Reunion Engg. Co. Limited Vs. National Building Construction Corporation

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Court : Delhi

Decided On : Apr-05-2005

Reported in : 2005(1)ARBLR574(Delhi); 120(2005)DLT252; 2005(82)DRJ204

Judge : Mukul Mudgal, J.

Acts : Arbitration Act, 1940 - Sections 5, 8, 11, 12, 12(3), 20, 30 and 33

Appeal No. : CS(OS) No. 83A/1995 and is No. 2515/1995

Appellant : Reunion Engg. Co. Limited

Respondent : National Building Construction Corporation

Advocate for Def. : Arvind Minocha, Adv.

Advocate for Pet/Ap. : George Thomas and; Jeemon Raju, Advs

Judgement :

Mukul Mudgal, J.

1. These are objections preferred by the N.B.C.C./respondent under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as the 'Act') to the award dated 22nd October, 1994.

2. The facts of the case as per the claimant/petitioner M/s Reunion Engineering Co. Ltd. are as under:-

(a) In 1980 NBCC/respondent entered into an agreement with State Organisation For Tourism (SOFT) Iraq for construction of two hotels (Mosul and Dokan). NBCC entered into a contract with the petitioner to execute the electrification works in the aforesaid two hotels. The works were completed in 1987. Certain disputes arose under the contracts. Disputes were to be settled by arbitration. As per the arbitration agreement in the contract, the named arbitrator was Project Director, NBCC or any person appointed by him.

(b) The post of the project Director was not available at the time of raising the disputes. NBCC appointed one Shri V.A. Kelkar, one of its Chief Engineers as arbitrator. When the designated appointing authority to appoint arbitrator was absent, the arbitrator should have been appointed only by mutual consent of the parties. thereforee, the petitioner Reunion objected to Mr. V.A. Kelkar's appointment and filed the OMP 50/89 in this Hon'ble Court under Sections 5, 11, 12 and 33 of the Arbitration Act, 1940. During the course of the hearing of the aforesaid OMP, the parties arrived at settlement and filed an application in this Court and as a result this Court appointed Shri S.R. Nair as Sole Arbitrator in substitution of Shri V.A. Kelkar the erstwhile arbitrator on the joint request of the parties by an order dated 6.8.1991 passed by a learned Single Judge. Mr. S. R. Nair entered upon the reference in 1991. The arbitration proceedings continued for a period of about three years and the time for making the award was extended by mutual consent of the parties without any objection from time to time till the award was made in 1994. The award was filed in the Hon'ble court and pleadings were complete.

3. Mr. Arvind Minocha, the learned counsel appearing for the objector NBCC raised the following two main pleas in support of the objections under Section 33 of the Arbitration Act, 1940 (hereinafter referred to as the Act). Firstly he raised a plea that in view of the specific terms of the contract between the parties, the Arbitration was coram non juris. The relevant portion of clause 36 on which this plea of Mr. Minocha is based reads as follows:-

Arbitration

36. Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter of thing whatsoever in any way arising out or relating to the Contract, designs, drawings, specifications, estimates, instructions, order or these conditions or otherwise concerning the works, or execution or failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof shall be referred to the sole arbitration of the Projects Directors, National Buildings Construction Corporation Limited or any person appointed by him. There will be no objection if the arbitrator so appointed is an employee of National Buildings Construction Corporation Limited and that he had to deal with the matters to which the Contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitration to whom the matter is originally referred being transferred or vacating this office or being unable to act for any reason, the Project Director shall appoint another person to act as arbitrator in accordance with the terms of contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this Contract that no person other than a person appointed by the Projects Director, as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all. In all cases where the amount of the claim in dispute is ID 2500 (Iraqi Dinar two thousand five hundred only) and above the Arbitration shall give reasons for the award.

It is a term of the Contract that the party invoking arbitration shall specify the dispute or disputes to be referred to Arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

(underlining supplied)

4. Mr. Minocha thus submitted that if arbitration was not possible according to the said contract in the manner stipulated in the said contract, then the dispute pertaining to the parties could not be referred to Arbitration at all. In support of this plea Mr. Minocha relied upon a judgment of the Kerala High Court in Food Corporation of India v. Mohammed Yunnus, 1988 (2) K.L.T. 232. Reliance, in particular was placed on paragraph 2 of the said judgment which sets out the arbitration clause in that case, which reads as follows:-

All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of any person appointed by the F.C.I..... it is also a term of this contract that no person other than a person appointed by the F.C.I. as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all.

5. Accordingly, the learned counsel for the Objector relied upon the principles of law laid down in paragraph 10 of the aforesaid judgment of the Kerala High Court in FCI's case to following effect:-

10. As the court could not have appointed arbitrator it can never be said that there was any proper appointment. It necessarily follows that there is no estoppel by conduct in such a case. In Jagannath v. P.C. & I. Corporation Ltd. : AIR1973All49 it has been held that objection as to the lack of jurisdiction in the arbitrator can be allowed to be raised at any stage and the mere fact that the party objecting had appeared before the arbitrator at earlier stages of the proceedings and had even filed objections against the claim of the opposite

party could not operate as estoppel against them in challenging the jurisdiction to give the award. As the Court lacked jurisdiction to appoint the arbitrator overlooking the affirmative clause that arbitrator can only be appointed by the appellants, the arbitrator appointed by the Court cannot get any jurisdiction to make the award and consequently it is always open to the appellants to challenge the award on the ground that it has been improperly procured or is otherwise invalid.

6. Mr. Minocha further referred to the affirmation of the aforesaid judgment of the Kerala High Court, by the Hon'ble Supreme Court by its order in Mohammad Yunus (dead) by LRs v. Food Corporation of India and Anr., reported in JT 2000 (4) SC 621. The relevant portion of the order of the Hon'ble Supreme Court affirming the judgment of the Kerala High Court in FCI's case (supra) reads as follows:-

4. Section 20 of the Arbitration Act, 1940 on which learned counsel for the appellant relies is merely a machinery provision. The substantive rights of the parties are to be found in Section 8(1) Clauses (a) and (b). It is not disputed before us that the case of the appellants does not fall in any of the two clauses. Recourse to arbitration could not have been taken contrary to the agreed stipulation contained in Clause 19 of the agreement (supra). The Award made in this case was thus a quorum-non-juris. That being the position, no fault can be found with the judgment of the Division Bench setting aside the award and the decree of the learned Sub-Judge, Trivandrum. This appeal, thereforee, has no merit. It fails and is hereby dismissed. No costs.

Mr. Minocha further relied upon the judgment of the Hon'ble Supreme Court in Tarapore & Co. v. State of M.P., JT 1994 (1) SC 162 to contend that even acquiescence cannot confer the jurisdiction which did not exist in the first place.

7. The second major plea advanced by Mr. Minocha is that the award of interest @ 15% p.a. on the awarded amount is wholly unjustified as the award is in US Dollars and with the change of value in Dollars the award in US Dollars will suitably compensate the claimant/petitioner for the passage of time. He has relied upon a judgment of this Court in similar circumstances where the award was in US Dollars, in Palmyra Tsiris Lines S.A. of Piraeus c/o Transport Counsellors International Ltd. v. Union of India reported as 1998 (1) Arb LR 409. In the said judgment, the learned Single Judge of this Court while upholding the Arbitrator's jurisdiction to award interest held as follows:-

The arbitrators are perfectly within their rights to award interest for the pre-suit period as well as for the subsequent period which is not barred by any provisions as contained in the contract. However, the objection of the respondent with regard to the higher rate of interest may now be examined. Paragraph 11 of the Objections reads as follows:

11. That the learned arbitrators have grossly erred while awarding 12% rate of interest per annum on the sum payable. They erred in recognising that the amount payable in question is in US $ and not in Indian rupees. The rate of interest which US $ earns in a deposit with any nationalised Bank is 6% and not 12% which the Indian rupee earns. The learned arbitrators have not appreciated the linking formula between the two currencies and the award of 12% interest instead of 6% which is earned by the US $.The interest has to be awarded by the arbitrators on the basis of the current market rate which is stated to 6 per cent. thereforee, the arbitrators should have awarded interest at that rate taking into consideration the facts and circumstances of the present case, particularly, when the amount awarded is in US Dollars currency.

8. The learned counsel for the respondent/objector has thus submitted that the aforesaid judgment in Palmyra's case is para materia with the facts of the present case and this Court should follow the position of law laid down by this Court in respect of the quantum and rate of interest when the award is in Dollars.

9. Mr. Minocha further submitted that the contract also clearly stipulated that the payment was only to be made after the payment was received by the objector and in this context referred to the following stipulation in the financial terms of the contract.

Final payment shall, however, be made within 30 days of the receipt of the final payment from the Iraqui clients.

The objector only received the payment in 1998 by way of bonds which bonds were only encashable in the year 2003. He further submits that the claim of interest would at best be available to the petitioner/claimant w.e.f. 2003 and not earlier than that. He also claimed that the award being in dollors the libor interest rate at 2% to 3% should govern the rate of interest.

10. Mr. Minocha has also raised pleas regarding the excepted matters and in addition had highlighted the claim No. 13 in the Docan Hotel's case i.e. Suit No. 18/95 where the claim for 6% rebate was accepted in the case of Docan Hotel, but was rejected in the present case of Mosul Hotel. The learned counsel for the objector has further submitted that the while arriving at decision for the similar cases, the Arbitrator had adopted conflicting reasoning in respect of two parallel awards which raised identical issues.

11. In reply, the learned counsel for the claimant/petitioner Shri George Thomas has sought to distinguish the judgment of Kerala High Court and the Hon'ble Supreme Court in FCI's case (supra). He relied upon Section 5 and 12 of the Act and submitted that the judgments of the Kerala High Court and the Hon'ble Supreme Court in FCI's case (supra) were based on the provisions of Section 8 of the Act which related to the appointment of an arbitrator by the Court as is evident from the portions of the judgments extracted above. He further submitted that the present case did not arise under Section 8 but was in respect of the revocation of the existing Arbitrator's mandate under Section 5 of the Act and the consequent appointment of another arbitrator in substitution of the existing arbitrator under Section 12(3) of the Act.

12. For ready reference the provisions of Sections 5, 8 and 12 of the 1940 Act are set out as under:-

5. Authority of appointed arbitrator or umpire irrevocable except by leave of court.--- The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary contention is expressed in the arbitration agreement.

8. Power of Court to appoint arbitrator or umpire.-- (1) In any of the following cases--

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

12. Power of Court where arbitrator is removed or his authority revoked.-- (1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the

Court may, on the application of any party to the arbitration agreement, either--

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

13. The learned counsel for the claimant has also relied upon the decision of a learned Single Judge of this Court in W.S. Constructions Co. v. Hindustan Steel Works Construction Ltd., AIR 1990 Del 134, to contend that the position of law in respect of Section 12 qua 'Revocation' and Section 8 qua 'Appointment' is different. In support of this plea he has relied on the order in respect of the present case dated 6-8-1991 passed by Hon'ble Mr. Justice A.D. Singh's, the relevant portion of which reads as follows:-

Learned counsel for the parties jointly submit that Mr. S.R. Nayar, Retd. Chief Engineer, Survey of Works, MES be appointed as an arbitrator in place of respondent No. 2. They have also filed a joint statement before me. In view of the statement of learned counsel for the parties, Mr. S.R. Nayar, Retd. Chief Engineer, Survey of Works, M.E.S. Is appointed as an arbitrator in place of respondent No. 2. The authority of respondent No. 2 will stand revoked. Let a copy of the order be sent to the new arbitrator.

Petition stands disposed of.

(underling supplied)

He submitted that this order was based on a joint application, the relevant contents of which are reproduced hereunder:-

Both the petitioner and respondent No. 1 agree to the appointment of Shri S.R. Nair, Retired chief Engineer, Survey of Works, MES & Ex. General Manager, E.P.I., resident of H.No. TC-9/260, Palace Road, Kawdiar, Trivandrum- 695003, as an Arbitrator in place of Shri V.A. Kelkar, Chief Engineer (E&M;), N.B.C.C., Respondent No. 2.

14. The learned counsel for the petitioner/claimant has thus submitted that considering the facts in the present case which indicated that the appointment of Shri Nair was by this Court in substitution of an existing arbitrator, the contract pleaded on and relied upon by the respondent which according to the respondent was para materia with the contract in the FCI's case (supra), cannot come to the assistance of the respondent. He submitted that such a plea could have only been available to the respondent/objector if an order of appointment of arbitrator in the present case had been made under Section 8 of the Act. He submits, in my view rightly, that the present case is not case of a Section 8 appointment and thereforee the FCI's case(supra) has no application and indeed he is right in submitting that the judgment of the learned Single Judge of this Court in WS Construction (supra) is the relevant and applicable judgment. Mr. Thomas has further relied upon the judgment of the Hon'ble Supreme Court in Hindustan Construction Company Ltd. v. Governor of Orissa : [1995]2SCR441 and the judgment in Inder Sain Mittal v. Housing Board Haryana, : [2002]2SCR5 . The relevant portion of the said judgments read as follows:-

Hindustan Construction Company's case

7. ..... It is an admitted position that the State Government had not at any stage quested before the Special Tribunal the jurisdiction thereof to adjudicate the said dispute. The State Government itself by a statutory notification having constituted the Special Tribunal and referred the dispute to said Special Tribunal, we fail to appreciate as to how for the first time this stand was taken before the High Court by the State Government that the Special Tribunal had no jurisdiction to adjudicate the dispute or to make the award. According to us, in the facts and circumstances of the case, the High Court ought not to have permitted the State Government

to raise such a contention after it had submitted to the jurisdiction of the Special Tribunal merely because the award went against it. It hardly behoves the State Government to question the jurisdiction of the Special Tribunal at such a belated stage merely because the award was not to its liking. The State Government cannot be permitted to behave like an ordinary dishonest litigant who takes an off chance hoping to succeed and if the outcome is not to his liking to turn back and question the Special Tribunal's jurisdiction. The High Court should not have permitted such a somersault. We, thereforee, set aside the High Court's finding on this issue for the above reasons.? (underling supplied)

Inder Sain Mittal's case

7. We find that the point raised in this case is no longer rest integra as the same has been considered by this Court, times without number. Reference in this connection may be made to a decision of this Court rendered in the case of N.Chellappan v. Secretary, Kerala State Electricity Board & Anr. : [1975]2SCR811 , in which case the dispute, which had arisen between the parties, was referred by them for decision of two arbitrators who appointed an umpire,but as the award was not made by the arbitrators within the time limit which was extended from time to time, a petition was filed in court for revoking authority of the arbitrators on the ground that they did not make the award within the prescribed time limit and further, prayer was made that the umpire may be appointed as a sole arbitrator in place of two arbitrators and he be directed to enter upon the reference. The prayer was granted by the court and after revoking authority of the two arbitrators, umpire was appointed as the sole arbitrator with the consent of the parties and he ws directed to enter upon the reference and make the award. Parties, thereupon, participated in the proceedings before the umpire without demur and ultimately the award was given to which one of the parties filed objections whereas , the other filed a petition for making the award, rule of the court. The objection was disallowed and prayer for making the award rule of the court was granted. When the matter was taken in appeal to the High Court of Kerala, the objection was allowed and award set aside on the ground that the order revoking authority of the arbitrators to pass the award and appointing the umpire as the sole arbitrator was bad in law, as such the umpire as a sole arbitrator had no jurisdiction to enter upon the reference and pass the award. When the said matter was brought to this Court, objection to the award was disallowed as umpire was appointed by the court with consent of the parties, to act as the sole arbitrator after revoking authority of the arbitrators already appointed and no endeavor was made to have that order vacated by filing a review inasmuch as the parties participated in the proceedings before the umpire without any demur to his jurisdiction from which conduct of the parties only inference that can be drawn is that the party, who was objecting to the award, by his conduct had no objection to the order revoking the authority of the arbitrators. thereforee, by acquiescence such a party was precluded from challenging the jurisdiction of the umpire by filing an objection to the award.

15. He further stated that when the objector has participated actively and only raised such a plea of coram non Jurisdiction upon the award going against it, there is acquiescence and a public sector undertaking akin to the Government of India cannot take an inequitable stand contrary to the pleas advanced by it.

16. It is evident that the judgment of the Kerala High Court in FCI's case (supra) which was affirmed by the Supreme Court arose in the context of the appointment of an arbitrator under Section 8. The above judgment could not be applicable in the present case as the facts disclosed from the application made by the parties and the order of the learned Single Judge of this Court thereon substituting Shri S.R. Nair as an arbitrator in place of Shri V.A. Kelkar clearly showed that the proceedings taken in this Court were under Section 12. The order of the learned Single Judge specifically records the joint agreement of the parties while revoking the authority of the erstwhile arbitrator V.A. Kelkar. Revocation of an arbitrator's mandate could only be done under Section 12 of the Act.

17. In my view the position of law applicable to the present case has been stated as follows in W.S. Constructions Co. v. Hindustan Steel Works Construction Ltd., AIR 1990 Del 134 by a learned Single Judge, Y.K. Sabharwal J.(as he then was) to the following effect:-

6. The question then to be considered is who should be appointed as the arbitrator. Learned counsel for the respondents relying upon the arbitration clause which, inter alia, provides that it is also a term of this contract that no person other than a person appointed by such Managing Director, as aforesaid shall act as arbitrator..... submits that only the Managing Director can appoint arbitrator and this Court has no jurisdiction to appoint an arbitrator in view of the arbitration clause between the parties. Reliance has also been placed by Mr. Ghosh, learned counsel for the respondents on Supreme Court in Prabhat General Agencies v. Union of India : [1971]2SCR564 and it is submitted that in view of law laid down by Supreme Court and the terms of the arbitration clause as aforesaid, on removal of respondent 3 only the Managing Director is entitled to appoint an arbitrator. In my opinion, the aforesaid judgment of the Supreme Court has no applicability to the present case as the Supreme Court was only considering scope of S. 8 of the Act and not the scope of S. 12 of the Act. Under Section 12 of the Act the Court to appoint an arbitrator where the one is removed by the Court. The terms of agreement cannot supersede the statutory provisions. Under S. 12 of the Act, on removal of respondent 3 as arbitrator I have either to appoint a person to act as sole arbitrator in place of respondent 3 or to order that the arbitration agreement should cease to have effect. There are no grounds for taking recourse to the later option. The contention that power to appoint an arbitrator remains with the Managing Director stands concluded against the respondents by judgment of this Court as also judgments of High Courts of Jammu and Kashmir (See: OMP 50/83 M/s M.s. Khanna v. N.D.M.C., decided by Jagdish Chandra, J. on 12th November 1984 (reported in AIR 1985 Del 262, Mohinder Singh and Co. v. Union of India, AIR 1972 J & K 63 and Fertiliser Corporation of India v. Ravi Kumar Ohri : AIR1979Ori19 .

18. Thus in light of the joint application of the parties and the order passed thereon which clearly demonstrated that the appointment of Mr. S.R. Nair was in substitution of the existing arbitrator. The position of law laid down in the FCI's case in respect of an appointment had no application to the facts of the present case. In addition the tenure of Mr. S.R. Nair was extended on several occasions by consent of both the parties. I respectfully concur with and indeed am bound by the above position of law laid down in W.S. Construction's case (supra) as in the present case also in view of my finding that S.R. Nair was appointed an arbitrator by this Court not in Section 8 proceedings, but under Section 12 proceedings. Thus there is no merit in the plea relating to coram non Jurisdiction raised by the learned counsel for the respondent and this plea is accordingly rejected.

19. The objector had also sought to question other factual findings in the award relating to excepted matters and submitted that since in Docan Hotel's case 6% rebate was accepted in the case of Mosul Hotel, it should not have been declined for the Mosul Hotel. In my view in so far as the other findings of fact are concerned such as excepted matters the position of law as laid down by the Hon'ble Supreme Court in respect of limited scope of interference by courts with arbitral awards is well settled and has been summarized in a judgment of this Court in Ground Engineering Co. P. Limited v. D.D.A. in CS(OS) 75A/1996 as under:-

(a)In Union of India v. Rallia Ram reported as : [1964]3SCR164 , it was held as under:-

The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts, which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.(b) In Sundarshan Trading Co. v. Government of Kerala reported as : [1989]1SCR665 and 58, it has been observed that:

This is our opinion, the Court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties.

It may be stated that if on a view taken of a contract, the decision of the arbitrator on certain amounts awarded, is a possible view though perhaps not the only correct view, the award cannot be examined by the

court in the manner done by the High Court in the instant case.

(c) It has further been held in Hind Builders v. Union of India reported as : [1990]2SCR638 that:

In a matter on which the contract is open to two equally plausible interpretations, it is legitimate for the arbitrators to accept one or the other of the available interpretations and, if the Court may think that the other view is preferable, the Court will not and should not interfere.(d) In Jawahar Lal Wadhwa v. Haripada Chakrobety reported as : 1990CriLJ1731 , it has been observed:

The Court reiterated that it was now firmly established that an award was bad on the ground of error of law on the face of it only when it the award itself or in a document actually incorporated in it, there was found some legal proposition which was the basis of the award and which was erroneous.(e) In a recent judgment of the Hon'ble Supreme Court reported as B.V. Radhakrishna v. Sponge Iron India Ltd. reported as : [1997]2SCR707 , it has been held that the Court cannot sit in appeal and cannot re-appraise or re-assess the evidence in respect of an award.

(f) The same view is taken in State of Orissa v. Kalinga Construction reported as : [1971]2SCR184 ; Municipal Corporation of Delhi v. Jagannath Ashok Kumar reported as : [1988]1SCR180 ; Indian Oil Corporation v. Indian Carbon Ltd. reported as : [1988]3SCR426 ; Puri Construction Pvt. Ltd. v. Union of India reported as : AIR1989SC777 ; Food Corporation of India v. Joginderpaln Mohinderpall reported as : [1989]1SCR880 .

(g) The Hon'ble Supreme Court in Army Welfare Housing Organisation v. Gautam Construction & Fisheries Ltd. reported as : AIR1998SC3244 has held that:-

It is not possible for the Court to reappreciate the evidence produced before the Arbitrator and thus come to a conclusion whether a certain amount claimed was towards one head or the other.(h) In Trustees of the Port of Madras v. Engineering Construction Corporation Ltd. reported as : AIR1995SC2423 , it has been held as follows:'The above decisions make it clear that the error apparent on the face of the award contemplated by Section 16(1)(c) as well as Section 30(c) of the Arbitration Act is an error of law apparent on the face of the award and not an error of fact.

20. Thus the findings as to excepted matters and other allied findings of fact are not amenable to challenge in these proceedings.

21. However, in so far as denial of the 6% rebate is concerned there is no real reason why this rebate should have been accepted in Docan Hotel's case and rejected in Mosul Hotel's case. Indeed there is no serious objection to this plea of the respondent by the learned counsel for the petitioner claimant. Consequently while dismissing other pleas of the objector in view of the aforesaid settled position of law I uphold the objection that even in Mosul Hotel's case the plea of rebate of 6% on a parity of reasoning with the Docan Hotel's case should have been allowed by the arbitrator.

22. Mr. Thomas in reply to the second plea of Mr. Minocha about the final payment being made to the NBCC only in 2003, has relied upon the affidavit dated 24th September, 2002 filed by the NBCC/objector pursuant to the order of this Court. Paragraphs No. 2 and 5 of the said affidavit are relevant and read as follows:-

2. I submit that the work in respect of the Mosul and Dokan Hotels were completed on 20.03.1987 and 16.04.1987 respectively and the final bill payments of the Respondent in respect of the said Mosul & Dokan hotels were as follows:-

a. Mosul Hotel US $ 916,137.43b. Dokan Hotel US $ 922,746.99----------US $ 1,838,884.42----------A photocopy of the letter/document dated 22.03.95 showing the payments in respect of the aforesaid hotels as aforestated, is filed as Annexure R-1.

5. That accordingly, in respect of the Mosul and Dokan works, the Respondent received bonds of the value of

US $ 1,838,884.42 Indian Rs.6,58,35,740.00 @ Rs.35.8020 having maturity during the year 2003. These bonds were, in any case, towards the part payments in respect of the pending bills of the Respondent against the total works executed by the respondents in Iraq including final bill payments of Mosul and Dokan works. After adjustment of borrowing due to the banks the Govt. of India has issued remaining payments amounting to Rs.1,47,50,000/- dated 31.03.98 in shape of RBI COMPENSATION bond of this value, the maturity whereof is 31st March 2003. A photocopy of the said bond is filed herewith as Annexure R-2.

23. He submitted that the aforesaid affidavit disclosed that the payments were received in the year 1998 and the plea of the objector that the payments were received in 2003 has no substance in view of the averment in the said affidavit. He has further submitted that even if the payment was received in 2003 as contended by the respondent the bonds issued by the UOI in the year 1998 carried an interest @ 11.40% payable annually which clearly meant it was compound interest approximating to the interest @ 15% awarded by the Arbitrator. He further submitted that thereforee, there was no merit in the plea of the respondent questioning the rate of interest payable as awarded by the arbitrator.

24. While the petitioner/claimant contended that the final payment by the respondent had been received in 1998 the respondent sought to contradict this position. The respondent's objections did not clearly spell out the date and mode of the final payment and consequently this Court by the order dated February 23, 2005 directed the filing of an additional affidavit by the respondent. The affidavits of the respondent skirt the issue and this is best demonstrated by the following contents of the affidavit filed by the respondent earlier on 24th September, 2002.

'2. I submit that the work in respect of the Mosul and Dokan Hotels were completed on 20.03.1987 and 16.04.1987 respectively and the final bill payments of the Respondent in respect of the said Mosul & Dokan hotels were as follows:-

a. Mosul Hotel US $ 916,137.43b. Dokan Hotel US $ 922,746.99----------US $ 1,838,884.42----------A photocopy of the letter/document dated 22.03.95 showing the payments in respect of the aforesaid hotels as aforestated, is filed as Annexure R-1.

3. That because of Gulf war, the United Nation had imposed sanctions against Iraq and consequent UN Embargo, with the result, that no payments in respect of the work executed by the Respondent in respect of the aforesaid 2 hotels besides other projects could be received by the Respondent.

4. That because of the serious financial crunch being faced by the Respondent and other similarly situated various persons to whom money was due from the Govt. of Iraq, the Govt. of India in liaison with Exim Bank and RBI formulated a Scheme for pending payments, whereby it was directed that the creditors to whom the moneys were due would be given in shape of RBI COMPENSATION BONDS in respect of the amounts due to them from the Govt. of Iraq.

5. That accordingly, in respect of the Mosul and Dokan works, the Respondent received bonds of the value of US $ 1,838,884.42 Indian Rs.6,58,35,740.00 @ Rs.35.8020 having maturity during the year 2003. These bonds were, in any case, towards the part payments in respect of the pending bills of the Respondent against the total works executed by the respondents in Iraq including final bill payments of Mosul and Dokan works. After adjustment of borrowing due to the banks the Govt. of India has issued remaining payments amounting to Rs.1,47,50,000/- dated 31.03.98 in shape of RBI COMPENSATION bond of this value, the maturity whereof is 31st March 2003. A photocopy of the said bond is filed herewith as Annexure R-2.

6. I further submit that while the payment directed by the Ld. Arbitrator is in US $ the interest which is payable has necessarily to be as per the LIBOR Rates and not 15% as has wrongly been awarded by the Learned Arbitrator. I submit that the LIBOR Rates of interest in the concerned years were as follows:

Year Rate of Interest1998 5.8125%2002 2.03%The relevant certificate of 2002 in this behalf is annexed as

Annexure R-3.

25. Since this affidavit and the annexures thereto were not very forthcoming another affidavit was directed to be filed on 23rd February, 2005 by this Court. The relevant contents of this affidavit are as under:-

2) I, state, that upon examination of the official records including the books of accounts, the position so far as the final bill payments of Mosul and Dokan (Iraq) projects are concerned as as under:

3) That while the Central Bank of Iraq had certified the final bill payments in respect of Mosul and Dokan Hotels, vide their letter dated 22.3.1995 to the EXIM Bank, Bombay s per Annexure R-1 on record filed along with the affidavit dated 23.9.02, no payments were received by NBCC Limited in respect of the said works as explained in the said affidavit.

4) That instead of any actual payment being received by NBCC Limited, the Government of India, issued a bond dated 31.3.1998 with maturity date being 31.3.2003. A copy of the said bond is on the record.

5) I submit that being permitted NBCC redeemed the said bond by selling it to Syndicate Bank and received the amount of Rs.1,47,50,000/- under the said Bond from the Syndicate Bank on 31.3.1999. A photocopy of the ledger account in this behalf is annexed herewith as Annexure R-4 and the extract of the Balance Sheet in this behalf is annexed as Annexure R-5.

26. Thus it is evident that even on its own showing the respondent had received the final payment at the highest on 31.3.98 by virtue of bonds which were got redeemed by it on 31.3.99. However, the bond amount was suitably compensated by interest. In any event whether the final payment was by way of bonds maturing instantly or at a future date is of no material concern to the claimant and cannot affect his rights. Even according to the respondent the final payment was received by it on 31.3.98. Consequently even according to the respondent's own case and as per clause 3 of the financial terms providing for payment 30 days after the receipt of the final payment. Thus since final payment was received by the respondent on 31.3.98 with effect from 1st of May, 1998 the petitioner became entitled to payment and the amount is thereforee required to be awarded from 1.5.98. In this respect the finding of the arbitrator that the general terms of the contract override the financial terms cannot be sustained. Accordingly the petitioner is entitled to be awarded interest from 1.5.98 on the awarded amount. The respondent's plea that as payment was in dollars the libor rate of interest should have been awarded, is not supported by any contractual stipulation and thereforee cannot be sustained.

27. I am of the view that in so far as the question of interest is concerned there is considerable force in Shri Minocha's plea about the rate of 15% interest awarded by the arbitrator being excessive particularly in light of the judgment of this Court in Palmyra's case (supra). The claimant is only concerned with the operation of the contract in so far as it concerns it and its claim for interest cannot be founded on or enhanced on the basis of whether or not the interest received by the respondent is compound or simple or even the rate of interest earned by the bonds. However, so far as the quantum of interest is concerned there is merit in the plea of the objector that since the award is in dollars the principle laid down by a learned Single Judge in Palmyra's case (supra) would be applicable. In case of the award payable in Dollars 6% interest had been considered sufficient. In this view of the matter the question of receipt of payment by the respondent in 1998 or 2003 is of no significance as the payment of interest to the claimant would adequately compensate the claimant.

28. The objections of the respondent are thus dismissed except (a) for reduction of interest from 15 to 6% p.a. and (b) the disallowance of 6% rebate for the Mosul Hotel's case. The respondent as a public sector unit has, however, taken a stance of questioning the arbitrator's mandate even after agreeing to the appointment in this Court. Such conduct of public bodies has received the disapproval of the Hon'ble Supreme Court in Hindustan Construction Company's case (supra). The respondent's obdurate and continued reiteration of such a stance which in any event has been found to be without merit is undesirable and wholly uncalled for. The prolongation of litigation by public sector undertakings such as the respondent and at public expenses is

required to be censured and punitive financial sanction have now become absolutely imperative to discourage not only meritless but inequitable stands being adopted. The conduct of the respondent in agreeing to the substitution of the existing arbitrator and then questioning its mandate after finding the award going against it does not bring any credit to an instrumentality of State. Accordingly, the objections are dismissed with costs quantified at Rs.30,000/- payable within four weeks from today. A sum of Rs.15,000/- shall be paid to the petitioner and Rs.15,000/- to the Prime Minister's Relief Fund. A copy of this order will be sent by the Registry to the office of the Prime Minister's Relief Fund. The Award dated 22nd October, 1994 is made a Rule of the Court in the above terms.