

(1998) 04 DEL CK 0074

In the Delhi High Court

Case No : IA No. 62 of 1988 and S. No. 1392A/87

Bhagat Ram Sahni and Sons

APPELLANT

Vs

Delhi State Industrial Development Corpn. Ltd.

RESPONDENT

Date of Decision : 17-04-1998

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (1998) 45 DRJ 587

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : D.P. Sharma, for the Appellant; Ansuiya Salwan, for the Respondent

Judgement

J.B. Goel, J.—The work of levelling and dressing of Blocks A, C & E at Narela Industrial Complex was awarded in the petitioner after inviting the tenders on 25.2.1982 and an agreement No. DSHIDC/PE(N)/Accounts/81-82 dated 12.3.1982 was executed between the parties. The work was to be completed within six months but was actually completed on 30.3.1983. The petitioner executed the work specified in the agreement and also some extra item of work. Some payments were also made for the work agreed to be done but no payment has been made for the extra item of work. The respondent did not agree to pay for the extra item of work of filling of earth and compaction work in a ditch and also for work of excavation done in excess of agreed quantities; work done is alleged to be defective for which penalty has been imposed. Disputes arose between the parties about the quality and quantity of the work done and the amounts payable to the petitioner. The agreement between the parties in its Clause 25 contained arbitration clause. In pursuance of an order passed by this Court on an application of the Contractor u/s 20 of the Arbitration Act (for short the "Act"), the Managing Director of the respondent vide his letter dated 30.9.1985 appointed Shri C. Banerjee, formerly a Superintending Engineer, DDA, New Delhi (later on Chief Engineer) as an Arbitrator. The arbitrator entered upon the reference. Claims and counter claims by the parties were submitted before

him. Both the parties had filed documents comprising of correspondence between the parties and relevant contract documents but no oral evidence was adduced by either of them. During proceedings u/s 20 of the Act on the application of the petitioner, a Local Commissioner was appointed who had taken measurements of the work alleged to have been done by the petitioner in the presence of the parties and he gave his report. The claim of the petitioner comprised of the following :-

Claim No. 1

Refund of security deposit of Rs. 1.00 lakh.

Claim No. 2

Claim for Rs. 13,84,474/- in respect of work executed but not paid for.

Claim No. 3

Claim of Rs. 9,92,906.54 for the work of filling and compaction of earth in "a ditch as extra item of work.

Claim No. 4 :

Claim for payment of Rs. 3,84,595.80 on account of escalation in labour wages under Clause 10(c) of the agreement.

Claim No. 5 :

Damages by way of interest for illegal withholding of their dues. Claim No. 6 :

Pendente lite and future interest @ 24% per annum.

Claim No. 7:

Cost of the proceedings.

Respondent had made following counter- claims:-

Counter-claim No. 1: 1. Claim for Rs. 1,93,922.80, being penalty imposed under Clause 14 of the contract @ 10% of the estimated cost.

2. Claim for interest.

3. Claim for costs.

2. The Arbitrator gave his award dated 26th June, 1987 whereby claims No. 1 and 2 of the petitioner were fully allowed. Claim Nos. 3 and 4 were partly allowed to the extent of Rs. 9,16,966/- and Rs. 3,78,691.44. Claim No. 5 was disallowed as not pressed. On claim No. 6 interest was allowed @ 12% per annum for the amount awarded on account of the work done w.e.f. 10.8.1983 and from 1.10.1983 on the security amount of Rs. 1.00 lakhs till the date of actual payment or decree. Claim No. 7 was disallowed. The counter-claims of the respondent were disallowed.

3. On the application of the petitioners u/s 14 of the Act, the Award was . filed in the Court. On notice of the filing of the Award being given, only the respondent filed objections dated 2.1.1988, being is No. 62/88 raising various objections against the award. The objections mainly are that the arbitrator was biased; has misconducted himself and the proceedings; the award is contrary to the settled principles of law and also in violation of the principles of natural justice; the award is based on no evidence but on conjectures, imagination and on his personal knowledge, is contrary to the material on record; the arbitrator has not taken into consideration the relevant material and circumstances; the award is not reasonable; interest, has been wrongly awarded; the counter claims of the Objector have been wrongly disallowed. These are disputed by the petitioner. It is alleged that the objections raised are not tenable and that this Court is not sitting in appeal. The award is proper, justified and valid which calls for no interference. On the pleadings of the parties, the following issues were framed on July 13, 1988 :

1. Is the Award liable to be set aside for any of the objections?

2. Relief.

4. Parties led evidence by way of affidavits. Five affidavits of S/Sh. Shiv Kumar Gupta, S.S. Jain, R.K. Gupta, Gopal Sharma and Rajendra Mudgal, Secretary, Chief Engineer (Project Engineer), Executive Engineer, Junior Engineer were filed on behalf of the respondent/Objector. The petitioner filed his separate five affidavits in rebuttal of each of these five affidavits. These witnesses were cross-examined at great length.

5. Arguments on behalf of the parties were heard further arguments on behalf of the petitioner have also been heard. The contentions of the learned counsel for the petitioner are that the objections are misconceived, not bona fide and not tenable as this Court is not sitting as a trial court nor as an appellate court and cannot reappraise the evidence led before the arbitrator and that there is no error apparent on the face of the Award. He has relied on a number of decided cases; whereas learned counsel for respondent had contended that the award is as a result of bias, and the arbitrator has misconducted himself and the proceedings; the Award is beyond the scope of the agreement between the parties and thus beyond the scope and jurisdiction of arbitrator and is bad and invalid.

6. The first question is whether oral evidence led by the parties and lengthy cross-examination done on their witnesses on the merit of the controversy is at all relevant and permissible for the purpose of the present proceedings.

7. Ambit and scope of power of the Court in interfering in the Award of an arbitrator u/s 30 of the Act has been considered in a number of judicial pronouncements It was held in Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, as under :-

"An award made by an arbitrator is conclusive as a Judgment between the parties and the Court is entitled to set aside an award if the arbitrator has misconducted himself in the proceedings or when the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid u/s 30 of the Arbitration Act. An award may be set aside by the Court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion."

8. The legal position about power of the Court has also been recently considered by the Supreme Court in *State of Rajasthan Vs. Puri Construction Co. Ltd. and Another*, where it has been reiterated as under:-

The arbitrator is the final arbiter for the disputes between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court, cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

9. In *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, , it has been held :

"that appraisal of evidence by the arbitrator is ordinarily never a matter which the court questions and considers, it may be possible that on the same evidence the court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award. The word reasonable has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably knows or ought to know. Therefore, where reasons germane and relevant for the arbitrator to hold in the manner he did, have been indicated, it cannot be said that the reasons are unreasonable."

10. In *Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd.*, , it was held that the

Court does not sit in appeal over the award and review the reasons. The Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous.

11. Recently, in *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, , also the same principles have been summarised as follows:-

"It is well known that the Court while considering the question whether the award should be set aside, does not examine the question as an appellate court. While exercising the said power, the Court cannot re-appreciate all the materials on the 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."

12. In view of this legal position, the Court while considering the objections against Award is neither acting as a trial court nor as an appellate court. When the Court cannot even reappraise the evidence, the parties cannot supplement the evidence in court to explain or to make up the lacunae in their evidence, the affidavit evidence as also the lengthy cross-examination of the witnesses on merit of the controversy in this Court is wholly irrelevant, inadmissible in evidence and cannot be considered by this Court.

13. The works agreed to be executed by the petitioner as given in the schedule annexed with the agreement were as under :

1. Earth work in excavation over areas (exceeding 30 cm in depth 1.5 m in width as well as 10 m on plan) including disposed of excavated earth lead up to 50 m and lift 1.5m disposed earth to be leveled and neatly dressed. Soft/loose soil. (2,90,402 Cu.m. @ Rs. 4.20 P.)

2. Carriage of earth by Mechanical/Manual transport 1/c loading, unloading at site for lead up to 1 K.M. (1,79,428 metres @ Rs. 8.90)

3. Extra for additional load of 50m or part thereof beyond first 50m up to such additional lead over item No. 1 (1,10,974 @ Re. 0.10).

14. It appears the petitioner has executed extra work not so mentioned in this schedule. Extra item is filling and compaction of earth in a ditch 400 mtrs. x 200 mtrs x 4 meters for which claim No. 3 has been preferred which was disputed by the respondent but has been upheld and awarded by the arbitrator. For this claim for extra item, the petitioner relies upon Clause 12 of the agreement between the parties which will be noticed hereafter.

15. There is also dispute regarding the excess excavation of (sic) and about proper levelling and dressing the area involved and transportation/ disposal of the extra earth obtained due to excavation. One of the dispute is whether the levels to be achieved were specified in the agreement documents before

commencement of work. The case of the respondent is that initial levels existing and also the levels to be achieved on excavation were specified in the relevant agreement documents and it was on the basis of these prescribed levels that the earth work involved was reiterated and specified in the schedule; whereas the case of the petitioner is that initial levels were prescribed but the levels to be achieved were not prescribed at the time of contract and even thereafter in spite of several letters written by the petitioner to the respondent and the objection was raised by the respondent to this effect only after the work has been completed by the petitioner.

16. On an application of the petitioner during proceedings u/s 20 of the Act, a Local Commissioner was appointed to record the final levels/measurements in respect of the work carried out by the petitioner who visited the spot, took the measurements in the presence of parties which were duly signed by both of them and gave his report in court which was sent to the arbitrator.

17. Before going into the merits, the objection of the respondent that the arbitrator was biased against the respondent and misconducted the proceedings is being taken up. The objection is that the arbitrator has been guiding the contractor to raise and to prove the claimed a particular manner during the proceedings for which protest was made in writing on 15.12.1986. This letter dated 15.12.1986 is available on the arbitration file whereby the grievance to this effect has been made.

18. A reply was filed on behalf of the petitioner disputing the allegations made in it. It appears that during hearings the learned arbitrator had given example of some precedents that could be relevant. This in itself would not show the bias of the arbitrator. It is not uncommon that during proceedings or during oral arguments, the court tries to elicit information from parties by putting questions having bearing to the controversy either to get clarification or to understand the same to arrive at a proper conclusion. Unless any particular instance of bias is apparent from the award or is otherwise demonstrated which may have influenced the award, vague plea of bias would not be a ground of interference by the Court. If the respondent was feeling aggrieved against the arbitrator, they should not have proceeded with the proceedings and taken appropriate steps for the removal of the arbitrator at the earliest opportunity before the competent Court. Instead of doing so, the respondent has not only participated in the proceedings but had also agreed for extension of time thereafter. In spite of such apprehension, attending and taking part in the proceedings with full knowledge of the facts amounts to acquiescence and such a party is precluded from objecting to the validity of the award later on. It is settled law that an applicant who stands by a partial arbitrator knowing him to be partial all the time and takes his chance of the award turning out to be favourable to him in spite of such partiality cannot be permitted to put forward such grounds if the award ultimately turns out against him.

19. In State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, , the legal

position on the challenge of award on the ground of bias or misconduct has been considered and it was held that where a party having knowledge of the disqualification of the arbitrator to act maybe for any reason like bias, impartiality or other misconduct on his part having participated in arbitration proceedings, having agreed to the extension of time for making the award and invited adjudication on the reference cannot be allowed to raise objection against the validity of the award on the score of disqualification of the arbitrator. The same principle had been laid down by Calcutta High Court in National Fire and General Insurance Co. Ltd. Vs. Union of India (UOI) and Another, and by a Division Bench of the Bombay High Court in ONGC v. Offshore Enterprises Inc. 1995 (1) Arb LR 432. The Supreme Court in Ranjit Thakur Vs. Union of India (UOI) and Others, has considered the test of bias of the Judge where it was held that there must be reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. It is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. This was followed in International Airports Authority of India Vs. K.D. Bali and Anr, . In Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, also it was held that acquiescence of a party to arbitration proceedings for a long lime debars him from challenging the award on the ground of a known disability. The respondent having acquiescence can not now raise this plea of bias or misconduct. This objection has no merit.

20. It is also alleged that the learned arbitrator has violated principles of natural justice. This objection is not substantiated during arguments and nothing was pointed out from record to support this allegation. The records of the arbitrator have been considered by me and I do not find that at any stage the respondent was not given proper and sufficient opportunity to put forward their case. Mere allegations without basis or supporting material are devoid of any merit. This objection also has no merit.

21. In was then contended that the arbitrator had not inspected the site which should have been done. Inspection of a place or thing is not necessary for the Court or any judicial tribunal who may have to determine the controversy. It is left to their discretion to decide as to whether or not it was necessary for him to inspect a particular place or particular thing in order to give his decision on the disputes between the parties. An Arbitrator would not be guilty of misconduct merely because he does not accept the request of a party to inspect a particular site or thing. There appears to be nothing on record to show even that a request was made by the respondent to the arbitrator to inspect the site. Moreover, the site inspection by the arbitrator would not have advanced the cause of either of the parties as the works were completed in the year 1982-83 long before the arbitrator was appointed. His inspection would have been of no use. Inspection

by Court or arbitrator is not done to collect evidence for the parties but for the purpose of appreciating the evidence that is led by them. The dispute was about the extent of work executed by the petitioner. The Local Commissioner has visited the site and gave his report about the extent of the work of excavation that may have been done by the petitioner. The dispute about the levels to be achieved whether prescribed or not could be determined on the basis of evidence produced by the parties. The question whether the Contractor is entitled wholly or partially for the work done is to be determined on the basis of the terms and conditions of the agreement and relevant material brought on the record. This objection also has no merit.

22. Coming to the main controversy involved, Issue No. 2, the petitioner against this head had claimed Rs. 13,59,352/- as under:-

1. Cutting of earth (CA item No. 1) : 355178cu.m. @ Rs. 4.20 = 1491747.60

2. Conveyance of earth beyond 100 metres (CA Item No. 2) : 342366.30 cu.m.@ Rs. 8.90 = 3047060.00

3. Conveyance of earth from 50m. to 100 m. (CA Item no. 3) : 1438.30 cu.m. @ Rs. 0.10 = 14183

Total: 4538951.43

Less already paid : 3179594.00

Balance due : Rs. 1359352.43

23. This claim during arbitration proceedings appears, to have been revised. In Items No. 2 & 3 (Carriage of earth), quantity of earth was revised raising the quantity to 345178 cu.m. in Item No. 2 and to 2415 cu.m. in Item No. 3. The claim was raised to Rs. 13,84,474/-.

24. This claim was denied inter alias on the ground that the claim is arbitrary and unsubstantiated and lacking in details of the quantity. It was also pleaded that the work . executed was not according to specifications and was in excess of the estimated quantity.

25. The respondent had alleged that the claimant did not join the recording of final levels/work when called upon and avoided joint recording of levels with a view to claim more amount; the work was defective and the defects have not been removed by the petitioner. They also disputed liability to pay for the quantities of work assessed by the Local Commissioner as according to them the same was not based on the prescribed formation levels. Correctness of the report of the Local Commissioner was also otherwise disputed. The extent of work done, agreed to be done, the amount claimed and the basis of the claim were thus disputed.

26. Both the parties had produced before the arbitrator copies of some of the correspondence exchanged between them and the respondent had also produced

the relevant record of the agreement including the site plans of the work to be done.

27. Dispute raised before the arbitrator was whether formation level to be achieved was specified or not when the work was started. According to the respondent the same was duly specified in the agreement documents on 5th, 7th and 9th March, 1982 and the extent of levels executed by the contractor are far in excess of the prescribed levels and this is defective work which required rectification. This was disputed by the claimant. In support of its case, the respondent had relied on certain letters (Exs. R-18,19, 20, 26, 27, 6, 9 & 12) and also the entries made in level books Exs.R-13, 14 & 15 (pages 68, 65 & 55) (copies of which are Exs. R-29, R-30 and R-31) before the arbitrator. The claimant had disputed the correctness of these entries and dubbed them as fabricated, made in different ink than other contemporary entries under the signatures of the A.E. & J.E. in the level books. This aspect was discussed and considered in the proceedings held before the arbitrator on 10.7.1986, 17.9.86, 14.12.86 & 7.5.1987.

28. The learned arbitrator on the basis of the respective contentions, the material before him and the attending circumstances by detailed reasons has held that formation levels were not initially prescribed nor projected or intimated by the respondent to the claimant nor during the execution of the work in spite of repeatedly asking. The quantities of cutting and filling in the area as found by the Local Commissioner were accepted as correct and he awarded as follows :-

1. Cutting of earth (CA item No. 1): 355178 cu.m. @ Rs. 4.20 = 1491747.60
2. Conveyance of earth beyond 100 metres (CA Item No. 2) 345178 cu.m.@ Rs. 8.90 = 3072084.20
3. Conveyance of earth from 50m. to 100 m.(CA Item no.3) 2415.00 cu.m. @ Rs. 0.10 = 241.50

Total : 4564073.00

Less already paid : 3179599.00

Balance due : Rs. 1384474.00

29. A sum of Rs. 2.00 lakhs paid earlier has been deducted and the claim for Rs. 11,84,474/- has been awarded.

30. The learned arbitrator has also considered the claim of the respondent for rebate of 1% under Clause 8 of the general conditions of contract but disallowed the same for the reasons recorded by him that under the agreement such rebate was permissible if the running bills were paid fortnightly and the final bill was paid within one month of completion of the work which was not done.

31. In the objections as well as during the arguments it was contended on behalf of the respondent that objections were filed against the report of Local

Commissioner which Were not decided by the Court or by the arbitrator. The Local Commissioner was appointed to record the extent of work that may have been executed by the petitioner. He made spot inspection, took measurements and recorded the same in the presence of both the parties which are signed by them. It was not disputed on behalf of the respondent that the formation levels as found by the Local Commissioner existed at site. Correctness of the total measurements of the work as recorded by the Local Commissioner on its basis, as noticed by the arbitrator, was not disputed. The only dispute was whether the formation levels as achieved by the contractor were prescribed or were executed in excess by the petitioner of their own. For this, the learned arbitrator has arrived at the conclusion after hearing both the parties and taking into consideration the documentary evidence produced. The question of not deciding any objection if raised against the report of the Local Commissioner is not understandable. The award cannot be faulted on this ground. It may be mentioned that an arbitrator is a judge of choice of the parties. He is not bound by the rules of evidence prescribed under the Evidence Act, 1872. He could decide the dispute entrusted to him as best as he thinks fit and the award given by him will be binding upon the parties. The only limitation on his powers are that he should not violate the principles of natural justice, give the parties a fair hearing and reasonable time and opportunity to substantiate their respective claims which as noticed earlier was done by him. The arbitrator was a skilled person on the subject of dispute involved.

32. The Supreme Court in *Municipal Corporation of Delhi v. Jagan nath Ashok Kumar and Anr.* (supra) has referred with approval the following observations made in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.* (1948) 2 AII ER 186 in respect of the award made by an arbitrator who is an expert person on the subject matter of the dispute:-

".... The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrator. The modern tendency is in my opinion more especially in commercial arbitrations to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award."

33. As held earlier, it is not shown by the respondent that they were not heard or were not given opportunity to adduce evidence. In the circumstances, it also cannot be said that the material adduced by them was not considered by the arbitrator.

34. The reasons given by the arbitrator for arriving at the conclusions he arrived at against this claim are based on material placed before him and are germane and relevant to the dispute. To that extent no error is apparent on the face of the award nor the arbitrator has exceeded his jurisdiction in this respect. No fault can thus be found with the findings of the arbitrator on claim No. 2. The

objections of the respondent against this finding have no merit and the same are rejected and the award to this extent is upheld.

Claim No. 3:

35. The petitioner claimed Rs. 10,726,37.50 on account of extra item of work, i.e., filling 3,55,178 Cu.m. of earth @ Rs. 3.02 on the basis of DSR. The respondent disputed this claim on the grounds of admissibility, justification, quantity and as unsubstantiated. The learned Arbitrator after considering the relevant correspondence between the parties produced before him came to the conclusion that though no written orders were given to carry out this item but there was no denial of the claim at appropriate time and has partly allowed the claim to the extent of Rs. 9,16,966 on account of filling and compaction of work in a ditch 400 M x 200 M x 4 M.

36. Objection taken by the respondent against the Award of this amount is that this item of work is an extra item and was beyond the purview of the contract and thus beyond arbitration and reference, as extra work could be executed under the instructions in writing of and signed by the Engineer-in-charge of the respondent as specifically agreed in Clause 12 of the agreement. It is alleged that such instructions were not given and even that this work was not at all executed by the petitioner. Thus, it is alleged that the learned Arbitrator has misconducted himself in awarding this amount against the specific terms of the agreement which was not the subject matter to be arbitrated by him.

37. There is thus a dispute between the parties whether this item of claim was arbitrable. Claimant has based this claim on Clause 12 of the Agreement. Relevant portion of Clause 12 reads as under :-

"12. The Engineer-in-Charge shall have power to make any alterations in, omissions from, additions to or substitutions for the original specifications, drawings, designs and instructions that may appear to him, be necessary during the progress of the work and the Contractor shall carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge, and such alterations, omissions, additions or substitutions shall not invalidate the contract and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to the main work.

and rates for such extra items of work has been provided in the same clause.

38. This is not disputed that this was an extra item of work not provided under the contract. It is also not disputed on behalf of the petitioner that written instructions under the signatures of the Engineer in-charge were not given for this work. This fact is also noticed by the arbitrator.

39. Clause 25 of the Contract pertaining to Arbitration Agreement reads as under :-

"CLAUSE 25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawing and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim, right matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawing, specifications, estimates instructions orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment, thereof shall be referred to the sole arbitration of the person appointed by the Engineer Adviser of DSIDC in Charge of the work at the time of dispute"

40. Learned counsel for the respondent has contended that this claim is beyond and contrary to the specific agreement between the parties and thus was not within the scope of the arbitration. The Arbitrator has thereby misconducted himself, in proceeding beyond his jurisdiction and awarding this claim. Whereas, learned counsel for the petitioner has contended that several letters were written by the petitioner during the execution of this work that this work was being done, still no objection was raised by the respondent and also that the learned Arbitrator after taking into consideration the material available before him has allowed the claim. It was within his jurisdiction to construe the agreement and to award this amount. He also contends that this work is very much connected with the work assigned.

41. It is well settled that if any adjudicating authority has no jurisdiction to entertain and decide on a subject matter it cannot assume it even if the same were to be acquiesced. An arbitrator cannot travel beyond the reference and a reference cannot be made of what is not agreed and if he does so, the Award will be without jurisdiction. Associated Engineering Co. Vs. Government of Andhra Pradesh and another,). If the question of jurisdiction of the Arbitrator is raised the only way to test the correctness is of looking into the agreement between the parties as reference can be one which is contemplated by the agreement. (See : Managing Director J.K. Handicrafts, Jammu v. Good luck Carpets 1994 (4) SCC 740. The scope of power of the Arbitrator in this respect has been considered by the Supreme Court in the case of Associated Engineering Company (supra), where it has been held as under:-

"The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the

Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. As stated by Lord Parmoor. (AC p.276)

"It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties."

42. Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court cannot look at the affidavits and pleadings of the parties; the court can look at the agreement itself. *Bunge & Co. V. Dewar and Webb.*"

43. Parties cannot be allowed to depart from what they had agreed and an award rendered by going beyond the agreement is without jurisdiction. Ignoring the express terms of the agreement would amount to misconduct. *Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, and Tarapore and Co. Vs. State of M.P.,*

44. The Arbitration Clause noticed above contemplates only such claims, rights, matters or things or disputes which arise out of or relating to contract, instructions or orders as mentioned in the said contract, Clause 12 of the Agreement specifically provides that any extra or additional work could be executed by the Contractor only if instructions in writing signed by the Engineer in-charge were given. It is a mandatory requirement to eliminate unauthorised claims on alleged oral instructions and thereby expose the department to illegal claims. It was the admitted case of the plaintiff that such instructions in writing

and signed by competent authority had not been issued. The claim thus does not arise under the agreement and is not arbitrable. It is beyond the scope of arbitration.

45. Learned counsel for the petitioner has contended that notwithstanding that no such written instructions were issued the work relates to and was connected with the work agreed to be executed and the respondent is liable to make payment for the same. He has also contended that the learned Arbitrator was competent to construe the terms of the Agreement and after so construing he has held that the petitioner is entitled for this claim. The case of Ram Nath International Construction Pvt. Ltd. v. State of U.P. AIR 1998 SC 367 relied on behalf of petitioner has no application. In that case Clause 32 of the tender which related to "extra items" of work stated , "Extra items of work shall not vitiate the contract. The contractor shall be bound to execute extra items of work, as directed by the Engineer Incharge. The rates of extra items are to be mutually agreed". And arbitration Clause 51 provided that "all the disputes in respect of which the decision has not been final and conclusive shall be referred to arbitration to a sole arbitrator appointed". Disputes had arisen between the parties in connection with the execution of work specified in the tender as also in respect of the payment for extra items of work. In the reference made to the Arbitrator according to Clause 51 of the agreement inter alias the question of rate for extra items of work were referred to. No dispute was raised before the Arbitrator nor could be raised that this claim was not arbitrable.

46. The Arbitrator by a detailed speaking Award allowed the claim for extra items of earth work. The District Judge had granted decree in terms of the Award. In appeal the High Court disallowed its on the ground that the arbitrator travelled beyond the scope of his reference in granting this claim. In further appeal, before the Supreme court on behalf of the respondent it was contended that, excavating the canal was not extra work and the rate for this work was not specified anywhere. Whereas on behalf of the appellant it was contended that this was extra work for which the payment had not been specified and had to be agreed upon and this dispute was specifically referred for arbitration and was in issue before the Arbitrator. It was held by the Supreme Court that the disputes were expressly referred to arbitration; both parties argued this question before the Arbitrator and the Arbitrator gave speaking Award giving detailed reason why he considered this work was extra item for which payment was required to be made to the contractor. The Court observed that the correctness or otherwise of the conclusion reached by the Arbitrator could not be examined as it is a matter of interpretation of the contract and the dispute was referred by the parties to the Arbitration.

47. The Clause providing for extra items of work in the case in hand is materially different where the extra items of work could be executed only under written instructions duly signed by the Engineer in charge and admittedly no such signed instructions were issued. This claim does not arise under Clause 12 and is thus

beyond the agreement and consequently beyond arbitration. In view Of specific provision the question of constructing the agreement differently by the arbitrator does not arise. The learned Arbitrator, thus by awarding claim not provided under the contract has acted beyond scope of arbitration. The Award to this extent is without jurisdiction. If admissible otherwise, petitioner may seek remedy according to the law of the land before a competent court. This part of the Award is thus not maintainable and is set aside.

Claim No. 4 :

48. This is a claim for payment of Rs. 4,01,169.44 (and not Rs. 3,84,545.80 as noticed by the learned Arbitrator) on account of escalation in labour wages enhanced by the Government under Minimum Wages Act with effect from 1.3.1982 and was claimed under Clause 10C of the Conditions of the Contract. Against this the Arbitrator awarded a sum of Rs. 3,78,691.44 in respect of cutting, cartage and filling work. The claim was disputed as exaggerated and not admissible as requirements of Clause 10-C had not been complied with inasmuch as the claimant had failed to produce the relevant records showing the payments having been made to the labour according to the revised wages.

49. The rise in labour wages w.e.f. 1.3.1982 by Govt. notification and the same being admissible otherwise was not disputed. The learned Arbitrator has noticed that there was entry in MB No. 75 and 76 for payments done towards this claim. The learned Arbitrator has given further reasons that the J.E. and the A.E. who were most closely associated with the work must have satisfied themselves with the record before entering the details in the M.B., the Senior Engineers also did not ask for further check or submission of record regarding payment to the labour during the execution of the work till entering into the arbitration and further that there was no dispute raised by the respondent that the wages being paid to the labour were less than notified by the Government Notification and the present day enlightened labour would not have accepted less than admissible wages. He also accepted the plea of petitioner that the records were required to be preserved for 3 years which period was also over and came to the conclusion that the labour must have been paid enhanced wages as per the Govt. Notification. And Awarded Rs. 3,78,691.44 under Clause 10(c) for cutting (355178 Cu.m.) @ Rs. O. 49 amounting to Rs. 1,74,037.22, Cartage of 345178 Cu.m. @ 0.25 P. .amounting to Rs. 86,294.50 and filling @ 0.36 P. for 328777 Cu.m. amounting to Rs. 1,18,359.72. Rates awarded under three heads had not been disputed before the arbitrator. However, in my findings on Claim No. 3 since award against claim No. 3 in respect of work for filling earth in the ditch has been disallowed, the Award relating to filling amounting to Rs. 1,18,359.72 is also not permissible and it is without jurisdiction. The claim is admissible to the extent allowed in claim No. 2 only. As such the Award to the extent of Rs. 2,60,331.72 (Rs. 1,74,037.22 on account of cutting + Rs. 86,294.50 on account of cartage) only is upheld. These two parts of the claim are separable. Thus the Award is partly upheld to the extent of Rs. 2,60,33,72 only and partly set aside for the

remaining amount.

COUNTER CLAIM NO. 1 :

50. The respondent had made a counter claim for Rs. 1,93,922.80 under Clause 14 of the Agreement on account of work being defective and not according to specification. It was alleged that the work was not conforming to the terms of the Contract and specifications and defects were not removed inspire of various reminders and the work was not completed as agreed. And a penalty was levied under Clause 14 vide letter dated 23.1.1986 (Ex. R.16). The petitioner has disputed this claim. The learned Arbitrator has disallowed this counter-claim for the reasons : that this claim arose out of the formation levels adopted and that as found by him the formation levels were not disclosed to the claimant even during execution of the work, as such the alleged defects and deficiencies on the basis of formation levels adopted by the claimant could not create a liability on the claimant and it did not attract Clause 14 of the agreement. This claim was rejected. The award of the arbitrator on claim No. 2 is being upheld. The learned Arbitrator has given reasons. This Court cannot go into the reasonableness of the reasons. It cannot be said that the reasons given are not germane and relevant. There is no error requiring interference. The Award on Counter Claim No. 1 is, thus, upheld.

CLAIM NO. 1 :

51. This claim pertains to refund of security deposit of Rs. 1 lakh. The work had been executed and the defect period was over by 1.10.1983. Counter claim of the respondent on account of defective work has been disallowed. The petitioner was entitled to refund of the security deposit after the expiry of defect period. The learned Arbitrator has held that this claim is justified and the petitioner is entitled to refund of the security deposit. This part of the Award is reasonable and justified and the same is also upheld.

CLAIM NO. 5

52. This claim has been disallowed as not pressed by the claimant.

CLAIM NO. 6 & COUNTER CLAIM NO. 2

53. This dispute pertains to interest. The claim of the respondent has been disallowed and as such the question of awarding interest to the respondent does not arise. The learned Arbitrator has awarded interest to the petitioner claimant @ 12% p.a. with effect from 10.8.83 on the balance amounts awarded for the work done in claims No. 2 and 4 and with effect from 1.10.83 on the security amount. The award against claim No. 2 and 4 is being upheld as under :--

(1) Claim No. 2 Rs. 13,84,474 - Rs. 2,00,000 (paid as deducted by the learned Arbitrator) = Rs. 11,84,474

(2) Claim No. 4 = Rs. 2,60,331

Total = Rs. 14,44,805

54. The Arbitrator is competent to Award interest for pre-reference period, pendente lite and post Award period as held by the Supreme Court in a number of cases. (See : Ram Nath International Construction Co. Pvt. Ltd. v. State of U.P. AIR 1998 SC 367, Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, Sudhir Brothers Vs. Delhi Development Authority and Another, , State of Orissa Vs. B.N. Agarwalla, etc., B.V. Radha Krishna Vs. Sponge Iron India Ltd., , Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, etc.)

55. The interest awarded by the Arbitrator from 10.8.83 to the extent that this interest would be payable on Rs. 14,44,805.72 (and not on Rs. 24,80,131/- awarded by the Arbitrator) and on the security deposit of Rs. 1 lakh @ 12% per annum from 1.10.93 is upheld.

IA No. 62/88

56. This application is partly allowed in terms of my, findings above. The award passed by the learned Arbitrator is partly upheld and partly set aside. Suit No. 1392A/87

57. The Award dated 26.6.19087 is upheld to the extent of Rs. 14,44,805.72 on account of balance payment due for the work done plus Rs. 1 lakh on account of refund of security deposit, i.e. Total amount of Rs. 15,44,805.72 with interest @ 12% per annum on the amount of Rs. 14,44,805.72 w.e.f. 10.8.83 decree and w.e.f. 1.10.83 on the amount of Rs. 1,00,000/- both, till the date of decree. Future interest @ 12 % p.a. on the amount of Rs. 15,44,805.72 with effect from the date of decree till realisation is also awarded. Award is, accordingly, partly made Rule of the Court to this extent.

58. In the circumstances, the parties are left to bear their own costs.

59. Suit and the I.A. are disposed of accordingly.