

(2000) 05 MP CK 0050

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 244 of 1995

Bengal Trading Syndicate

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 03-05-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : AIR 2001 MP 71 : (2000) 2 MPHT 499

Hon'ble Judges : Bhawani Singh, C.J.; Arun Mishra, J

Bench : Division Bench

Advocate : Ravindra Shrivastava, for the Appellant; K.C. Ghildival and I. Nair, for the Respondent

Final Decision : Partly Allowed

Judgement

Arun Mishra, J.—The present appeal has been filed by M/s. Bengal Trading Syndicate, the appellant, aggrieved by the order passed by the District Judge, Jabalpur in Civil Suit No. 33-A of 1994 whereby the award passed by the Arbitrator with respect to claims under Item Nos. 3, 5, 31 (a) and 32 was set aside and the award in respect of other claims of the appellant was made rule of the Court. It was ordered that in respect of Claim No. 4 an amount of Rs. 25,584.91, p., in respect of Claim No. 7 an amount of Rs. 1,29,645.00, in respect of Claim No. 36 an amount of Rs. 50,932.48 p. in respect of Claim No. 9 an amount of Rs. 13,455/-, in respect of Claim No. 12 an amount of Rs. 29,748.54 and in respect of Claim No. 33(a). 33(b) and 37 an amount of Rs. 34,560/- shall be paid by the Union of India to the appellant. It was further directed that the Union of India shall pay to the appellant interest at the rate of Rs. 12% per annum from 14-6-1990 to 24-8-1994 on all awards except award in respect of Claim No. 33(a). Interest at the rate of 15% per annum from the date of award till realisation was also awarded.

2. Arbitration was resorted whereas certain differences arose between the parties to the contract in respect of certain civil works at Khajnaria Factory Jabalpur

pertaining to C.A. No. CEJZ/JBL/49 of 86-87. Brigadier S.D. Sohoni was appointed Sole Arbitrator. He was appointed as Sole Arbitrator in the matter by the Engineer-in-Chief. Army Headquarters. Thereafter, vide letter dated 22nd June, 1993 the Arbitrator entered into reference. Hearing was held from 6-6-1994 and the Arbitrator closed the hearing on 8-6-1994. The award was passed on 16-8-1994.

3. A tender for the contract in question was issued on 22nd Feb. 1986 and the tender was received back on 16th May. 1986. The lowest tender was accepted on 4-12-1986. The amount of lowest tender was Rs. 2,14.65,528.07 p. The work order was issued on 9-12-1986 to the appellant and the date of commencement of work was 24-12-1986. The date of completion of work contemplated under the contract was 23-9-1988 which was extended upto 15 Sept, 1989 and the work was actually completed on 15th Sept. 1989. It was a lumpsum contract based on 1AFW 2249, having 9 parts of Schedule "A". Part I of the contract was lumpsum and Part II to IX were item-rate. Scope of the contract was construction of various kinds of shops and buildings in Khamaria Ordnance Factory Jabalpur as contemplated under the agreement.

4. General background indicates that the claimants-appellants are old reputed construction firm having long experience with Military Engineering Service. A work of the factory worth Rs. 2.45 crores was undertaken by the appellant firm in the year 1986-87. According to the claimants, following were the main causes of delay in completion of the present contract in question :

- (a) "Omit and Add" portions were much;
- (b) Valuation shown in work order No. 4 was wrongly calculated;
- (c) Clear site was not handed over to the claimants as envisaged in the contract;
- (d) Site of work was in restricted area and entry and exist created serious problems ;
- (e) working hours were badly curtailed;
- (f) Because of an erroneous contour plan used by the respondents foundation designs of most buildings had to be changed;
- (g) Certain buildings were asked to be handed over to A/c contractor even before their completion;
- (h) there had been perpetual shortage of cement.

5. Facts pertaining to Claim Nos. 3, 5, 31 (a) and 32 which are relevant and subject matter of the present appeal are as follows :

Claim No. 3 :

Claim No. 3 was laid by the claimant with respect to pricing of Moorum filling work for the road formation under provisional sum. For the road formation, in the

contract Moorum filling work was created under Item II-A of the General Summary on Page 70(R-I). Note to Item No. 11-A reads thus :

"(a) Rates given in MES Schedule Part II 1980 against Hem x 113 and 3874 shall not be applicable for pricing work under provisional sum.

(b) Works carried for locally available moorum spreading, levelling etc. shall be priced at applicable rate of "Hard/dense Soil" as given in MES Schedule Part II (1980). Moorum will be brought from nearest source as directed by G.E. in writing."

The claimant submitted that he had obtained the locally available moorum from "Gola Pahar" quarry. He further claimed that method of pricing this moorum should be as per the SSR Item 3789 for "supply only". With this rate, according to the claimant, he would get Rs. 13,62,271.00 in addition to what has already been paid.

6. In reply, before the Arbitrator the respondents have submitted that as per the contract provision. Item No. 113 of SSR pertains to Moorum/hard bazari filling under floor or pavings and Item 3674 pertains to Moorum or red bazari for sub bases and light bearing surfaces. Both these items have been excluded for the purposes of payment under the provisional sum. It was submitted that pricing of moorum has been done as specified in the contract and no amount is due to the claimant. Even the rough excavation work has been accounted in addition to the alleged claim of supply of moorum entered separately under Serial Item No. 3783 of MES Schedule Part II. Thus, the claimant was claiming duplicate amount and as such, according to the respondents, the claim was frivolous, imaginary, unjustified and beyond the contract terms.

7. The Arbitrator found that the contractor had acquired moorum from Defence land and only excavation rate can be applied and paid. The excavation was from a quarry and was not surface excavation. Thus the Arbitrator held that the rate of 6.15 M3 was most reasonable and the difference was worked out to be $(27901M3) \times 10.00 - 6.15 = \text{Rs. } 1,07,418.85 \text{ p.}$ to be paid to the contractor. Thus, a total amount of Rs. 1,07,418.85 was awarded.

8. The learned District Judge in the impugned order, with respect to Item No. 3, has found that the Arbitrator while allowing the amount of Rs. 1,07,418.85 at the rate of Rs. 10/- per cum, has lost sight of the fact that the respondent had paid much higher rate than what has been awarded by the Arbitrator. The respondent had paid at the rate of Rs. 10.6 per cum. which is more than the rate in the arbitration award of Rs. 10/- per cu.m.

9. Claim No. 5.

Claim No. 5 is with respect to payment of foundation work of Building No. 5 which according to the claimants has not been made to them. The original claim put forth by the claimant/contractor was two lacs. He revised the claim to Rs. 69,653.18 p. The claimant submitted that no foundation drawing existed for the

Building No. 5 in the contract agreement. Thus, lumpsum amount quoted i.e. Rs. 15,39,366.00 for the entire building did not include the cost of foundation. The claimant further added that the respondents ordered to construct pile foundation as per Drawing No. CEJZ/JF/617/ 86 Sheet 1/1 as the original contract agreement did not contain any drawing for foundation.

10. The respondents in their reply to the claim before the Arbitrator submitted that foundation of Building No. 5 was covered by the contract. According to them, the claimants' contention that respondent intended to get the foundation of the building executed by other agency and the claimants were not required to include the cost of foundation is a misrepresentation because the contract was a lumpsum contract for entire completion of work. There was no stipulation in contract either in Schedule "A" or elsewhere in the contract that foundation to Building No. 5 is excluded from the scope of the contract.

Schedule "A" Note 7 runs as under :

"Schedule "A": Items of work described in Schedule "A" Part I shall inter alia be deemed to include all as specified in the particular specifications and/or shown in drawings but excluding the works of internal services and external services described in Schedule "A" Part II to IX and Provisional sum as catered for in General Summary.

Note 7 : Unit rates for Building in Schedule "A" Part 1 shall include for complete building all as shown in drawings and specified with -

- (a) Cost of 4 metres deep piles measured for ground level (after surface digging)
- (b) Cost of pile caps as shown in drawings
- (c) Cost of stub column 400 mm high from top of pile cap (pile caps have been provided over the piles) or from top of pile (in case of piles without pile caps). Any increase/decrease in the length of stub column shall be ordered as deviation.
- (d) leaving or cutting holes, chases, opening in walls, floors, ceilings etc. and making good to match with adjoining surfaces above required for sanitary fittings, water supply and electric supply works etc."

Thus, it was contended that cost of foundation for Building No. 5 was included in the Unit Rate quoted by the contractor at SI. No. 5 of Schedule "A" Part I as per Note 3 (a) reproduced above, Schedule "A" shall be deemed to include all as specified in particular specification and/or shown on drawings but excluding the work of internal services and external services. In substance, submission of the respondents was that piles i.e. foundation is included in Schedule "A". It was further submitted that building cannot be constructed without a proper foundation and several buildings in its entirety were to be constructed by the claimant including Building No. 5. Further more Drawing No. CEJZ/JF/617/86 Sheet 1/1 shows the foundation details also, though it is not mentioned in the reference, on Drawing No. CEJZ/JF/593/85 Sheet 4/7 but has been included vide

"Amendments to drawing" bearing Drg. No. CEJZ/JF618/86 Sheet 1/1 forming part of the contract. As such as the claim made by the contract is without any basis and inadmissible.

11. The Arbitrator found that there was no drawing in original contract to indicate any foundation plan or design for Building No. 5. The Arbitrator further recorded that he asked the respondent to produce any drawing issued by them to the claimant for construction of foundation of building No. 5. The respondents failed to produce any proof. Thus, it was held that technically the foundation ordered/constructed is outside the purview of Schedule "A" Part I and the contractor is required to be paid extra. There fore, an award of Rs. 69,653. 18 in favour of the claimant was passed.

12. The learned District Judge has found that the foundation work was included in the initial contract. The District Judge also found that there was no separate contract in respect of foundation work and hence the contract in respect of Building No. 5 shall be deemed to be inclusive of foundation work also. An agreed drawing with heading "Amendment to Drawing" was submitted before the Court which contained the following statement -

"FLOOR SLAP P.S. -- 3 SHALL BE PROVIDED"

S.L. No. 3 DRG. No. CEJZ/JF/617/86 SHT No. 1/1"

The District Judge concluded that even if the aforesaid drawing is not taken into consideration and is kept out of purview, the foundation work was clearly included in the contract. Merely because no separate foundation drawing existed, it cannot be said that it was the excess work of Building No. 5. Hence the award was set aside.

Claim No. 31 (a) :

13. Claim No. 31 (a) is with respect to the working hours and conditions of working. According to the claimants, the working hours and conditions of working as stipulated in the contract were varied abnormally resulting in man hour loss for which the claimants are entitled to extra labour employed. It was also stated that this has resulted in excess transportation charges. The original claim made under this head was Rs. 36,50,000/-. It was revised to Rs. 35,11,525/-.

14. It was submitted by the claimant that Condition Nos. 3.4 of the contract agreement provided that working hours would be from 8.00 hrs. to 17.00 hrs. Similarly, full six days a week were given as working days. The claimant contended that the working conditions of his work force was drastically reduced to 62.5% and of his vehicles by 50%. According to the claimant, the changes in timings and restrictions on vehicle entries was totally non-contractual and had following effects :--

(a) Entry through Gate No. 4 changed to Gate No. 1

(b) Double check of labour adopted by the user thereby wasting long time.

(c) Saturdays were converted, into half working days.

(d) Labour could work for 6 hours/day and vehicles could ply for 4 hours/day.

15. The claimant further submitted that search was contemplated only at Gate No. 1 and search at Gate No. 4 was never mentioned in the contract. The claimant produced a letter dated 11th July 1988 (Ex. C 82) in which the actual available time for both labour and vehicles has been spelt out. The search for labour force is indicated to be starting at 8 .00 hrs and continuing upto 9.00 hrs. Vehicle plying timings given therein are :

(a) morning-- 10.00 hrs. to 12.00 hrs. (b) Afternoon-- 14.00 hrs. to 15.00 hrs.

16. The respondents submitted that the alleged working hours" reduction and the compensation asked for was imaginary. According to the respondents, Clauses 2.2. and 2.5 categorically mentioned that the work was in "Restricted Area" and the claimant was to ascertain the relevant data on local working conditions before tendering as per the conditions of the tender notice. Clause 3.4 indicated that security check was contractor's liability and after issue of Amendment to Clause 3.4 Gate No. 4 was also liable to search of work force. While commenting on claimant's calculations, the respondents admitted that loss of working hours could be maximum 1/2 hours and nothing more.

17. The learned Arbitrator has found in para 14.5 of his award as under :--

"..... The contract is very clear about "Restricted Area" and liability of security check at the gate. I find that hardly 1/2 hour's delay in the morning was probably experienced for the work force. This could easily be absorbed by the Claimant by adjusting lunch break. I, therefore, feel there has been no loss as far as labour force was concerned.

However, in paragraph 14.6 of the award, the Arbitrator found -

"Thus security checks and restrictions on entry are unavoidable in Ordnance factories and the contractor has to keep this in mind while quoting. In this case, however, I find that restrictions put on vehicles are not reasonable and have caused a disadvantage. This loss of vehicle hours therefore, need to be compensated. I do not agree with the calculations given by the respondent on loss due to vehicle restriction. Exhibit C-81 submitted by the claimant is also exaggerated. I feel that more accurate estimate of loss due to vehicle restrictions will be as follows :

(a) cost of project Rs. 2,47,49,433.00 (b) cost of materials Rs. 1,48,49,660.00 @ 6% (c) Top cost @ 5% of Rs. 7,42,483.00 material cost (d) Loss due to re-Rs. 3,71,241.60 striction of timing 50%

Thus, the Arbitrator has awarded a total sum of Rs, 3,71,241,50 on account of loss due to restriction on timings of vehicles.

18. The learned District Judge has held that when the Arbitrator has not awarded

damages claimed on account of loss of labour hours and it has been held by the Arbitrator that security checks and restrictions on entry are unavoidable in Ordnance factories and the contractor has to keep to this in mind while quoting, the Arbitrator has misconducted himself in awarding Rs. 3,71,241.50 on account of restrictions put on entry of vehicle. The restrictions imposed were not unreasonable and the submission of the respondents was accepted that it was looking to the secret nature of place where the work was carried out -- that the work hours were restricted. Thus, the award of Rs. 3,71,341.50 in respect of Item No. 31(a) was set aside.

Claim No. 32 :

19. The claimant has laid this claim as contract period has been prolonged resulting into losses. The prolongation of performance period was mainly due to delay in issue of Sch. "B" stores, erratic issue of road roller under Schedule TV, Imposition of restrictions by the authorities, delay in decisions and radical changes in the scope of work. Original claim was Rs. 15,00,000/- which was revised to Rs. 15,17,945/-. According to the claimant, the work was prolonged by 12 months due to defaults on the part of the respondent and the defaults were :--

(a) Contour map given by the department was wrong and therefore levels for various pile foundations, stub column and other columns had to be redesigned.

(b) Due to change in strata and subsoil water foundations had to be changed/ redesigned.

(c) Plenty of water was encountered in the pile foundations and getting them dewatered was a big problem.

(d) Clear site was not handed over and undergrowth and heaps of rubbish had to be removed.

(e) The site was within "Restricted Area" and the users put in very difficult restrictions on labour and vehicles.

(f) Issue of Schedule "B" stores including cement was delayed .

(g) Road roller was not available when needed.

The claimant further submitted that time extensions were no doubt given but that did not hold the claimant as far as his establishments, overheads and profits are concerned. He. therefore, claimed extra for the damages caused.

20. The respondents submitted that no specific delay in issue of Schedule "B" stores has been brought, and all the reasons mentioned in the claim were non-contractual. As per Condition No. 11 (c) of IAFW/2249 once time extension has been granted no claim shall be admitted. Moreover, escalation of 14 lakhs has been paid. The respondents further submitted that the calculations put by the contractor were inflated and hypothetical, and the establishment charges were

only 2.5%.

21. The Arbitrator found that there was an initial delay on the part of the respondents since they did not hand over a clear site. In case of various buildings the foundations had to be redesigned due to wrong contour plan or due to lack of ground work which was the responsibility of the department. Documentary evidence was produced to that effect. The Arbitrator further found that labour force of the claimant was not allowed to enter the factory area for at least 20 days and unreasonable restrictions of time were imposed on the contractor's vehicles by the user's. The cement issue register and other documents confirm that there had been some delay on that part too. The Arbitrator found that there had been some kind of breaches of contract for which the respondents are held to be responsible. It was found that time extensions were granted to the contractor and the escalation of labour and material had been paid to him. The Arbitrator, however, found that overhead and establishment charges for prolongation of time need to be paid to the claimant. He considered the total prolongation of 12 months and granted total compensation to the tune of Rs. 4,59,720.00.

22. The learned District Judge has held that the Arbitrator has misconducted himself in awarding the aforesaid amount in respect of Claim No. 32 on the ground that Clause 11C of the contract expressly contains prohibition with respect of award of overhead and establishment charges. The learned District Judge has relied on the decision in *Ishwar Singh v. D.D.A.*, 1994 Arbitration Law Reporter 526.

23. The learned counsel for the appellant in this appeal has submitted that the learned District Judge has erred in interfering with the award passed by the Arbitrator. It is submitted that the District Judge has travelled beyond the scope of interference permissible to the Court in an award passed by the Arbitrator. He has made various submissions with respect of the four different items disallowed by the District Judge and has relied upon various decisions which would be adverted to while discussing the submissions pointwise.

24. The learned counsel for the respondents has supported the reasonings of the District Judge and contends that the award passed by the Arbitrator was against the terms agreed to by the parties and there was error apparent on the face of record of the award. Thus, the award called for interference on certain points. He has further submitted that the award has been upheld with respect to most of the items and only where the error was apparent and the Arbitrator had travelled beyond his jurisdiction that the same has been interfered with.

We take up for consideration the different items separately hereinbelow.

25. With respect to Claim No. 3, the learned counsel for the appellant has submitted that the Arbitrator has rightly awarded a sum of Rs. 1,07,418.85 on account of pricing of moorum filling work over floor foundation. His submission is that though the Arbitrator awarded a sum computing at the rate of Rs. 10/- per

c. u. m. while allowing the claim in part, as a matter of fact, the claimants had claimed an amount of Rs. 13,62,271/-. He tried to justify the impugned award passed by the Arbitrator on the ground that the claim laid by the claimant/appellant was higher even if the award of the Arbitrator may not be justified at the rate of Rs. 10/- per cum. Since the amount at the higher rate than awarded by the Arbitrator already received by the claimant appellant could not be disputed by appellant's counsel, the learned counsel for the Union of India has submitted that the Arbitrator had awarded compensation holding that no amount was paid for moorum filling work and he totally ignored that payment was already received by the claimant --appellant, at the rate of Rs. 10.76 per cum. This fact that payment has already been made at the rate of Rs. 10.76 per cum for the moorum filling work could not be disputed before by the claimant-appellant. Thus, in the submission of the learned counsel for the respondents, it would amount to double payment if the award of the Arbitrator is upheld and there was an error apparent on the face of record as it is not disputed that amount at the rate of Rs. 10.76 per cum has already been paid.

26. A close scrutiny of the award would indicate that the Arbitrator had proceeded on the basis that no payment was made on account of pricing of moorum filling work for road formation under Claim No. 3. Thus, the Arbitrator had clearly overlooked that payment was already received by the contractor. Hence, there was an error apparent on the face of record committed by the Arbitrator, it has been corrected by the District Judge. In view of the admission that payment was already made at the rate of Rs. 10.76 p. per cum. the Arbitrator could not have awarded the amount of Rs. 1,07,418.85. In fact more amount has been paid than what has been determined by the Arbitrator. Since the appellant contractor had already been made payment as stated above, there was absolutely no justification for the Arbitrator to have awarded the amount as against Item No. 3.

27. An error apparent on the face of record of an Arbitration award can always be corrected by the Court. The Arbitrator had totally ignored the fact that payment was already made at the higher rate than determined by him, Thus, the award suffered a patent error and this fact has not been disputed before us that payment was already received at the higher rate. Thus such an error can be corrected as per the decision in *Nana Kwaku v. Nana Sir Ofori* AIR 1933 PC 46, in which it was laid down that an award can be impugned only in the case of patent error. If Arbitrator has committed a patent error he can be said to have misconducted himself as held in *M/s. Chahal Engineering and Construction Co. Vs. Irrigation Department, Punjab, Sirsa*, . In paragraph 7 of the said decision, the Supreme Court observed at page 2546 :

"..... It cannot be disputed that the misconduct of the Arbitrator referred to in Section 30(a) and the expression "is otherwise invalid" in Section 30(c) would include an error apparent on the face of the record. Since as held below, we have come to the conclusion that the award suffered from several patent errors it will

have to be held that the objections raised by the respondent are within the scope of S. 30 of the Act. Since the proposition is obvious and is based upon the law settled by a series of decisions, it is not necessary to discuss the decisions here in detail. We, therefore, reject the preliminary contention."

28. The Court normally disfavours interference with arbitration award but the Court should have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. This is the law laid down by the Supreme Court in the case of *State of Rajasthan v. Puri Construction Co. Ltd.* (1994) 4 SCC 485 : (1994 AIR SCW 5061), The Apex Court has held that the arbitrator cannot perpetrate gross miscarriage of justice and the same cannot be reduced to mockery of a fair decision of the lis between the parties to arbitration. The Court cannot reappraise the evidence. It is not possible for the Court to take alternative view of the law and if a different view is possible it is not permissible for the Court to adopt the same if the one adopted by the Arbitrator is also a permissible view. Error apparent on the face of record does not mean that on closer scrutiny of the import of documents and material on record the finding made by the arbitrator may be held to be erroneous. An error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. In the present case, what error was committed by the Arbitrator was not merely an error of law but also of appreciation of facts as it has ignored and over-looked the payment made. The Supreme Court has further held in the case of *Associated Engineering Co. Vs. Government of Andhra Pradesh and another*, that if there is an error apparent on the face of record committed by an arbitrator going to the root of the matter it can be corrected by the Court.

29. The arbitrator has clearly misconducted himself as per the ratio of the decision of the Hon'ble apex Court in the case of *K.P. Poulose Vs. State of Kerala and Another*, , in which it was laid down that misconduct u/s 30(a) of the Arbitration Act, 1940 has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

30. Thus, we come to the conclusion that as the amount as determined by the Arbitrator stood already paid by the respondents before the Arbitrator took up the matter, the Arbitrator has misconducted himself in awarding the amount of Rs. 1,07,418.85 p.. and the award in respect of Item No. 3 has rightly been set aside by the District Judge.

31. With respect to Claim No. 5, the learned counsel for the appellant has raised the submission that the foundation work of Building No. 5 was not included in the original work. It is submitted that no payment was made to the claimant-appellant with respect to the foundation work, of Building No. 5. His further submission is that the learned District Judge while setting aside the award on

Claim No. 5 has looked into a drawing which was not placed before the Arbitrator . His submission is that the arbitration award cannot be assailed on the basis of a document which had not formed part of the record before the Arbitrator and the District Judge should not have accepted the drawing and considered it, so as to come to the conclusion that the drawing included the work of foundation. He has further submitted that the District Judge has acted as if it was an appellate authority. The approach adopted by the District Judge is not sustainable. He placed reliance on a decision of the Supreme Court in B.V. Radha Krishna Vs. Sponge Iron India Ltd., . His further submission is that even if the Arbitrator had adopted a construction considering the clause of the contract, it was a case where two views were possible, hence the District Judge ought not to have interfered with the award with respect to Claim No. 5. The learned counsel has relied on the decision of the Supreme Court in M/s. Hind Builders Vs. Union of India, . It is further submitted that the Arbitrator has acted within his jurisdiction on the basis of the construction of the contract and no jurisdictional error was committed by the Arbitrator and as such the District Judge could not have interfered with the award. The learned counsel pressed into service the ratio of the decision in Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, .

32. Learnd counsel for the appellant further submitted that the Court cannot examine the correctness of an award on merits. Reliance was placed on Puri Construction Pvt. Ltd. Vs. Union of India (UOI), . He also placed reliance on Sudarsan Trading Co. Vs. Government of Kerala and Another, to contend that once with respect to foundation work there was dispute as to interepretation of contract, the Court cannot substitute its own decision. His further submission is that mistake of law or fact has to be determined on the basis of the record of the case and riot otherwise. The counsel derives assistance from the decision of the Supreme Court in State of Orissa Vs. Dandasi Sahu, .

33. The learned counsel for the Union of India submitted that foundation was included in the original agreement. This was a lumpsum contract for entire completion of work. There is no stipulation of contract either in Schedule "A" or elsewhere that foundation to Building No. 5 is excluded from the scope of the contract. He has further placed reliance on Schedule "A" to the agreement, quoted above. He has submitted that according to the provision of contract foundation for Building No. 5 is included in the unit rate quoted by the contractor at SI. No. 5 of Schedule "A", Part I. His further submission is that building cannot be constructed without a proper foundation and no separate provision has been made. Thus, the unit rates in Schedule "A" include cost of foundation. He has also placed reliance on the drawing which was agreed to between the parties. The learned counsel supported the reasonings of the District Judge in disallowing the amount for foundation work.

34. The case of the claimant was that they were instructed to carry out the foundation work of Building No. 5 according to the new drawing being Drawing

No. CEJZ/ JF/617/86 Sheet No. 1/1. It was a different foundation work than the other buildings and the drawing of the same was not ready at the time of submission of the tender. The claimants requested for payment for the foundation work vide their letter dated 18th May, 1987. Letter dated 27th Jan. 1988 has been placed on record as C-32 of Garrison Engineer, Khamarta. In reply to the letter of 18-5-1987 and other letters of the claimant/ contractor, claimant/contractor. Garrison Engineer mentioned that the "contract being a lumpsum one for provision of the building and there being no separate provision in the contract towards foundation for this building you are deemed to have provided for the requisite foundation for the Building. You have provided the same as per drawing No. CEJZ/JF/617/86 Sheet 1/1".

35. The claimant's case is that nomenclature of the Drawing No. CEJZ/JF/593/85 Sheet 4/7 was given at page 124 of the list of drawing as "Foundation plan" and the said nomenclature was later on amended to read as "RCC Floor Plan & Schedule of grade beams" under Alteration No. 6.

36. It appears that the foundation of the building in question was different considering the sensitive nature of the building. Thus, in the agreement and the tender documents alteration was effected to read the nomenclature of Drawing No. CEJZ/JF/ 593/85 as "RCC Floor Plan & Schedule of grade beams". The Arbitrator has given the following reasons to award the sum of Rs. 69,653.18 on Claim No. 5 :

"16. Claim No. 5 : Payment for foundation work of Building No. 5 has not been made to us.

Original Claim : Rs. 2, 00,000.00 Revised Claim : Rs. 69,653.00 16.1. The claimant contended that no foundation drawing exists for the Building No. 5 in the CA. Thus lumpsum amount quoted (i.e. Rs. 15,39,366.00) for the building does not include the cost of foundation. He further added that the respondents ordered to construct the pile foundation as per Drawing No. CEJZ/JF/617/86 Sheet I/(sic) as original CA did not contain any.

16.2. The respondent argued that it was a lumpsum contract and there is no mention about exclusion of foundation of Building No. 5. Notes 3(a) and 7 on page No. 3(R) and S (R) clearly show that Schedule "A" Part I inter alia deem to include everything shown in particular specification and drawing.

16.3. Surprisingly on detailed scrutiny I find that there is no drawing in original contract to indicate any foundation plan or design for Building No. 5, I, therefore, asked the respondent to produce any drawing issued by them to the claimant for construction of foundation of building No. 5. Since the respondents failed to produce any proof whatsoever, technically the foundation ordered/constructed is outside the purview of Schedule "A" Part I and need to be paid extra.

16.4. I therefore, award Rs. 69,653.18 to the Claimant for this claim."

37. The Arbitrator has taken the view that there is no drawing in the original

contract to indicate any foundation plan or design for Building No. 5. The foundation so constructed was outside the purview of Schedule "A" Part I and need to be paid extra. The Arbitrator has clearly overlooked the tender document at page 124, Building No. 5. Entry 23 with foundation plan, key plan and other details, and consider the fact that the nature of the building foundation was converted to "RCC Floor Plan and Schedule of grade beams". Item No. 7 of Schedule "A" has also been ignored by the Arbitrator that the lumpsum included "the cost of 4 m deep piles measured for ground level (after surface digging), cost of pile caps as shown in drawings; cost of atub column 400 mm high form top of plel cap". Thus piles were clearly included in the agreement and the contractor was aware that even in the absence of drawing, the lumpsum rates are supposed to cover Schedule "A" Item 7. Thus, the Arbitrator simply for want of drawing has held that work of foundtion was not included in Building No. 5 and has proceeded contrary to the express stipulations in the agreement in the shape of tender document. The Arbitrator has thus failed to appreciate the express condition in the tender document that while quoting lumpsum amount it has to include work of foundation and that with respect to Building No. 5 its nature was also altered to "RCC Floor Plan and Schedule of grade beams." Therefore, the contractor had clearly quoted the rate including the cost of foundation which is apparent from the original tender document placed before us by the District Judge.

38. The question arises for consideration is even in the event of such a stipulation in the tender document and quoted rate by the contractor when a sum has been awarded by the Arbitrator treating that foundation was not in the original agreement, whether it is open to the Court to make interference and the interference in this case made by the District Juge has to be set aside.

39. As held by the Supreme Court in *New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation*, , when there is express stipulation between the parties as to the rate, the contractor cannot claim any amount in violation of the same. The award granting such amount is beyond the authority of the Arbitrator. Arbitrator derives authority from the agreement of the parties and dispute must be within the purview of the ageement in order to authorise the Arbitrator to pass an award. Agreement appears to be the matter of essence between the parties, that is why the arbitrator is required to confine himself within the four corners of the agreement and cannot go beyond the express terms contained therein. The learned counsel for the respondents placed reliance on the decision in *V.G. George Vs. Indian Rare Earths Ltd. and Another*, in which it has been laid down as under at page 1411:

"..... While awarding the amount the arbitrator did not lake note of the above Clause (c) of the tender notice which is a part of the agreement and under which the respondent would not be liable for such obstruction. Therefore, we hold that the amount awarded under Claim No. 3 is beyond the scope of the agreement entered into between the parties and, therefore, the awarded amount

in respect of Claim No. 3 cannot be sustained."

The Supreme Court has further laid down in V.G. George (supra) that if the amount awarded is beyond the scope of the agreement, such award is not sustainable.

40. In yet another decision in Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, the Supreme Court has held that the Arbitrator cannot exceed his jurisdiction or go beyond the terms of the agreement. It would be proper to reproduce the relevant paragraphs Nos. 15, 16 and 17 which reads as under at page 3279-3280, of AIR :

"15. Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the Contractor is required to arrange his working programme accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the Contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of the Government or other reasons beyond the control of either the Corporation or the Contractor. Obtaining permission from the Forest Department to carry out the work in the wildlife sanctuary depends on statutory regulations. Clause (vi) of the general conditions of the contract also provides that failure or delay by the Corporation to hand over to the contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation due to any other cause whatsoever would not entitle the contractor to damage or compensation thereon, in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that the arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs. 11 lakhs and more for the alleged lapses or delay in handing over the work site, is on the face of it, against the terms of the contract.

16. Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. In Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, , this Court considered the clauses of the contract, which stipulated that the contractor had to complete the work in spite of rise in the prices of material and also rise in labour charges at the rates stipulated in the contract. Despite this, the arbitrator partly allowed the

contractors claim. That was set aside by the Court and the appeal filed against that was dismissed by this Court by holding that it was not open to the Contract to claim extra costs towards rise in prices of material and labour and that the arbitrator misconducted himself in not deciding the specific objection regarding the legality of the extra claim. In that case, the Court referred to the various decisions and succinctly observed (SCC p. 88 para 5) (at page 1170; of AIR) :

"If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliatory and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the Court provided his error appears on the face of the award."

17. It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in case where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. Dealing with a similar question, this Court in *New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation*, held thus at page 982-983; of AIR) :

"It is amiomattc that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is rule out or prohibit by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the build up area the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that amount."

From the aforesaid decision, it is apparent that the Arbitrator his passed award In respect of Item No. 5 contrary to the express terms of the agreement which are not capable of two interpretations. Thus the arbitrator has exceeded his Jurisdiction while holding that foundation work was not included whereas it was included in the express terms of the agreement and the prices were quoted with

respect to Building No. 5 by the contractor in a lumpsum contract. We have come to this conclusion particularly in view of the absence of finding by the Arbitrator that there was any deviation and no finding with respect to deviation was recorded by the Arbitrator .

41. The decisions cited by the learned counsel for the claimant appellant are distinguishable and there is no quarrel with the proposition laid down in those decision. They are applicable in the different factual matrix and not in cases of jurisdictional error committed by the Arbitrator, acting contrary to the express stipulations in the agreement for which the direct decisions are (i) V.G. George; (ii) Steel Authority of India; and (iii) New India Civil Erectors (P) Ltd. (supra). The Arbitrator has ignored from consideration the agreement which contains an express stipulation as to the work of Building No. 5 including its foundation and the rates were only quoted in lumpsum by the contractor and the alteration was wholly immaterial. Thus, the Arbitrator has committed jurisdictional error in coming to the conclusion that it was not Included.

42. For the reasons mentioned above, the award with respect of Item No. 5 was beyond the authority of the Arbitrator and as such the claimant is held not entitled to claim the amount of Rs. 69,653,18.

43. With respect to Claim No. 31(a), according to the claimant, the working hours and conditions of working as stipulated in the contract were varied which has resulted in excess transporation charges and also man-hour loss. The working hours of the claimant was reduced to 62.5% and the claimant's vehicle working hours were reduced to 50%. The material transported required 2508 number of truck days against which actual deployment of truck days had been 4310. The claimants, therefore, certified that they had suffered a loss of Rs. 14,41,600.00. In additon, they also prayed for loss of man working hours in the sum of Rs. 20,69,925.00.

44. The respondents in their reply have relied upon Clause 2.2 and 2.5 of the contract which lays down as under :

"2.2. Site of work lies in restricted area which is controlled by the authorities of Ordinance Factory, Khamaria.

2.5. A tenderer, whether or not he visits site(s), will be deemed to have ascertained all relevant information, about this area of work, access to site, working conditions, availability of materials and labour and such other conditions which are likely to affect his prices and execution completion of work."

Their main submission is that the claim ant has claimed the amount owing to the conditions of workingin restricted area which was near an ammunition factory. Their case is that claimants trucks/vehicles were per mitted from 9.00 hrs to 12.00 hrs and after lunch from 13.30 hrs to 17.00 hrs. The respondents submitted that the claim of the claimant was imaginary and beyond the contract provisions.

45. The Arbitrator has disallowed the claim on account of loss of labour force and working hours holding that the contract was very clear about "Restricted Area" and security checks and restrictions on entry are unavoidable in Ordnance Factories and the contractor has to keep this in mind while quoting. However, the Arbitrator has found that restrictions put on vehicle are not reasonable and have caused a disadvantage. A sum of Rs. 3,71,241.50 was awarded on account of loss due to restriction of timing on vehicles.

46. The learned counsel for the appellant has submitted that the District Judge has erred in law in disallowing the claim on account of loss of labour force and contradictory findings have been recorded with respect to the restrictions put on entry of the vehicles. His further submission is that it was a restricted area and entry through Gate No. 4 was changed to Gate No. 1. The changes in timings and restrictions on vehicles entries were totally non contractual. The vehicle plying timings given in the letter of G.E. Khamaria addressed to CWE (P) Fy Jabalpur dated 11th July 1988 are 10.00 hrs to 12.00 hrs. in the morning and in the afternoon 14.00 hrs to 16.00 which was lesser than the timings available for the labour.

47. The learned counsel for the respondent submitted that since it was a restricted area, there were particular specifications contained in the contract adding special conditions. Learned counsel relied on Condition No, 3. 4 and further relied upon Ex. C-7 which is a letter dated 28th Feb. 1987 issued by CWE to the claimant. It was stated that entry through Gate No. 1 was more convenient being nearer to work site and entry through Gate No. 4 to all vehicles was permitted from 16-2-1987. Thus it is submitted that no loss has been caused to the claimant on account of vehicle restrictions.

48. In this respect it would be noteworthy to examine whether the Arbitrator has misconducted himself while allowing claim of Rs. 3.71,241.50. In order to adjudge the propriety, it would be apt to examine the terms of the contract. That exercise appear not to have been done by the learned District Judge which was necessary for a limited purpose so as to find out whether the Arbitrator had acted within the purview of the contract agreement and had not violated any specific conditions actually settled between the parties while allowing the claim. In other words, the question is whether the Arbitrator has violated any express terms of the agreement. The Special Conditions of the agreement under the heading "particular Specifications" at serial page No. 72 of the tender document, contains the entry and exit provision in restricted area. Clause 3 under the headings "Condition of Working in Restricted Area" is reproduced below :

"3. CONDITION OF WORKING IN RESTRICTED AREA.

3.1. Entry and Exit.

The contractor, his agents, representatives, workmen and his materials, cars, trucks or other means of transport except donkeys etc. will be allowed to enter through and leave from Gate No. 4. Contractor's authorised representative is

required to be present at the place of entry and exit for the purpose of identifying the carts, trucks etc. to the personnel in-charge of the security of the Restricted Area.

2. Identity of Workman.

Every workman shall be in possession of an identity card. This identity card shall be issued after a thorough investigation of the antecedents of the labourer by contractor and attended by the Engineer in Charge Factory authorities. Contractor shall be responsible for the conduct and action of his workmen, agents or representatives.

Thorough search of all personnel and transport shall be carried out at the main gate and for as many times as gate is used for entry or exit, any search may also be carried out at any time or any number of times at the work site within the Restricted area.

3.4. Working Hours.

The unit controlling Restricted Areas, usually work for six days, in week. The contractor shall be allowed to work from 0800 hours to 1200 hours during working days. Contractors labour shall leave the site gate by those hours. No claim or compensation shall be admitted by Govt. for any less working time on account of time spent for check at the gate and searching by security staff from time to time.

3.5. Fire precautions.

The contractor, his agents, representatives workmen, etc. shall strictly observe the orders pertaining to fire precautions prevailing within the Restricted Area."

49. It is apparent from Clause 3.1 quoted above that the contractor, his agents, representatives, workmen and his materials, cars, trucks or other means of transport were allowed to enter through and leave from Gate No. 4. Clause 3.3 mandated a thorough search of transport at the main gate as many times as the gate is used for entry or exist. Working hours contained in clause 3.4 contemplated that contractor shall be allowed to work from 8.00 hrs to 17.00 hrs that is to say, 8.00 a.m. to 5.00 p.m. but these working hours were curtailed with respect to vehicles further from 10.00 hrs. to 12.00 hrs and from 14.00 hrs to 16.00 hrs. However, Clause 3.4 further provides that contract labour shall leave the site gates by those hours and no claim for compensation shall be admitted by Govt. for any less working time on account of time spent in check at the gate and searching by security staff from time to time.. It is clear from Clause 3.4 that working hours even for the transport as contemplated under Clause 3.1 "Entry and Exit. were from 8.00 hrs. to 17.00 hrs as per the agreement. Thus, the arbitrator has awarded the amount for imposing further restrictions on the time agreed as per the agreement between the parties which was substantially reduced for vehicle to four hours. It was fixed 8.00 hrs. to 17.00 hrs. It is not the case of the respondents that time was consumed in security. Only with respect to

the loss of time in thorough search on account of security of the transport vehicles, no claim of compensation would be entertained as per alternation made in Clause 3.4 of the Special Conditions. It was not on account of this that the Arbitrator had awarded the amount.

50. Further question which arises for consideration is whether it was open for the District Judge to interfere in the award only on the basis that loss of man working hours was not awarded which was to the extent of 1/2 hr. i.e. 30 minutes which could be absorbed by the contractor by working In the lunch hours. The learned District Judge appears to have lost sight of the fact that the restriction on the vehicle entry was in contravention of the above quoted conditions 3.1 and 3.4 of the Special Conditions.

51. It is settled law that scope of interference in an award is very limited. Where there are certain clauses which are considered by the Arbitrator, even if the clauses are such where two views are possible, if the Arbitrator has adopted a particular interpretation it is not possible for the Court to interfere with the award. As parties have agreed for settlement of their dispute by the Arbitrator the award should not normally be interfered with If it is within the purview of the agreement. The law in this regard is clear as per the ratio of the decisions in M/s. Hind Builders Vs. Union of India, and U.P. Hotels v. U. P. State Electricity Board (1989) 1 SC 359. Though it was restricted area, but it was a case of imposition of further restrictions and when the Arbitrator has come to a conclusion that further restrictions not contemplated under the agreement are in violation of It, were unreasonable even If it is possible to take a different view by Court. It is not permissible for a Court to make interference in an award as such an error is not an error which calls for correction by the Court. Thus, as there was no mistake with respect to Item No. 31 (a) on the face of the award, it is not for the Court to appreciate the evidence and substitute its own view as pronounced in the case of The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, by the Apex Court.

52. Terms of the agreement can be seen in order to find out whether the arbitrator has exceeded jurisdiction as laid down in Tarapore and Co. Vs. State of M.P., . With that view we have examined clauses 3.1 and 3.4 of the agreement so as to find out whether error was committed by the Arbitrator by crossing its jurisdiction and violating the agreement. We find that no such violation had been committed by the Arbitrator.

53. The objection raised by the respondents was purely with respect to the merits of the award and it is settled law that merits of the award cannot be made subject matter of objection uner Section 30. Clause 3.4 referred to above bars the compensation only with respect to loss of time consumed in security check of transportation vehicles. The loss of hours was not on that account. Thus, the bar created under Clause 3.4 is not attracted and the learned District Judge has virtually entered into the merits of the award while setting aside the award with respect to Claim No. 31 (a), contrary to the decision rendered by the Apex Court

in State of U.P. Vs. Harish Chandra and Others, .

54. In the instant case, the reasons were given by the Arbitrator and the Arbitrator had considered the material on record and came to the conclusion and the reasons do not constitute an error of law apparent on the face of the award. Even an award with reasons are not per se bad if the reasons can be supported by material on record. The law has been reiterated in this regard in the decision of State of Orissa Vs. Dandasi Sahu, . As held by the Supreme Court, if the award is in excess of jurisdiction of Arbitrator then it is liable to be set aside, but if the award is on the basis of construction of the contract, then the Court cannot set aside it merely because another view was possible. In B.V. Radha Krishna Vs. Sponge Iron India Ltd., in paragraph 12 the Supreme Court observed :

"12. In The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, this Court observed on the scope of interference by the Court as follows at page 2194; of AIR:

"..... It is well known that the Court while considering the question whether the award should be set aside, does not examine that question as an appellate Court. While exercising the said power, the Court cannot reappreciate all the material on record for the purpose of recording a finding whether in the facts and circumstances of a particular case the award in question could have been made. Such award can be set aside on any of the grounds specified in Section 30 of the Act." "

The learned District Judge in the instant case while deciding Claim No. 31 (a) has substituted his own views as if it was dealing in appeal. This is exactly what is forbidden by the decision of the Apex Court. Therefore, we have no hesitation to set aside the judgment of the District Judge on Item No. 31 (a).

55. Claim No. 32 -- is with respect to award for the prolongation of period. The Arbitrator has awarded a sum of Rs. 4,59,720.00. The work prolonged by 12 months beyond the original date of completion as per the claimant's case. According to the claimant and the Arbitrator, the following were the glaring defaults of the respondents :

(a) Contour map given by the Department was wrong and therefore levels for various pile foundations, stub column and other columns had to be redesigned.

(b) Due to change in strata and subsoil water foundations had to be changed/ redesigned.

(c) Plenty of water was encountered in the pile foundations and getting them dewatered was a big problem.

(d) Clear site was not handed over and under growth and heaps of rubbish had to be removed.

(e) The site was within "Restricted Area" and the users put in very difficult restriction on labour and vehicles.

(f) Issue of Schedule "B" stores including cement was delayed.

(g) Road roller was not available when needed.

56. It is not disputed by the claimant that time extensions were given. The respondents' case was that there was no specific delay in issue of Schedule "B" stores. As per condition 11(c) of IAFW 224 no claim for compensation or otherwise arising as a result of extensions granted under Conditions (A) and (B) of Clause 11 of IAFW 2249 is admissible. On account of the extension granted, escalation of Rs. 14 lakhs has already been paid. Time was the essence of the contract and as per Clause 11 (A)(vii) if the delay is by any other cause which in the absolute discretion of the Accepting Officer is beyond the Contractor's control, and where reasonable extensions were given the contractor cannot claim any compensation being the result of extensions and escalation. The respondents have further relied on Clause 11 (B) (a) & (b) to contend that if the work be delayed by reason of non-availability of Government stores mentioned in Schedule "B", or by reason of non-availability of breakdown of Govt. Tools and plant mentioned in Schedule "C", in such event extension of time as may appear reasonable to the G. E. may be granted. However, no claim is entertainable, as per Condition 11 (C), in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions 11(A) and 11(B).

57. Schedule "B" contains 11 items and is to be found at Serial Page No. 59 of the contract agreement, and Includes cement, jute bags, bitumen and other articles. Schedule "C" is to be found at Serial Page No. 62 which contains the provisions which will be hired to the contractor. The road roller is mentioned in Schedule "C".

58. The Arbitrator has also considered unreasonable restrictions on timings imposed on the contract vehicles by users and the labour force was not allowed to enter the factory area for at least 20 days. Award with respect to unreasonable restriction on the vehicles was covered by Item No. 31 (a) and could not be combined again by the Arbitrator while awarding the amount under Item No. 32. This error is apparent. We have upheld the award with respect to Item No. 31 (a). Thus, the amount could not be given twice under the same head. There is error apparent on the face of the award committed by the Arbitrator while considering the unreasonable restrictions of time on the contract vehicles by the users. The cement and road rollers are clearly covered in IAFW-2249, Clause 11(C) being part of Schedule "B" and Schedule "C" of the contract documents as mentioned above. No claim for compensation on account of such delay could be entertained in view of the express stipulation with respect to the labour force also. It is apparent that there were certain conditions which may be fulfilled and the Arbitrator himself has held while considering item No. 31(a) that loss of man-hour could be absorbed and the restrictions were known and the formalities were to be completed in view of the particular specifications contained in Sec. 1 Special conditions which find place at page No. 73 of the contract document.

59. The Arbitrator has also taken into consideration the delay in issuing the Schedule-B store which is specifically prohibited under IAFW 2249 quoted above. Conditions Nos. 2.2, 2.4 and 2.5 are relevant and read thus :

"2.2. Site of work lies in restricted area which is controlled by the authorities of Ordinance Factory, Khamaria.

"2.4. The tenderer in his own interest is advised to visit the site of works and ascertain for himself regarding working conditions with prior appointment with G. E. for which CE will arrange the necessary permission and facilities for the tenderer to enter upon and visit the site of work.

"2.5. A tendered, whether or not he visits site (B), will be deemed to have ascertained all relevant informations, about this area of work access to site, working conditions, availability of materials and labour and such other conditions which are likely to affect his prices and execution/completion of work."

Thus it was the responsibility of the contractor as expressly stipulated to consider the strata and subsoil water foundation and question of entry of plenty of water in the pile foundation and consequent dewatering. Thus, considering the terms of the agreement it was not open to the arbitrator to consider these aspects to award compensation for prolongation of the period particularly when extension of time was granted and accepted. No claim for damages on that count due to these facts is admissible to the contractor.

60. There was another factor taken into consideration by the Arbitrator to make the award under Item No. 32 which was not at all permissible. In view of the extension granted the claimant was given a sum of Rs. 14 lacs as escalation. For prolongation of the period, therefore, the award could not be made by the Arbitrator. The Arbitrator also failed to take notice of the specific conditions of Clause 11 (A), (B) and (C) of IAFW 2249. The Arbitrator further erred in considering the question of loss of man-hour, working hour and restriction on vehicles. While considering Item No. 31 (a) it was held by the Arbitrator himself that there was no loss of man hour as it was absorbable. There are contradictory findings given while considering the Item No. 32 by considering the loss of man working hour. Restriction on entry of vehicles was again considered to award the amount under Item No. 32 whereas the amount was already awarded under Item No. 31 (a). Such a course is not permissible. Commenting on contradictory findings, in V.G. George Vs. Indian Rare Earths Ltd. and Another, the Supreme Court observed at page 1411-1412 :

"20. The amount awarded under Claim No. 9 is not only beyond the scope of the agreement but also contrary to the findings recorded by the arbitrator."

Thus, if there are contrary findings recorded by the arbitrator, the award is interferable.

61. The arbitrator has awarded the amount for delay in issue of stores included in Section 8. On escalation has been granted, the amount could not be awarded

as per Clause 11 (C) of IAFW 2249. When such is the situation, we respectfully follow the law laid down by the Apex Court in Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, where it has been observed :

"As the Arbitrator has acted contrary to the fixed terms of the agreement, the award is interferable as what is prohibited by express terms cannot be allowed by the Arbitrator as that would defeat the very spirit of the contract agreement within the purview of which the Arbitrator can act."

Similar is the view taken in Tarapore and Co. Vs. State of M.P., .

62. In New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, . an area of the Balcony was included in the measurement of the built-up area. The Apex Court considered that it was outside the purview of the words "measurement agreed to between the parties" and the claim was disallowed. It was held that the Arbitrator cannot award any amount ruled out by the terms of the agreement. In the said decision. Claim No. 9 was made with respect to the escalation for the cost of construction during the period subsequent to the expiry of the original contract period. There was a term of non-granting escalation. In view of the said express stipulation between the parties, the Supreme Court held that the claimant could not have claimed any amount on account of escalation in the cost of construction carried out by him after the expiry of the original contract period. The Arbitrator awarded escalation contrary to the specific stipulation contained in the agreement between the parties. The award was set aside following the decision in the case of Sudarsan Trading Co. Vs. Government of Kerala and Another, wherein it has been held at page 901 :

"if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the Court can find that he exceeded his jurisdiction on proof of such excess....."

63. The challenge to the demand on account of extension has been made on the ground that claimant has been granted extension of time and the same has been accepted by him with following provision :

"Financial effect NIL"

It is further case of the respondents that having been granted extension of time and having received payment of escalation, the claimant has no ground to claim damages for prolongation of contract. Furthermore, in view of Condition 11 of IAFW 2249, no claim in respect of compensation or otherwise howsoever arising as a result of extension granted shall be admitted. In the award, para 43.4, it has been mentioned :

"43.4. The claimant quoted some Court Judgments to prove that if the delays were due to one of the parties which has caused the damages to the other then the other party can claim these damages. On this the Respondent quoted Bombay High Court case of Ajit Mehta v. Union of India (sic) to indicate that if the Contractor has given no claim certificate on time of extension he cannot

claim any damages on the same."

The Arbitrator has not decided as to the effect of submission mentioned in para 43.4 of the award.

64. When the wordings of an extension of time clause is very widely drawn in favour of the employer an award will not bind an arbitrator in the absence of clear words is not entitled to determine whether delay has been caused by his own acts or those of employer as held in *Roberts v. Bury Improvement Comrs.* (1870) LRS C.P. 310 and *C. F. Sattin v. Prole* (1901) Hud B.C 306.

65. If the contract contemplates that a new date be fixed at the time of the event giving rise to delay, in such cases, right to liquidated damage is lost. This is the view taken in *Miller v. LCC* (1934) 151 LT 425; *Anderson v. Tuapeka County Council* (1900) 19 NZER 1, wherein Stout C. J. considered the relevant laws.

66. In *Vipinbhai R. Parekh Vs. General Manager Western Railway, Bombay*, the effect of contractor giving no claim certificate was taken into consideration. It was held that contractor was estopped to claim damages and by mutual agreement of "no claim" parties have bound themselves. It is not the case that "no claim" certificate was given of coercion, mistake or misrepresentation without prejudice or under protest.

67. The Supreme Court in *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, in view of specific clauses in the contract, held that the specific price escalation clause in the agreement would bar consideration of claim made by contractor and awarding extra cost. In such an event delay in handing oversite would not entitle the contractor to claim extra costs.

68. D. Keating in *Building Contract*, 4th Edition, Chapter 9, Note 7, has observed that if an extension has been granted, it operates wholly or partly as a defence to a claim for liquidated damages. Relying on *Trollope and Colls v. Singer* 1913 H.B.C.4, it is further observed that when the contractor has a claim against the employer for latter's delay. An extension of time does not in the absence of express words release the claim. In the instant case, in view of express Clause 11 and no claim certificate having been given, the contractor is not entitled to claim the damages.

69. In *Himachal Pradesh Nagar Vikas Pradhikaran Vs. M/s. Aggarwal and Co.*, when the award has been made granting escalation charges, necessarily the increased rates of the cost of securing the material for performance of the contract are required to be compensated by paying the amount to the extent of escalated charges. The department was found responsible for the delay in execution of the works contract. Arbitrator awarded increase of 25% over and above tendered rates of the contractor for all works executed after the stipulated date of completion of work. The department had supplied material and did not charge increased rates. The contractor was held not entitled to 25% of escalated

cost in that behalf. In the present case, the department had already given escalation. Thus for delay, in view of "no claim" certificate, it was not open to the Arbitrator to award the amount of overhead expenditure.

70. No material has been placed before us with respect to change in contour plan and pile foundations. Contour plans have been filed before us so as to indicate that there was change in the contract plans and levels of various pile foundations were changed. Reason for the delay is not borne out. Even if there was some change, the Arbitrator has not found that delay has occasioned on that account. Moreover, the Arbitrator has himself held that the escalation of labour and material has been paid to the contractor, he is not entitled to overhead and establishment charges for prolongation of time. Thus no separate amount could be awarded in view of the condition of the agreement entered into between the parties. The amount has been awarded by the Arbitrator with respect to deviation of the contract while considering Claim Nos. 4, 7 and 36. It may further be seen that the Arbitrator has disallowed the Claim No. 6 on account of Jungle clearance four times done by the contractor. Again the question of clearance was considered and awarded the amount under Item no. 32. With respect to pumping out of water, Claim No. 8 was specifically laid and it was disallowed on the ground that the contractor was required to visit the site of work prior to tendering and the lumpsum was put after the visit. The District Judge, therefore, rightly rejected the claim under Item No. 32.

71. In the result, the appeal filed by the appellant Is allowed in part. The judgment passed by the learned District Judge with reference to Claim No. 31 (A) is set aside and the award in the sum of Rs. 3,71,241.50 p. passed by the Arbitrator is upheld and is made rule of the Court. Remaining part of the judgment passed by the District Judge is confirmed. However, considering the partial success of the appeal, parties are directed to bear their own costs as incurred in the present appeal.