State of U.P. Vs. Texmaco Ltd.

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Court : Allahabad

Decided On : Oct-11-2007

Reported in : 2008(1)ARBLR605(All); 2008(1)AWC541

Judge : Amitava Lala and ;Pankaj Mithal, JJ.

Appellant : State of U.P.

Respondent : Texmaco Ltd.

Disposition : Appeal dismissed

Judgement :

Amitava Lala, J.

1. The impugned order passed by the learned Civil Judge/Judge, Small Causes Courts, Bijnor dated 26th July, 1993 in Original Suit No. 193 of 1991, Taxmaco v. State of U.P. in the capacity of Civil Judge arising out of an award dated 3rd August, 1989 of Justice L. P. Nigam, former Judge of Allahabad High Court, as Umpire, which was challenged by the State for setting aside the same but ultimately failed and the decree was passed on the award, is under challenge.

2. As per the erstwhile Arbitration Act, 1940 (hereinafter in short called as the 'Act') an award can be challenged in the Court of law under Sections 30 and 33 of the said Act. When Section 30 is subject, Section 33 is procedural. As per Section 30

of the Act, there are three conditions for the purpose of challenging the award, as under:

30. Grounds for setting aside award.-An award shall not be set aside except on one or more of the following grounds, namely-

(a) that an arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35 ;

(c) that an award has been improperly procured or is otherwise invalid.

3. Out of the aforesaid grounds, ground Nos. (b) and (c) are admittedly not under challenge hereunder. The remaining issue of misconduct of the arbitrator/umpire was the basic point for consideration by the Court, where such application was filed in the form of suit challenging the arbitration award. From the impugned judgement and order passed by the learned Judge, it appears that three issues were framed, which are as follows (as per the English version supplied by the contesting parties):

(1) Was the arbitral award outside the jurisdiction or authority of the Arbitrators, as has been stated in the objection, if yes then its effect?

(2) Whether misconduct committed by the arbitrator in the process of arbitral award or judgment or by themselves? If yes, then its consequence and effect. (sic)

(3) Relief.

4. Additionally, a very important question arose before this Court as regards limitation. Under Section 14 of the Act, provisions of signing/ filing/notice of the award by the arbitrator/umpire or the Court have been specified. As the scope and ambit of Section 14 of the Act is very pertinent in this context, the same is quoted hereunder:

14. Award to be signed and filed.- (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under Clause (b) of Section 13, the Court, after giving notice to the parties and hearing them shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

5. If one allows the time to expire from putting any objection in the form of setting aside, if any, then the Court will pass judgment in terms of award which will be followed by a decree, in terms of Section 17 of the Act. Section 17 of the Act is quoted hereunder:

17. Judgment in terms of award.-Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award.

6. Therefore, it is statutory obligation on the part of the defaulting party to put his objection within time.

7. Factually, the objections were filed by the appellant-State of Uttar Pradesh on 14th May, 1992 when the award was filed in the Court on 19th October, 1989. It appears from the judgment and order impugned that on 30th September, 1991 State of U. P. appeared in the Court and submitted an application and prayed two months time for filing objection and again on 4th December, 1991 an application was filed by them for filing objection and finally objection/s was/were filed only on 14th May, 1992, as aforesaid. As per Article 119 of the Limitation Act, 1963 (hereinafter called as the Limitation Act'), the period of filing the award in the Court is 30 days from the date of service of the notice of making of the award, whereas for the purpose of setting aside an award or getting an award remitted for reconsideration the period of 30 days will be calculated from the date of service of the notice of filing of the award. Article 119 of the Limitation Act is quoted hereunder:

---Description of suit Period of Time from which periodLimitation begins to run.---119. Under the Arbitration Act, 1940-(a) for the filing in Court of an Thirty days The date of service ofaward; the notice of the making of the award.(b) for setting aside an award or -do- The date of service of getting an award remitted for the notice of the filingreconsideration. of the award.---

8. First part of Article 119 is related with Section 14 (1) of the Act, whereas second part of such Article is related with Section 14 (2) of the Act. In the instant case, admittedly the award has been filed on 19th October, 1989, therefore, under no stretch of imagination it can be said that the State of Uttar Pradesh was not aware of filing of the award even after 30th September, 1991 when they wanted time to file application taking objection thereto. Period of 30 days as given under the Limitation Act had already expired prior thereto. Even assuming that the State of U. P. came to know about filing of the award on 30th September, 1991, there was no scope but to file the necessary application challenging the award for setting aside or remitting of the same within 30 days taking such date as the date of notice. Therefore, apparently the challenge, as has been thrown for setting aside

the award, is much after the period which has been specified under Article 119 of the Limitation Act that too without any explanation whatsoever. In view of the judgment of the Supreme Court in Deo Narain Choudhury v. Shree Narain Choudhury : (2000)8SCC626 , the period of limitation under Article 119 of the Limitation Act will start running from the date the notice has been given by the Court under Section 14 (2) of the Arbitration Act, 1940.

9. We have no quarrel with the proposition that when there is applicability of the Limitation Act, the same will be applicable as a whole including the power of the Court to condone the delay under Section 5 of the Limitation Act, in support whereof the appellant relied upon the judgment in Bharat Coking Coal Ltd. v. L.K. Ahuja and Co. : [2001]1SCR1152 . But, no laxity will be shown to the defaulting party to frustrate the provision of Section 17 of the Act being piece of special legislation. Moreover, when power of condoning the delay is available, but no sufficiency is available, it has to be held a sentence without verb. Mere submission of any substantial justice cannot ipso facto be a sufficient ground to ignore the question of limitation.

10. Again by relying upon Bharat Coking Coal Ltd. (supra) Mr. V.C. Tripathi, the learned standing counsel appearing for the appellant, contended that the law is equally well settled that in cases of speaking awards the Court can interfere if there is an error apparent on the face of the award itself. It could also be shown that the Arbitrator has misconducted himself in arriving at certain conclusions, which are either plainly contrary to law or to the terms of the contract or ignored the provisions of the contract or the evidence on record and such other similar matters. Hence, point of misconduct can be gone into by the Court irrespective of the point of limitation.

11. It has been contended by Mr. Anil Sharma, learned Counsel appearing for the respondent, that a four Judges' Bench of the Supreme Court in Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningashetti and Ors. : [1962]2SCR551 has held that notice under Section 14 (2) of the Act can also be served orally. No question of service of notice in the formal way of delivering the notice or tendering it to the party can arise in the case of a notice given orally. In

support of his contention he also relied upon the judgments in Ch. Ramalinga Reddy v. Superintending Engineer and Anr. : (1999)9SCC610 and Deo Narain Choudhury (supra). The communication of the information to the pleader of the party that an award has been filed is sufficient compliance with the requirements of Sub-section (2) of Section 14 of the Act with respect to the giving of notice to the parties concerned about filing of the award. Moreover, when no party filed an objection praying for the setting aside of the award, no question of refusing to set aside the award can arise and therefore no appeal is maintainable under Section 39 (1) (vi), which allows an appeal against an order refusing to set aside an award against the order of the Court ordering that the award be filed. Mr. Sharma further stated that apart from the question of limitation, the issue of misconduct was also considered by the Court, therefore, the question whether delay in filing the objections under Section 30 of the Act should have been condoned in the interest of justice or not would pale into insignificance and would be academic as the very same objections have been considered on merits and rejected by the court below in view of the judgment in State of Andhra Pradesh v. I. Chandrasekhara Reddy and Ors. : AIR 1998 SC3311 .

12. Learned Counsel appearing for the appellant has contended before this Court whether the umpire travelled beyond the jurisdiction or not, is a question of misconduct irrespective of question of limitation and, as such, there should not be any departure from considering the issue hereunder. In such circumstances, it is necessary to see the purported misconducted portion of the award to satisfy the test. Therefore, such part is quoted hereunder:

Merely because the contractor took time in sending revised drawings it provided no ground to the Department to communicate approval more than two to three months after and in some cases even six months after. Letter dated 3.2.72 addressed by Mr. N. K. Dwivedi to the Director, Construction, Ramganga River Project, Kalagarh, Mr. Phool Prakash, filed by the Department on 26.4.1989, tries to explain the delay on the part of the Department in communicating approval. So the fact that there was delay is rather admitted in that letter. Learned Counsel for the Department relied on letters dated 30.1.1971 and 4.1.1971 addressed by Mr. N. K. Dwivedi to Mr. Maheshwari, filed as documents Nos. 3 and 4 with the

Department's list dated 26.4.1989 for contending that the delay was on the part of the contractor. I do not accept that stand. Considered as a whole the entire evidence on the record and the evasive denial in the written statement of the specific facts alleged in the statement of claim leads me to the conclusion that the Department defaulted in communicating approvals as per terms of the agreement already quoted above and as such the responsibility for the delay in the start of the work squarely rests on the shoulders of the Department.

Further, the other relevant part of the award is also quoted hereunder:

There is yet another point in this connection namely that in view of the undertaking given by the contractor vide his letter dated 19.6.1976 that he would not claim any amount for the extended period from 30th October, 1975 to 30th April, 1976, the contractor cannot be allowed any amount for escalation for that period. This stand of the Department is correct and as such the contractor can be allowed escalation only for the period from 30.6.1973 to 30.10.1975. In other words, he cannot be allowed any escalation for the period prior to 30.6.1973 as also the period subsequent to 30.10.1976.

13. The court below at the time of consideration of the application for setting aside the award considered the points as follows (as per English translation supplied by the learned Counsel appearing for the appellant):

(10) Issue Nos. 1 and 2.- These two issues are correlated. Hence they are disposed of together. By the Ld. advocate for the defendant U. P. Government it was argued before me that the arbitral award that has been filed, the First Party M/s. Tex Maco Ltd. wants to import to it will shape to court order. (sic) Hence the onus is on the first party to establish and prove the fact that the Award is correct and in keeping with law. (sic) The liability to file evidence also lies on it. I do not agree to this argument of the learned advocate. Whenever any award is filed in Court, the Court issues notice to both the parties to file objections. Whether thirty day (sic) after getting notice under Section 14 of Arbitration Act, the parties have to file objections. (sic) If any objection is not filed within time, then the Court becomes bound to import the form of order to the Arbitrator's Award. Hence, the responsibility of proving whether the Arbitral Award is fit to be set aside, amended

or returned is on him, who says that in the instant suit, this Award is fit to be set aside by filing several objections by the objector U. P. Government. (sic) Hence, the responsibility to prove whether the award in question is fit to be set aside on the basis of misconduct or on the basis of causing the granting of interest, jurisdiction of the Arbitrator or any (sic) in any other manner, lies on the defendant U. P. Government. The maximum force that has been produced before me by the U. P. Government, such has been given in this regard that as per the agreement if at all delay has taken place in completing the work due to U. P. Government even then the First Party M/s. Tex Maco Ltd. is not entitled to get any compensation because, it is mentioned in the agreement itself that no compensation is payable on this basis. (sic) On behalf of the opposing (sic) party Section 7-10 of the agreement has been referred to before me in which it is mentioned that if in accordance with Section 7-09 of the agreement if delay is committed by Government and providing any aid to the contractor, then for the same, the Government shall not consider any claim of compensation for the same. (sic) According to the learned advocate, even if there was some delay on the part of U. P. Government in complying with Section 7-09 of the agreement, even then the U. P. Government shall not be held responsible for the same. According to the award passed by the arbitrator, the programme that was made between the parties for completion of the work, for committing delay in the same the U.P. Government has been held responsible and it is also accepted that the drawings were also approved after much delay, by the U. P. Government and it is also admitted that delay was made by U. P. Government in securing the import licence and in supplying the steel and delay was committed by U. P. Government in executing the civil work and at several times the U. P. Government has interfered in the work of the First Party. (sic) As per the opposing (sic) party all these analysis are against the provisions of the aforesaid Section 7-10 and Section 3-06 of the said agreement also does not permit the same. The instance of K.P. Paplok (sic) v. State of Kerala and Ors. : (1975)IILLJ98SC (sic) has been cited before me by the learned advocate for the opposing (sic) party in which this opinion has been expressed by the Supreme Court that the description of misconduct that is given aspect (sic) section of Arbitration Act, is not related to legal or moral aspect and only illegal and unlawful activity does not fall under the definition of misconduct

rather if any sequificant (sic) paper is intentionally avoided by the conciliator, then such fact also comes under the definition of misconduct. (sic) This example is not applicable in the instant case. No such example has been produced by the opposing (sic) party. Instance of M/s. Bhai Sandar Singh and sons New Delhi v. New Delhi Municipal Committee and Ors. have been cited before me in which it was expressed by the Hon'ble Court that if any award or judgement is passed by the arbitrator without perusing the agreement that was executed between the parties then, and if the responsibility and authority of the parties mentioned in the agreement has been overlooked then such Arbitral Award stands fit for being set aside. (sic) On behalf of the opposing (sic) party the instance of Union of India v. Ajit (sic) Mehta Associate Pune and Ors. : AIR1990 Bom45 , has been cited before me in which it is stated by the Hon'ble Court that, wherein the contractor has received the required amount of money to full satisfaction there, what all authorities shall the arbitrator have in granting money under the said dispute? (sic) The aforesaid two instances also are not applicable in the instant suit. In the instant suit, without perusing the agreement executed between the parties and the authority power and responsibility to which the parties are entitled to under the said agreement, conclusion has been drawn by the arbitrators. The basis of such conclusions also are described in the award. The arbitrator also has absolute authority to see that the payment in respect of the final (sic) is made or not and in this regard also the arbitrator is entitled to pass judgment or award. In this regard the decision of Division Bench of Supreme Court in the case between mentioned in the case of Sudarshan Trading v. Government of Kerala : [1989]1SCR665 (sic) is absolutely clear. (sic) What is the limit of the agreement that has been placed before the Arbitrator to decide the dispute that has arisen between the parties? and what are the responsibilities and authorities the parties have under the same? (sic) and what are power and payables do the parties have under said agreement? In this regard the conclusion made by the Arbitrator, is binding on the parties as per the aforesaid view. The Court does not have any such power by which it can draw conclusion from a fresh point of view by re-examining the evidences placed before the Ld. Arbitrator and re-establish its own conclusions in place of the conclusions or decisions made by the Arbitrator. This opinion has been given by the Hon'ble High Court in State of Orissa v. B. (sic) C. Kanungo : AIR1980 Ori157 .

in which it is mentioned that only the arbitrator shall have the authority to consider the agreement and its limits. At the time of hearing objection against award the Court does not play the role of any appeal (sic) Court. In such matters, the precinet (sic) of research by Court is extremely limited. In this regard the view of the Hon'ble Court given in Late Murarilal v. Governor General Bar Council (sic) AIR 1944 (31) SC 73 and Mulchand (sic) Adin (sic) v. Kashi Prasad Shukla : AIR 1965 MP118 and Puri Construction Pvt. Limited v. Union of India : AIR 1989 SC777 is absolutely clear. As per the opinion expressed by the Full Bench of Supreme Court in the matter Bugo (sic) Steel Furniture (sic) v. Union of India : [1967]1SCR633 , the matter which is referred to for being decided by arbitrator, in the same, the decision made and conclusions arrived at by the mediator or arbitrators stand binding on the parties, whether such conclusion is wrong or right. (sic) The basis of this view is that, when the parties have given consent for deciding their suit by a particular person then they should also accept his decision as long as no legal fault is detected in the main part of the award.

11. As per the aforesaid consideration it is neither evident that the agreement that stood between the parties was not analysed by the arbitrator or their rights and responsibilities were overlooked and not it is revealed that there is any legal fault in the main sheet of the award or judgement, and it is neither evident that the arbitrator has overlooked any significant document. (sic) Under the circumstances no misconduct was committed by the arbitrator himself or in dealing with the process of arbitration in passing the Award.

12. The objections that were filed before the Court on behalf of U. P. Government were done on 14.5.1992 whereas the Arbitrator's Award was filed in Court on 19.10.1989. From the perusal of the order sheet available in the documents it is learnt that on 30.9.1991 the advocate on behalf of the opposing (sic) party U. P. Government appeared in Court and he submitted application being Gha-18 and prayed for two months time for filing objection again on 4.12.1991 an application 19-Gha was filed on behalf of the opposing party U. P. Government for filing objection, and finally these objections were filed on 14.5.92. (sic) For filing objections Clause 119 of Limitation Act, 1963 is absolutely clear. For filing objection again (sic) Arbitrator's Award, the time limit is of thirty days after filing of

the Award in Court and receipt of the notice and objections filed thereafter are barred by limitation. The decision of the Full Bench of Supreme Court mentioned in Nilkantha Sidrampa (sic) Ningo (sic) v. Kashinath Souanna (sic) Ningo (sic) Section AIR 1962 (sic) is absolutely clear. It is opened (sic) by the Hon'ble Supreme Court that the Notice given under Section 14 (2) of the Arbitration Act can be verbal also and if the party or its Ld. advocate enters appearance in Court, and if he is aware of the fact that the Arbitrator's Award has been filed in Court, then even if written notice is not given, then also, the calculation of the period of limitation shall start from that date on which any party or its Ld. advocate had appeared in Court and learnt about the filing of the Arbitrator's award in Court. (sic) In the instant suit on 30.9.1991 the opposing (sic) party U. P. Government had learnt about the filing of Award in Court but no objection was filed in Court by hand within the period of limitation. (sic) The decision of the Division Bench of Allahabad High Court given in Madan Lal Haveli Vala (sic) v. Sundarlal (sic) and Ors. AIR 1964 All 30 (sic) and the decision of the Full Bench of Hon'ble Supreme Court given in this (sic) case in : [1967]3SCR147 , expressly clearly the opinion that if those objections are not filed within time then, the Court cannot make any consideration on them. (sic) In Secretary Assistant State Construction Organisation v. Shreeram Construction AIR 1981 Bom 266. (sic) Not by it is opened by the Hon'ble Court that if the objection filed are beyond the period of limitation then the Court itself does not have the authority to set aside the Award. (sic) The Court shall not have any other alternative then (sic) to pass order similar to and as per the Award of the Arbitrator.

As per the opinion expressed by the Division Bench of Supreme Court in Indian Rayon Corporation Ltd. v. Raunak (sic) and Co. Pvt. Ltd. : AIR 1988 SC2054 . the calculation of the period of limitation shall start from the time since when the fact of filing of Award of Arbitrator in Court shall be known such knowledge be of any manner. (sic) In this manner the objection filed by U. P. Government against the Award of Arbitrator is beyond limitation if time is continued to be given by Court to file opposition then the benefit of limitation cannot be obtained. The Court does not have any authority to extend the period, under Section 119 of Limitation Act. Alongwith these objections, no application for giving the benefit of limitation (sic) has been filed on behalf of the U. P. Government. Hence, no consideration can be

made on the objection filed on behalf of U. P. Government.

13. On behalf of the opposing (sic) party U. P. Government this objection has also been raised that interest also was caused to be given by the arbitrator, when he did not have the authority to do so. (sic) In this regard the agreement has been submitted before me by the learned advocate of the Opposing (sic) Party in which it is mentioned that no interest shall be charged on the amount payable. In the agreement, the amount of money and interest which is mentioned, the same is in respect of the payment which is to be made by the U. P. Government and the admitted claim. In this agreement nothing is mentioned that in the matter that has been refused to for Arbitrarial (sic) decision and in the dispute that has been decided before the learned arbitrator, no parties shall have the authority to receive any interest. Also the provisions of under Section 29 of Arbitration Act, it can be made to be given and the Arbitrator has such authority. (sic) As per the Hon'ble Court order mentioned in Natvarlal (sic) Shyamlal Das (sic) and Co. Bombay v. Mineral (sic) Metal (sic) Trader (sic) New Delhi, AIR 1952 (sic) Delhi : AIR1982 Delhi44 . The (sic) Arbitrator also has the authority to make the interest that has been waived, to be given. Apart from this, in U. P. Para 72 has been added to Schedule-A of the Arbitration Act through amendment and as per the same the arbitrator reserves the absolute authority to give interest. This opinion is confirmed by the opinion of Allahabad High Court in the matter Union of India v. Civil Judge Allahabad AIR (sic) 1990 (16) All 511, on this basis the Award passed by the arbitrator is not fit to be dismissed. (sic) In the award, interest has been made to be given by the arbitrator for making paying (sic) during the pendency of the suit. Hence the provision made in the Award for paying interest on the payment during the pendency of the suit is fit to be amended and dismissed.

14. In the argument it is also stated before me on behalf of the U. P. Government that as per Section 10 of the Arbitration Act, the Small Causes Court does not have the jurisdiction to hear the instant case. The present suit has been filed in civil side and this Court has the power of Civil Judge Small Cause Court has additional powers and hearing of the present suit has been done in the civil side. (sic) Hence this argument also is not fit to be admitted.

15. From the aforesaid consideration the issue Nos. 1 and 2 has been decided against the opposing (sic) party U. P. Government and in favour of the First Party Texmaco Limited.

16. Issue No. 3:

As per the aforesaid conclusion the Award in question with the amendment is fit for being granted the status of order and the objections are fit to be dismissed.

Hence, the objections are dismissed and the suit is decreed in accordance with the Award of the Arbitrator, being paper No. 3. In this Award, the provision about the rate of interest mentioned for being given on the payment during the pendency of the suit is dismissed. (sic) On the amount of money mentioned in the Arbitrator's Award, simple interest at the rate of 5 percent per annum shall be payable during the pendency of the suit till realisation. The parties shall bear their own respective costs of the suit themselves. The Award of the Arbitrator, being Kha-3 shall be a part of the decree.

14. Finding out misconduct is essentially an investigation of fact. Therefore, at the time of consideration of misconduct, it is to be seen whether the nature of misconduct is in respect of the fact or misconduct in law. For an example, if the umpire has no inherent jurisdiction to consider the issue but the same was considered then the Court can construe that the umpire has exceeded his jurisdiction by means of such action. In such circumstances, no matter whether the objection as raised by the appellant in the Court below is within the time or not, such issue has to be considered. But when the misconduct is in respect of the fact, which is to be ascertained by the umpire on the strength of the materials available before him, objection of misconduct after participation should not have been taken. In K. N. Sathyapalan (Dead) by L.Rs. v. State of Kerala and Anr. 2006 (4) Arb LR 275 (SC), we find that the Supreme Court held that when in any unforeseen circumstances the contractor held up from completing the work within the stipulated period and the State had not taken any step in cooperating with the contractor, in such circumstances if any question with regard to delay of execution of work has been considered by the arbitrator, the same cannot be said to be without jurisdiction but within the jurisdiction. In Food Corporation of India v. A.M.

Ahmed & Co. and Anr. : AIR 2007 SC829 , the Supreme Court further held that escalation of price due to gap of time or non-fulfilment of contract within the period is normal event or consequence if the question of delay is not out of the domain of the arbitrator to consider. According to us, once the arbitrator/umpire has considered the delay, he is also empowered to consider the natural and consequential event in connection with the delay. Therefore, it can not be said that the umpire acted without jurisdiction in considering the delay. In the instant case, the nature of misconduct as objected by the appellant is available from the quoted portion, as above. Such fact has to be taken into account by the umpire before forming an opinion on account of delay in completing the work.

15. Hence, such ascertainment by the umpire cannot be considered as misconduct in law. Moreover, the Court below has considered all the points irrespective of the factum that the application in the form of suit is totally barred by law. Therefore, when all the points have been considered by the Court below irrespective of the question of limitation for abundant precaution, there is nothing left for the purpose of due consideration by this Court except which has been taken note hereunder.

16. Thus, in totality the appeal cannot succeed. Hence, the appeal is dismissed without imposition of cost.

Pankaj Mithal, J.

17. I agree.