

(2004) 05 MP CK 0058

In the Madhya Pradesh High Court

Case No : First Appeal No. 357 of 2001

Agrawal Steels

APPELLANT

Vs

Grasim Industries Limited and Another

RESPONDENT

Date of Decision : 14-05-2004

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 13, 13(5), 16
Contract Act, 1872 — Section 73, 74
Electricity Act, 1910 — Section 26

Citation : AIR 2005 MP 125 : (2005) 2 MPHT 233

Hon'ble Judges : Dipak Misra, J;A.K. Shrivastava, J

Bench : Division Bench

Advocate : V.R. Rao and Divesh Jain, for the Appellant; Ravindra Shrivastava and Prem Francis, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.—In this appeal preferred u/s 37 of the Arbitration and Conciliation Act, 1996 (for brevity "the Act"), the appellant (hereinafter referred to as "the claimant") has called in question the sustainability of the judgment passed on 25-6-2001 by the learned IXth Additional District Judge, Jabalpur in Arbitration Case No. 36/2000 whereby the Court allowed the application preferred u/s 34 of the Act filed by the respondents and set aside the award of the learned arbitrator.

2. The facts which are discernible from the order of the learned Trial Judge, the memorandum of appeal and other documents brought on record and are necessitous to be stated are that the respondent No. 1 is a Company registered under the Indian Companies Act, 1956 and the respondent No. 2 is a subsidiary concern of respondent No. 1. The respondent No. 2 is engaged in manufacture of cement and as widespread business throughout the country. It carries on business through its agents and one category of agent is called consignment agent. The appellant was appointed as consignment agent on stock transfer basis in Lucknow area on 23-1-1997 by the respondent No. 2 and an agreement was

signed between both the parties and as put forth the said agreement was only for a period of 10 days, i.e., up to 31-3-1997. The claimant was called upon to furnish a bank guarantee worth Rs. 30 lacs under the said agreement. No business transaction were conducted during the said period. The claimant had not furnished any bank guarantee under the said agreement and the said agreement did not contain any arbitration clause. After a lapse of one month, both the parties entered into a fresh agreement with certain new different conditions on 1-5-1997 which was to remain in vogue from 1-6-1997 to 31-3-1998. The said agreement contained an arbitration clause. In pursuance of the said agreement, the claimant furnished a bank guarantee of Rs. 40 lakhs in favour of respondent No. 2 in accordance with the terms and conditions of contract dated 1-5-1997. After furnishing the bank guarantee, the respondent started supply of cement on stock transfer basis by rail from Raipur to Lucknow. All supply of cement were entered into the stock register of the claimant and verified by the sale officers of the respondents. Daily sales book, weekly stock and sale summary stock, daily collection report, physical verification report and other statements were duly verified and signed by the sales officer and an employee of the claimant and the original documents were sent to the Head Office of the respondent company. The claimant used to remit all sales collection either by account payee demand draft or by account payee cheques. During three months supply of 4807 MT cement was made by rail and out of the same 424.25 MT cement were damaged in transit due to rain in July and the respondents had recovered the whole price of the damaged cement from the Insurance Company. No cement was supplied by the respondents after the July, 1997 to 31-3-1998 without assigning any reason. Because of this non-supply the claimant suffered a huge loss because of maintenance of establishment during the contract period, i.e., 1-5-1997 to 31-3-1998. On 21-4-1997, the claimant received an outstanding statement prepared by the sales officer by the respondent on simple paper contending some disputed entries like Faizabad account. But some payments made by the claimant in the month of September, 1997 and October, 1997 were not included. As there was allegation that there was over payment by the claimant under agreement in question and correspondences went on between the parties, a dispute arose. As alleged respondents maintained a sphinx like silence and they eventually encashed the first bank guarantee of Rs. 15 lacs on 3-2-1998 and the second bank guarantee of Rs. 25 lacs on 9-5-1998. As the dispute arose, the claimant filed a petition before the District Judge, Lucknow u/s 9 of the Act seeking relief that an arbitrator be appointed to settle the dispute between them and further to restrain the respondents from invoking the bank guarantee of Rs. 40 lacs furnished by the claimant. The District Judge, Lucknow decided the matter only on the point of jurisdiction and came to hold that exact nature of the outstanding dues could only be determined by the arbitrator when appointed in terms of the agreement or in accordance with Section 11 of the Act. The Court at Lucknow expressed the view that it had no territorial jurisdiction to decide the matter. As the learned District Judge, Lucknow dismissed the petition on the ground of

jurisdiction, the claimant moved the High Court at Lucknow which was dismissed and thereafter SLP was filed before the Apex Court which was also dismissed. Being unsuccessful, the claimant preferred a petition under Sections 8 and 11 of the Act before this Court. In the said application, which formed the subject matter of MCC No. 931/88, Justice B.C. Varma, Former Chief Justice of Punjab & Haryana High Court was appointed as the sole arbitrator with the consent of both the parties to adjudicate the disputes that had arisen between the parties.

3. The claimant filed its claim petition before the arbitrator and the respondents filed the written statement on 15-10-1999. Thereafter on 20-11-1999 a rejoinder alongwith the documents was filed by the claimant. Reply thereto was also filed by the respondents. Evidence on affidavit was filed before the arbitrator. The learned arbitrator on 22-1-2000 passed an order that Counsel for the parties had agreed they did not propose any amendment in the issues framed earlier and accordingly treated the issues to be final. Thereafter evidence was recorded and after appreciating the evidence both oral and documentary brought on record, the learned arbitrator passed an award on 6-8-2000 awarding a sum of Rs. 49.90 lacs in favour of the claimant with interest to the tune of Rs. 20,38,200.00 and future interest at the rate of 18% per annum till the date of payment together with Rs. 70,000.00 as costs of the proceeding including arbitrator's fee and expenses. It is pertinent to mention that the counter claim preferred by the respondents was dismissed by the sole arbitrator.

4. Against the award dated 6-8-2000, the respondents moved an application u/s 34 of the Act before the learned District Judge which was eventually taken up by the Xth Additional District Judge who set aside the award. Assailing the aforesaid order, it is submitted by Mr. V.K. Rao and Mr. Daves Jain, learned Counsel for the appellant that the learned Additional District Judge has committed serious illegality in deciding the application preferred u/s 34 of the Act as if he was deciding an appeal of civil nature totally being oblivious to the conditions prescribed u/s 34 of the Act. It is urged by them that the Court below could not have re-appreciated the evidence, which had been properly and prudently scanned by the learned arbitrator to arrive at the findings and substitution of such findings by the learned Trial Judge are wholly erroneous and unwarranted. It is propounded by the learned Counsel for the claimants/appellants that the scope of interference in an award under the 1996 Act is limited but the learned Additional District Judge failed to keep the same in view and illegally relied upon the document Ex. D-8 (outstanding statement) to arrive at the conclusion that had constituted the settled account and was in the nature of a settled account and therefore the arbitrator had no jurisdiction to reopen or look into the said document. It is further propounded by them that the document contained in Ex. D-8 was the base which gave rise to the dispute between the parties and a document of this nature can not be given the status of settled account as per law and, therefore, the findings recorded by the Court below is contrary to the basic principles of law and the approach being erroneous, the order has to be lanced. It is the submission of the learned Counsel that the Court below has totally erred

in conception of breach of terms and conditions of contract and appreciation of the evidentiary value of the documents brought on record and has illegally overturned the finding recorded by the learned arbitrator thereby making the order sensitively susceptible. It is also urged by them that the learned District Judge had reversed the findings in favour of the respondents which are based on mere presumption, conjectures and is not founded upon the evidence on record. Lastly, it is canvassed by them that the Court below has erroneously accepted the contention of the respondents that certain claims had been allowed by the arbitrator though the same were not claimed by the claimant inasmuch as such a finding has been reached without verification of the claim petition and that goes a long way to pave the path of vitiation of the order.

5. Mr. Ravindra Shrivastava, learned Senior Counsel appearing with Mr. P. Francis for the respondents, sounding a contra note, has contended that the order of the learned Trial Judge is absolutely as he has addressed himself to the core issue by arriving at indubitable conclusion that there was a settled account between the parties and the said document being an admitted document could not have been discarded and its importance in law of evidence could not have been marginalized and the arbitrator dealt with the same on the foundation that the claimant had been successful in reverting such an admission which is incorrect and unsound. His further submission that the scope of interference in an award under the Act is not limited but on the contrary it has wide and ample scope as not only certain grounds have been provided under the provision for assailing the award but also an award becomes susceptible and vulnerable if it is against the public policy. It is urged by Mr. Shrivastava that terms/policy is of immense magnitude and enormous amplitude, it would not be appropriate to restrict and constrict its meaning and if an award runs counter to the judg-made law or any other law in force that would tantamount to violation of public policy making the award flawed, erroneous and unsound. It is put forth by him that as the learned arbitrator has proceeded contrary to the settled law relating to settled account, the same destroys the marrows of the award and the learned Trial Judge having lanced the award on that score the order passed by the Court below is totally presentable and does not warrant interference by this Court. It is his further proponement that there has been procedural irregularities in the proceedings of the arbitration inasmuch as certain amounts have been awarded though not specifically claimed in the claim petition which in derogation of the statutory provisions and therefore the learned arbitrator has committed an incurable flaw in entertaining such claim. It is also the contention of learned Senior Counsel that certain documents were filed at a later stage, which could not have been taken note of and that having been considered the award becomes flawed.

6. Before we into the debate raised by the parties and the submission, we think it absolutely seemly to notice certain decisions which have dealt with the jurisdiction of the Court while dealing with the award passed by an arbitrator. At this juncture, we think it condign to remind ourselves that the present award has been passed by the learned arbitrator under 1996 Act but we will be failing in our

duty if we do not notice certain decisions rendered under the Arbitration Act, 1940 as they were cited before us. Sections 30 and 33 of the 1940 Act deal with the jurisdiction of the Court with regard to the interference with the award. In the case of Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., , the Apex court expressed the view that award can be set aside on the ground of error appearing on face of award or any document incorporated therein, and if there is some legal propositions which has former the basis of award which is erroneous. In the aforesaid case, the Apex Court referred to the decisions rendered in the case of Hodgkinson v. Fernie [(1857) 5 CB (NS) 189], which was approved in the case of Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. (AIR 1923 PC 66). In the said case, it was held that the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award.

7. In the case of Smt. Santa Sila Devi and Another Vs. Dharendra Nath Sen and Others, , the Apex Court ruled that award given in writing by an arbitrator as to all disputes referred to him, there has to be a presumption in favour of such award.

8. In the case of Damodar Valley Corporation Vs. K.K. Kar, , Their Lordships of the Supreme Court expressed the view whether there had been a full and final settlement of a claim under contract was itself a dispute arising "upon" or "in relation to" or "in connection with" the contract. A claim for damages was a dispute or difference, which arose between the parties and was "upon" or "in relation to" or "in connection with" with the contract and the reference to the arbitrator was not barred.

9. In the case of Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, , it has been held that reasonableness of reasons given by an arbitrator in making his award can not be challenged as arbitrator is the sole Judge of the quality as well as quantity of evidence. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is not ground for setting aside the award.

10. In the case of Union of India (UOI) Vs. Prithipal Singh and Co., Nagpur, , this Court had held that the award can not be assailed or set aside the award on the ground that the arbitrator has reached an erroneous conclusion or has failed to appreciate facts and evidence. In this regard, we may usefully refer to the decision rendered in the case of B.V. Radha Krishna Vs. Sponge Iron India Ltd., wherein it has been categorically held that the High Court has no jurisdiction to set aside an award by substituting its own view in place of the arbitrator's view as if it was dealing with an appeal.

11. At this stage, it is also essential to note another decision rendered in the case of The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, wherein it has been held that an award could not be set aside on the basis of re-

appreciation of evidence and it can be set aside only on the ground specified in Section 30 of 1940 Act. Similar view has also been expressed in the case of Puri Construction Pvt. Ltd. Vs. Union of India (UOI), .

12. Recently in the case of Smita Conductors Ltd. v. Euro Alloys Ltd. [(2001) 7 SCC 728] while dealing with the award under Foreign Awards (Recognition and Enforcement) Act, 1961, the Apex Court ruled that when the view of the arbitrator is a plausible one, it can not be ruled out as impossible of acceptance as the Court can not substitute its own view in place of the arbitrator. We think it appropriate to reproduce Paragraph 15 of the aforesaid judgment :--

¶15. The view taken by the arbitrators on the effect of the force majeure clause in the light of Reserve Bank of India's directives is a plausible view and can not be ruled out as impossible of acceptance, and, therefore, the question of substituting our view for that of the arbitrators would not arise. Question of public policy would have arisen if there was complete restriction on the implementation of the terms of the contract. There was no such restriction imposed. But, on the other hand, certain restrictions were imposed which could have been worked out by resorting to appropriate measures in terms of the contract as held by the arbitrators. In that view of the matter, we do not think any question of public policy as such arises for consideration in a situation of this sort. The argument is almost a red herring and does not constitute a valid reason for interference with the award. Therefore, we reject the contentions raised on behalf of the appellant."

13. We have referred to the aforesaid decisions which were delivered under the 1940 Act. We have done so only to fresco the picture in its proper perspective in regard to the arena of challenge and the jurisdiction of the Court under the earlier statute. When the new Act has come into existence, the award has to be scrutinized on the anvil of the statutory provisions and the law, which have come into existence. In this context, we think it apposite to reproduce Sections 34, 75 and 81 of the 1996 Act. They read as under :--

¶34. Application for setting aside arbitral award.--

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that?

(i) a party was under some incapacity; or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable

to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration :

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties can not derogate, or failing such agreement, was not in accordance with this part; or

(b) The Court finds that--

(vi) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(vii) the arbitral award is in conflict with the public policy of India.

Explanation : Without prejudice to the generality of Sub-clause (ii) of Clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that arbitral award or if request had been made u/s 33, from the date on, which that request had been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under Sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.

75. Confidentiality.-- Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure, is necessary for purposes of implementation and enforcement.

81. Admissibility of evidence in other proceedings.-- The parties shall not rely on

or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,--

- (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) admissions made by the other party in the course of the conciliation proceedings;
- (c) proposals made by the conciliator;
- (d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

Mr. Shrivastava has adverted to the concept of public policy and has referred us to the decision rendered in the case of *Berest v. Insurance Co. Ltd.* (AIR 1938 AC 586) wherein it has been held : "the Court itself ought to have raised question of public policy if none of the parties does so. In this context, we may also profitably rely to the decision rendered in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, wherein the Apex Court has while dealing with the scope, powers and jurisdiction of the Court u/s 34 held as under :--

(1) The Court can set aside the arbitral award u/s 34

(2) of the Act if the party making the application furnishes proof that :--

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submissions to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(2) The Court may set aside the award :--

(i) (a) If the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act. (ii) if the arbitral procedure was not in accordance with :--

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be conflict with the provisions of Part I of the Act from which parties can not derogate.

(c) if the award passed by the Arbitral Tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to :--

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) if it is patently illegal.

(4) It could be challenged :--

(a) as provided u/s 13(5); and

(b) Section 16(6) of the Act. (Para 74) and again further held as follows :--

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read alongwith Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts; it would be impossible for the Court to assess the compensation arising from and if the compensation contemplated is not by way of penalty or unreasonable. Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation. (Para 68)

For the reasons stated above, the impugned award directing the appellant to refund the amount deducted for the breach as per contractual terms required to

be set aside mainly on the grounds:--

- (i) there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;
- (ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed.
- (iii) It was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages.
- (iv) On the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;
- (v) Liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;
- (vi) There is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.
- (vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract. (Para 74)

We have reproduced the above paragraphs in extenso to show the jurisdiction of this Court.

14. The aforesaid sections have been interpreted in certain decisions. We think this is the proper stage to notice them. In the case of Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, the Apex Court in Paragraph 37, Their Lordships stated thus :--

¶37. This point concerns the issues between the parties on the merits of the award relating to default, time being exercise, readiness and willingness etc. These are all issues of fact. If we examine Section 34(2) of the Act, the relevant provisions of which have already been extracted under Points 1 and 2, it will be seen that under Sub-clause (b) of Section 34(2), interference is permissible by the Court only if:

- (i) the subject matter of the dispute is non capable of settlement by arbitration under the law for the time being in force; or
- (ii) the arbitral amount is in conflict with the public policy in India.

The Explanation to the provisions says that without prejudice to the generality of Sub-clause (ii) of Clause (b), it is declared for the avoidance of any doubt, that an award is to be treated as in conflict with the public policy of India if the

making of the award was induced or affected by fraud, or corruption or was in violation of Section 75 or 81. Section 75 deals with confidentiality while Section 81 deals with admissibility of evidence in other proceedings. We do not have any such situation before us falling within Section 34(2)(b)(ii). The factual points raised in the case before us, to which we have referred to earlier, do not fall within Section 34(2)(b)(ii). Coming to Section 34(2)(b)(i) we have already held that the subject matter of the dispute is not incapable of settlement by arbitration under law for the time being in force. Nor is any point raised that the arbitral award is in conflict with the public policy of India. We are, therefore, of the view that the merits of the award, on the facts of the case do not fall u/s 34(2)(b) of the Act. Point 4 is held accordingly against the appellant."

15. At this stage we may profitably refer to the decision rendered in case of *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.,* . It is relevant to state here that in the aforesaid case the three Judge Bench of the Apex Court was dealing with Section 11(6) of the 1996 Act in Paragraph 4 Their Lordships expressed the view thus:--

?With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on arbitration in the country that had been enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian Law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL Model and, therefore in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so."

In the said case Their Lordships further observed as under :--

"The award itself has now been vested with status of a decree inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the Court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of law so that the trade and commerce is not affected on account of litigations before a Court."

16. We have referred to the aforesaid observations only to highlight that the Court has highlighted certain aspects with regard to the role of the Court. We may usefully refer to the decision rendered in the case of *Rajinder Krishan Khanna and Others Vs. Union of India and Others*, |. Though the said case arose in a different context yet the Apex Court had the occasion to say in Paragraph 14 which we think it appropriate to reproduce :

"14. There is no discussion or ruling in the award relating to the scope of the reference; this despite the fact that the second respondent had contended in its reply to the appellants' statement of claim that the claim therein fell outside the scope of the reference. It is difficult to see how, in the circumstances, the second respondent can be said to have acquiesced in the determination of damages for the alleged loss of potential of the appellants' land. All that was referred to by learned Counsel for the appellant in this behalf was the statement in the award of the points for determination. Thus the first of the points relates to compensation for damage suffered by the appellants does not itself support learned Counsel's submission for compensation for damage to the appellants' residential houses, crops and mango garden was within the scope of the reference. The first point must be read in the light of this restricted claim and not as encompassing the claim for compensation for the alleged lost potential of the land."

17. At this juncture a paragraph from *Olympus Superstructures Pvt.. Ltd.* (supra), is also worth producing :--

"17. Section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and it will be noticed that under the 1996 Act the scope of the provisions for setting aside the award is far (sic more or) less the same as u/s 30 or Section 33 of the Arbitration Act of 1940."

18. At this stage, we may refer to a judgment of the Bombay High Court rendered in the case of *Rajendra J. Joshi v. Dilip J. Joshi and Ors.* [2000 (2) Arb. LR 633 (Bombay)], wherein the learned Judge set aside the award passed u/s 96 of the Act on the ground that there had been violation of the principles of natural justice. In another case *Laxmi Mathur v. The Chief General Manager, MTNL, Mumbai* [2003(3) Arb. LR 685 (Bombay)], the High Court of Bombay while examining the power of the Court u/s 34 expressed the view that the Court would be entitled to set aside the award if grounds mentioned in Sub-section (2) of Section 34 read with grounds stated in Sections 13 and 16 of the Act are

proved to its satisfaction by the party making application for setting aside the award. At this stage, we may notice with profit a Division Bench decision of the High Court of Bombay rendered in the case of *The Tata Hydro-Electric Power Supply Co. Ltd. and Ors. v. Union of India* (AIR 2001 Bombay 240), where in Paragraph 30, the following view was expressed :--

?The Umpire, therefore, was required to decide the question of jurisdiction raised before him. We are unable to accept the submission of the learned Counsel for the appellants that the decision of the Umpire on the issue of law was on a specific issue of law referred for arbitration. Consequently, we are unable to accept the contentions of the appellants that the findings on the issue of law made in the award which is undoubtedly contrary to the law laid down by the Supreme Court in *U.P.S.E.B. Vs. ATMA Steels and Others*, is immune from judicial scrutiny u/s 34 of the Arbitration and Conciliation Act, 1996. We agree with the learned Single Judge that the issue of law on which the award contains a patently erroneous finding was not one specifically referred for arbitration. We also agree with the view of the learned Single Judge that there was no specific question of law referred to the Umpire and what was referred to the Umpire was the dispute arising from the claim made by the appellants against the respondent. The question of applicability of provision of Section 26 of the Indian Electricity Act, 1910 incidentally arose as a part of the defence raised by the respondent and was decided by the Umpire. Hence, a learned Single Judge was fully entitled to examine the correctness or otherwise of the decision of the Umpire on the question of law. Having found that the decision of the Umpire on the issue of law was directly contrary to the judgment of the Supreme Court in *Atma Steel* (supra), the learned Single Judge was justified in interfering with the award. The petition was rightly allowed and made absolute in terms of prayer Clause (a)."

19. After stating the law in this regard, we may proceed to state on what heads the Arbitrator has passed the award. The learned arbitrator has after dealing with certain issues, namely, if the agreement (Ex. C-1) is valid, if there is extension of previous agreement dated 23-1-1997, whether there has been breach of agreement (Ex. C-1), dated 1st May, 1997, whether there has been breach of agreement (Ex. C-1), dated 1-5-1997, scope and ambit of arbitration clause in agreement (Ex. C-1) proceeded to state the claims and counter-claims. It is worthwhile to mention here, the owner heavily relied on the Statement of Accounts (Ex. D-8, dated 21-10-1997) as there was an admission on behalf of the claimant and the claimant per contra, tried to demonstrate that the admission was mistaken and basically incorrect. After stating so, the arbitrator proceeded to state with regard to Faizabad account and expressed the view, which we would like to reproduce in seriatum :

?..... Thus the claimant has successfully shown that his alleged admission contained in Ex. D-8 strongly relied upon by the respondent is erroneous and mistaken and he is held to have successfully withdrawn that admission. As a necessary corollary it must follow that claimant is not liable to pay any amount

towards any cement allegedly sold from the Concerns at Faizabad in Lucknow, Barabanki and Hardoi. A sum of Rs. 10.50 lacs has thus been wrongly adjusted towards Faizabad account. Further in that statement (Ex. D-8), a sum of Rs. 12.19 has been wrongly shown as due from the claimant....."

?..... For this reason I am of opinion that the matter of adjustment of old dues is within the jurisdiction of the arbitrator."

?..... The claimant has thus been successful in demonstrating the incorrectness of this debit entry of Rs. 6.90 lacs. Though challenged, neither any document has been filed nor has any one on behalf of respondent stated as to on what account and to what period this sum relates, unlike the amount of Rs. 15.23 lacs which is said to be due on account of prior dealings under the star dealership agreement (Ex. D-3), I therefore, am inclined to hold that this amount of Rs. 6.9 lacs has been wrongly credited to respondents."

?..... Thus during these 8 months, $3000 \times 8 = 24000$ MTs of cement could be sold through the claimant's agency and on that quantity the claimant had become entitled to Rs. 8,64,000/- (24000×36) on account of breach of contract. I find accordingly."

?.... The claimant therefore is held entitled to commission on Bank Guarantees at 3%. This amount of commission comes to Rs. 1.20 lacs. Claimant is held entitled to this amount."

?..... I also find, relying on the deposition of the claimant that the damaged cement had no market value and further that the claimant was required to spend Rs. 15,000/- for its removal from the godown. This amount the claimant is held entitled to from the respondent."

20. The bad debts amounting to Rs. 8.68 lacs as claimed by the claimant was not accepted. The payments made after execution of Ex. D-8, i.e., after 21-1-1997 in respect of payment, the arbitrator awarded the sum of Rs. 8.14 lacs. As far as the Bank guarantee is concerned, the arbitrator has held that sum of Rs. 49.90 lacs is due to the claimants. As far as interest is concerned, the arbitrator held as under :--

?In view of this provision and on the finding returned above I deem it proper to award interest on the claim allowed to the claimant as under :--

(I) Interest on Bank Guarantee Commission of Rs. 1.20 lacs @ 18% p.a from 1-4-97 when Bank Guarantees were furnished and upto 31-7-2000 amount to Rs. 72000/-.

(II) Interest on Bank Guarantee of Rs. 15 lacs @ 18% p.a. from 1-4-98 till 31st July, 2000 amounting to Rs. 630000/-.

(III) Interest on Bank Guarantee of Rs. 25 lacs @ 18% p.a. from 1-6-1998 to 31-7-2000 amounting to Rs. 975000/-.

(IV) Interest on the remaining amount of Rs. 8.6 lacs included in the award @ 18% from the date of cause, i.e., 1-4-98 till 31-7-2000 amounting to Rs. 361200/-."

Thereafter the claimant was awarded cost of the arbitration which was quantified at Rs. 70,000.00. Thus in total, the arbitrator awarded Rs. 49.90 lacs towards the award plus Rs. 20,38,200 as interest thereon and future interest at the rate of 18% per annum. The arbitrator rejected the counter claim of the owner.

21. Mr. Shrivastava, learned Senior counsel has submitted that if the award is rendered by the arbitrator specially under the Act of 1996 and it runs counter to the settled position of law, it will tantamount to flagrant violation of public policy and the conception of public policy should be read in a wider sense and not in a narrow one. He has referred to the statement with regard to the public policy as far as various decisions on that score are concerned. We would like first to deal with the submission of Mr. Shrivastava, who has submitted that the arbitrator has totally erred by treating Ex. D-8 as not a settled account, though as per law, it is a settled account and that being the position, the award is vitiated being contrary to public policy. We will deal with this submission first and thereafter we shall proceed to deal with other submissions.

22. To appreciate what is a settled account, it is appropriate to refer to the decision rendered in the case of *Elvira Rodrigues Siqueira v. Godnicalo Hypolite Constancio Noronha* (AIR 1934 PC 144). In the aforesaid case, the Privy Council held as under :--

?Eventually, in March, 1928, Rodrigues, who was then, and had been for a long time, the managing partner, sent the document which is to be found at P. 6 of the record. It is headed: "In account with B.C. Siqueira, Nairrobi and Mcmbasa", and is dated 27th March, 1923. It begins : "My Balance due on 31st December, 1921", 26,000 odd shillings. It then states accounts for the ensuing six years, entering debits during the years in one instance of 5,162 shillings, and salary and other credits 9,998 shillings. Then 1923 :

?To total debits for the year, 5,818 shillings". It proceeds in that way to deal with the debits, which vary each year : 1,315 shillings; 1,350 shillings; 773 shillings; and the last year, 3,014 shillings. The last year also contains as a credit item "By Salary and Bonus for the year, 4,700 shillings, which is the amount to credit in each year. It ends "By Balance in your favour on 31-12-27, 42,458.84". On that document Mr. Rodrigues put two stamps of 10 cents. Each, which appear to have no real legal significance, or revenue significance as far as one can see, and over the stamps he signed: "For and on behalf of B.C. Siquera" - which is the firm's name - "B.A. Rodrigues, Managing Partner". Upon that document the plaintiff sued, representing it as an account stated, and Their Lordships have no doubt that is the substance of the claim. An interesting argument was addressed to the Court there, and would probable have boon addressed to Their Lordships by Mr. Evershed, if it had not turned out to be unnecessary, to the effect that the

promise which is by law implied from an account stated, even though the account is stated in writing, and therefore, such a promise would not be one which would come within Sub-section (3). In the opinion of Their Lordships this question does not arise because it appears to them reasonably plain that, in this particular case, the account stated is in fact an account from which there arises a promise made for good consideration to pay the balance shown in the account. Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise.

But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described. Probably the best authority for that definition of an account stated is that which was selected by Viscount Cave in the case of *Camillo Tank Steamship Company Limited v. Alexandria Engineering Works* (1), which was in the year 1921, although the account in that case was not an account of the nature described because it was merely a repairer's account with the items probably only on one side. Viscount Cave, in dealing with the various descriptions in law of an account stated, goes on to cite this passage at P. 143 :

So that at this particular time, when the employment had just ceased and when the ex-servant desired to receive his proper remuneration for the whole of that period, it was open to the employer to investigate each and all of the items that appeared in the books to determine for himself what the remuneration should be, and certainly to determine so as to bind the other side what his share of the profits, if any, should be. That was done. The man writes an account which was demanded by the servant for the express purpose of knowing what sum he would be entitled to get and which, it seems to Their Lordships, was stated by the managing partner of the business, for the sole purpose of enabling the servant to know what his final remuneration was to be. To make quite clear that it was intended to express something in the nature of an obligation he authenticated the document and that can be the only effect of that particular part of the transaction by writing his signature over two 10-cent stamps."

In this context, we may usefully refer to the decision rendered in the case of *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, . In the aforesaid case, the Apex Court in Paragraphs 14 and 15 expressed the view as under :--

?(14) The legal position is that the accounts are settled or stated if they are submitted and accepted as correct by the other side to whom the accounts have been rendered. Such a statement of accounts need not be in writing, nor is it necessary that before the accounts are settled, they should be gone into by the parties and scrutinised and supported by vouchers. It is sufficient if the accounts are accepted and such acceptance may be inferred by conduct of parties. As observed in Daniell's Chancery Practice, eighth edition, Vol. I, p. 419 :

?The mere delivery of an account will not constitute a stated account without some evidence of acquiescence which may afford sufficient legal presumption of a settlement". There is also the following passage in Bullenn and Leake's Precedents of Pleadings ninth edition, P. 584 :

?It is not enough for the accounting party merely to deliver his account; there must be some evidence that the other party has accepted it as correct. But such acceptance need not be express, contemporaneous or subsequent conduct may amount to a sufficient acquiescence."

Again, in Willis v. Jernegan (1741) 2 Atk 251, the Lord Chancellor was dealing with the two objections raised by the plaintiff's Counsel to the defendant's plea of a stated account. It was observed by the Lord Chancellor that there was no absolute necessity that the account should be signed by the parties who had mutual dealings to make it a stated account, for even where there were transactions, suppose between a merchant in England and a merchant beyond sea, and an account was transmitted to England from the person who was abroad, it was not the signing which would make it a stated account, but the person to whom it was sent, keeping it by him any length of time, without making any objection which should bind him and prevent his entering into an open account afterwards. In another case, Ticket. v. Short, (1751) 2 Ves (Sen) 239, the Lord Chancellor expressed the opinion that it is the rule of the Court that where a merchant kept an account current by him for about two years without objection, the Court will consider that the accounts are stated or settled. The same principle has been expressed by the Bombay High Court in Maneklal Mansukhbhai Vs. Jwaladutt Pilani, , in which it was pointed out that it was sufficient if the account were accepted and such acceptance might be inferred by conduct of parties.

(15) The contention on behalf of the defendants is that there has been a "stated" or "settled" account in this case and in the absence of fraud, mistake or any other sufficient equitable ground it is not liable to be reopened at the instance of the plaintiff. In this connection it is necessary to state that the expression "account stated" has more than one meaning. It sometimes means a claim to payment made by one party and admitted by the other to be correct. An account stated in this sense is no more than an admission of a debt out of Court; while it is no doubt cogent evidence against the admitting party, and throws upon him the burden of proving that the debt is not due, it may, like any other admission, be shown to have been made in error. Where the transaction is of this character,

it makes no difference whether the account is said to be "stated" or to be "stated and agreed", the so-called agreement is without consideration and amount to no more than an admission. There is, however, a second kind of account stated where the account contains items both the credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. This is called by Mr. Justice Blackburn, in *Laycock v. Pickles* (1863) 4 BS 497, a "real account stated", and he describes it as follows :--

?There is real account stated, called in old law an *insimul computassent*, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be legal debts. In think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated."

In the present case, the "settled account" between the parties falls within the second kind of "account stated" and it is to an account of this description that the equitable doctrine of "settled account" has to be considered."

At this juncture, we may profitably take note of the decision rendered in the case of AIR 1934 147 (Privy Council) wherein Their Lordships held that the essence of an account stated is not the character of the items on one side or the other but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable. Their Lordships expressed the views that such a transaction is in truth bilateral and creates a new debt and a new cause of action. In the case of *Hiralal and Others Vs. Badkulal and Others*, , Their Lordships have ruled that settled account can not be opened except on a plea in defence of fraud and coercion or undue influence or mistake of fact. Relying on these decisions and incrementally advancing the contentions, it has been submitted by Mr. Shrivastava, learned Senior Counsel for the owner respondent that once Ex. D-8 is regarded as a settled account, the claims of the claimant are to be thrown over board as it is not liable to be reopened.

23. Per contra, submission of Mr. Rao, learned Counsel is that a mere glance on Ex. D-8 would clearly show that it can not earn the status of settled account. To appreciate this vital submission, we think it appropriate to refer to Ex. D-8 and then deal with the reasons ascribed by the learned arbitrator on the anvil and touch stone of the law laid down by the Privy Council as well as by the Apex

Court. To have a clear picture, it is necessary, nay imperative, to reproduce Ex. D-8 in toto :

"Lucknow

Grasim Cement Lucknow

Outstanding Statement as on 21st October, 97

(A) Consignment A/c.

Sr. No.	Months	Sales Value	Collection	Outstanding
1.	April 97	Rs. 30.80	Rs. 17.00	
2.	May 97	Rs. 18.22	Rs. 4.00	
3.	June 97	Rs. 13.31	Rs. 19.22	
4.	July 97	Rs. 22.24	Rs. 17.01	
5.	August 97	Rs. 10.62	Rs. 10.5	
6.	Sept. 97	Rs. 2.97	Rs. 9.78	
7.	Oct. 97	Rs. ---	Rs. 0.45	
				----- As on date
grand total		Rs. 98.11	Rs. 77.51	Rs. 20.60

(-) Adjustments:

(1) Old Claims Rs. 2.76 (2) O/s TFR A/S Rs. 3.32 (3) Handling Bills Rs. 4.58 (4) Qty. Discount Rs. .98

Outstanding in Consignment A/c Rs. 11.64 Rs. 8.96 Net Outstanding In Rs. 8.96
Consignment A/c Rs. 15.23 (+) Old O/s In M/S AG Steels Rs. 6.90 Old Balance of
G/c TRF To M/s Agrawal Steels Rs. 6.90 Rs. 31.09 (B) Faizabad A/c

S.r No. Months___ Value Payments

1 Aug. 97 Rs. 7.72 2 Sept. 97 Rs. 9.77 Rs. 8.00 3 Oct. 97 Rs. 5.20 Rs. 2.50 Rs.
22.96 Rs. 10.50 Rs. 12.19

Grand Total Outstanding As on Date

Rs. 31.09 (+) Rs. 12.19 Rs. 43.28 Stock Position Consignment A/c (F) Fresh
Stock Nil (D) Damage Stock 474.25 MT."

24. The arbitrator did not accept the claimant's plea that signatures of Ex. D-8 was only in lieu of receipt. However, he addressed himself to the facet whether the admission was erroneous or mistaken or it was conclusive proof of the matter. Posing this question, he came to hold, as we have already indicated hereinbefore, it was a mistaken statement and he had mistakenly so stated. What we find is that the learned arbitrator has arrived at the conclusion after dealing with the facts in proper perspective. To elaborate this facet we have perused the reasons given by the arbitrator. He has held that the claimant never requested the respondent to supply cement to him or under his instructions from the Faizabad Concern; that the cement had also not been sent to the claimant from Faizabad nor to any dealer in Lucknow, Barabanki and Hardoi to Consignment Agent, i.e., Airon Sales and the sister concerns on instructions; that no commission for sale of such cement has been credited to claimant's account; that no stock register of M/s. Airon Sale or M/s. Vishal Enterprises has been filed to show stock transfer; that no one has been examined to prove such supply of

cement on claimant's account; that the D.W. 1 has stated that it was done on oral instructions and has admitted that he has not come across with any document either with the respondent or with the concern at Faizabad indicating supply/sale of cement to Lucknow Region dealers; that though it was stated that relevant bills were in existence they were not filed; that receipts from dealers evidencing receipt of cement consignment from Faizabad concerns which were filed were not in favour of Airon Sales or the claimant but have been obtained by agent or employee of Grasim Cement at Lucknow; that these receipts have been obtained after commencing of the arbitration proceedings; that there were no signatures of Transporters; that there has been non-examination of either of the author of those challans or of the transporter; that the document (Ex. D-6) which purports to be a letter on the letter head of the claimant addressed to respondent's Regional Manager at Allahabad, purported to have been signed by one Poonam Sharma for the claimant, which was confronted to D.W. 1 but he could not explain the attribute of this expression; that a demand draft has been credited to Faizabad concern as per statement of account on 15-9- 1997 prior to alleged instructions dated 20-9-1997; that the claimant has successfully demonstrated that on 20-9-1997, Poonam Sharma was not in his employment; that the documents contained in Exs. D-6 and D-7 are not above suspicion; that the amount paid by the claimant within the duration of contract (Ex. C-1) are towards the contract consignment-- Agency and certain amounts were wrongly credited to what has been branded as Faizabad account; that Anil Pawar (D.W. 2) had made the position clear in Paragraph 8 of his deposition that the figures in Ex. D-8 under heading "Faizabad Account" have been taken from the account books of M/s Airon Sales kept in Faizabad; and that the demand drafts by the claimant were under his instructions but were credited into the accounts of Airon Sales. The findings of the arbitrator can not be treated to be perverse as they are based on reasons which are acceptable, germane and if we allow ourselves to say so, quite cogent. Submission of Mr. Shrivastava is that a settled account can not be over-turned in this manner. We have referred to the decisions cited at the Bar with regard to the settled account. On a perusal of the ratio stated therein, by no stretch of imagination, it can be said that the manner in which Ex. D-8 has been prepared and the explanation which has come on record can never be regarded as a settled or stated account. The settled account has a different status. A mere signature by a person can not make it a settled account as if the concept of stated or settled accounts has no meaning. Hence, we are not persuaded to accept the submission of Mr. Shrivastava that it is a settled account.

25. The next plank of submission of Mr. Shrivastava is that the learned Arbitrator has awarded amounts that were not claimed. It is well settled in law, if the amounts that had not been claimed are awarded on a different manner, the same can not be said to be illegal. On the first head sum of Rs. 10.5 lacs has been in respect of Faizabad Account. In this regard, we would like to produce the statement of claims as has been stated in the claim petition :

"Statement of Details of Claiming Amount

40. That the claimant is entitled to the following reliefs :--

(A) Refund of a sum of Rs. 15,52,045 lacs over paid as detailed above.

(B) Interest at the bank borrowing rate of 18% p.a. compounded yearly on the above amount from 12th February, 1998 till the date of recovery.

(C) Refund of Rs. 40 lacs wrongly realized through encashment of bank guarantees from the respective dates of encashment till the date of recovery.

(D) Interest at the rate of 18% p.a. compounded annually for the same period.

(E) Commission on bank guarantee paid by the claimant to the bank at the rate of 3%.

(F) The claimant is also entitled to compensation on account of short supply of cement during the period of contract. As stated above no cement was supplied at all during the last eight months of the contract period, namely, August, 1997 to March, 1998. During the earlier months namely, April to July, 1997 also the supply was far short of the expected quantity. As submitted earlier the claimant had a legitimate expectation of receiving 5000 M.T. per month, or a total 60,000 M.T. for the entire contract period from April, 1997 to March, 1998. As against this the claimant received, in all, only a quantity of 4807 M.T. of undamaged cement. The short supply thus amounted to 55,193 M.T. Under Clause XI the claimant was to receive a remuneration of Rs. 73 per M.T. inclusive of all expenses and godown rent and commission. Now so far as expenses and godown rent etc. were concerned the claimant had to continue to incur all the expenditure even though he was not receiving any further supplies. The reason is that the respondents never terminated the contract, nor did any occasion arise for such termination. Hence the claimant is entitled to entire remuneration of Rs. 73 per M.T. on the short supply of 55,193 M.T. Total comes to Rs. 40,29,089 which is due to the claimant from the respondents as compensation for breach of implied contract, as detailed earlier, to supply a reasonable quantity of cement throughout the contract period.

(G) Interest at the rate of 18% p.a. compounded yearly on the last foregoing item.

41. That the detailed figures pertaining to the aforesaid items are set out in the annexed Statement which forms part of this claim. The aggregate amount till the date of claim comes to Rs. 1,23,69,946/- (Rs. One crore twenty three lacs sixty nine thousand nine hundred forty six only)."

26. On a perusal of the same we find that there was claim for damaged cement. Submission of Mr. Shrivastava is that this claim had not been specifically put forth by the claimant. Mr. Rao, learned Counsel for the appellant has referred to the written statement filed by the owner before the arbitrator wherein there is an admission that such damaged cement was debited on 9-5-1998, a day before the encashment of Bank Guarantees. The respondent General Manager, Mr. M.L.

Samtani (D.W. 1) in his evidence has admitted and stated as under :--

?..... Since the consignment has been retained by M/s Agrawal Steels, they are liable for its price. The value of the damaged consignment has also been assessed on the market value of the undamaged consignment and after deducting the amount received from the Insurance Company, the balance has been debited to M/s Agrawal Steels. The damaged consignment has also been treated as sold to M/s Agrawal Steels. This value should also include amount payable as sales tax. I have even so not credited to M/s Agrawal Steels with the sale commission on assuming sale for that consignment to M/s Agrawal Steels. Under the transit policy, the consignment agent (M/s Agrawal Steels) is not liable for the price of goods damaged in transit."

In this context, if we scan the claim statement it is quite manifest that there is a claim for damaged cement. The arbitrator has dealt with it by giving reasons. The reasons are absolutely reasonable. Thus, allowing of claim of the claimant on this core can not be found fault with.

27. The next facet of argument of Mr. Shrivastava is that certain documents were accepted by the learned arbitrator as a consequence of which the principles of natural justice have been violated and that could come u/s 34 (2) and (3) of the Act of 1996. It is contended by him, during the arbitral proceedings, documents were filed of which the owner had no notice. The aforesaid agreement apparently seems to have substantial force but what is noticeable is that it has not been specifically pointed out by the owner, how the proceedings continued thereafter and what kind of documents had been taken note of. In addition, it appears that this is a plea which has been advanced to frustrate the award. The parties were very well aware what they were contesting. If they knew very well, what was in issue, it is futile to contend that they were not given opportunity. The bald stand and the enormous complaint that the owner was not afforded opportunity to represent its case, in our considered opinion, is sans substance. We may further add that the parties had appeared before the arbitrator in all the proceedings and on closure of evidence, advanced arguments and given written note of submission. Judged from totality of circumstances, this contention can not be accepted. We have no option but to reject the same.

28. Presently, we shall proceed to deal with the interest factor. In this regard, it is appropriate to reproduce Section 31(7) of the Act which reads thus:--

?31. Form and contents of arbitral award.--

*** ***(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

28. The arbitrator has dealt with the subject of reasonableness and granted 18% interest per annum on the bank guarantee commission and bank guarantees and remaining amount of Rs. 8.6 lacs and awarded interest of Rs. 20,38,200 up to the date of making the award as also further interest up to the date of payment, i.e., 18% per annum. Two facets are noticeable. The arbitrator u/s 31(7)(b) of the Act of 1996 has the total jurisdiction to grant interest at the rate of 18% per annum from the date of the award till date of payment. The same can not be varied by Court as the language of the statutes states, "unless the award otherwise directs. Another facet is that the Arbitral Tribunal may include in the sum for which award is made, interest at such rate as it deems reasonable, on the whole or any part of the money and for the whole or any part of the period between the date from which the award is made. Here, the award has been made on 6-8-2000. The arbitrator has granted interest on the bank guarantee commission, if we say so at the cost of repetition, on 4 heads. On a perusal of the award, we feel the grant of interest at 18% per annum on the determined sum is not reasonable. Accordingly, we reduce the interest to 10%. We also reduce the period to 18 months on the interest of bank guarantee commission, 18 months on bank guarantees, to one year on sum of Rs. 8.6 lacs. Interest from the date of award till the date of payment remains undisturbed.

29. The first appeal is allowed to the extent indicated above. The parties shall bear their respective costs throughout.