., by reason of breach of contract on the part of the appellant. This claim was rejected. The claim for loss of profits and also the claims under Head 'B' towards compensation' for non-payment of the amounts claimed were also negatived.

6. The claims that were accepted and allowed by the Arbitrators are as follows;-

Claim No. III(A) .. Rs. 3/33,300/-(towards extra expenditure incurredon account of escalation in rates for doing the workbeyond the agreement period)'Claim No. VI (A) .. Refund of excess recoveries effected from thecontractor's bills towards cost of explosives.Claim No. VII (A) .. Refund of EMD and FSD and other amountswithheld from the running bills (about Rs. 3 lakhs)

The learned Arbitrators awarded interest on the sums due at 12% per annum from the date of making the award.

7. As already mentioned, the award was confirmed by the Civil Court. Practically, no controversy has been raised in the C.M.A. or the C.R.F. as regards claim Nos.

VI and VII nor any objection raised with regard to the award of interest from the date of award though a ground has been raised in the Memorandum of appeal. In fact, we are of the view that there could be no possible objection on any relevant ground for accepting these claims.

8. The entire controversy turns round claim No. III (A) under which the Arbitrators awarded a sum of Rs. 3,33,300/-. With reference to this claim this is what has been said in the Award:

' The petitioner could not keep up the rate of progress stipulated in the Agreement Bond and complete the work within the agreed period due to the existence of water in the reservoir for a major part of the year. The contention of the respondent that the claimant should have foreseen this situation and quoted his rates does not appear to be reasonable as this was never visualised by the department either at the time of preparation of the estimate or inviting tenders. The argument that the contractor could have done the work by laying a ring bund beyond the obstruction removal area appear to be only for the sake of argument as the department have not considered such an arrangement in their data, while sanctioning the estimate. We feel that the petitioner has to be compensated for the escalation of costs due to efflux of time which was beyond his control. We are convinced that the petitioner's letter to the effect that he will accept his tendered rates during the extended period if extension of time granted was given only to overcome a situation as the department would not grant it otherwise and this is more than clear from the correspondence.

It is therefore considered reasonable to allow the rates as per the S.S.R. of the year in which the work was actually done plus the tender premium for the work done beyond the agreement period and pay accordingly duly deducting the payments already made. The amount so payable shall however not exceed Rs. 3,33,300/-.'

9. Thus, the finding of the Arbitrators was that the water level in the reservoir could not be kept at the requisite level so as to facilitate the execution of the work by the contractor and therefore the prolongation of the work beyond the contractual period was for reasons beyond the control of the Contractor. Though it is an

admitted case that the contractor applied for extension of the period of contract with an undertaking not to claim any extra amount, the Arbitrators were of the view that the letters to that effect were given by the contractor in compelling circumstances in order to overcome a particular situation caused by the department's insistence to furnish such undertaking.

10. The first question that arises for consideration is whether the respondent is legally precluded from claiming escalation in rates, having agreed to do the work during the extended period, at the rates stipulated in the original agreement. While asking for extension of time on account of high water level in the reservoir and short supply of blasting materials, the contractor signified his willingness to do the work at the originally stipulated rates, and undertook not to claim extra payment in his letters dated 18-9-1979, 14-6-1980 and 10-9-1980. If these letters are considered to be valid and binding, the respondent obviously cannot lay claim for extra payment at a later stage. But the contention of the contractor was that these letters were given not voluntarily, but on account of pressure tactics adopted by the departmental officials. This contention was accepted by the Arbitrators. The Arbitrators relied on the correspondence. The question is whether the correspondence reveals an element of duress or coercion, including the respondent to give 'consent to do the work at the agreed rates, while seeking extension of time.

11. The correspondence shows that the contractor did in fact make a claim initially, to compensate them adequately for the increase in the market rates as well as the extra overheads incurred on account of the delay vide his letter dated 17-4-1979. The Assistant Engineer replied by his letter dated 27-4-1979, that the extension of time could be recommended only if he agreed to accept the agreement rates. The same is the tenor of the letters of the Executive Engineer dated 30-4-1979. On 8-5-1979, the contractor addressed a letter to Superintending Engineer reiterating his request for extension of time. In that letter, the contractor indicated that he was prepared to execute the agreement works without prejudice to the claims preferred by him. The most crucial document is the letter addressed by the Assistant Engineer on the same day, in reply to the telegram issued by the contractor, to release the payment. It reads as follows:-

'Kindly refer the Executive Engineer's Letter No. 328 dated 30-4-1979 wherein it was specifically informed that the payment can be arranged only after granting extension of time from the suitable authority competent'.

It shows that the Department was not willing to release the payments due to the contractor apart from not acceding to the request for extension of time, until and unless the undertaking was given by him not to claim extra rates. By his further communications dated 30-7-1979 and 23-8-1979, the Assistant Engineer called upon the petitioner inter alia to furnish a declaration not to prefer any claim or compensation on account of extension of time. The Assistant Engineer also addressed a letter dated 10-9-1979 to the same effect. It was at that juncture, the respondent sent a letter on 18-9-1979, addressed to the Executive Engineer, expressing his willingness to receive payments at the rates and conditions of the original agreement for the work done during the extended period. The Executive Engineer was requested to extend the time upto 30-6-1980 and 'release the payment of running bills'. Even after this letter, the respondent persisted in his representations to the departmental officials to allow escalation in rates at 33% above the original agreement rates, while making it clear that he was accepting the running bill payments under protest, (vide his letter dated 26-5-1980). Repeated requests were also made to release the withheld amounts. In this background, the letter dated 14-6-1980 on which the appellants placed reliance in their counter came to be addressed by the contractor. He sought for extension of time upto 30-6-1981 and agreed to receive payments at the rates stipulated in the original agreement. A similar letter was addressed on 10-9-1980. These letters dated 14-6-1980 and 10-9-1980 are not of much significance, because practically no work was done by the contractor thereafter, and according to the respondent, 95% of the work was done in the areas made avaliable to them upto August 1980. But it is relevant to mention that within a week after the aforementioned letters were sent, the contractor made a claim to compensate him for the losses incurred, and to close the contract after release of payments due to him. (vide his letter dated 19-9-1980 addressed to the Chief Engineer).

12. Under Section 14 of the Contract Act, it is essential for the enforceability of an agreement that the consent should be free. The consent should not have been

obtained by coercion, undue influence, fraud, mis-representation or mistake. The term 'coercion' corresponds to the concept of 'duress' in English law. 'Coercion' according to Section 15 of the Contract Act 'means and involves the committing or threatening to commit an act forbidden by the Indian Penal Code or the wrongful withholding of property belonging to another person, to the prejudice of that person or any person whatever, with the intention of inducing that person to enter into a contract.'

13. In passing, we may mention that in the recent times, the concept of economic duress has come to be recognised in England. Chitti on Contracts (25th edition) summarises the said concept in the following words at page 486:-

'In substance this amounts to recognising that certain threats or forms of pressure, not associated with threats to the person, nor limited to the seizure or withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or the pressure'.

Thus, refusal of extension of time despite there being valid reasons unless the contractor offered to execute the work for old rates might amount to economic duress especially because the employer is in a position of dominance armed, as it were, with a printed form of contract with terms of his choice.

14. Irrespective of the application of the principle of economic duress obtaining in England and gaining currency in our country too, the acts of the departmental engineers in refusing to release the payments due to the .. contractor unless the contractor gave a letter giving up the claim for extra rate could be brought within the scope of 'coercion' as defined under Section 15 of the Indian Contract Act, in-as-much as it would amount to wrongful withholding of property, with a view to induce the contractor to agree for extension on the terms dictated by the departmental authorities. The letter dated 8-5-1979 addressed by the Assistant Engineer referred to supra, bears ample testimony to the coercive methodology adopted by the department to accomplish their objective. We cannot, therefore say that there was no material at all for the Arbitrators to come to the conclusion that the letters agreeing to accept the tender rates during the extended period of contract were given under compelling circumstances. That the actions of the

departmental officials in this regard would amount to coercion is a possible view to take if not a correct view. In ignoring those letters, therefore, it cannot be said that the Arbitrators have committed any error of law apparent on the face of the award or decided the issue by taking into account an erroneous legal proposition.

15. As observed in Indian Oil Corporation Limited v. Indian Carbon Limited, : [1988]3SCR426 .

'The Court can set aside the award only if it is apparent from the award, that there is no evidence to support the conclusions or if the award is based upon a legal proposition which is erroneous'.

The correct line of approach was pointed out by G.N. Ray, J. speaking for the Supreme Court in The State of Rajasthan v. Puri Construction Co. Ltd., : (1994)6SCC485 (D.N.) in the following terms:-

'Even if it is assumed that on the materials on record a different view could have been taken and the Arbitrators have failed to consider the documents and materialson record in their proper perspective, the award is not liable to be struck down in view of the judicial decisions referred to hereinbefore. The error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the Arbitrator may be held to be erroneous'.

16. Even where a question of law is referred to the Arbitrator and the Arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible, (vide the observations in the above case at para 28).

17. Judged by the above standards, we are of the firm opinion that it was reasonably possible to take a view based on the material on record that the letters addressed by the contractor undertaking not to claim extra payment during the extended period are not voluntary or out of free consent, and therefore do not bind him. The learned Arbitrators cannot be said to have committed an apparent illegality or an act of legal misconduct in disregarding those letters.

18. The next question debated before us is whether the claim under III(A) is barred by Clause 59 of A.P. Detailed Standard Specifications (APDSS) and whether the arbitrators exceeded their jurisdiction in allowing this claim for escalation of rates. It is relevant, at this stage, to notice the pleas taken by the appellant in the rebuttal statement (counter). The appellant had taken the plea that the respondent should have pointed out at the time of taking over the site that the water level should be kept below 1384 and should have refused to take over the site if the water level was higher. It is also pointed out that the claimant had quoted rates higher than the estimated rates keeping in view the difficulties he was likely to encounter. It was then submitted that the inability to keep up the requisite progress of work during the period when the reservoir level was depleted to 1380 and below in 1979 was on account of inadequate deployment of men and machinery. It was also submitted that the work of obstruction removal can be tackled at varying levels over and above 1384 and it is not necessary that the level should always be below 1384. No specific or even indirect reference was made to clause 59 of APDSS. The appellant also took shelter under the two letters - Ex.Nos.5 and 6 addressed by the respondent while seeking extension of time during the years 1979 and 1980. It was the contention of the respondent that the maintenance of reservoir level was not their responsibility and the work could have been carried out by laying a ring bund or coffer dam beyond the obstruction removal area.

19. The arbitrators have come to a definite conclusion that the respondent could not carry out the work within the agreed period on account of existence of water in the reservoir (beyond a particular level) and this situation was not visualised by the parties. The formation of ring bund-which admittedly involves a considerable expenditure-was not contemplated at the time of entering into the contract, as found by the Arbitrators. The facts found by the Arbitrators which are based on the materials placed before them have to be accepted, whether or not a different finding could have been arrived at by a different body or the Court. The finding of the Arbitrators under Claim No. III (A) plainly and clearly means that there was non-performance of the contractual obligation-which is necessarily implied, to keep the water level in the reservoir at an acceptable level so as to facilitate the execution of the work. Thus, the non-completion of the work within the agreed period and the prolongation of the contract was for reasons beyond the control of

the contractor and the result of a breach of contractual obligation by the appellant which goes to the very root of the contract. The question then is whether the appellant can escape the consequences of such breach and avoid the liability to pay extra rates or compensation for the work done beyond the agreement period by invoking the immunity under Clause 59 which reads as follows:-

'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 last.'

20. As already noted, the said Clause was not referred to nor relied upon by the appellant in the counter filed to the claim statement. However, Clause 59 was pressed into service by the appellant in the objections filed in the lower Court against the award. Clause 59 has been strongly relied upon by the learned Government Pleader before us to make good his submission that the arbitrators have exceeded their jurisdiction in accepting the claim under III(A) by ignoring or disregarding a clear term of the contract - a ground which is now well recognised to be a valid ground to set aside the award, vide M/s. Sudarshan Trading Company v. Government of Kerala, : [1989]1SCR665 . and Associated Engineering Company v. Government of Andhra Pradesh, : [1991]2SCR924 etc. In Sudershan Trading Company's case, : [1989]1SCR665 . it was observed that an Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award. It was pointed out in the latter case that 'an arbitrator who acts in manifest disregard of the contract acts without jurisdiction.' Further, 'if he has remained inside the parametres of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons in the award disclosing an error apparent on the face

of it.' In this regard, the observations in Managing Director, J & K Handicrafts v. M/s. Good Luck Carpets, : AIR 1990 SC864 . are also pertinent.

21. Before we proceed further, it would be appropriate to refer to the decision of Supreme Court in Ch. Ramalinga Reddy v. Superintending Engineer, 1994 (5) SCALE 67, 1995 (1) ALT 25 (D.N.). on which strong reliance has been placed by the learned Government Pleader. Endorsing the view of the Division Bench of this Court (Jeevan Reddy and Neeladri Rao, JJ.), the Supreme Court negatived the claim for 'payment of extra rates for work done beyond the agreement time at the schedule of rates prevailing at the time of execution' in view of Clause 59. The Supreme Court upheld the decision of the High Court in setting aside the award which was in favour of the contractor. It was held that such a claim was impermissible in the light of Clause 59 and the High Court was right in holding so. Referring to Clause 59, their Lordships pointed out that the 'claim of the contractor falls outside the defined exceptions.' It was further noticed that when extensions of time were granted to the contractor to complete the work, the respondents made it clear that no claim for compensation would lie. On both these grounds, it was held that the claim cannot be accepted. It was observed that 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. The principle laid down in Sudarshan Trading-Company's case, : [1989]1SCR665 was reiterated by the Supreme Court in this case. While referring to the argument that the Court should be circumspect about setting aside an award reached by an arbitrator, it was 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 the terms of contract between the parties, plainly barred.

22. Adverting to the Supreme Court's decision, the learned Counsel for the respondent-contractor contended that the Supreme Court has not laid down a broad proposition that a claim for compensation on account of escalation of costs during the extended period of contract is altogether ruled out in view of Clause 59 of APDSS. It is submitted that the Supreme Court was not concerned with the situation like the present one where there was a fundamental breach of contract by tine appellant. It is pointed out that there was nothing in the Judgment of Supreme

Court or that of High Court (which was affirmed) to indicate that delay or default was attributable to the Government. It is also submitted that Clause 59 deals only with extension of time and the word 'compensation' used therein is not monetary compensation. Even otherwise, it is submitted that the instant case falls within the 'defined exceptions' contemplated by the opening sentence of Clause 59. Alternatively, it is submitted that in the instant case, there was no specific order granting extension of time and therefore, the bar under Clause 59 is not at all attracted. It is then pointed out that the wide words used in the exemption or exclusion clause should not be literally con strued but they should be read down in accordance with the purpose and intention of the parties. It is also submitted that even if the Arbitrators had taken an erroneous view of Clause 59, they were entitled to interpret and come to their own conclusion. The very fact that a Division Bench of this Court in State of Andhra Pradesh v. Shivraj Reddy, 1988 (2) APLJ 465. having considered the effect of Clause 59 held that the clause did not prohibit payment at the standard schedule of Rates prevailing, in a case of prolongation of contractual period by reason of breach of fundamental obligations under the contract is sufficient to conclude that Clause 59 need not be literally construed and it is susceptible of more than one interpretation. Finally, it was submitted that Clause 59 was never pleaded as a bar and it is not open to the appellants to raise that objection after the award is passed.

23. If we are called upon to decide on the validity of award from the stand- point of Clause 59, we may have to answer several debatable and moot questions, as rightly pointed out by the learned Counsel for the petitioner. Such questions are: what is the true scope and effect of Clause 59? Does it altogether shut out the payment of extra rate for the work done beyond the agreement period irrespective of the circumstances in which the work had to be prolonged and irrespective of the breach of fundamental contractual obligations by the other party Whether the decision of the Supreme Court in Ramalinga Reddy's case (6 supra) is a complete answer to the respondent's claim for extra rate and that decision applies with equal force to the facts of the instant case But, for reasons stated hereinafter, we need not record our definite views on these questions.

24. To digress a little, we must voice an irrepressible feeling at the back of our mind that it would result in grave injustice if the contractor is called upon to execute the work at the old rates in spite of prolongation of the contract not merely for reasons beyond his control but on account of non-performance of a fundamental obligation that was expected to be performed by the employer. It cannot be denied that unless the water level is maintained by the Department at a congenial level, it becomes impracticable if not impossible to carry out the work. When during a major part of the contractual period, the requisite water level was not maintained by the Department, the contractor cannot be expected to complete the work within the agreement period. To require him to do the work at the same old rates for years together would lead to palpable injustice, especially when we bear in mind that the State could have gained nothing by putting an end to the contract and entering into a fresh contract for the execution of the balance work. But, these considerations of justice and reasonableness may not be strictly relevant as it is often said that an Arbitrator is not a conciliator and he cannot go by his own notions of justice and equity regardless of the terms of the contract and the law of the land.

25. Before we proceed further, we take note of the argument of the learned Government Pleader that the respondent could have as well refused to perform and determined the contract after the expiry of the agreement period if the rates were not workable. Having agreed to proceed with the work without any assurance as to extra payment, it is argued that the contractor cannot lay such claim subsequently. This argument, in our view, is nothing but over- simplification of the issue. The respondent having been allowed to do the work beyond the agreement period and the State having taken benefit of the work done is liable to pay the contractor at the prevailing rates and thereby compensate him reasonably unless, of course, there is a contractual bar against such reimbursement. This is based on the principle of quantum meruit. The contractor's claim cannot be repudiated on the mere ground that he has agreed to proceed with the work even beyond the agreement period without getting an assurance from the Government that extra rate will be paid for. We have to eschew from consideration the fact that the respondent undertook not to claim extra rate during the period of extension of contract work inasmuch as we have already held that such undertaking is not valid

and binding on the respondent.

26. Coming back to Clause 59, we are relieved of the necessity to dilate upon its ambit and amplitude, effect and implications for one important reason which we have already adverted to. At the risk of repetition, we wish to point out that no plea was advanced in the counter/rebuttal statement filed by the Superintending Engineer. It was not even indicated in general terms that a claim for extra rates for the work done beyond the agreement period is prohibited under the contract or that the contractor is bound under the contract to carry out the work at the same rates whatever be the extra cost involved. Obviously, no reliance was placed on that clause before the Arbitrators. We do not also find any reference in the award to Clause 59. The arbitrators did not, therefore, have occasion to interpret Clause 59 and to consider the effect thereof. Clause 59 was relied upon for the first time in the objections filed before the Civil Court. When Clause 59 or an analogous term in the contract was never put in issue before the arbitrators, it cannot be said that the award is vitiated by an error of law apparent on the face of it or that the arbitrators committed a legal misconduct in not considering the same.

27. However, we must test the argument based on Clause 59 advanced on behalf of the appellant from the stand point of the well settled principle that the Court can look beyond the award in order to see whether the arbitrator gave his award in utter disregard of the terms of the contract and thereby exceeded his jurisdiction. In Associated Engineering Company's case (4 supra) it was observed that the arbitrator cannot travel outside the bounds of the contract and if he does so he acts without jurisdiction. At the same time, it was pointed out that if the arbitrator 'has remained inside parametres 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.' It was further pointed out that' An Arbitrator who acts in manifest disregard of the contract acts without jurisdiction.' It was laid down that 'a conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.'

28. The following observations at paragraph 28 also deserve notice:

'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 Lloyd's Rep. 436 (KB).'

29. The Supreme Court agreeing with the High Court held that the umpire misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority. At paragraph 30, it was graphically observed '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. He digressed far away from the allotted task. 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 acted in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary.'

30. In that case the umpire awarded escalation of rates for labour on the basis of a formula which was totally different from the formula laid down in the contract. The Supreme Court held that the function of the umpire was to make an award in accordance with the formula prescribed under item No. 35 and he had no jurisdiction to alter that formula. The Supreme Court, after referring to the four claims held as follows at paragraph 23 :-

'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.'

31. In Ch. Ramalinga Reddy's case (6 supra) the same line of approach was adopted and it was held that the claim for payment of extra rate for the work done

beyond the agreement period could not be entertained by the arbitrator by reason of Clause 59 of APDSS. After refering to the case of Sudershan Trading Company (3 supra) it was observed that:

'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.'

32. It was further observed that the Court should intervene when the arbitrator has made an award in respect of a claim which is by the terms of contract plainly barred.

33. It seems to us an enigma to reconcile the principle that an arbitrator giving an award contrary to the terms of the contract commits an error of jurisdiction and the equally well settled principle that the construction or interpretation of the terms of the contract is an error within the jurisdiction of the arbitrator. We can only say that the deviding line is thin and on which side of the line the conclusion of the arbitrator falls is a matter not free from doubt. The only way to harmonise these two principles seems to be to see whether the particular term of the contract providing for or prohibiting the payment of extra amount for the work done in given circumstances is so patently clear that it means only one thing and one and only view is possible. If the relevant clause in the contract is ambiguous or does not necessarily speak out in one voice and more than one view is reasonably possible it could be said that the arbitrator was within his jurisdiction to interpret the clause and reach his own conclusion. His conclusion in such an event cannot be faulted as it is not a conclusion reached by wandering outside his jurisdiction. His award

will still be within his jurisdiction even if the interpretation placed by the arbitrator either expressly or by necessary implication does not appeal to the Court. That is why in Associated Engineering Company's case (4 supra) the phrase 'manifest disregard of contract' is used. The observations at paragraph 23 succinctly indicates the line of approach of the Supreme Court in Associated Engineering Company's case (4 supra). At the risk of repetition, we quote that sentence 'This conclusion is reached not by construction of the contract but by merely looking at the contract.' As already noticed in that case, the arbitrator applied a formula different from what was laid down in the contract for making reimbursement of extra wages thereby ignoring the contract virtually. If we understand the judgment in Associated Engineering Company's case(4 supra) in that light, there would be no difficulty in reconciling the two principles adverted to above. But the observations in Trustees of Port Trust of Madras v. Engineering Constructions Corporation Limited, : AIR 1995 SC2423 (D.N.). pose a further difficulty in harmonising the two principles. After referring to the principle laid down in Hindustan Construction Company Limited v. State of jammu and Kashmir, : AIR 1992 SC2192 . that the Court cannot interfere even if the interpretation placed by the arbitrator on the relevant clauses of the contract is erroneous, their lordships observed as follows:-

'The above principle, of course, is subject to the proposition aforestated, viz., that the Arbitrator being a creature of the contract must operate within the four corners of the contract and cannot travel beyond it either by mis-interpreting the terms of the contract or otherwise.'

34. By saying so, perhaps, their Lordships had in view, a case of plainly and clearly worded clause in a contract, being given an absurd or perverse interpretation though it is not susceptible of two interpretations.

35. A very recent case decided by the Bench consisting of Ahmadi, C.J., and S.C. Sen, J. forcefully reinforces the principle that a case involving interpretation of a clause in the contract susceptible of more than one interpretation does not fall within the realm of jurisdictional error or excess of jurisdiction. Their Lordships were considering a clause in the agreement which laid an embargo against the

payment of interest with respect to the disputed amount lying in the hands of the Department. It was observed:-

'Looked at from another point, if there was a dispute as to whether under this term of the contract the arbitrator was prohibited from awarding interest pendente lite, that was a matter which fell within the jurisdiction of the arbitrator, as the arbitrator would have to interpret sub-clause (g) of Clause 13 of the contract and decide whether that clause prohibits him from awarding interest pendente lite. In that case it cannot be said that the arbitrator had wandered outside the contract to deny to him jurisdiction to decide the question regarding payment of interest pendente lite.'

36. The Supreme Court took note of the observations in Associated Engineering Company's case (4 supra) and observed nevertheless that 'the Arbitrator was well within his jurisdiction in awarding interest pendente lite.'

37. Coming to Ramalinga Reddy's case (6 supra) varying interpretations were not put forward before their Lordships. Both parties have taken it for granted that Clause 59 is an absolute bar against the payment of compensation in the form of extra rates for the work done beyond the agreement period. The circumstances under which the contract prolonged beyond the stipulated period are not spelt out in the judgment. It is reasonable to think that by reason of a particular fact situation in that case, the contractor could not wriggle out of the parametres of Clause 59. The various possible interpretations which we indicated above, were not the subject-matter of consideration by the Supreme Court. Be that as it may, even if we go by the broad observations that the claim for award of extra rates for the work done beyond the agreement period is 'plainly barred' under Clause 59 and the Arbitrator therefore acted in excess of jurisdiction in entertaining the claim, we do not think that Clause 59 becomes a stumbling-block to the contractor, the reason being that it was never pressed into service by the appellants before the Arbitrator. It was only after the award was pronounced, the plea based on Clause 59 was raised before the Civil Court.

38. What is the effect of not invoking Clause 59 in reply to the contractor's claim? Irrespective of whether Clause 59 is called in aid by the appellants or not, does the award get vitiated on account of jurisdictional error These are the questions which

we should address ourselves now.

39. In considering the questions posed by us, the observations of the Supreme Court in Tarapore & Co. v. State of Madhaya Pradesh, : [1994]1SCR1012 . at paragraph 19 are apposite and relevant. In that case the relevant clause of the agreement laid down that the contractor shall observe all Labour Laws enacted by the State or Central Governments as amended from time to time 'without having any claim on Irrigation Department'. Another clause was to the effect that the contractor shall pay not less than FAIR WAGE to labourers engaged by him on the work. 'Fair Wage' means the wage notified at the time of inviting tenders and if it is not notified the wages prescribed by the PWD for the division in which the work is done. The Supreme Court held that there was an error of jurisdiction insofar as that part of the award relatable to minimum wages is concerned. However, it was held that the State had by necessary implication agreed to reimburse the increased cost by reason of upward revision of fair wages by the PWD. It was pointed out that the concept of fair wages is different from minimum wages and the claim for additional cost on account of fair wages is not barred under the contract. Before embarking upon a discussion on the terms and conditions of the agreement the Supreme Court pointed out the well known distinction between the patent and latent lack of jurisdiction. It was observed at para 19:' .. it deserves to be stated that if an authority would lack jurisdiction in the sense that the subject-matter is not amenable at all to its decision, i.e., the case be of patent lack of jurisdiction, acquiescence of the parties would not be material inasmuch as it is settled law that by agreement jurisdiction cannot be conferred. The present is, however, not such a case inasmuch as the arbitration clause 4,3/29, reading as below: ...would show that any dispute relating to or arising out of or in any way connected with the contract has to be referred to arbitration. The present was definitely a dispute arising out of or connected with the contract. The subject-matter of the dispute is thus squarely covered by the arbitration clause and therefore we do not read patent lack of jurisdiction on the part of arbitrators in having gone into the question of reimbursement. The best that could be said is that the terms of the agreement being what they are, the arbitrators had no jurisdiction to entertain the claim, and so, the present was a case of latent of jurisdiction. In such a case acquiescence of the parties may be relevant.' (Underlining is ours). The Supreme Court, therefore,

observed by construing a more or less a similar arbitration clause that the dispute as regards the claim relatable to escalation in wages falls within the arbitration clause and therefore there is no inherent or patent lack of jurisdiction on the part of the arbitrators. At para 25, the Supremo Court rejected the theory that the arbitrators had no jurisdiction to make the award because of lack of specific provision permitting the claim on hand, though their Lordships were cautious enough to say that what is not excluded specifically need not always be the subject-matter of a claim by the contractor.

40. Thus, if one of the terms of the agreement prohibited the claim being put forward, but nevertheless entertained and considered by the arbitrator, that would be a case of latent lack of jurisdiction and the conduct of the contracting party is relevant. The appellants being fully conscious of the protective clause embodied in Clause 59 did not think it fit to invoke that clause for whatever reason it be. It may be a case of deliberate inaction or sleeping over their rights. If the said clause had been invoked and pleaded as a defence, the arbitrators could have gone into the question of applicability of the clause. They could have decided whether the claim for compensation though primn facie barred falls within the defined exceptions having regard to the facts and circumstances of the case. It must be remembered that in Ramalinga Keddy's case (6 supra) their Lordships made the significant observation that the claim in that case did not fall within the defined exceptions. What are those exceptions and whether the case on hand falls within one of the exceptions could have been legitimately gone into by the arbitrators, had it been put in issue. The arbitrators could have also gone into the question whether having regard to the factual scenario depicting fundamental breach of obligation on the part of the appellants, the protective umbrella of Clause 59 will still be available to the State Government. A consideration of these questions would not merely involve interpretation of the clause but also looking into certain factual aspects especially in order to see whether the case fails within the exceptions envisaged by the clause. We cannot understand the decision of the Supreme Court in Ramalinga Reddy's case (6 supra), as precluding an enquiry into the question of applicability of Clause 59 if that is put in issue on the basis of factual situation obtaining in a given case. Their Lordships of the Supreme Court did not lay down an unqualified or absolute proposition in Ramalinga Reddy's case (6 supra) that

any claim for escalation in rates for the work done beyond agreement period has to be rejected in limine, - at the threshold. Further, as already noticed, we do not have any indication in the judgment as regards the circumstances under which the claim was made and the award was given in favour of the contractor. There is nothing to show that any breach of fundamental obligations on the part of the Government was involved in that case or that there was an attempt to bring the case within the defined exceptions. In these circumstances, we come to the irresistible conclusion that failure on the part of the appellant to invoke Clause 59 and to plead immunity on that basis is fatal to its case. That clause cannot be invoked for the first time in the proceedings before the Court, especially because the other party is denied of the opportunity to place the factual and legal aspects before the arbitrators in order to extricate itself from the rigour of Clause 59, if possible. In such an event, it is not right to contend that the arbitrators exceeded their jurisdiction in the face of Clause 59 or that they committed an error of jurisdiction. It is not a case where one can say, merely looking at Clause 59 (to borrow the language from Associated Engineering case) and without any further investigation, the claim is barred or beyond the scope of reference. We, therefore, find no merit in the contention of the appellants.

41. Our conclusions in regard to Clause 59 of the contract are summarised as follows:-

(1) Clause 59 was never pleaded before the Arbitrators to resist the Contractor's claim.

(2) Assuming that Clause 59 creates a jurisdIctional bar to the entertainment of a claim for escalation in rates, it cannot be said that the award is the product of inherent or patent lack of jurisdiction insofar as it allows a claim contrary to and disregarding one of the terms of the contract, At best, it would be a case of latent lack of jurisdiction, as pointed out in Tarapore Co., case (10 supra). It would therefore be relevant to consider the conduct on the part of appellant in failing to put forward the objection based on a contractual term or the acquiescence of the appellant to suffer a decision on merits and the resultant prejudice that might be caused to the opposite party if it is allowed to be raised in post-award proceedings.

(3) Viewed from the above angle, it is not just and proper to allow the appellant to raise that plea for the first time before the Civil Court, especially because the contractor was denied the opportunity to prove that the claim falls within the exceptions contemplated by Clause 59 having regard to the factual situation obtaining in the present case. The contractor could have also contended that on a just and reasonable construction of Clause 59, there is no room to apply the bar laid down in that clause to the facts of the instant case.

(4) In Ramalinga Reddy's case (6 supra) there was no finding that the execution of contract was prolonged on account of breach of a fundamental obligation on the part of employer. No argument was advanced on the various possible interpretations to be placed on Clause 59. On the other hand, it seems to be a common ground that the fact situation giving rise to the claim did not attract the defined exceptions.

(5) The decision in Ramalinga Reddy's case (6 supra) does not preclude an enquiry into the question of applicability of the bar Contained in Clause 59 - if that is put in issue, on the basis of factual situation obtaining in a given case.

(6) The question whether Clause 59 bars the claim for escalation in rates where the execution of contract is prolonged beyond the originally agreed period on account of a fundamental breach on the part of the employer (department) is atleast a debatable point.

42. Finally, before closing the case, we would like to refer in brief to two earlier decisions rendered by us recently. In Prasad and Company v. Superintending Engineer, : 1995(3)ALT537 . we affirmed the judgment of the Civil Court setting aside the award allowing extra amount towards escalation in costs. In that case, the major part of the claim related to the work carried out within the agreement period. Thus the nature of the claim in the present case differs substantially. That apart, there is nothing in that case to indicate that the State did not plead before the arbitrators that Clause 59 was a bar to the contractor's claim. In Government of Andhra Pradesh v. G. Kondal Rao (AAO 241 of 1991, dated 14-7-1995), : 1995(3)ALT591 , after adverting to the earlier cases in which Clause 59 was considered, we indicated that 'the cases involving prolongation of contract as a

direct result of default or breach on the part of the Government were placed on a somewhat different footing'.

43. Anyway, as we already observed, the exact scope and implications of Clause 59 need not be explored in this case.

44. In view of the foregoing discussion, we find no merit in the appeal and revision. Accordingly the C.M.A. and C.R.P. are dismissed. We make no order as to costs.