

State of U.P. Vs. M/S. Ram Nath International Construction Pvt. Ltd.

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Court : Allahabad

Decided On : Sep-13-1996

Reported in : AIR1997All240

Judge : G.P. Mathur and ;S.P. Srivastava, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 14, 15, 17, 20, 30 and 33; [Evidence Act, 1872](#) - Sections 91; Arbitration Act, 1910 - Sections 39; [Interest Act, 1978](#); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 34

Appeal No. : F.A.F.O. No. 477 of 1995

Appellant : State of U.P.

Respondent : M/S. Ram Nath International Construction Pvt. Ltd.

Advocate for Def. : S.P. Gupta, Adv.

Advocate for Pet/Ap. : Statnding Counsel

Judgement :

ORDER

S.P. Srivastava, J.

1. Feeling aggrieved by a decree passed in terms of the award which has been made a rule of the Court, the plaintiff has now come up in appeal seeking reversal

of the decree by setting aside the award in dispute.

2. We have heard Learned Standing Counsel representing the appellant and Sri S. P. Gupta, learned Senior Advocate representing the Contractor-respondent and have carefully perused the record.

3. The relevant facts, shorn of details and necessary for the disposal of this appeal preferred under Section 39 of the Arbitration Act, 1910, lie in a narrow compass. Under an agreement/ contract entered into between the plaintiff appellant and the contractor-respondent, the tender submitted by the contractor for the lining of parallel upper Ganges canal between the reach K. M. 189.50 to K. M. 197.00 was to be completed in conformity in all respects with the stipulations in the contract for which the plaintiff had agreed to pay the contractor the amount specified in the agreement in consideration of the construction and completion of the work at the time and in the manner prescribed by the contract. The terms and conditions of the agreement/contract provided that if the contractor considered any work demanded of him to be outside the requirement of the contract and the contractor is dissatisfied with the instructions or the decision of the Engineer-in-Chief he could within thirty days after receiving the instructions or decision, appeal to the Chief Engineer against whose decision the contractor could get the dispute referred to arbitration if he felt dissatisfied with the same. The terms and conditions of the agreement provided further that all disputes or differences in respect of which the decision has not become final and conclusive shall be referred for arbitration to a sole arbitrator appointed in the manner prescribed. The aforesaid terms and conditions clearly provided that extra items of work shall not vitiate the contract and the contractor shall be bound to execute extra terms of work as directed by the Engineer-in-Charge. The rates of extra items were to be mutually agreed upon.

4. On a dispute having been raised by the contractor, a reference was made by the Chief Engineer vide his order dated 14-10-92 appointing Sri Thakur Das, Chief Engineer Design and Research, IDUP Lucknow. The reference was to the following effect :--

'..... As such Sri Thakur Das Chief Engineer, Design and Research, IDUP Lucknow is hereby, appointed as Arbitrator for the following claims as raised by the

contractor vide his letter dated 13-2-91 against the agreement No. 132-02A-033 dated 17-2-89 according to para 51 of the agreement.

(1) Rate for extra item of earth work beyond lip cutting in reach K.M. 189.50 to K.M. 190.70;

(2) Bailing out of standing water;

(3) earth work beyond lip cutting in reach K. M. 190-70 to K.M. 197.00;

(4) claim of idle labour due to non-supply of cement.

5. It may be noticed that the terms and conditions contained in the contract agreement specifically provided that an award shall be in writing and in case of awards amounting to Rs. 100 lacs and above such awards shall state reason for the amount awarded.

6. The sole arbitrator vide the award in dispute dated 23-5-94 awarded an amount of Rs. 1,71,28,558/- only in favour of the claimant contractor along with interest at the rate of 18% per annum on the total amount of Rs. 1,71,11,208/- with effect from 1-1-1991 to the date of award and an interest at the rate of 6% per annum on the amount of Rs. 1,71,28,558/- with effect from the date of award to the date of decree or payment whichever was earlier.

7. The split up of the aforesaid amount as indicated in the award shows that as against the first item of reference the arbitrator awarded an amount of Rs. 72,22,740/- and as against the third item the total amount awarded was Rs. 57,000/-. As against the second item of reference an amount of Rs. 98,31.468A had been awarded but the claim covered under item No. 4 of reference was rejected.

8. The first item on the reference, as already noticed herein above was in regard to the rate of for extra item of earth-work beyond lip cutting between reach K. M. 189-50 to K.M. 190.70. This obviously contemplated determination of the fact as to whether the earth work beyond lip cutting between reach K. M. 189.50, to 190.70 could be taken to be an extra work as envisaged under para 32 of the agreement

which provided that extra-items of work shall not vitiate the contract and the contractor shall be bound to execute extra items of work as directed by the Engineer-in-Charge and further that the rates of extra-items were to be mutually agreed upon. It was only after determining the nature of the earth work beyond lip cutting to be an extra item as envisaged under para 32 of the agreement/contract that the other question about its rate could arise for which an amount as stipulated in para 32 of the agreement could be awarded in favour of the contractor.

9. The sole arbitrator while determining the nature of the work beyond lip cutting so far as the reach K.M. 189.50 to K.M. 190.70 covered under item No. 1 of the reference was concerned, observed that an examination of the tender as well as the contract between the parties disclosed that the work for which tender notice was issued did not make any separate provision for the two reaches that is K. M. 189.50 to K. M. 190.70 or K.M. 190.70 to K.M. 197.00 and no rate for the work of excavation involved in the work of lining was asked for. It was further observed that the rates in item No. 1 of the schedule of bids of quantities did not in any way include the work of excavation. The arbitrator proceeded to observe that it was clear from the tender as well as the contract that the work of excavation could not be deemed to be included in the work described in item No. 1 of Schedule of bids and quantities and, therefore, the work of excavation in lining was an extra-item.

10. Proceeding further the arbitrator placed reliance upon an alleged admission of the appellant noticing that the appellant had admitted that for the reach K.M. 189.50 to K.M. 190.70 the excavation work involved beyond lip cutting was an extra item for which rate was also sanctioned by the appellant. Taking note of the clause in the agreement of contract which stipulated execution of extra-item of work, the arbitrator held that in the circumstances both the parties knew that the work of excavation if carried out will have to be paid as an extra-work. Consequently expressing the opinion that the work described in item No. 1 of schedule of bids did not include the work of excavation done, it was further indicated that no such classification between reaches K.M. 189.50 to K.M. 190.70 and K.M. 190.70 to K.M. 197.00 could be done as claimed by the respondents.

11. In the aforesaid circumstances holding that the excavation in dispute for reach K.M. 189.50 to K.M. 190.70 was in fact an extra item which had admittedly been executed on the direction of the appellant the arbitrator determining the extent Of the excavation work done beyond lip cutting so far as reach K.M. 189.50 to K.M. 190.70 was concerned found the contractor entitled to an amount as indicated herein above.

12. So far as the second part of item No. 1 of the reference in regard to the earth work beyond lip cutting undertaken by the contractor-respondent for the reach Km. 190.70 to Km. 197.00, the sole arbitrator took into consideration the evidence and materials on the record and the various documents relied upon by the defendant while determining the quantum of extra-earth work executed by the contract or respondent and in appraisal of the evidence on record determined the rate at which the payment for the extra-work done ought to have been made. For the remaining items of the reference the sole arbitrator look into account the evidence and materials on record and on appraisal of evidence returned the findings on the basis whereof the various amounts were awarded to the contractor excepting the claim covered under item No. 4 of the reference which claim was rejected.

13. The award dated 23-5-94 was challenged by the appellant on various grounds praying for either setting aside of the award or modifying it justifiably or remitting the same for reconsideration. On the basis of the objections under Sections 30 and 33 of the Indian Arbitration Act to the award praying its setting aside or being suitably modified or remitted for reconsideration as indicated above the O. S. No. 477/1994 giving rise to the present appeal was registered. The contractor-respondent had also filed an application under Sections 14 and 17 of the Indian Arbitration Act for making the award dated 23-5-94 a rule of the Court and submitted by the sole arbitrator and for making it a rule of the Court seeking a decree on its basis,. This was registered as Original Suit No. 476 of 1994.

14. Both the aforesaid suits were disposed of by the Court below by a common order where under while dismissing the Original Suit No. 477 of 1994 the other suit being suit No. 476 of 1994 was decreed for the recovery of the amount as specified in the award making the award a rule of the Court.

15. Learned counsel for the appellant has strenuously urged that the impugned award so far as the item No. 1 of the reference is concerned, is clearly beyond the scope or reference and without jurisdiction. The contention is that the arbitrator had, without any justification proceeded to determine the quantum of the earth work beyond lip cutting for the two reaches, i.e. Km. 189.50 to Km.190.70 and Km. 190.70 to Km. 197.00 for which there as no reference. The further contention is that the only thing reference was the rate of extra-work claimed lo have been executed by the contractor which could not be taken to include a reference in regard to either the nature of the work for its quantum. In the circumstances, it is urged, that (he arbitrator acted clearly without jurisdiction in giving an award in respect of the earth work beyond lip cutting claimed to have been done by (he contractor in ihc entire reach Km. 189.50 to 197.00 treating the said work to he an extra work.

16. Learned counsel for the contractor-respondent has, however, urged that the item No. 1 of the reference was wide enough to cover the dispute in regard to the nature of the work claimed to have been done as an extra work and also its quantum and the rate at which the contractor was entitled to be paid for undertaking and completing the said work, especially when, the schedule of rates which former part of the agreement/contract did not include the rate tor any such extra work as involved in the present case which was admittedly performed by the contractor pursuant to the directions of the appellant.

17. The first element of submission to arbitration always is that it should show an intention of the parties to have the dispute concluded by the decision of the arbitrator. To give him this character, there must be a difference between the parties as, if there is no difference then there is nothing for an arbitrator to arbitrate about. The arbitrator being a Judge selected by the parties and chosen to decide and the parties having agreed to abide by his determination must be bound by the same. The arbitration agreement is a contract within the meaning of Section 91 of the Indian Evidence Act and when the parties to an agreement of reference refer a dispute which arises between them they cannot lead evidence to vary or add to lhc terms of agreement or reference. An arbitrator acting on a written submission must, therefore, confine himself to the terms of the submission and the claims

which are entirely unrelated to the transaction covered by the contract or the reference will have to be excluded. It is, therefore, obvious that if there be want of initial jurisdiction that defect is not cured by appearance of the parties in the proceedings. However, unless it is demonstrated that there is a clear exclusion the arbitrator would have jurisdiction to entertain a claim arising out of a dispute where one party asserts a right and the other repudiates the same.

18. The reference dated 14-10-1992 in the present case clearly required the arbitrator to arbitrate in respect of the claim of the contractor as raised by him in respect of rate for extra item of earth work beyond lip cutting in reach Km. 189.50 to Km. 190.70 and for earth work beyond lip cutting in reach Km. 190.70 to Km. 197.00. The question of determining the rate for earth work beyond lip cutting in reach Km. 189.50 to Km. 190.70 or for the earth work beyond lip cutting in reach Km. 190.70 to Km. 197.00 could arise only if the earth work referred to above was taken to be an extra item and such a conclusion was reached. It is, therefore, obvious that under the terms of reference the arbitrator had to confine himself to the claim in regard to an extra-earth work beyond lip cutting so far as both the reaches were concerned. There being a contract in writing in existence containing the various terms and conditions which was a contract as contemplated under Section 91 of the Evidence Act, the arbitrator could not read into the various terms and conditions of the agreement/contract any terms or conditions in addition to what was already contained therein. In other words, the arbitrator had to proceed taking into account the terms and conditions contained in the agreement/contract and in case a particular work stood clearly mentioned therein its nature could not be altered so as to bring it out of the items enumerated in the contract and treat it to be an extra-work envisaged under para 32 of the agreement. Such a course could not be deemed to be permissible in law even on the basis of materials or evidence available on the record which could lead to an inference indicating that the nature of the work in question was different from what was apparent from the written agreement/ contract.

19. The specification for earth work as provided for in the technical specifications which formed part of the agreement/contract clearly provided that from Km. 190.7 to Km. 197.0 the earth work involved was in lip cutting and from Km. 189.5 to Km.

190.7 whole of the canal section was to be excavated. It has also come on record that in the minutes of pre-bid conference it had been clarified that between Km. 189.50 to Km. 190.70 the whole of the canal section was to be excavated below ground level by the contractor. TS-9 para 2-09-01 as amended relevant for the purpose provided that departmental machines will be working from Km. 190.70 to Km. 197.00 of the parallel upper Ganges canal. The canal cross section available shall be irregular and the contractor shall be required to execute the remaining quantity to the dimension shown in the drawing and between Km. 189.50 and Km. 190.70 the whole of the canal cross section was to be excavated below ground level by the contractor.

20. It will be useful to reproduce the stipulations contained in para 2-09-01 of the Technical Specification as it originally stood and as it stood with amendments:

'2-09-01 as unamended:

From Km. 190.7 to Km. 197.0 earth work, involved is in lip cutting and from Km. 189.5 to Km. 190.7 whole of the Canal Section is to be excavated. Earth obtained from excavation is to be placed mostly in spoil banks on the left bank of the canal. Some quantity of earth may be required to be placed on the right common bank with Upper Ganga Canal (UGC) as per directions of Engineer-in-Charge.

TS-9 Para 2-09-01 as it stood with amendments

From km. 190.7 to km. 197.0 earth work involved is in lipculling and from km. 189.5 to km. 190.7 whole of the Canal Section is to be excavated. Earth obtained from excavation is to be placed mostly in spoilbanks on the left back of the canal. Some quantity of earth may be required to be placed on the right common bank with Upper Ganga Ca-pal (UGC) as per directions of the Engineer -in-charge.

Departmental machines will be working from km. 190.7 to km. 197 of U. G. C. The canal cross section available shall be irregular and the contractor shall be required to execute the remaining quantity to the dimensions shown in the drawing. Between km. 189.5 and km. 190.7 whole of the canal cross section is to be excavated below ground level by the contractor.

21. Even in TS-9 para 2-09-01, what had been stipulated in technical specification 2-09-01 which formed part of the contract had been reiterated, as it required that Km. 190.7 to Km. 197.0 earth work involved was in lip cutting and from Km. 189.5 to Km. 190.7, the whole of the canal section was to be excavated, earth obtained from excavation was to be placed mostly in spoil banks on the left hand of (he canal and some quantity of earth might to required to be placed on the right common bank with upper Ganga Canal as per directions of the Engineer-in-Charge. In the aforesaid circumstances, once the whole of the canal section was to be excavated between Km. 189.50 to Km. 190.70, the earth work beyond lip cutting which involved excavation below ground level by the contractor could not, by any stretch of imagination be deemed to be an extra work as stipulated in para 32 of the agreement contract. Obviously therefore, the arbitrator could not have any jurisdiction to proceed either on the assumption that the earth work beyond lip cutting between Km. 189.50 to Km. 190.70 was an extra work or determine the quantum of the said earth work or the rate at which the contractor was entitled to be paid for that earth work. The arbitrator could not alter the terms and conditions contained in the agreement/contract and any work expressly shown to be covered under the agreement/contract which had been reduced to writing could not be taken to be an extra-work as stipulated in para 32 of the agreement/contract.

22. In the circumstances, therefore, the scope of reference had to be treated as limited to the determination of the nature of the earth work between Km. 189.50 to Km. 197.00 which had not been included within the terms and conditions of the agreement/contract. The arbitrator had, therefore, to confine himself to the earth work which was not included in the work as specified in the agreement/contract and since the earth work between Km. 189.50 to Km. 190.70 had been clearly included within the ambit of the work covered by the written contract, the award in question, so far as it related to the claim of earth work beyond lip cutting between Km. 189.50 to Km. 190.70 is clearly beyond the scope of reference and is without jurisdiction.

23. There is yet another aspect which cannot be lost sight of. Under the Contract/agreement signed by the parties on 17-2-1989, the tender notice, information and instructions for tenderers, general conditions of contract, special

conditions of contract, the specification and drawing, the schedules, the letter exchanged between the employer and the contractor after receipt of the tender but before award of the contract, any and all agenda or modifications to the aforesaid and letter of acceptance of tender were to be deemed to form and be read and construed as part of the agreement. It was specifically provided therein that in consideration of payments to be made by the employer to the contractor specified in the contract agreement itself, the contractor had to complete the construction in conformity in all respects with the provisions of the contract. The total amount specified in the contract agreement was 4,80,61,300/- only.

24. As has already been noticed hereinabove, the earth work beyond lip cutting for the reach kilometer 189.50 to Kilometer 190.70 was clearly covered under the terms of the contract. It is therefore, obvious that the omission to prescribe and specify the rate for this earth work in the schedule of rates could be of no significance at all as the total amount mentioned in the contract agreement, had to be taken as covering this earth work also which stood clearly specified. The determination of the quantum of the earth work beyond lip cutting for the aforesaid portion of the reach in the circumstances indicated above could not be deemed to have arisen at all.

25. Considering the circumstances referred to hereinabove, we are of the considered opinion that the mere fact that the technical specifications were silent in regard to the rate of earth work beyond lip cutting so far as the aforesaid portion of the reach is concerned could not be taken to mean that the same were contrary to what was stipulated in the specifications of the work required to be performed by the contractor.

26. However, so far as the earth work beyond lip cutting for reach Km. 190.70 to Km. 197.00 is concerned, the omission of the mention of the rate for the earth work beyond lip cutting assumes importance as once it was admitted that this earth work was in fact an extra work as envisaged under paragraph 32 of the contract agreement, in the absence of any rate mutually agreed upon, the arbitration clearly stood vested with the jurisdiction to determine both the quantum of the extraearth work as well as the rate at which the payment should have been

made to the contractor for that extra work.

27. As has already been noticed hereinabove, the sole function of the Arbitrator is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract and if he travels out side the bounds of the contract, his action has to be treated as without jurisdiction. His authority is derived from the contract and he certainly commits misconduct if by his award he decides matter excluded by the agreement as any deliberate departure from the contract amounts to not only manifest disregard of his authority or a misconduct on his part but it may tantamount to the mala fide action and conscious disregard of law, or the provisions of the contract from which the Arbitrator has derived his authority and this vitiates the award.

28. As pointed out by the Apex Court in its decision in the case of Associated Engineering Company v. Government of Andhra Pradesh, reported in AIR 1992 SC 232, a dispute as to the jurisdiction of the Arbitrator is not a dispute within the award but is one which has to be decided out side the award. Arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. If the Arbitrator commits an error in the construction of the contract that is an error within his jurisdiction but if he wanders out side the contract and deals with matters not allotted to him he commits a jurisdictional error. The Apex Court in its aforesaid decision had clarified that such an error going to the jurisdiction of the Arbitrator can be established by looking into material out side the award. The dispute as to jurisdiction is a matter which is out side the award or outside what ever may be said about it in the award.

29. On the facts and circumstances brought on record, the present case we are clearly of the opinion that the Arbitrator had decided the matter in regard to the quantum of the earth work and the amount claimed to be due for the same so far as the portion of the reach Km. 189.50 to Km. 190.70 was concerned acting out side his jurisdiction and out-stepping the confines of the contract. He therefore, outstepped the confines of the contract and written submission or reference and digressed away from his task so far as this matter was concerned. Obviously

Therefore, this portion of the award must be held to be vitiated on account of an error going to the root of the jurisdiction of the Arbitrator and the award so far as the earth work beyond lip cutting in regard to the reach Km. 189.50 to Km. 190.70 is concerned must be held to be in excess of the authority with which the Arbitrator stood vested.

30. In view of our conclusions indicated hereinabove excepting the determination of the quantum of the earth work beyond lip cutting in reach Km. 189.50 to Km. 190.70 and the rate for the same treating it as the extra work the determination of the question in regard to the nature of the earth work beyond lip cutting for the reach Km. 190.70 to Km. 197.00 could not be deemed to be beyond the scope of the contract/agreement or the reference and the contention in this regard has no merit and is not at all acceptable.

31. Learned Standing Counsel has further contended that under the terms of reference so far as the earth work beyond lip cutting was concerned, the Arbitrator could only determine the rate at which the payment was to be made for the extra earth work but he could not go into the question in regard to the quantum of the earth work.

32. This submission is totally misconceived and baseless.

32-A. The order of reference dated 14-10-1992 clearly required the determination of the claims as raised by the contractor vide his letter dated 13-2-1991. In the aforesaid letter, the contractor had raised a claim for his alleged right-full dues payable to him. It was indicated in the aforesaid letter that the contractor had been assured that the rate of extra item will be sanctioned and paid to him before 31-1-1991 indicating that the contractor was not demanding any payment which was not due to him for all the items for which payment had been asked for. It is therefore, obvious that the claim raised by the Contractor as noticed in the referring order was in regard to the payments of the dues which the contractor was asserting to be right full dues payable to him.

33. The first item in the order of reference has to be read along with para 32 of the agreement. The reference therefore, clearly envisaged determination of the

amount payable to the contractor for the extra item of earth work which fell within the ambit of the scope of reference for which purpose the determination of rate in the absence of any rate having been mutually agreed upon had to be done by the Arbitrator. The submission of the learned Standing Counsel in this regard therefore, is not acceptable.

34. The learned Standing Counsel has next contended that the Arbitrator had committed a misconduct while giving the award in dispute by ignoring the amount paid by the appellant to persons other than the contractor for the work which had to be done by the contractor and the said amount was liable to be adjusted against the amount found due to the contractor.

35. So far as the contention in regard to the adjustment of certain amounts claimed to have been paid by the appellant to persons other than the contractor for the work which was in fact to be executed by the contractor himself and this non-adjustment as against the amounts found due to the contractor is concerned, suffice it to say in this connection that the Arbitrator on a consideration of the evidence and materials on the record has come to the conclusion that there was nothing to justify such claim and even if it was assumed that any such payment was made, the same could not be deemed to be the payment made to the claimant specially when there was no disclosure about any quantity and as to when and under what circumstances, the agency was employed. On a consideration of the entire material, on record, the Arbitrator had determined the exact quantum of the earth work beyond slip cutting in dispute which had really been executed by the contractor and the award is only in respect of that work. The Arbitrator has observed in the award that the appellant's claim in regard to the dewatering having been executed through another agency was false and the appellant had given up this stand. It has further been observed that the correspondence on the record showed that even the work which was claimed to have got done through another agency was in fact done by the claimant.

36. Nothing could be pointed out which could in any manner lead to a conclusion different from the one as reached by the Arbitrator.

37. In the aforesaid circumstances, the contention of the appellant noticed above appears to be totally misconceived and is rejected.

38. It may be noticed that the claimant had asked for payment of interest at the rate of 18% per annum with effect from the date the amount became due for payment up to the date of award and future interest also. The Arbitrator had allowed an interest of 18% per annum on all the amounts awarded with effect from 1-1-1991 to the date of award and further 6% per annum interest on the amount was awarded with effect from the date of award to the date of decree or payment whichever is earlier. The Court below had decreed the suit No. 476 of 1994 for the recovery of the amount awarded with interest as specified in the award which was made rule of the Court.

39. In its decision in the case of Executive Engineer, Irrigation Calimala v. Abna Duta Jena, reported in AIR 1988 SC 1520, the Apex Court had observed that in cases arising after the commencement of the Interest Act, 1978 an Arbitrator had the same power as the Court, to award interest upto the date of institution of the proceedings observing further that under the [Interest Act, 1978](#), an Arbitrator is, by definition, a Court and may award interest in all the cases to which the Interest Act applies. But while making it clear that in such a situation the award of interest prior to the proceeding was not open to question yet for the pendente lite interest, the interest from the date of reference to the date of the award, the claimant would not be entitled to the award, the claimant would not be entitled to the same for the reason that the Arbitrator was not a Court within the meaning of Section 34 of the Code of Civil Procedure in cases where the reference to arbitration had not been made through the Court in a suit.

40. The aforesaid decision of the Apex Court was subsequently reconsidered by a Constitution Bench of the Apex Court in its decision in the case of Secretary Irrigation Department, Government of Orissa v. G. C. Roy reported in (1992) 1 SCC 508 : (AIR 1992 SC 732), wherein holding that an Arbitrator acts within the jurisdiction in awarding the pendente lite interest to the Contractor when the agreement is silent as to award of interest clarifying further that where the agreement between the parties does not prohibit grant of interest and where a

party claims interest and that dispute along with claim for principal amount or independently is referred to the Arbitrator he shall have the power to award interest pendente lite. The decision in Abhaduta Jena case (AIR 1988SC 1520) (supra) was found to have laid down good law on this aspect. The Apex Court however, indicated that the decision in the case of Secretary, Irrigation Department (supra) shall only be prospective in operation indicating thereby that the said decision was not to entitle any party nor was to empower any Court to reopen proceedings which had already become final. The Apex Court made it clear that in other words, the law declared in the aforesaid decision shall apply only to pending proceedings.

41. As observed by the Apex Court in its decision in the case of Sudhir Brothers v. Delhi Development Authority, reported in 1996 All CJ 597 : (1995 AIR SCW 4622) the law is now well settled that the Arbitrator has the power and jurisdiction to grant pre-reference interest also in references made after the coming into force of the [Interest Act, 1978](#).

42. In the aforesaid circumstances, unless there is a clear exclusion, the Arbitrator would have jurisdiction to entertain a claim for interest. The claim put forward by the Contractor respondent included the claim in regard to the payment of interest and this claim has to be treated as within the claim for the determining the quantum of the amount payable to the Contractor which payment remained withheld and which withholding of the payment gave rise to the dispute in question. The right to interest, we may observe is a question of fact on which the Arbitrator is the sole judge. The award in respect of the interest taking into account the rate at which the interest has been made payable does not appear to suffer from any such error which may justify any interference therein.

43. We must observe in this connection that in the matter relating to the recovery of an amount in the proceedings under the Arbitration Act, the payment of which amount stands withheld, the question of the award of interest on the amount wrongfully withheld clearly arises and has to be treated as included in such a dispute in order to render the award just and fair inasmuch as the purpose for awarding the interest is only to indemnify the wronged person with some

equivalent or substituted value which appears to be just. Award of interest for the period from the date of detention of the money upto the raising of the claim as also for the period when the arbitrator was in seisin of the proceedings is clearly tenable. The award cannot be held to be vitiated on the ground that the arbitrator had no jurisdiction to make an award in regard to an amount towards interest.

44. The provisions contained in Section 15 of the Arbitration Act, apart from other things provide that the Court may be order modify or correct an award where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred. Obviously therefore, if apart of an award is found to be invalid as being in excess of the arbitrator's power and is separable from the rest, the remainder of the award can be maintained and acted upon while the excessive part of the award can be declared to be un-enforceable. This section contemplates a case where an arbitrator in making the award has gone out side the legitimate subject matter of the reference. If that part of the award which deals with the matter out side the reference could be separated from the other part without affecting the decision on the matters referred, the Court may in such a case modify or correct the award. It has been observed by the Apex Court in its decision in the case of Union of India v. Jain Associates reported in (1994) 4 SCC 665 : (1994 AIR SCW 2507), that it was true that if the bad portion of the award is severable from the good part, the Court may set aside the bad part and uphold the rest of the award once it is found that the part which is invalid is severable from that which is valid and there can be no justification for setting aside the entire award.

45. In the present case, what we find is that the award in dispute so far as it relates to the payments in respect of the earth work beyond lip cutting for the reach Km. 189.50 to Km. 197.70 is distinct and clearly severable from the residue and the rest of the award.

46. In the circumstances, therefore, the invalid part of the award as indicated above can be separated while maintaining the valid part of the impugned award by modifying the said award accordingly.

47. No other point has been urged or pressed by the learned Standing Counsel.

48. In view of our conclusions indicated hereinabove, this appeal succeeds in part. The impugned award dated 23-5-1994 is modified to the extent that it shall remain confined to the claim determined by the Arbitrator under the aforesaid award excepting the determination of the amount payable for the earth work beyond lip culling for the reach Km. 189.50 to Km. 190.70. The award shall stand modified to the extent as indicated hereinabove and the award decree shall also stand modified to that extent accordingly.

49. The respondents shall be entitled to the proportionate costs only.

50. Appeal partly allowed.

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