

Em and Em Associates Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Apr-10-2002

Reported in : AIR2003Delhi128; 2002(2)ARBLR222(Delhi); 97(2001)DLT835

Judge : Dalveer Bhandari and; Vikramajit Sen, JJ.

Acts : [Arbitration Act, 1940](#); [Arbitration and Conciliation Act, 1996](#); Electricity (Supply) Act - Sections 49

Appeal No. : FAO (OS) 129 of 1989

Appellant : Em and Em Associates

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Ansuya Salwan, Adv.

Advocate for Pet/Ap. : Neelam Rathore, Adv

Disposition : Appeal allowed

Judgement :

Vikramajit Sen, J.

1. By means of this Appeal the Appellant M/s. Em & Em Associates (hereinafter referred to as 'the Contractor'), has assailed the impugned judgment dated 26.5.1989 of the Learned Single Judge, in respect of Claims 3 & 4 and 16 to 18.

We shall consider Claims 3 and 4 together as has been done in the Statement of Claims, in the arbitral Award, and in the judgment of the Learned Single Judge. These Claims are - 'that the rates quoted by the Claimants in their tender were based on the quantities shown in the Schedule to the tender documents but when the work was actually carried out it was found by the Claimants that the quantity shown in the schedule to tender documents was wrong and as a result of the wrong quantities mentioned in respect of Box-Liners and Shutters in the schedule to the tender documents by the respondent the claimants suffered a loss of Rs. 1,06,725.51 i.e. Rs. 30,483.66 in respect of Box Liners and Rs. 76,241.85 in respect of Shutters. The respondent is liable to pay the said amount of Rs. 1,06,725.51 to the Claimants along with interest at the rate of 18% per annum which comes to Rs. 16,008.75 from 11.10.82 till the filing of the statement of claim.' Originally, the Award read as in the first Column, and after its remission reads as in the second column. These have been juxtaposed for facility of comparison, and for a complete understanding of the reasons which prevailed upon the Arbitrator to make his award in respect of these two claims:-

Claim No. 3: The Claimants claimed '... the claimants quoted the Rs. 76,241.85 on account of rates after going through the short payment for difference detailed quantities as in percentage of wrong available in the schedule of quantity in the schedule quantities attached with the items and wastage occurring tender papers. Also the work because of same shutters was actually executed on the whereas the reference of basis of the original conceived claim No. 3 had been made for drawings and design and there a sum of Rs. 61,965/-. During were no changes except in the discussions it was agreed overall quantities. It may be that I will adjudicate upon pointed out that the quantities the claim to the extent of in the schedule to tender were Rs. 61,965/- and for the shown up to nearest square meter balance claim (which is and were not rounded off which outside the scope of clearly shows that these were reference) the Claimants the exact quantities to be shall take necessary steps executed. Also Clause 1.1 offer adjudication. The the agreement which reads that Respondents, however, the cupboards shall be contended that the Claimants manufactured as per actual niche are not entitled to this size in individual houses claim. This claim is according to the enclosed justified since the Claimants drawings. This further made quoted the rate

keeping in the claimants believe that themind the finished product. quantities given in the tenderTherefore, reduction in paper were the actualoverall sizes did not reduce quantities to be executed inthe cost of overall product proposition to the drawings andas envisaged. I, thereforee, designs given for the saiddirect the Respondents to pay jobs. Any deviation in thethe aforesaid amount to the original work would reduce orClaimants. increase the quantum in theoriginal proportion of numberof niches to the givenClaim No. 4. quantities. But in this casethere was no deviation orThe Claimants during the change in the number ofcourse of discussion cupboards to be manufactured.restricted their claim to Nor was there any change in theRs. 30,475/- towards short given design. This shows thatpayment for difference in the quantities given in thepercentage of wrong schedule were wrong andquantities of wastage resulted in misconception onoccurring for the items of the part of the claimant whilebox link. The Respondents, quoting the rates in thehowever, contended that the tender. It may be furtherClaimants are not entitled to clarified that if the correctthis claim. This claim is quantities had been given unjustified since the Claimants the tender papers the quotedquoted the rate keeping in rates for these finished itemsmind the finished product would have still been the sameTherefore, reduction in but the rates per square meteroverall sizes did not reduce would have increasedthe cost of overall product proportionately. The abovean envisaged. I, thereforee, facts have further beendirect the Respondents to pay established to the detailedthe aforesaid amount to the measurements taken that theClaimants. quantities were actually lessthan that given in the scheduleof quantities attached with theagreement. Because of thiswrong information given to the claimants at the time ofsubmitting the tender on whichthey relied upon the claim ofthe claimants is justified'.

After considering the above reasons the Learned Single Judge was of the following opinion:

'The next objection is that the reasons given in respect of claims 3 & 4 are in total contravention of the provisions of the agreement signed between the parties. The finding now recorded that 'quantum of items mentioned in schedule of quantities of the contract is wrong', is without substance or reason. The so called reason given in support has no bearing on the facts of the case and are not reasons at all in any

reasonable perspective. The findings of the Arbitrator that the petitioner had tendered for finished product is not based on any evidence and runs counter to the contract. The rates quoted by the petitioner in the tender were not only for the quantities mentioned in the Schedule of quantities, but also for the possible deviation up to the extent of 50% as per Clause (ii) to memorandum on page 17 of the agreement between the parties. Clause 1.1 of the tender stipulated that cup-boards had to be manufactured as per actual niche sizes existing at the site as per enclosed drawings. The subsequent manufacture of the cup-boards was also done as per the actual niche sizes and the work measured accordingly for payment. It was provided in the contract that the only permissible mode for payment is the actual measurement of the work executed at the site. It was so observed by this court in its order dated 11.4.1986 that when the actual measurement was the only criteria for these two claims i.e. 3 & 4 provided in the agreement the arbitrator was bound by the same and could not resort to any other criteria for determining these claims. This is a legal error apparent on the face of it.

On the other hand on behalf of the petitioner it is stated that the contention of the respondent is without substance. The arbitrator in the statement of detailed reasons had given sufficient indications to justify his reasons. The findings of the Arbitrator are final.

I have considered this aspect of the matter. While disposing of the objections on behalf of the Objector that the award was bereft of reasons this court by order dated 11.4.1986 against claims No. 3 & 4 observed:-

'Under claims Nos. 3 & 4 the Arbitrator gave the following uniform reasons:-

'This claim is justified since the claimants quoted the rates keeping in mind the finished produce. therefore, reduction in over all sizes did not reduce the cost of overall product as envisaged. I, therefore, direct the respondents to pay the aforesaid amount to the claimants'. Regarding this reason, it is pointed out by Dr. Singhvi for the Objector-DDA that the claim had been put up towards short payment for difference in percentage of wrong quantities in the schedule items and wastage occurring and the same could be adjudicated upon by the Arbitrator with reference to the only criterion provided for in the agreement between the parties

and that the criterion was the 'detailed measurements' which could determine the wrong quantities and the wastage, and not by resorting to any other criterion which was extraneous to the said agreement between the parties, and in this connection he has invited the attention of the court to Clause (7) and (8) of the agreement in question. When actual measurement was the only criterion for these two claims, provided for in the agreement, the Arbitrator was bound by the same and could not resort to any other criterion for determining these claims which factor has resulted in a fundamentally invalid and ultravires reason for the adjudication of these claims, which would be tantamount to 'no reasons'.

I have perused the detailed reasons given by the Arbitrator on these claims. The Arbitrator tried to justify the claims Nos. 3 & 4 by giving additional reasons. The award against these two claims is not based on actual measurements. It has already been observed by this court by order dated 11.4.1986 that actual measurements was the only criteria for these two claims provided for in the agreement and the Arbitrator was bound by the same and could not resort to any other criterion for determining these claims. The Arbitrator has gone beyond the scope of Clauses 7 & 8 of the agreement. The Arbitrator was bound to remain within the terms of the agreement and he could not travel beyond the terms of the agreement. Since the Arbitrator has transgressed the limits of the terms of the agreement, his award on these two claims cannot be sustained. I uphold the objection of the respondents regarding these two claims and set aside the award in respect of these claims.'

The above passages have been quoted verbatim and in extension in order to illustrate that the divergence in the conclusion arrived at by the Arbitrator and the Learned Single Judge was predicated on their disparate interpretation given to the sundry clauses in the Agreement between the Contractor and the DDA. It is also significant that the Arbitrator and the Learned Single Judge based their respective judgments on different provisions of the same agreement. The later had relied on the aforementioned Clauses 7 & 8 of the General Rules & Directions, and the former on the specifications of the finished products.

2. Since the Learned Single Judge has relied on Clauses 7 & 8 of the Agreement these are reproduced below. It is, however, important to immediately mention that these Clauses are contained in the 'Percentage Rate Tender & Contract for Works - General Rules and Directions' (underlining added). It is an established principle of interpretation that general provisions should make way to specific provisions in case of any inconsistency between them; and that later provisions usually modify and prevail upon preceding ones. It will further be relevant to mention that Clauses 7 and 8 contemplate the manner in which payments are to be made to the Contractor. These would, therefore, not be germane to the controversy that has arisen in the present case viz. the quantification of the actual amounts due and payable to the Contractor. The Learned Single Judge has not discussed any of the Clauses which are specific to the Scope of Work which was to be completed by the Contractor, as has the Arbitrator.

'Clause 7.

No payment shall be made for a work estimated to cost rupees five thousand or less till after the whole of the work shall have been completed and certificate of completion given. But in the case of work estimated to cost more than Rs. five thousand, the contractor shall, on submitting the bill be entitled to receive a monthly payment proportionate to the part thereof then executed to the satisfaction of the Engineer-in-Charge, whose certificate of the sum so payable shall be final and conclusive against the contractor. But all such intermediate payments shall be regarded as payment by way of advance against the final payment only and not as payments for work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed, or re-erected or be considered as an admission of the due performance of the contract, or any part thereof, in any respect or the accruing of any claims, nor shall it conclude, determine, or affect in any way the powers of the Engineer-in-Charge under these conditions or any of them as to the final settlement and adjustment of the accounts or otherwise or in any other way vary or affect the contract. The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work or of the date of the certificate of completion furnished by the Engineer-in-Charge and payment shall be made

within three months if the amount of the contract plus that of additional items is up to Rs. 2 lakhs and in 6 months if the same exceed Rs. 2 lakhs of the submission of such bill. If there shall be any dispute about any item or items of the work then the undisputed items or items only shall be paid within the said period of three months or six months or as the case may be. The contractor shall submit a list of the disputed items within thirty days from the disallowance thereof and if he fails to do this, his claim shall be deemed to have been fully waived and absolutely extinguished.

Wherever there is likely to be delay in recording detailed measurements for making running payments in the case of residential building, advance payments without detailed measurements for works done (other than foundations and finishing items) up to (a) lintel level (including sun shade etc.) and (b) slab level, for each floor, worked out at 75% of the tendered rates may be made in running account bills by the Engineer-in-Charge in his discretion on the basis of certificate from the Assistant Engineer to the effect that the work has been completed up to the level in question.

The advance payments so allowed shall be adjusted in the subsequent running bill by taking detailed measurements thereof. Final payment shall be made only on the basis of detailed measurements.

Clause 8.

A bill shall be submitted by the contractor each month on or before the date fixed by the Engineer-in-Charge for all work executed in the previous month, and the Engineer-in-Charge shall take or cause to be taken the requisite measurements for the purpose of having the same verified, and the claim, as far as admissible, adjusted as far as possible before the expiry of ten days from the presentation of the bill. If the contractor does not submit the bill within the time fixed as aforesaid, the Engineer-in-Charge may depute within seven days of the date fixed as aforesaid, as subordinate to measure up the said work in the presence of the contractor whose counter signature to the measurement list will be sufficient warrant, and the Engineer-in-Charge may prepare a bill from such list.'

3. The Arbitrator, however, found the following Clauses of the Agreement to be relevant for the determination of the disputes between the parties. There are several sub clauses which need not be produced since they are similar in nature to Sub-clause (a).

S. No.	Description of Item	Quantity	Unit	Rate	Amount....
.....					

11. Providing and fixing

Cup-board box liner

made of 19 mm block

board with commercial

veneering on both

faces and 4 mm

commercial plywood,

with 19mm thick block

board partitions, 18mm

thick removable

shelves of

prevaricated 3 layer

particle board with

melamine impregnated

overlays of reqd.

finish & colour on

both faces-edges
sealed with resin
based putty and
supported over
18mm x 9mm size 2nd
class teak wood
beares/runners
including fixing the
box liner in the itch
with & including
wooden plugs & screws
all as per enclosed
architectural drawings
& directions of
Engineer-in-Charge
(over all outer
dimensions - width &
height - of the box to
be measured for
payment).

a) Cub-board type 1 157 Sq.m. Sq.m. 512.36 80,441/-

with a depth of 555mm (Rs. Five

(depth to be measured hundred

form in-side of teak twelve &

wood frame to out-side paise

of 4mm ply at back). thirty six

only).

...

ADDITIONAL CONDITIONS & SPECIFICATION

1. GENERAL

1.1. The cub-boards shall be manufactured as per actual itch size in individual house according to enclosed drawings.

4. The immediate question is whether the Learned Single Judge has breached the boundaries of judicial review and thus had erred in setting aside the Award by accepting the Objections raised by the Delhi Development Authority (for short 'DDA'). It should be borne in mind that even if the Arbitrator commits an error of law or of facts, in either or both events there is little or no scope for judicial interference, as has repeatedly been set down by the Hon'ble Supreme Court. (see Union of India v. Rallia Ram, : [1964]3SCR164 ; State of Orissa and Anr. v. Kalinga Construction Co. (P) Ltd., : [1971]2SCR184 ; Hindustan Iron Co. v. K. Shashikant & Co., : AIR 1987 SC81 ; Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar and Anr., : [1988]1SCR180 etc.). Jural intervention in arbitral Awards is not prescribed but proscribed as pronounced by the Apex Court while interpreting the provisions of the Arbitration Act 1940; it has now become even more limited and restricted under the [Arbitration and Conciliation Act, 1996](#). In cases governed by the [Arbitration Act, 1940](#), court's interference with an Award by

the Court would be expected and justified where the Arbitrator has travelled beyond the frontiers fixed by the contract between the parties. However, even in these instances, if the Arbitrator's conception of his jurisdiction is a plausible one, the Court is not competent to substitute with its own interpretation of the relevant clause. In *U.P. Hotels etc. v. U.P. State Electricity Board*, : AIR 1989 SC268 , the decision of the Umpire had been challenged in respect of his interpretation of Section 49 of the Electricity (Supply) Act. Even on this aspect, which quite palpably takes on the characteristics of a point of law in contradiction to point a fact, the Apex Court did not favor jural intervention. It observed that 'the view taken by the Umpire on Section 49 was a possible view in the light of the decision of this Court in *Indian Aluminium's* case. In the premises, a question of law arose certainly during the course of the proceedings. Such a question has been decided by the Umpire on a view which is a possible one to take. Even if there was no specific reference of a question of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award of the Umpire, and which is erroneous'. In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr.*, : AIR 1999 SC3627 the Hon'ble Supreme Court exercised jurisdiction in the context of the interpretation of two clauses in the subject contract since it held that opinion that their construction was 'absolutely clear and unambiguous'. The Court observed that in ignoring these clauses the Arbitrator had travelled beyond his jurisdiction since the Award was irreconcilable with those clause. This case contains a Restatement of the law concerning entertainment of objections to an Award, making reference to earlier decisions wholly unnecessary. For this reason the following passage deserves to be reproduced in extension.

'(a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of the fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The Award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement.

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitration is a tribunal selected by the parties to decide the disputes according to law.'

5. Another Coordinate Bench of the Apex Court in *Arosan Enterprises Ltd. v. Union of India and Ors.*, : AIR 1999 SC3804 , has opined as follows:

'36. Be it noted that by reason of a long catena of case, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined. In this context, reference may be made to one of the recent decisions of this Court in the case of *State of Rajasthan v. Puri Construction Co. Ltd.* wherein this Court relied upon the decision of *Sudarsan Trading Co. case (Sudarsan Trading Co. v. Govt. of Kerala.)*

6. As has already been mentioned above, in the present case the perspective of the Arbitrator and the Learned Single Judge is irreconcilable. In *Rajasthan State*

Mines & Minerals Ltd. case (supra) the opinion expressed in Associated Engineering Company v. Government of Andhra Pradesh, : [1991]2SCR924 was extracted and followed. This observation was that if the conclusion is reached that the Umpire/Arbitrator has travelled outside the permissible territory, not by the construction of the contract but by merely looking at the contract, the Award can be interfered with. In other words if only one understanding is possible from a reading of the relevant clauses of a contract, and this understanding is at variance with that preferred by the Arbitrator, the Courts may step in and modify the Award. Where, however, multiple understandings and interpretations are possible on a perusal of the contract, the Court cannot impose its own interpretation on that of the Arbitrator. It would be transgressing its own boundaries, and interloping upon those of the Arbitrator, in substituting the view preferred by it for that of the latter.

7. After a perusal of all the relevant Clauses of the subject Agreement, including Clauses 7 and 8 extracted above, we are unable to arrive at the conclusion that the interpretation adopted by the Arbitrator was not a possible one. This is despite the fact that on an appraisal of the above material we may be inclined to agree with the view taken by the Learned Single Judge. However, on the basis of the pronouncements of the Hon'ble Supreme court jural interference was not called for. It must also be borne in mind that the contract in question is of the genre of a standard form contract drafted by the DDA. The Arbitrator is nominated by the DDA. Even on this short ground the Courts must be hesitant to interfere with the Award. In the present case the Arbitrator, unlike the Court, was a technical person with an engineering background and a nominee of the DDA, which is the party aggrieved by the Award. No moral misconduct has been alleged, leaving no room for jural interference. The observations in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Limited*, (1948) 2 All ER 186, approved by the Hon'ble Supreme Court in a number of cases decided by it would apply on all fours, and reads as follows:

'A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of

sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award.'

8. The Learned Single Judge in setting aside the amounts awarded by the Arbitrator against Claims 3 & 4 has departed from the principles established in Associated Engineering Company's case (supra), and Hindustan Construction Co. Ltd. v. State of J & K, : AIR 1992 SC2192 , all of which have, more recently, been affirmed and applied in H.P. State Electricity Board v. R.J. Shah and Company, : [1999]2SCR643 . His Lordship B.N. Kirpal, J. has opined that 'it is clear that when the arbitrator is required to construe a contract then merely because another view may be possible the Court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award'. The Arbitrator's trend of thought is evident from the Award. In his opinion the erroneous specifications led the contractor to make a faulty bid, thus justifying that he should be compensated. This interpretation of the contract is not implausible. In these circumstances the order of the Learned Single Judge is set aside and the Award on Claims 3 and 4 is restored.

9. In respect of Claim Nos. 16 & 17 the Arbitrator's findings are as follows:

'Regarding claim No. 16, it is true that certain rectification to the niches were carried out by the department. However, the claimant has established through his letters on page 40 and 39 that they have incurred heavy losses for bad workmanship of the niches. They had to remove the already made cupboards as per the original size of the niches available at site and cut them to the proper size of the rectified niches and refixed it as a result they have incurred losses due to wastage of material and manpower as intimated in their above cited letters. It may be seen that the respondent has not replied to these letters indicating the acceptance of the facts intimated by the claimant in these letters. During the arbitration proceedings and discussions with the claimants as well as the respondents it was found that the actual expenditure incurred by the claimant was not Rs. 2,50,000/- as claimed by the claimant but in the neighborhood of Rs. 75,000/- and therefore the claim was awarded.'

'The claimants claimed Rs. 3,00,000/- towards loss on account of idle labour for a period of 60 days. The respondents, however, stated that the claimants are not entitled to this claim. The claimants, however, satisfied me that the payment was made to the labour for sitting idle. But from replies to the questions put by me to the claimants I could gather that about 50% of the labour must have been put to some other work of the claimants. I, however, allow the claim of the claimants to the extent of 25% i.e. an amount of Rs. 75,000/- and direct the respondents to pay this amount to the claimants.'

.....

'Regarding claim No. 17 reference to letter on page 40 of the arbitration file where the claimant has actually claimed an amount of Rs. 1,50,000/- @ Rs. 5,000/- a day for one month instead of 60 days as claimed in the claim statement. The claimants also submitted the bills of the labour which are placed in the arbitration file on page 81, 82 and 83. During the arbitration proceedings by questioning the claimant, it was found that about 50% of the labour was not actually idle but was utilised for other works as such the net claim justified to an extent of Rs. 75,000/- which comes to 25% of the total amounts claimed under this head.'

(emphasis supplied)

10. The reasons that persuaded the Learned Single Judge to set aside these findings are that the 'Arbitrator has not referred to any material on the basis of which he considered the claim of the claimant to the extent of Rs. 75,000/- reasonable on this account. All this appears to be fanciful, if not imaginary. It is settled law that the award can be set aside in absence of evidence to support the conclusion. This is the case here. There is no evidence to support the conclusion. Rather the words used by the Arbitrator are that the amount is in the neighborhood of Rs. 75,000/-'. On a perusal of the underlined portion of the Award it will at once be clear that material and evidence of the expenditure incurred by the Contractor, in the neighborhood of Rs. 75,000/-, was before the Arbitrator. He is not expected to articulate his views and findings with the precision expected from a person with a judicial background. On the strength of the decision of the Hon'ble Supreme Court in Kalinga Construction's case (supra), the Learned Single Judge erred in considering the matter as a Court of Appeal and further erred in reevaluating the evidence. The decision of the Learned Single Judge also runs counter to the approach recommended by the Apex Court in Hindustan Construction Company's case (supra). The decision of the Learned Single Judge also runs counter to the view preferred by the Hon'ble Supreme court in Bijendra Nath Srivastava v. Mayank Srivastava and Ors., : AIR 1994 SC2562 , inasmuch as the reasonableness of reasons given by the Arbitrator are not open to challenge. In Army Welfare Housing Organisation v. Gautam Construction & Fisheries Ltd. : AIR 1998 SC3244 the Apex Court declined to vary the Award for the reason that without reappreciating evidence it would not be possible to fault the quantum awarded towards the expenses incurred. From a reading of the Award it is not possible to conclude that there was absence of any evidence before the Arbitrator. The setting aside of the Award was, thereforee, speculative. Clearly, there was material before the Arbitrator for declining to grant the claimed amount of Rs. 2,50,000/- and instead allowing the claim to the extent of Rs. 75,000/-. The arbitral Award in respect of Claims 16 and 17 are, thereforee, upheld.

11. The Arbitrator has granted interest at the rate of 18 per cent per annum. The Learned Single Judge has relied on the decision in Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd., : [1989]1SCR318 to reduce the rate of interest to 9 per cent per annum, and this has been assailed. It is

contended on behalf of the Contractor that because of the prevailing legal opinion, pendente lite interest was not given. This question has now been set at rest in Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy, : [1991]3SCR417 . After overruling its earlier view expressed in Executive Engineer, Irrigation, Galimala and Ors., v. Abnaduta Jena, : [1988]1SCR253 the Apex Court laid down the following proposition of law in respect of Arbitrator's power of awarding interest pendente lite:

'45. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and thereforee when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.'

12. Very recently, in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, etc. v. N.C. Budharaj (Dead) by L.Rs. etc. etc., : [2001]1SCR264 , the Constitution Bench of the Hon'ble Supreme Court has further held that the Arbitrator has the jurisdiction to award interest on the sums found due and payable even for the pre-reference period also, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. In pronouncing so, the view in Abnaduta Jena's case (supra), even on this point, was overruled. The present position, thereforee, is that the Arbitrator is empowered to award interest for the entire period, past, present and future, provided there is no stipulation in the contract barring him from doing so. As regards the claim for grant of interest pendente lite we have perused the ground of Appeal and find that no such claim has been raised therein. We find no justification, thereforee, to grant interest pendente lite in the absence of any claim in this regard. However, it was not proper for the Learned Single Judge to modify the rate of interest which the Arbitrator has granted in exercise of discretion vested in him. The Award is

restored on this point also.

13. In this analysis the Appeal is accepted and the impugned Award, in respect of Claims 3, 4, 16, 17 and 18 is restored. Consequently the Award is made rule of the Court, and a decree in terms thereof is hereby passed. The parties are, however, left to bear their respective costs.

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