

(2002) 08 DEL CK 0189
In the Delhi High Court
Case No : Suit No. 2627 of 1996

Ashok Leyland Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 14-08-2002

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 30, 33
Constitution of India, 1950 — Article 299

Citation : (2003) 1 ARBLR 83 : (2002) 101 DLT 65

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : A.K. Ganguly and Jasmeet Singh, for the Appellant; Dalip Singh, for the Respondent

Judgement

Mukul Mudgal, J.—This application filed u/s 14 and 17 of the Indian Arbitration Act, 1940 seeks to make the award dated 30th August, 1996 given by Shri R.L. Meena, Additional Secretary, Law, Govt. of India as a Rule of the Court. Simultaneously, the petitioner have also sought the dismissal of the objections filed by the respondent UOI under Sections 30 and 33 of the Indian Arbitration Act, 1940 to the said award.

2. The claimant/plaintiff averred as under:-

(a) The dispute involved in the present petition arises from supply of 13 Crash Fire Tenders (CFTs) which were offered by the claimant to the respondent by its letter dated 5th March, 1990 @ Rs. 34,05,000/- per unit for the supply for 13 units or supply of 6 units @ Rs. 35,01,000/- each. The letter of the claimant as per Clause 9 sought an Essentiality Certificate to enable the claimant to import fire power, accessories etc. Thereafter pursuant to the negotiations between the parties on 4th April, 1990, letter dated 5th March, 1990 issued by the claimant was modified and further letter dated 6th April, 1990 containing the modified conditions was issued and price was amended to Rs. 33,35,000/- for 13 CFTs. A general Clause was also inserted which provided that all other terms and

conditions of letters dated 5th March, 1990 and 21st March, 1990 will remain unchanged and the Essentiality Certificate was also referred to. The relevant portions of letters dated 5th March, 1990 and 6th April, 1990 read as under:-

"ED: VRP-SUKG

05 March 90

Dear Sir,

Sub: Your enquiry for 13 Crash Fire Tenders and our offer to Indian Navy ref: SAL: SGPS:39 dated 1/11/89.

..... 2) Prices: For 13 Units For 6 Units EACH EACH Price for complete crash fire tender as per enclosed spec. Rs. 34,05,000/- Rs. 35,01,000/- 3) Delivery Sep"90 : 6 vehicles Oct"90 : 7 vehicles subject to receipt of order before 31.03.1990. 9) Essentiality Certificate:

We will need an essentiality certificate to favor our Super structure manufacturers to enable them import fire pump, monitor & access thereof."

"RON:SAL:RPV:A:507

6th April, 1990

Dear Sir,

Sub: Supply of 13 Fully Built Crash Fire Tenders

Ref: Our offer letters No. ED/VRP/SUKG dt. 5.3.90 and SAL/SKG dated 21.3.90.

..... The price of complete Fire Crash Tender as per specifications is revised as under:-

Rs. 33,35,000/- (Rupees thirty three lakhs thirty five thousand only) each unit. This price is valid for orders placed within validity period for a total quantum of up to 13 Nos. only.....

..... Para (3) Delivery

13. Units progressively by Sept/Nov"90 subject to receipt of letter of intent by 16.4.90 and formal order by 23.4.90. (We are planning 6 units by Sept"90)

..... Para (11) validity

Our offer is valid for acceptance up to 16.4.90 with formal order to follow by 23.4.90 along with the essentially certificate requested in para 9 of our letter dt. 5.3.90.

General

All other terms & conditions of our letters dated 5.3.90 and 21.3.90 will remain unchanged."

(b) On 3rd August, 1990, the respondent forwarded an advance supply order by accepting the offer made by the claimant. The said letter referred to the claimant's quotations dated 5th March, 1990, 6th April, 1990 and 26th July, 1990. The said letter of the respondent dated 3rd August, 1990 placed an order for supply of six CFTs. On 7th September, 1990, a formal supply order was placed by the respondent referring both to the quotations dated 5th March, 1990 and the revised quotation dated 26th July, 1990.

(c) The claim is based upon non-supply of essentiality certificate or similar documents i.e. Import recommendation certificate in terms of the contract. The failure of the provision of the Essentiality Certificate compelled the claimant to purchase each chassis at a price which was Rs. 2,89,965/- higher. The failure of the respondent to furnish the Essentiality Certificate/letter also compelled the claimant to purchase the imported components under the new policy through the exim scrip route. Thus the claimant was required to pay much higher prices as deposed in paragraph 4 of the affidavit of Mr. Khaitan dated 28th December, 1995. The claimant was forced to spend higher amounts to purchase the imported super structure and this difference has resulted in the claim due to the difference in the imported contents of CFTs as per the original quotation as contrasted with the goods in the final products.

3. The respondent/UOI's case before the Arbitrator was as under:-

(a) The total number of 11 CFTs were supplied in pursuant to the supply order dated 7th September, 1990. 6 CFTs were supplied against supply order dated 7th September, 1990 and the remaining CFTs were supplied against supply order dated 1st November, 1991.

(b) The respondents have contended that the prices as per the supply order placed, were firm and fixed and there was no scope or warrant for enhancement sought to be claimed by the claimant.

4. The arbitrator inter alias recorded the following findings:

".....From the above provisions of the offer dated 5.3.1990 and the offer dated 6.4.1990 which are mentioned in the advance supply order as well as in the formal supply order, there was a clear cut provision for issue of an Essentiality Certificate along with the supply order. Since no such certificate was issued in this case along with the supply order, the supply order cannot be said to be in conformity with the offers of the Claimant dated 5.3.1990 and 6.4.1990.

..... In view of the above, it is quite clear that the supply order dated 7.9.1990 read with advance supply order dated 3.8.1990 can be treated only as counter offer and not an "acceptance". This gives rise to a vital question as to whether the counter offer of the Respondent contained in the supply order/advance supply order was accepted by the Claimant.

..... From the above, it is quite clear that the Claimant had agreed to supply the stores as per the terms and conditions contained in the supply order dated

7.9.90 subject to receipt of amendments sought by them vide the aforementioned letter dated 26.9.1990. Thus, the Claimant had not accepted the advance supply order or the formal supply order. The various amendments sought by the Claimant vide their first letter dated 26.9.1990 read with the other letter of the same date amounted only to a counter offer/counter proposal and not an absolute and unqualified acceptance. Therefore, the next question would arise whether the Respondent had accepted the various amendments sought by the Claimant in the terms and conditions of the supply order.

..... In the circumstances, the supply order dated 7.9.1990 cannot be regarded as the "sole repository of the transaction". Therefore, the claim for price escalation has to be now examined with reference to the other correspondence/ letters exchanged between the parties.

..... A perusal of the aforesaid letter dated 8.2.1991 would clearly reveal that the Claimant had made a proposal for price escalation on account of increase in customs duty and variations in the exchange rate. Since the Claimant's offers dated 5.3.90 and 6.4.90 were not accepted by the Respondent for the reasons discussed hereinabove, there was nothing which could bar the Claimant from making fresh proposal for price escalation.

..... Thereafter, on 10.5.1991 the Claimant wrote a letter to the COP (Minister of defense) for extension of delivery date up to 31.7.1991. In reply to the above letter, the Respondent extended the delivery dated up to 31.7.1991 vide their letter dated 17.6.1991 subject to the conditions specified therein. One of the conditions mentioned in that letter was that no price increase would be allowed. Needless to say that since extension of delivery date was granted by the above letter subject to certain conditions, it was required to be accepted by the Claimant.

..... In any event, after the aforesaid correspondence, the Claimant had again revived their proposal for price escalation vide their letter No. SAL: SGKG dated 15th July 1991 whereby the Respondent was requested to refix delivery dates and to consider and agree to the increase in prices as mentioned therein.

..... Therefore, one can safely infer from the above circumstances that the Respondent can be said to have accepted the Claimant's proposal for price escalation by conduct. As already stated, the refusal of price escalation vide letter dated 19.12.91 after the 6 CFTs had been accepted by the Respondent would be of no significance. Further, the refusal of price escalation as contained in letter dated 19.12.91 was on the ground that the contract was placed with prices firm and fixed. Since the supply order dated 7.9.90 was only a counter offer which was not accepted by the Claimant as already discussed hereinabove, the basis of refusal of price escalation as contained in the letter dated 19.12.91 is also not sustainable.

The Claim made by the Claimant in respect of 6 CFTs is based on price break-up of import contents for 6 chassis and price break-up of import contents of super-

structure for 6 CFTs. After going through the various documents on record, the calculation of the import contents given in the statements of price break-up filed by the Claimant does not seem to be unbelievable.

..... Further, for the reasons already discussed, the offer for 7 numbers (beyond 6 numbers) as per the Claimant's letter dated 27th July 1990 was open only up to 30.9.1990. The order for 5 numbers in issue was not placed within 30.9.1990. In view thereof, placement of the order for additional number of 5 CFTs vide letter dated 1.11.1991 can be said to be only a fresh offer. That offer was not accepted by the Claimant vide their letter dated 2.12.1991. The Claimant, while not accepting the Respondent's offer dated 1.11.91, had quoted revised prices for supply of additional number of 5 CFTs vide their aforesaid letter dated 2.12.91.

..... In this connection, it may be stated that since the supply order dated 7.9.90 was not accepted by the Claimant and as the order for additional quantity of 5 CFTs was not placed by the Respondent within 30.9.1990 up to which the offer for placement of additional quantity of CFTs up to 7 numbers was open to be accepted, the very basis on which the price has been rejected vide the letter dated 19.12.1991 cannot be said to have backing of any contractual term already settled by the parties.

..... The Respondent had extended the delivery period up to 31.12.1992 for additional number of 5 CFTs vide their letter dated 7.7.1992. It is not clear whether this extension made by the above letter dated 7.7.1992 was accepted by the Claimant as acceptance/acknowledgment letter of the Claimant with reference to the above letter dated 7.7.1992 has not been placed on record by any of the parties.

..... The Claimant's above letter dated 31.7.1992 cannot be said to be unconditional acceptance of the delivery period which was extended up to 31.12.1992 as the Claimant had made certain counter proposals relating to delivery, payment of terms, consignee and arbitration. The Claimant had very clearly stated that they would like to have the Respondent's confirmation for commencement of the arbitration proceedings. The aforesaid letter dated 31.7.1992 is the last correspondence which has been placed on record. A perusal of the aforesaid letter dated 31.7.1992 clearly indicates that the Claimant had not dropped their proposal for price revision as contained in their letter 2.12.1991. The fact remains that after the aforesaid last correspondence placed on record which contained counter proposals of the Claimant, the Respondent had accepted the delivery of 5 CFTs. In the circumstances, one can without any doubt draw inference that the Respondent had accepted by conduct the Claimant's proposal for price revision as contained in the Claimant's letter dated 2.12.1991 in respect of 5 additional number of CFTs."

5. The Arbitrator awarded the following amounts to the claimant:

(i) Claim for Rs. 23,02,066/- in respect of 6 CFTs.

(ii) Claim for Rs. 37,00,000/- in respect of additional number of 5 CFTs.

(iii) If the aforesaid arbitral amount was not paid to the Claimant by the Respondent within 45 days from the date of the Award, 18% interest per annum was payable on the arbitral amount by the Respondent from the date of the Award."

This award is under challenge by the respondent before this Court.

6. By its affidavit of Contract Purchase Officer, Mr. A.K. Aggarwal in the Ministry of defense, the respondents have averred as follows:-

(a) That the Arbitrator wrongly treated the supply order dated 7th September, 1990 as a counter offer and it was not even the claimant's case that the said supply order was a counter offer by the Government. The claimant's case was that the offer dated 5th March, 1990 resulted in the revised offer dated 6th April, 1990 and the offer dated 5th March, 1990 was superseded by the revised offer dated 6th April, 1990. The revised offer at the rate of Rs. 33.35 lakhs per CFT was valid for 13 number of CFTs. Validity of the said offer dated 6th April, 1990 was extended by the claimant first up to 15th July, 1990, and thereafter up to 16th August, 1990 and the said offer dated 6th April, 1990 was accepted by the respondent by an advance supply order dated 3rd August, 1990 and the extended validity period up to 16th August, 1990. This supply order of the respondent dated 3rd August, 1990 was accepted by the claimant by its letter dated 21st August, 1990 and the formal supply order was placed by the respondent with the claimant by the covering letter dated 7th September, 1990. The relevant terms of the letter dated 7th September, 1990 read as follows:-

"(1) Your Quotation No. ED/VRP/SUKD dated 5.3.1990.

(2) Your Revised Quotation No. RON/SAL:RPV/A-507 dated 6.4.1990.

(3) Your Letter No. RG:SAL:ROV/1-A1026 dated 26.7.1990.

(4) Our Advance Supply Order No. 1(1)/90/D(81) dated 3.8.1990."

Dear Sirs,

"Please refer to your quotations/letter stated above. These have been accepted and a formal supply order is hereby placed on you for and on behalf of the President of India for the supply of items mentioned in Schedule A on the terms and conditions mentioned in Schedule A, B and C (revised in November 1989 attached hereto). No other terms and conditions will govern the contract.

(2) Please acknowledge receipt within 15 days hereof on the proforma attached as Appendix I hereto with a copy to the consignee and the Chairman, Technical Committee.

(3) Please quote on all the letters and invoices the number and date of this letter for reference.

(4) Your quotation mentioned in Clause 4 of Schedule A of this order and the schedules, appendix annexed hereto together with your letter of acknowledgement thereto shall be the sole repository of this transaction ".

(b) The relevant portion of the letter sent by the claimant accepting the supply order dated 7th September, 1990 along with terms therein, reads as follows:-

"(1) Your Quotation No. ED/VRP/SUKD dated 5.3.1990.

(2) Your Revised Quotation No. RON/SAL:RPV/A-507 dated 6.4.1990.

(3) Your Letter No. RG:SAL:RPV/1-A1026 dated 26.7.1990.

(4) Our Advance Supply Order No. 1(1)/90/D(81) dated 3.8.1990."

Dear Sirs,

"Please refer to your quotations/letter stated above. These have been accepted and a formal supply order is hereby placed on you for and on behalf of the President of India for the supply of items mentioned in Schedule A on the terms and conditions mentioned in Schedule A, B and C (revised in November 1989 attached hereto). No other terms and conditions will govern the contract.

(2) Please acknowledge receipt within 15 days hereof on the proforma attached as Appendix I hereto with a copy to the consignee and the Chairman, Technical Committee.

(3) Please quote on all the letters and invoices the number and date of this letter for reference.

(4) Your quotation mentioned in Clause 4 of Schedule A of this order and the schedules, appendix annexed hereto together with your letter of acknowledgement thereto shall be the sole repository of this transaction ".

(b) The relevant portion of the letter sent by the claimant accepting the supply order dated 7th September, 1990 along with terms therein, reads as follows:-

"Receipt is acknowledged of your Contract No. 1(1)/90/D(S1)/CPO/VGE-1636 dated 7.9.90 together with annexures.

2. We hereby agree to supply the said order as per the terms and conditions contained therein subject to receipt of all amendments sought in our letter dated 26th September, 1990."

The relevant portion of the said letter dated 26.9.90 reads as follows:-

Dear Sir,:

Sub: Supply Order No. 1(1)/90/D(S.I.)/CPO(VGE)-1636 dt. 7/9/90 for supply of 6 Nos. fully built Crash Fire Tenders.

We thank you very much for your formal Supply Order referred above for supply of 6 nos fully built Crash Fire Tender vehicles.

We are enclosed Appendix I duly completed confirming our acceptance to supply the said stores, subject to the following amendments which are required by us immediately.

Schedule :

Clause 9 - Price per unit

The Sales tax applicable in TNGST 4% and Surcharge on Sales Tax @ 8%.

Clause 13 (g) - Literature

All the literatures listed in the order will be provided by us. In addition we will also be providing an operator's guide which will provide basic data of the vehicle and instructions on operation.

The illustrated parts list will be provided in our own format. The format as required by you in the defense format is being complied and can be supplied only if it is ready by the time the order is completed since it requires an enormous preparation.

We would request you to please confirm the above.

Annexure "B" to Schedule "A"

Sl. No. 1 Clause 13.1: To read as : "ZF 6HP 600" fully automatic gearbox instead of "2 F 6HP 600"

Schedule "B"

Clause 15 - dispatch instructions

Clause 15(a) and (b) are not applicable as the chassis are to be dispatched by road through our authorised transport contractors.

Clause 16 Inspection Procedure

The chassis will be offered complete for inspection of the concerned authorities at our Hosur, works.

The fully built vehicle with super structure will be offered for inspect at the premises of the following super structure manufacturers:

1. Kooverji Devshi & Co P Ltd. Bombay 2 Nos.
2. Brijbasi Udyog, Agree 2 Nos.

Depending on the progress of the vehicles we would like to change the mix of orders on super structure manufacturers to enable us to be within the delivery schedule prescribed by you.

Since bulk production clearance has already been given and regular manufacturer of vehicles has commenced, we are not acceptable for any further user's trial.

Clause 22 - System of Payment for Stores

Since the vehicle will be delivered by road the Clause 22 (E) will be applicable.

Clause 23 Special conditions

Please note that no pilot sample will be offered since the bulk production clearance has already been given. Therefore the Clause 23 (iii), (iv) and (vii) will not be applicable.

Schedule C

Clause 23 - Security Deposit

Would request you to kindly send us a format to enable us to furnish a Bank Guarantee for Rs. 2 lakhs towards security deposit.

FORCE MAJEURE

Our standard force majeure clause will be applicable for this contract.

We request you to kindly issue the above amendments at an early date to enable us to go ahead with manufacture of vehicles."

(c) The respondent have Therefore contended that the Arbitrator has not even referred to the aforesaid unconditional acceptance of the supply by the claimant even though the said letter was filed at page 97 of the documents filed by the respondent before the Arbitrator who consequently committed legal misconduct ignoring the material letter and has not even referred to it in the award. For this purpose the respondent has relied upon the judgment K.P. Poulose Vs. State of Kerala and Another, .

(d) It is, Therefore, contended that the above unconditional acceptance contained in the letter dated 26th September, 1990 of the claimant along with other letter No. SAL/SGKS dated 26th September, 1990 clearly stipulated that the claimant will not claim any escalation in the prices and the Arbitrator has failed to consider the effect of the said letter.

(e) Reliance has also been placed on Clause 9 providing for fixed and firm price and the said Clause 9 reads as follows:-

"9. Price per unit, basic price Rs. 33,35,000/-, excise duty @ 21% will be paid extra on the chassis cost of Rs. 23.15 lakhs against of payment. C.S.T. @ 4% will be paid extra. FOR Hour price is otherwise Firm and Fixed."

7. It is also contended by the respondent that the affidavit of Shri A.K. Aggarwal dated 23rd February, 1996 filed before the Arbitrator has been totally ignored and reliance upon tenders of International Airport Authority of India is not justified as that related to super-structure. It is further submitted that the order for 6 CFTs was placed during August, 1990 and the order for the additional 5 CFTs was placed during November, 1991. The claimant has only now sought to

give the details of the escalation even though none was given even in the claimant's letter dated 2nd December, 1991. It is also contended that the quantity of 5 CFTs was governed in terms of the optional clause of the supply order and the prices under terms and conditions of the contract were Firm and Fixed.

8. The respondent has further relied on the inconsistencies in the award of the Arbitrator. It was also contended that while the total escalation claimed by the claimant before the Arbitrator were also follows:-

(1) 6 Nos. of Crash Fire Tenders Difference in original price and cost escalation up to the time of extended delivery period 23,02,066.00 (2) 5 Nos. of Crash Fire Tenders 37,00,000.00 (3) Interest 3,45,310.00 Total 63,47,376.00

9. The schedule was attached to the claim, details were given and claim was made for six vehicles @ Rs. 2,89,965/- amounting to Rs. 17,39,790/-, plus overhead of Rs. 3,45,310/-. In the price break up attached to the Schedule the total difference was Rs. 5,62,274/- and Rs. 2,88,965/-. The learned Arbitrator in awarding Rs. 23,00,266/- in respect of these CFTs has gone beyond the details given in the Schedule attached to the claim statement. Similarly, the claim of the claimant of Rs. 37,00,000/- for 5 CFTs is beyond the details given in Schedule I to the claim statement. The learned Arbitrator had no jurisdiction to go beyond the claim statement and the details given in Schedule I. He has acted without jurisdiction in awarding a claim which was not supported by any details and much less any evidence.

10. It was also submitted that the finding of the Arbitrator that the Option clause of the contract became Inoperative because the advance supply order dated 3rd August, 1990 and formal supply order dated 7th September, 1990 were also counter offers is uncalled for and the Arbitrator has erred in treating the supply orders as counter offers. The respondent accepted the revised offer of the claimant and not the original offer dated 5th March, 1990 which was superseded by the offer dated 6th April, 1990.

11. The other inconsistencies by the Arbitrator are that it treated the offers as counter offers and at same places supply orders has been referred to. The Arbitrator's finding that there was no phased supply is sought to be contradicted by the following clauses:-

" Optional Clause

Purchaser reserves the right to place order for additional 7 Nos. at the same rate, terms and conditions during the currency of the contract."

"3. Delivery

13 Units were progressively by submitting in November, 1990 subject to receipt of letter of Intent by 16.4.1990 and formal order by 23.4.1990. We are planning these units by September, 1990".

It is Therefore contended that the Arbitrator's Finding that the supply was not to be in a phased manner is perverse. It is contended the first order was placed for 6 CFTs which accepted by the claimant and the second order was placed for the 5 CFTs which was also accepted by the claimant. The option clause provided supply of 6 CFTs at the same rate. There was no escalation clause.

12. Finally it has been contended that the amendments were claimed to be made by the claimant by the letters dated 26th September, 1990. It is submitted that these letters do not say so and in any case these letters were not received by the respondent. Even if the same are assumed to be received, the said letters could not have the effect of modifying a formal contract. The letter dated 26th September, 1990 of the claimant accepting the formal supply letters did not raise any objection to the option clause and the subsequent letters dated 15th July, 1991, 8th August, 1991, 11th November, 1991, 29th November, 1991 and 2nd December, 1991 for price increase were rejected by the respondent by letter dated 19th December, 1991. The claimant continued to supply the CFTs without protest and Therefore, accepted by conduct the supply at the Firm and Fixed price.

13. Thus the finding of the Arbitrator that the letters dated 15th July, 1991 and 8th August, 1991 containing the request for price increase was not rejected is obviously unsustainable in view of the respondent's letter dated 19th December, 1991 which rejected the claim raised in said letters. This clearly shows non-application of mind.

14. It is also submitted by the respondent that the Arbitrator held that the main cause of delay was the non-issuance of Essentiality Certificate by the respondent. There was no clause in the contract providing for issuance of Essentiality Certificate by the respondent. Clause 4(4) of the Schedule B provided as follows:-

"(4) Assistance of Contractor :

The Contractor shall not except to the extent specifically agreed to by the purchaser in the contract be entitled to any sort of assistance either in the procurement of raw material required for the fulfillment of the contract or in securing of transport facility. Any assurance or assistance given or attempted to be given to the Contractor in regard to these and not covered by the terms of the contract shall not be construed as a representation that the purchaser is willing to waive its right under this or any other condition of the contract."

15. In the revised offer dated 6th April, 1990 Clause 9 relating to the Essentiality Certificate mentioned in the original offer dated 5th March, 1990 was amended. Even in the original offer in Clause 9, it was merely stated that the contractor will need the essentiality certificate to favor its super structure manufacturers to enable them to import fire pumps and accessories thereof. The Controller of Imports and Exports by its letter dated 29th April, 1991 rejected the claim of the manufacturer as the applications were received after the last date prescribed in paragraph 60 of the Hand Book i.e. 31st March, 1991. The claimant thereafter

requested the respondent to give assistance. By its letter dated 10th July, 1991, the respondent requested the Chief Controller of Imports and Exports to issue the necessary license. Thus as and when the assistance was sought from the claimant it was given and the delay was caused by manufacturer in submitting the application after the last date prescribed as 31st March, 1991. Inspite of laches the respondent had given timely assistance and thus the Arbitrator's conclusion on the essentiality certificate demonstrate non-application of mind and non-consideration of these crucial documents. The Arbitrator ignored the terms and conditions of letter 14th May, 1992 and 7th February, 1992 extending the delivery period up to 31st December, 1992 and by these letters it was clearly stipulated that time shall continue to be the essence of the contract and the supply shall be made on the terms and conditions and no increase in the prices will be allowed. This also discloses non-application of mind on behalf of the Arbitrator. On the aforesaid pleas the impugned award was sought to be set aside.

16. For the purpose of the determination of the Respondent's challenge to the Award it is necessary to consider the impact and effect of Clause 9 which stipulated that save excise at 21% and Central Sales Tax at 4% the price was otherwise firm and fixed. The letter dated 7.9.90 by which the formal supply order was placed on the petitioner, noted the quotations of the petitioner dated 5.3.90, 6.4.90 and the petitioner's letter dated 26.7.90 and the advance supply order of the respondent dated 3rd August, 1990. This letter clearly accepted the petitioner's offer on the terms and conditions mentioned in Schedules A, B & C and further stipulated that no other terms and conditions would govern the contract.

17. Clause 9 of the letter dated 5.3.90 strongly relied upon by the claimant which stipulated firm and fixed price read with the aforesaid correspondence exchanged between the parties on 5th March, 1990, 6th April, 1990, 26th July, 1990 and 3rd August, 1990 makes it evident that the petitioner's offer was accepted in the terms and conditions mentioned in Schedules A, B & C of the letter dated 7th September, 1990. It is clearly stipulated therein that no other condition would govern the contract. The impugned award has not properly appreciated the impact of this vital clause having a critical bearing on the present claim of the petitioner which is based on the enhancement of the price owing to the non-supply of essentiality certificate and other similar document i.e. import recommendation certificate by the respondent. The petitioner itself had agreed to supply the order as per the terms and conditions contained in the letter dated 7th September, 1990 sent by the respondent. Since the letter dated 7th September, 1990 clearly stipulated that no other terms except those mentioned in Schedules A, B and C would govern the contract and further mentioned that the quotation mentioned in Clause 4 of Schedule A along with letter of acknowledgement shall be the sole repository of this transaction, the petitioner was bound to bring its claim within the Clause 4 of Schedule A and the perusal of the award shows that the petitioner has not been able to do so. Even the

amendments sought by the petitioner as detailed in the letter dated 26th September, 1990 only refer to Sales Tax and surcharge on Sales Tax, literature, change in the specification of gear box, dispatch instructions, inspection procedure, system of payment and special condition, security deposit and force majeure. Consequently, the essentiality certificate has not been mentioned as an ingredient of the contract between the parties, if the letter dated 26th September, 1990 sent by the petitioner is taken into account. In my view the consideration of the impact of these Clauses is vital and affect the jurisdiction of the Arbitrator and if the contract between the parties is to the effect that the requirement of the essentiality certificate was not a part of the contract between the parties, then the petitioner's claim must fail without reference to the other pleas raised. The arbitrator has not properly construed the effect of the categorical phrase in Clause 9 that the prices were firm and fixed. Consequently, I am not dealing at this stage with the other challenges to the Arbitration award, raised by the respondent in so far as it relates to 6 CFT's supplied as per the supply order dated 7.9.90. The respondent's plea is buttressed by the fact that apart from the fact that the letter dated 26th September, 1990, even if assumed to have been sent, did not claim any objection to the option clause and the subsequent letters dated 15th July, 1991, 8th August, 1991, 11th November, 1991, 29th November, 1991 and 2nd December, 1991 claiming increase in the prices were rejected by the respondent by letter dated 19th December, 1991, even then the respondent has continued to supply the CFTs without demur which also points to the conclusion that the supply of CFTs ordered on 7th September, 1990 was to be at the firm and fixed prices. In this respect the finding of the Arbitrator that the letters dated 15th July, 1991 and 8th August, 1991 which contained the request for enhancement in prices were not rejected by the respondent cannot stand in view of the following terms in the letter dated 19th December, 1991 sent by the respondent rejecting the claim raised by the petitioner vide letter dated 15th July, 1991 and 8th August, 1991. The relevant portion of letter dated 19th December, 1991 read as follows:-

"Kindly refer to the letters quoted above. The same have been considered. Your request for price increase cannot be acceded to as the contract was placed with prices firm and fixed.

2. As regard coverage of five numbers under option clause the same has been exercised in terms of the contract. Advance supply order was acknowledged vide your letter SAL:SGKG dt. 21.8.90 and formal supply order was acknowledged vide your letter dated 26.9.90. There was no mentioned/objection in the above letters regarding indicating of option clause.

3. In view of the position explained above, additional quantity has been covered in terms of the contract and your request for increase in price for additional quantity cannot be acceded to. This is however without prejudice to the terms and condition of the contract."

In fact the Arbitrator's award is based essentially on the delay caused in the

issuance of the essentiality certificate by the respondent. I have also found that issuance of essentiality certificate by the respondent did not form part of the contract between the parties.

The only relevant provision which might be of some assistance to the petitioner is Clause (4) of Schedule 4 which provides that the contractor except to the extent specifically agreed to by the purchaser/respondent, is not entitled to any sort of assistance. Even if the original Clause 9 contained in the offer dated 5th March, 1990 is considered to be the operative clause, it is clear that the essentiality certificate was merely required by the contractor to enable him to import the fire pump and accessories. The said Clause 9 which has been extracted above does not make the issue of essentiality certificate as a mandatory component of the contract and respondent is justified in terming it as a courtesy.

18. Pursuant to the rejection by the Controller of Imports & Exports on 19th April, 1991, assistance was sought from the respondent by the claimant and such assistance was given on 10th July, 1991 by the respondent by requesting the Chief Controller of Imports and Exports to issue the license. Thus the respondents have given assistance when sought and the application made before the Chief Controller of Imports & Exports has been dismissed by it owing to the reason that it was filed after the last date prescribed i.e. 31st March, 1991. If the petitioner was aggrieved by the wrongful refusal by the Chief Controller of Imports & Exports to issue the necessary license it would and should have adopted legal remedies against the order passed by the Chief Controller of Imports & Exports on 29th April, 1991. It has been submitted by the petitioner that the appeal against the order of JCCIE refusing to issue import license to claimants' super structure manufacture was rejected. It is not stated whether the appellate order had been assailed. Not having challenged the appellate order, it is not now open to the claimant/petitioner to raise this issue.

19. The Arbitrator recorded a finding that the claimant's offers dated 5.3.90 and 6.4.90 were not accepted by the respondent to arrive at a conclusion that the claimant was Therefore not barred from making a fresh proposal for price escalation. The above finding that the claimants offers dated 5.3.90 and 6.4.90 were not accepted by the respondent UOI, contradicts another finding of the Arbitrator that Clause 9 contained in the letter dated 5.3.90 applied. Consequently on its own findings that the claimant's offers dated 5.3.90 and 6.4.90 were not accepted, the arbitrator's finding regarding the conclusion regarding applicability of Clause 9 cannot survive.

20. Furthermore, the Arbitrator finds that by letter dated 15.7.91 the claimant had revived its proposal for price escalation and consequently requested the respondent to refix delivery dates and to consider and agree to increase the prices. The relevant portions of letter dated 15.7.91 read as under:-

"Dear Sir:

Sub: Supply of Order No. CPO(VGE)-1636 dt. 7.9.90 for supply of 6 Nos. CFTs.

Ref: Amendment letter No. 1(1)90/D(S.I.)CPO(VGE) - 1636/AL-96 dt. 17.6.91.

We thank you for the above letter and for amending the delivery dated up to 31.7.91.

The events that have taken place since the receipt of this contract by us are enumerated below for your ready reference and for favorable consideration.

1. Advance supply order No. 1(1)/90D(S.I.) dt. 3.8.90 was received on 9.8.90.

2. Order No. 1(1)/90D(S.I.)-CPO(VGE)-1636 dt. 14.9.90 with full contractual terms and conditions was received on 14.9.90.

3. We had requested for amendments to the order vide our letters:

A) SAL:SKG: dt 26.9.90

B) SAL:SKG: dt. 27.9.90 requesting deletion of "during currency of the contract" against the option clause for increase in the quantity by another 7 Nos.

..... (Copies of the above 3 enclosed for immediate reference)

4. While we have received confirmation on A & C, we have not yet so far received your confirmation for our letter dt. 27.9.90.

..... 12. In spite of close follow up, due to very severe foreign exchange crouch the application were not processed and in fact were rejected by JCCI&E vide letter dt 29.4.91 received by Kooverji Devshi on 7.5.91.

13. We had sought your intervention to recommend to DGTD for import of these pumps vide our letter SAL: SGKG dt 10.5.91 and 16.5.91 and we had also requested for refixing delivery date up to 37.7.91.

14. Though we are informally advised that recommendations were given by DGTD to JCCI&E Bombay be end June 91 for clearance of import license, this has not been received so far.

15. With new announcement by Commerce Ministry on 3.7.91, this license may not be issued at all.

We have to seek the path of obtaining a REP license at a premium for importing these pumps.

We are not yet clear about the Import Policy and we may have to wait until the presentation of Finance Bill on 24.7.91 about the Customs Duty structure etc"

..... 18. While we had agreed to execute this contract at firm price, developments of this magnitude have not been foreseen and it is virtually impossible to fulfill the contract without incurring very heavy losses.

19. The extent of losses suffered by us for various reasons referred to in the

foregoing, are as follows:

Difference-Per chassis

Rs.

Increase on account of variation in exchange rate from Rs. 140 to Rs. 207 per 100 ATS and also increase in Customs duty from 60 to 30% (effective 6.12.90) 2,19,928 Increase expected on account of use of EXIM scrips which has a premium of 28% as on date (3,06,360 x 28%) 85,781 Interest charges suffered @ 18% p.a. on the chassis value of Rs. 26.8 lacs since March 91 up to 31.7.91 due to non-receipt of fire pumps 5 months 2,00,000 TOTAL 5,05,709 The above increase will be suffered by us only due to non-receipt of license in time on account of which we are obliged to pay Customs Duty @ 80% and also a higher exchange rate on account of devaluation.

It may also be noted that we have not reflected any price increase suffered by us against escalation of indigenous materials which is also substantial.

..... This type of volatile changes have not been witnessed in recent years in our memory and the amount of cost escalation, as you will see, is unbearable.

We would Therefore request you to please issue the following amendments to facilitate completion of the contract.

1. To refix delivery dates beyond two months from the date of receipt of imports, without any penalty.
2. To consider and agree to the increase in prices as required.

Thanking you & assuring you of our best services at all times.

21. The Arbitrator also found the claimant's case for escalation was accepted by conduct by the respondent. The Arbitrator also finds the refusal of price escalation by the respondent's letter dated 19.12.91 to be unsustainable. The finding that the respondent's refusal by the 19.12.91 letter to escalate prices is unsustainable, cannot be co-exist with the implied acceptance by the respondent by conduct found by the Arbitrator. Thus it is clear that by ignoring the mandate of Clause 9 stipulating firm and fixed prices during the pendency of the Contract, the Arbitrator has exceeded its jurisdiction in enhancing rates for 6 CFTs ordered on 7.9.90. Significantly, the arbitrator had itself found that the letter of the respondent dated 17th June 1991 which extended the delivery date up to 31st July, 1991, stipulated that no price increase would be allowed.

22. Accordingly it is clear that the impugned award in so far as it relates to 6 CFT's as per supply order dated 7.9.90 suffers from legal errors apparent on the face of the record and accordingly deserves to be set aside.

23. The counsel for the respondent/UOI has relied upon the position of law laid down in the following decisions:

(i) In *New India Civil Erectors (P) Ltd v. ONGC* 1997 (2) Supreme Today 265, the Hon'ble Supreme Court held that the arbitration being a creature of agreement cannot award any amount ruled out or prohibited by the agreement.

(ii) In *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, , it was held that an error of law on the face of the award can be set aside.

(iii) In *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, , it was held that where by merely looking at the contract, the excess of jurisdiction is apparent, jurisdiction of arbitrator is exceeded and the award deserves to be set aside.

(iv) In *Rajasthan State Mines & Minerals Ltd v. Eastern Engineering Enterprises* 1993 (3) a LR 350, it was held that an arbitrator cannot cant arbitrarily ad outside the contract.

(v) In *State of Punjab and Others Vs. Om Parkash Baldev Krishan*, , it was held that Article 299 is based on public policy and singing of contract by Executive Engineers but not stated to be made in the name of Governor, does not bring into effect a legal contract.

On the basis of the law laid down in the above decisions the learned counsel for the respondent/Union of India contended that the award disclosed an error apparent on record and was clearly beyond jurisdiction.

The learned counsel for the claimant relied upon the following decisions:-

(i) In *State of Kerala v. Kurian P. Paul* (1991) 2 Klt 555, it was held that if the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere with the award.

(ii) In *Mathbai Ramji v. Jeram Ramji* AIR 1933 Sind 292 & *Nizamuddin, v. Ghulam Ahmad* (1909) 53 PLR: 1909 IC 353, it was held that Courts have long ceased to sitting in appeal on award either with regard to errors of law or errors on questions of fact.

(iii) In *A.M. Mair and Co. Vs. Gordhandass Sagarmull, and Dwarka Nath Sahai and Others Vs. Kedar Nath Sahai and Others*, , it was been held that if the dispute is within the scope of the arbitration clause it is no part of the province of the Court to enter into the merits of the dispute.

(iv) In *Commander, Bangalore Area v. Armugam nagarthnam* AIR 1954 Mys. 46 ; *Rajmani Sinha and Others Vs. Basant Sinha and Others*, , it was held that the Court cannot examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

(v) In *Food Corporation of India Vs. Joginderpal Mohinderpal*, , it was held that it is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fac turn law, and whether or not his findings of fact are supported by evidence.

(vi) In Union of India (UOI) Vs. Unit Construction Co. (Pvt.) Ltd. and Another, , it has been held that the Court has no jurisdiction to look into the contract or the records of the arbitration proceeding unless the contract or its clause of the particular document from the records concerned has been incorporated in the award either expressly or impliedly and the ground taken is an error apparent on the face of the award.

(vii) In Superintending Engineer, Somasila Project, Nellore District and another Vs. R. Ramana Reddy, Adv., it was held that erroneous conclusion arrived at by an arbitrator on a question of fact does not amount to misconduct.

(viii) In Puri Construction Pvt. Ltd. Vs. Union of India (UOI), , it was held that the Court cannot sit in appeal over the view of the arbitrator by re-examining and re-assessing the materials.

(ix) In Jawahar Lal Wadhwa and Another Vs. Haripada Chakroberty, , it was held that where the arbitrator has laid down the principles of law correctly, the award cannot be challenged on the ground of erroneous application of those principles when no reasons for arriving at the conclusion are given in the award.

The learned counsel for petitioner/claimant by relying on the above decisions has submitted that the award is fair and fully sustainable in law and on facts and further submitted that the award in any event cannot be looked at by the Court as if were sitting in appeal and if the conclusion arrived at by the arbitrator is a possible view of the matter and even if the award discloses an error of law, it does not call for interference.

24. However, in so far as the finding of the Arbitrator qua 5 CFTs concerned, it has rightly come to the conclusion that the erstwhile rates quoted by the petitioner by its letter dated 27th July, 1990, were open up to 30.9.90. The relevant extract of the letter dated 27th July, 1990 reads as under:-

"We had extended validity of our offer for your acceptance up to 16.8.90 vide our letter No. RON: SAL:RPV:A:1026 dt. 26.7.90. We further advise that for 7 nos. (beyond 6 nos.) 6x6 crash fire tenders, this validity stands further extended to 30.9.90. We would, Therefore, request you to place your formal order positively before this date."

25. This letter of petitioner clearly demonstrates that the offer of the erstwhile lesser rates was categorically offered only if the orders were placed up to 30.9.90. It is not in dispute that the orders were in fact placed by the respondent only on 1.11.91. By its letter dated 2.12.91, the claimant had declined to accept the offer dated 1.11.91, and had in fact quoted revised prices in consonance with the terms of the letter dated 27th July 1990, for the supply of CFTs. Even the respondent's own letter stated that the extension of the delivery period did not extend the contract period. The relevant portion of the claimant's letter dated 2.12.91 is significant and reads as under:-

"We acknowledge with thanks your letter No. 1 (1)/90/D(S.I.)/CPO (VGE)-1636/

AL-169 dt. 1.11.91 advising us that the quantity ordered to be supplied is to be increased from 6 to 11 units.

In this connection we wish to place the following facts for your consideration. While we are keen to supply additional quantities, we regret that we are unable to supply at the prices and terms and conditions of the original order.

In this connection we wish to recall the discussions held with yourselves and to the offers for supply of 13 CFTs against your earlier enquiry ref. letter No. 1(1)/90/D (S.I.) dt 22.2.90.

During the discussions held with yourselves on 4.4.90, we had requested that we should be considered for placement of order for all the 3 units and this was agreed to. Accordingly we had submitted revised offers.

We had at that time offered a very special price for these vehicles which was related to the specified volumes as mentioned in our letters dt 5.3.90 and 6.4.90 and for orders placed within the validity periods specified. WE had neither during the discussion nor in our offers agreed to giving option for placement of order on us for additional quantity other than for 7 units to be placed within the offered validity which expired on 30.9.90.

Subsequently when your Letters of Intent was received in August' 90 followed by your firm order dt 7.9.90, we had pointed out that the "option clause for procuring additional 7 nos. included in our order was not a part of our offer and could not, Therefore, be accepted by us. This was pointed through our letters SAL:SGKG of 27.9.90 and 21.1.91 wherein we had sought deletion of this clause. It will be apparent that the option clause that has been included was not a part of the offer made by us.

In spite of our abovementioned requests the amendment to Purchase Order by MOD vide letter No. 1(1)/90/D(S.I.)/CPO (VGE)-1636/ AL-44 dt 11.3.91 included a response to our letter SAL:SGKG dt 26.9.90 only but overlooked our letter SAL:SGKG dt 27.9.90 and 21.1.91 in regard to deletion of option clause.

This anomaly was again pointed out by us vide our letter SAL:SGKG of 9.4.91 for which a reply is yet to be received.

During the currency of the contract, extraordinary events affecting performance & costs of executing the contract has taken place viz. the August' 90 GULF crisis followed by import restrictions, foreign exchange rate fluctuation, devaluation, credit squeeze, import curbs etc. just to mention a few. You will appreciate that with such developments of a force majeure nature (over which we have no control) has both delayed execution of contract and we incurred losses through increase in input costs & delays. In such an extraordinary situation it would be reasonable to expect that due consideration be given to these factors & prices/deliveries be refixed if we are to execute order now for additional quantities.

We, Therefore, propose for your consideration and approval that following

revised prices be agreed to for supply of additional quantities of 5 nos. now sought:-

Basis price of AL F23 6x6 chassis ex-works Hour Rs. 28,50,000.00 (Rupees twenty eight lakhs & fifty thousand only) Super structure with Magirus pump to the design of Brijbasi Udyog. Rs. 12,25,000.00 (Rupees twelve lakhs & twenty five thousand only) Total price Rs. 40,75,000.00 (Rupees forty lakhs & seventy five thousand only)

Since the claimant by its letter dated 2.12.91 while not accepting the order for the additional 5 CFTs on 1.11.91 on the erstwhile rates as the order was placed beyond 30.9.90, quoted revised prices for supply of balance 5 CFTs. The claimant had in fact by its letter dated 31.7.92 iterated its demand for price revision while dealing with the extended period of delivery up to 31.12.92.

The findings of the Arbitrator on this issue about the limited duration of the offer of lower prices up to 30.9.90 are entirely justified and in any event unassailable in the present proceedings which give a Court very limited grounds for judicial review. for this purpose it is also necessary to consider the effect of the letter dated 6th April, 1990 sent by the petitioner which specified that the price of Rs. 33,35,000/- is valid for orders placed within the validity period for a total quantum up to 13 numbers only. Thus it is clear that the rate of Rs. 33,35,000/- was valid for the additional no. of CFTs such an order for the balance CFTs (up to 7 more CFTs) had to be placed by 30.9.90 in order to qualify for the lower price of Rs. 33,35,000/- per CFT. This also stated that the offer was valid for acceptance up to 6th April, 1990 Along with the essentiality certificate requested in Para 9 of the Letter dated 5th March, 1990. Clause 8 where the purchase has reserved right to place an additional order of 7 numbers of CFTs on the same terms and conditions during the currency of the contract, Therefore, has to be understood, in the light of the above letters, sent by the respondents, restricting the period for which their offers were valid for the additional CFTs not exceeding 13 CFTs. The amendment to the clause during the currency of the contract was also sought by the petitioner by its letter dated 15th July, 1991. Even the letter dated 1st November, 1991 reads as under:

"..... 1. Clause 8 -quantity covered in the contract

For : Existing Read : 11 nos. 2. Clause 10- Total Price

FOR : Existing Read :Rs. 3,66,85,000 (Rupees Three crores sixty six lakhs, eighthly five thousand only) 3. Clause 11- Delivery schedule

Supply for additional 5 nos to be completed by 31.1.1992 or earlier.

Amendment was made and the quantity covered from the existing was changed to number 11. Delivery schedule for additional period was also to be completed by 31st January, 1992. The perusal of the correspondence also indicates that the petitioner had forsaken the validity of the option clause as the offer of the petitioner was only for limited period and it is not disputed that the offer for the

balance 5 CFTs was not made by the respondent within the period stipulated by the petitioner. the letter dated 5.3.90 specified that the offer was subject to receipt of order prior to 31.3.90 and the letter dated 6.4.90 sent by the petitioner stated that the offer was valid subject to acceptance by 16.4.90. Significantly even the letter of respondent/UOI dated 3.8.90 referred to quotations of the petitioner dated 5th December and 6th April, 1990. The formal supply order dated 7.9.90 also referred to the quotation dated 5.3.90. Thus right from the inception of the contract between the parties, the petitioner had been insisting on a time limit to its quotations and the formal supply order itself categorically referred to petitioner's quotations dated 5.3.90 and 6.4.90 and stated that the said quotations had been accepted. The term of the letter of the claimant dated 2.12.91 are categorical and clearly decline to offer the remaining 5 CFTs at the rate of Rs. 33,35,000/- per CFT. Thus it is clear that while the terms of the contract between the parties were governed by the format referred to in the formal supply order dated 7.9.90 nevertheless the contract in so far as it provided a rate of Rs. 33,35,000/- per CFT was limited by the period of offer as per the respondent's letter dated 7.9.90 which referred to the petitioner's letters dated 5.3.90 and 6.4.90. Even the acceptance of the formal supply order dated 7.9.90, by the petitioner was categorically for 6 CFTs as per the letter of petitioner date 26.9.90. Thus it is clear that the contract in so far as it stipulates firm and fixed prices i.e. Rs. 33,35,000/- per CFT bears the intent and meaning sought to be given by the respondent except for the fact that it enured for six CFTs and could not apply to the balance 5 CFTs, the order for which was placed later on beyond the validity of the contract as per the petitioner's offer and these would be covered by the revised prices quoted by the petitioner in its letter dated 2.12.91. The respondent's own case set out in the Affidavit of A.K. Aggarwal filed in this Court is that the respondent had accepted the revised offer of the petitioner dated 6.4.90. Even the letter dated 6.4.90 of the petitioner made the offer valid for a limited period up to 16.4.90.

Thus the arbitrator's finding qua 5 CFTs that this was not covered in the order dated 7.9.90 placed by the respondent and was ordered by the letter dated 1.11.91 beyond the validity of the offer of the petitioner is justified and the petitioner/claimant was fully justified in claiming higher prices for these 5 CFTs based on the revised prices quoted by the claimant on 2.12.91. and warrants no interference.

26. In view of the above discussion in so far as the claim of the respondent towards the additional 5 CFT's is concerned it stands on a separate footing in view of the unassailable finding of the Arbitrator supported by the correspondence between the parties that the claimant had not agreed to supply the balance 5 CFT's on the same rate for orders placed beyond 30.9.90. The arbitrator's findings in respect of the balance 5 CFT's in my view is unassailable and disclose no jurisdictional error vitiating it. After considering the correspondence between the parties I am unable to accept the plea of the respondents that the exercise of the option by the Union of India on 1.11.91 was

only an exercise under the option clause. I have in the foregoing discussion held that the Arbitrator has failed to construe the impact of Clause 9 which stipulated firm and fixed prices so long as the contract subsisted and further held that the correspondence between the parties shows that the offer made by the petitioner was accepted in the terms and conditions mentioned in Schedule A, B & c of the Letter dated 7th September, 1990 which stipulated that no other condition shall govern the contract. In this view of the matter, the award to the extent it relates to the 6 CFTs is clearly beyond jurisdiction as per the contract between the parties as it seeks to award an amount prohibited by the agreement and consequently this error of the arbitrator is an error of jurisdiction apparent on the face of the award. Accordingly, the position of law quoted by the learned counsel for the respondent squarely applies in so far as the award of the arbitrator qua 6 CFTs is concerned. Consequently, the decisions relied upon by the learned counsel for the petitioner would not be applicable as it is not a mere error of law or fact but an excess of jurisdiction which has been found by this Court in so far as the award qua 6 CFTs is concerned. The decisions relied upon by the respondent are in fact applicable and in a particular the decision in Associated Engineering's case (supra) wherein it was held that apparent excess of jurisdiction in an impugned award could be interfered with. It is also apparent that the non-consideration of the true effect of Clause 9 makes it an error apparent on the face of the award as per the law laid down in Continental Construction Co.'s case. However, in so far as the award qua the balance 5 CFTs is concerned, I have found that since the offer was valid only up to 16th April, 1990 or at best 30th September, 1990 and the exercise of option by the respondent was made only on 1st November, 1991 beyond the subsistence of the contract in so far as it related to the firm and fixed prices of Rs. 33,35,000/- per CFT. In fact the option under Clause 8 A reads as under:

"Purchaser reserves right to place order additional 7 numbers at the same terms and conditions during the currency of the contract."

However, the said clause would apply during the currency of the contract. I have already come to the conclusion that the above clause was not applicable beyond 30th September, 1990 because in view of the correspondence between the parties it was evident that the contract was current at best up to 30th September, 1990 and consequently this option under Clause 8 A could not have been exercised qua the balance 5 CFT's beyond that date. I am, Therefore, satisfied that the arbitrator has correctly found in law, that the contract in so far as it fixed prices at Rs. 33,35,000/- per CFT did not subsist beyond 30th September, 1990 and this conclusion is not amenable to interference as per the law laid down by the Hon'ble Supreme Court in Jawahar Lal Wadhwa's case (supra). This finding of the arbitrator about the limited and time bound subsistence of the contract in so far as prices of Rs. 33,35,000/- is concerned is a pure finding of fact based on appreciation of evidence not liable to be interfered with as per the law laid down in Puri Construction Pvt. Ltd. (supra). The petitioner is justified in Therefore relying upon inter alia the judgment of the

Hon"ble Supreme Court reported as Food Corporation of India Vs. Joginderpal Mohinderpal, that even an erroneous finding is not amenable to challenge in these proceedings. In the present case, I have found that the option was sought to be exercised by the respondent only after the contract ceased to be operative. Accordingly the Award in so far as it relates to 5 CFT"s as per supply order dated 1.11.91 is concerned is unassailable and is confirmed and the Award to the extent it relates to claim for Rs. 23,02,066/- in respect of six CFT"s covered by the supply order dated 7th September, 1990 is set aside in view of the findings recorded hereinbefore. However, the awarded in so far as it relates to the 5 CFTs ordered on 1.11.91 is unassailable and the award of a sum of Rs. 37,00,000/- in respect of additional number of 5 CFTs is confirmed and the objections to that portion of the award are dismissed and the award made a rule of the Court to that extant. The petitioners would also be entitled to interest @ 18% from the date of award up to the date of payment for the award of Rs. 37,00,000/-.