

(2009) 03 MAD CK 0138
In the Madras High Court
Case No : O.P. No. 650 of 2004

Central Warehousing Corporation

APPELLANT

Vs

National Lorry Transport and Shri Rajkumar, Sole Arbitrator

RESPONDENT

Date of Decision : 16-03-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 30, 31(7), 34, 34(2)
Contract Act, 1872 — Section 73

Citation : (2009) 03 MAD CK 0138

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : V. Lakshmi Narayanan and A.J. Abdul Razak, for the Appellant; P. Jagadeesan, for R1, for the Respondent

Judgement

S. Rajeswaran, J.—The petitioner is challenging the award dated 23.05.2004 passed by the second respondent, u/s 34(2)(a) (iv) and (v) of the Arbitration and Conciliation Act 1996.

2. The petition averments are as under:

The first respondent was awarded by the petitioner a regular contract for loading/unloading, handling and transportation of food grains/fertilizers at Central Warehousing Corporation godown at Madurai Unit No. I & II, for a period of two years with effect from 24.11.1993 to 23.11.1995. An agreement was entered into between the parties on 23.11.1993, according to which, the contract is for a period of two years with effect from 24.11.1993 which is extendable for a period of six months at the discretion of the petitioner.

3. According to the petitioner, the first respondent stopped the work abruptly on and from 23.01.1995 and thereby committed breach of contract. The abrupt stoppage of work by the first respondent resulted in heavy loss to the petitioner apart from losing valuable goodwill built over the years. As the work was abandoned by the first respondent, the H & T operations had to be carried out for

the unexpired contract period by appointing another contractor at the risk and cost of the first respondent. Clause XIX of the contract provides for referring the disputes to the sole Arbitration of any person appointed by the Managing Director, Central Warehousing Corporation, New Delhi. Due to the sudden stoppage of work by the first respondent on 23.01.1995, disputes arose between the parties and the Managing Directors of the Corporation on 6.12.1996 appointed one Thiru S.K. Bhatnagar, I.A.S. (Retd) as the sole Arbitrator to adjudicate upon and to give an award.

4. The said Arbitrator held eight hearings and completed the arbitration proceedings on 30.05.1999. Unfortunately, he passed away before the award could be passed and thereafter, the Managing Director appointed the second respondent herein on 28.08.2001, as the sole Arbitrator to continue the proceedings.

5. The second respondent instead of proceeding with the work of arbitration at the stage where it was left by his predecessor, started proceeding afresh and thereby, new claim statement and counter statement were sought to be filed. By the award dated 23.05.2004, the second respondent disallowed the major portions of the claim of the petitioner and allowed major portions of the counter claims of the first respondent. Aggrieved by the award dated 23.05.2004, the petitioner filed the above Original petition u/s 34 of the Arbitration and Conciliation Act, 1996.

6. Heard the learned Counsel for the petitioner and the learned Counsel for the first respondent. I have also gone through the entire materials available on record including the impugned award dated 23.05.2004.

7. The learned Counsel for the petitioner submits that according to Clause XIX of the agreement dated 23.11.1993, in the event of the Arbitrator to whom the matter was originally referred to being transferred or vacated his office or being unable to act for any reason, the Central Warehousing Corporation, at the time of such transfer, vacation of office or inability to act, can appoint another person as Arbitrator. Such a person shall be entitled to proceed with the reference from the position at which it was left by his predecessor. The learned Counsel contended that instead of proceeding from where the previous arbitrator had left, the second respondent conducted a de-nova proceeding which is not in accordance with the arbitral agreement and therefore, the award is liable to be set aside. The learned Counsel further submitted that the award passed by the arbitrator was not in consonance with the specific provisions contained in the contract and therefore the award is vitiated. It is his further contention that the findings of the Arbitrator that the demurrage charges (DC) wharfage charges (WC) are to be shared between the petitioner and the first respondent in the ratio of 90:10, is perverse and therefore, the award is vitiated and is liable to be set aside. The learned Counsel further urged that some of the relevant documents were omitted to be considered and some of the findings were based on no evidence. He further submitted that the arbitrator is also guilty of awarding interest on the amounts

awarded as there was no provision in the contract to ward such interest. In support of his submissions, the learned Counsel for the petitioner relied on the following decisions:

1. Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another,
2. 2004 (13) SCC 44 (Travancore Devaswom Board v. Thanath International)
3. Union of India Vs. United Timber Works of Jamna Nagar,
4. 2000 (4) Raj 206 (DEL) (Delhi Development Authority v. Hargobind Jaggi)
5. Food Corporation of India Vs. Surendra, Devendra and Mahendra Transport Co.,
6. Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation,
7. AIR 1987 Delhi 148 (Bombay Ammonia Pvt. Ltd. v. Union of India)
8. Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor,
9. 2006 EWHC 727 (TCC) (Kershaw Mechanical Services Ltd. v. Kendrick Construction Ltd.)
10. Shyama Charan Agarwala and Sons Vs. Union of India (UOI),
11. Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/ Works, Palghat Division, Southern Railway, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway and Mr. M. Jayachandran [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway,
12. Food Corporation of India Vs. Sreekanth Transport,
13. Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another,
14. Tamilnadu Civil Supplies Corp. Ltd. Vs. Mr. R. Sampath, Handling and Transport Contractor and Mr. V. Chandran DRO (Rtd.) Arbitrator

8. Per contra, the learned Counsel for the first respondent submitted that having participated in De-nova proceeding initiated by the second respondent without any demur and having not objected to the jurisdiction of the tribunal at the right time, it is not possible for the petitioner to submit that the de-nova enquiry conducted by the second respondent arbitrator is bad. He further contends that the award is a reasoned one based on the evidence and no grounds have been made out by the petitioner as available u/s 34 of the Arbitration and Conciliation Act 1996. He further submits that the arbitrator has correctly decided the claims and counter claims on the basis of the contract entered into between the parties and therefore, it is not open to the petitioner to assail the award as if this court

was sitting in its appellate jurisdiction. In support of his submissions, the learned Counsel for the first respondent relied on the following judgments:

1. 2006 (1) RAJ 258 (DEL) (Union of India v. Pradeep Vinod Construction Co.)
2. 2006 (1) RAJ 556 (DEL) (Lloyd Insulations (India) Pvt. Ltd. v. Cement Corporation of India Ltd.)
3. 2006 (1) RAJ 699 (DEL) (Hindustan Construction Corporation Ltd. v. Delhi Development Authority)
4. Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.,
5. Inder Sain Mittal Vs. Housing Board, Haryana and Others,
6. 2004 (4) RAJ 1 (DEL) (Sharma Associates and Contractors Pvt. Ltd. v. Progressive Constructions Ltd.)
7. 2004 (3) RAJ 99 (CAL) (Union of India v. Pam Development Pvt. Ltd.)
8. 2004 (1) RAJ 135 (BOM) (Union of India v. Chawla Interbild Construction Co. Private Limited)
9. 2004 (4) RAJ 299(DEL) (Bharat Heavy Electricals Ltd. v. Globe Hi Fabs Ltd.
10. 2004 (4) RAJ 365 (BOM) (Union of India v. Arctic (India)
11. 2004 (1) RAJ 646 (KAR) (Karnataka State Board Transport Corporation and Anr. v. M. Keshava Raju)
12. 2005 (4) RAJ 378 (DEL) (Union of India, Thiru Deputy Chief Engineer (TS), Northern Railway, Baroda House v. Suchita Steels (India) Thru its partner)
13. 2005 (4) RAJ 24 (CAL) (Union of India v. Pam Developments Pvt. Ltd.)
14. Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another,
15. AIR 2007 NOC 1158 (Food Corporation of India and Ors. v. Niyaz Mohammed and Ors.)
16. Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another,
17. State of Rajasthan Vs. Nav Bharat Construction Co.,
18. B.V. Radha Krishna Vs. Sponge Iron India Ltd.,
19. State of Orissa Vs. B.N. Agarwalla, etc.,

9. I have considered the rival submissions carefully with regard to facts and citations.

10. Though this Original petition could be decided by this court without the help of any citations, I am referring to the decisions cited by both the learned Counsel, appearing for both the parties, since they have taken pains to produce a pleathora of judgments in support of their arguments.

1. In Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, , the Hon''ble Supreme Court held that the award of damages ignoring the terms of the contract amounted to legal misconduct on the part of the arbitrator.

2. In 2004 (13) SCC 44 (cited supra), the Hon''ble Supreme Court held as under:

12. The law on the subject is well settled. In the case of Alopi Parshad & Sons Ltd. v. Union of India 1 this Court has held that the Contract Act, 1872 does not enable a party to a contract to ignore the express covenants thereof. It is held that the Contract Act does not permit a party to claim payment of consideration for performance of contract at rates different from the stipulated rates, on some vague plea of equity. It is held that in the performance of a contract, one often faces, in the course of carrying it out, a turn of events which are not anticipated e.g. an abnormal rise or fall in prices, sudden depreciation of currency, an unexpected obstacle to execution or the like. It is held that these do not affect the bargain that has been made. It is held that there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an un contemplated turn of events, the performance of the contract has become onerous. It is held that compensation quantum meruit is awarded when the price is not fixed by the contract. It is held that for work done or services rendered pursuant to the terms of contract, compensation quantum meruit cannot be awarded.

3. In Union of India Vs. United Timber Works of Jamna Nagar, , it was held that an award allowing compensation on grounds of equity for loss of profit in the absence of proof that any damages had been sustained, is liable to be set aside u/s 30 of the Arbitration and Conciliation Act 1940 on the ground of patent error of law.

4. In 2004 (4) RAJ 206 (DEL) (cited supra), the Delhi High Court after finding that as per the terms of the contract that contractor is responsible for all demurrage charges and wharfage charges owing to late removal of consignment, held that the award given in favour of the contractor giving demurrage and wharfage charges, is not valid.

5. In Food Corporation of India Vs. Surendra, Devendra and Mahendra Transport Co., , the Hon''ble Supreme Court after finding that there was specific bar to the raising of a claim regarding the transit, demurrage and wharfage charges, the award made by the arbitrator in respect these would be in excess of the jurisdiction.

6. In Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, , the Hon''ble Supreme Court held that if the award passed is contrary to the terms of the contract, such award would be open to interference by the court u/s 34 of the Act 1996 as being patently illegal and being opposed to the public policy of India.

7. In AIR 1987 DELhi 148 (cited supra), the Delhi High Court observed as under:

4. Legal misconduct means and includes some honest though erroneous breach of duty causing miscarriage of justice. If there has been mishandling of the arbitration proceedings or serious neglect of duties on the part of the arbitrator which is likely to lead substantial miscarriage of justice, the Court is justified in setting aside the award.

7. In the instant case, the arbitrator had directed the respondent Union of India to produce the documents sought to be produced by the petitioner but he did not pursue the matter further. The documents sought to be produced by the petitioner before the arbitrator are not available on the record of the proceedings of the arbitrator. In other words, it means that the arbitrator failed to do his duty and his failure or negligence has resulted in substantial miscarriage of justice to the petitioner. On this ground, alone the award is liable to be set aside.

8. In *Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor*, the Hon'ble Supreme Court held that award passed in disregard of express terms of the contract would be arbitrary, capricious and is without jurisdiction.

9. In (2006) EWHC 727 TCC (cited supra), the Queen's Bench held that the principal document which should be considered in any appeal u/s 69 of the Arbitration Act 1996 was the arbitral award itself and in addition to that, the court should also receive any document referred to in the award which the court needed to read in order to determine a question of law arising out of the award. It was further observed in the above judgment that there was no philosophy or ethos of the 1996 Act which should deter the court from answering any question of law raised in the event that the arbitrator has erred.

10. In *Shyama Charan Agarwala and Sons Vs. Union of India (UOI)*, the Hon'ble Supreme court observed that if the arbitrator ignored the relevant clauses in the agreement and came to a perverse conclusion, the High Court can very well set aside the award on this aspect.

11. In *Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/ Works, Palghat Division, Southern Railway, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway and Mr. M. Jayachandran [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway*, a Division Bench of this court held as under:

62. Thus, interest could be awarded only in the absence of any specific stipulation or prohibition in the contract. In the absence of an Agreement by the parties to contract, Section 31(7)(a) provides that the Arbitral Tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date of which award was made pre-award period. Section 31(7)(a) underlines the discretion of the Arbitral Tribunal to

award interest it deems reasonable.

63. learned Counsel for Railway has vehemently contended that as per Clause 16(2) of GCC no interest is payable to the contractor and the Arbitrators have rightly declined interest and the same cannot be interfered with. Clause 16(2) of the Standard General Conditions of Contract reads as follows:

No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the Contract, by Government Securities deposited in terms of Sub-clause (1) of this clause will be rapayable (with) interest accrued thereon.

64. The above provision makes it clear that no interest as per the term of Agreement between the parties and no interest on the amount is due and payable by the Railways. Referring to Clause 16(2), express terms of the agreement between the parties, Arbitrators declined to grant interest for pre-reference period.

12. In Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, , the Hon"ble Supreme Court held that if the award is made by the Arbitrator disregarding the terms of the reference (or) the arbitration agreement (or) the terms of the contract, it would be a jurisdictional error which requires ultimately to be decided by the court. The arbitrator cannot award an amount which is ruled out or prohibited by the terms of the agreement.

13. In Food Corporation of India Vs. Sreekanth Transport, , the Hon"ble Supreme Court observed that "Excepted matters" in the agreement are generally excluded from the purview of the arbitrator.

14. In Tamilnadu Civil Supplies Corp. Ltd. Vs. Mr. R. Sampath, Handling and Transport Contractor and Mr. V. Chandran DRO (Rtd.) Arbitrator , I held that if a clause in the agreement stipulates that the contractor shall not be responsible for the delay which may arise on account of reasons beyond his control and if there is a strike by the contractor"s labourers on account of any dispute between the contractor and the labourers as to wages, the same should not be deemed to be a reason beyond the contractor"s control and the contractor alone is responsible for any loss suffered.

15. In 2006 (1) RAJ 258 (DEL) (cited supra), the Delhi High Court observed that when the arbitrators are technical people and when they considered the ramifications at site as also various obligations and counter obligations of the parties, the award cannot be said to be falacious. The Delhi High Court further observed that the expression "amounts payable to the contractor under contract" would mean the amounts which have to be paid in normal course to the party and it cannot be said that if the amount is unreasonably detained, no interest would be payable.

16. In 2006 (1) RAJ 556 (DEL) (cited supra), the Delhi High Court observed that no objection is taken before the arbitrator, about a matter on the ground that it

is an excepted matter, it cannot be objected to later on before the High Court while assailing the award.

17. In 2006 (1) RAJ 699 (DEL) (cited supra), the Delhi High Court observed that when the arbitrator himself is a technical person who can make assessment on the basis of his knowledge and experience, such award need not be interfered with just because there is no specific evidence. The effective assessment by a technical person acting as an arbitrator on the basis of his knowledge and experience is permissible. It is further observed that once the arbitrator holds that the breach is on the part of the party who awarded the contract, the question of detention of Earnest Money does not arise. In the above judgment, the Delhi High Court went on to hold that future interest as well as interest for the period prior to date of award on Security Deposit is permissible.

18. In Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., , the Hon''ble Supreme Court held that Section 34 C.P.C. had no application to arbitration proceedings and it was within the power of the arbitrator to award interest for all the three stages.

19. In AIR SC 1157 (cited supra), the Hon''ble Supreme Court held that when a party acquiesced to the invalidity by his conduct and by participating in the proceedings and taking chances therein, he cannot thereafter object to the award which goes against him on the ground that the Arbitrator has no jurisdiction to pass the award. The Hon''ble Supreme Court further observed that in such cases the party is estopped from challenging the validity of the award as it is deemed that the right of the award to raise objection has been waived.

20. In 2004 (4) RAJ 1 (DEL) (cited supra), the Delhi High Court held that u/s 34 of the Act, 1996, the court can only correct the mistake of law and not the mistake of fact. Further, the court cannot re-evaluate the evidence as if it is the Court of Appeal.

21. In 2004 (3) RAJ 99 (CAL) (cited supra), the Calcutta High Court observed that the arbitration court cannot interfere with the award on the ground that the decision is erroneous, if the award is otherwise proper. The arbitration court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials produced before the arbitrator. The Calcutta High Court has also held that when the petitioner never raised the question of jurisdiction at the proper time before the arbitrator, he waived his right by not challenging the same and such objection regarding jurisdiction shall not be raised after the award is passed.

22. In 2004 (1) RAJ 135 (BOM) (cited supra), the Bombay High Court observed that when a person waived his right to object to the jurisdiction of the arbitrator in respect of a claim, it is not open to him to assail the award u/s 34 of the Act 1996 on the ground that the claim did not fall within the jurisdiction of the arbitrator.

23. In 2004 (4) RAJ 299 (DEL) (cited supra), a Division Bench of the Delhi High Court observed that when "contract" does not debar payment of interest on money, which has been illegally withheld by the employer after it became due, the award granting interest is not without jurisdiction nor the award is liable to be set aside on that count. The Division Bench of the Delhi High Court further held that liability to pay interest is based on the trust of equity and if the employer was at fault and the money was withheld unreasonably, the employer would be liable to pay interest.

24. In 2004 (4) RAJ 365 (BOM) (cited supra), the Bombay High Court held that in view of the provisions of Section 31(7)(b) of the Arbitration and Conciliation Act 1996, which provides for granting of interest at the rate of 18%, contention advanced of current rate of interest in respect of award passed subsequent to enactment of the Act, 1996 is unjustified and not valid. The Calcutta High Court has also upheld the award of the arbitrator in granting interest on wrongly withheld or retained amount and justified the same by observing that the said amount was wrongly withheld and interest could be granted.

25. In 2004 (1) RAJ 646 (KAR) (cited supra), a Division Bench of the Karnataka High court observed that u/s 16 of the Arbitration and Conciliation Act 1996, the tribunal is empowered to rule on its own jurisdiction as well as on objections with reference to the existence or validity of the arbitration agreement. It is further held that the party raising jurisdiction point should raise such plea at the earliest point of time. Having acquiesced in the jurisdiction of the arbitral tribunal without any demur or protest and having participated in the proceedings, the plea of jurisdiction cannot be raised later on after suffering an award.

26. In 2005 (4) RAJ 378 (DEL) (cited supra), a Division Bench of the Delhi High Court held that the arbitrator is competent to award interest inspite of the prohibiting clause in Standard condition of Contract.

27. In 2005 (4) RAJ 24 (CAL) (cited supra), a Division Bench of the Calcutta High Court held that when the authority of the Arbitrator was not challenged in the course of the proceedings and no objection was taken either by way of filing an application or even in the counter statement, it is deemed that the party waived its objection and therefore the party cannot challenge the award u/s 34 of the Act 1996 on the ground that the dispute is not arbitrable.

28. In AIR 2007 NOC 1158 (RAJ), (cited supra), the Jaipur Bench of the Rajasthan High Court held that in case where the Security Deposit is held beyond the contract period, then the employer is liable to pay interest on such deposits even though the clause in the contract provides that the employer is not liable for payment of any interest on Security Deposit.

29. In AIR 1998 SC 205 (cited supra), the Hon"ble Supreme court held that acquiescence to arbitration proceedings by participating in it for a long time without protest will debar him from challenging the same on the ground that there is no jurisdiction as the party shall not be allowed to play hot and cold

simultaneously.

30. In State of Rajasthan Vs. Nav Bharat Construction Co., , the Hon''ble Supreme Court reiterated the principle that long participation and acquiescence in the proceedings preclude a party from contending that the proceedings are without jurisdiction.

31. In B.V. Radha Krishna Vs. Sponge Iron India Ltd., , the Hon''ble Supreme Court held that the High Court cannot substitute its own view in the place of the arbitrator''s view.

32. In State of Orissa Vs. B.N. Agarwalla, etc., , the Hon''ble Supreme Court held that the arbitrator has jurisdiction to the award pre-reference interest in cases which arose after the Interest Act 1978 has become applicable.

33. In Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, , the Hon''ble Supreme Court held that new plea on no arbitration clause cannot be raised while challenging an award u/s 34 of the Act 1996 when both the parties accepted that there was an arbitration agreement and proceeded on that basis without requiring the arbitrator to rule on the tribunal''s jurisdiction.

11. In the light of the above judgments and the legal principles settled thereon, now I shall proceed to consider the award under challenge.

12. A perusal of the award will show that the petitioner entered into an agreement on 23.11.1993 with the first respondent herein, under which, the first respondent was appointed as Contractor for H&T work for food grains/fertilizers at Central Warehouse, Madurai I & II for the period from 23.11.1993 to 22.11.1995. Disputes arose between the parties and the petitioner preferred a claim against the first respondent. Accordingly, the Managing Director of the Central Warehousing Corporation, on 6.12.1996, appointed Thiru S.K. Bhatnagar, I.A.S. (Retd) as the sole arbitrator to adjudicate upon the matter of disputes, raised by the petitioner. The arbitrator held several hearings of both the parties and most of the work was completed. Unfortunately, he passed away before the award could be issued by him. Thereafter, the Managing Director appointed the second respondent as the sole arbitrator by his letter dated 28.08.2001.

13. It is not in dispute that the second respondent arbitrator started the proceedings afresh and accordingly directed the petitioner to file their claim statement along with the supporting documents. The petitioner indeed filed their claim statement along with the supporting documents on 5.3.2002. The first respondent filed their reply to the statement of claims and their counter claims on 7.4.2002.

14. The following facts were narrated by the second respondent Arbitrator before considering the claims and counter claims of both the parties.

15. Kudal Nagar Railway station was the feeding point for receiving the goods which are mainly/fertilizers, which had to be transported by trucks to petitioner''s

Corporation godown Unit I, at Palanganatham and Unit II at Bypass Road, Madurai. When the contract was signed by the parties, the Railway Station was receiving goods through MG trains which had a maximum capacity of 700 M. Tons. But, from December 1993, goods started coming by BG goods trains which had a carrying capacity of around 2300 to 2700 M. Tons. Besides this, bunching of BG goods trains started happening which could become a crucial phenomenon on BG System unless controlled meticulously. The Arbitrator has also explained the meaning of bunching, which means arrivals of multiples of goods trains at one destination before the first one had not been unloaded/released. It is also pertinent to mention here that the second respondent Arbitrator is an Ex-member (Engineering) in the Railway Board.

16. The system started floundering leading to detention of BG rakes, thus incurring demurrage and wharfage charges from Railway authorities. The petitioner Corporation in turn went on recovering these charges from the first respondent contractor from their bills. This coupled with delays in payments, crippled the contractor financially who in turn could not pay to their labourers as well as the truck operators. Having reached an impasse, work under this contract came to a grinding halt on 23.01.1995. Thereafter, the H & T works were got done by the petitioner corporation by engaging alternative agencies without formally terminating the contract agreement.

17. The first respondent contractor filed a writ petition in W.P. No. 1402 of 1995 praying for appointment of an arbitrator and also challenging the petitioner Corporation's notifications for the fresh tenders before the expiry of the contract period. This writ petition was withdrawn by the first respondent on 21.8.1997, as an arbitrator had already been appointed by the petitioner on 6.12.1996.

18. The petitioner Corporation made the following claims before the second respondent/Arbitrator.

1. Losses sustained by the petitioner Corporation towards demurrage and wharfage charges amounting to a sum of Rs. 23,40,265/-.

2. Loss sustained by the Corporation towards departmental expenditure incurred for pending clearance of wagons amounting to a sum of Rs. 7,06,274/-.

3. A sum of Rs. 2,50,738/- towards losses suffered towards the damaged stocks due to unworkmanlike performance of the Contractor.

4. A sum of Rs. 4340/- being the losses suffered due to payment of wages to casual labourers at differential rate for unexpired period of contract.

5. Loss suffered on account of re-booking and freight charges incurred by their Depositor ? Food Corporation of India, amounting to a sum of Rs. 6,77,185/-.

6. Forfeiting Security Deposit and interest at 18% per annum (Security Deposit of Rs. 1,00,000/-).

19. The first respondent also made the following counter claims against the

petitioner:

1. Non-payment of pending bills amounting to a sum of Rs. 17,44,135/-.
2. Claim in respect of shortage of distance of 1 K.M. between Railway Goods shed and Warehouse godown (Rs.18,00,145/-)
3. Demurrage and wharfage charges deducted by the petitioner, amounting to a sum of Rs. 24,86,602/-.
4. Loss of profit suffered for one year to termination of the contract (Rs. 20,16,000/-).
5. A sum of Rs. 10 lakhs towards loss of goodwill and reputation.
6. Refund of Security Deposit.
7. A sum of Rs. 1,35,84,673.22 being the interest on all the counter claims.

20. While considering the first claim of the petitioner, namely the loss sustained by the petitioner Corporation towards Demurrage and Wharfage charges, the second respondent Arbitrator referred to the contention of the petitioner herein that due to unworkmanlike performance of the first respondent contractor, heavy demurrage and wharfage charges were incurred by the depositor namely Food Corporation of India since the first respondent contractor failed to clear the wagons/ rake meant for clearance. It was further contended that the depositor in turn passed on the liability to the petitioner Corporation and therefore, the petitioner Corporation had no other alternative except to recover the same from the first respondent Contractor. This was resisted by the first respondent by contending that as per the terms and conditions of the tender, bills are to be settled weekly once or fortnightly as soon as the bills were submitted. But, the petitioner delayed resulting in delay in payment to labourers. With regard to the allegations as to dislocation of work, it was stated by the first respondent that the warehouse godown at Madurai II was earlier locked for a period of five months and in view of the fact that it was one of the oldest types of godowns, there were a lot of hardships faced by the earlier contractors. Without rectifying those mistakes, the first respondent was called upon immediately on the next day of the contract to clear the wagons at a high speed and also the volume of the work was heavy which could not be coped with by any of the contractors. The further reasons given by the first respondent for demurrage and wharfage charges are that: one old type Weigh Bridge which is manually operated one which was there in the Madurai Unit II godown which took atleast six minutes to weigh one truck and therefore in an hour only 10 trucks could be weighed. But, when the Railway Rake arrived in the goods shed, the rake contained a minimum quantity of 2300 M.Tons of foodgrains/fertilizers. Many times there would be a second rake placed in the Goods shed which required clearance of 4600 tons and the clearance would take place in four days minimum. But, the Railways are giving only 10 hours free time for unloading. The second reason given was that there was only one Entry Point and out gate i.e. a Common Gate in the

Corporation godown. That apart, it was pointed out that the Railway Yard worked from 7.00 am to 7.00 pm, whereas the Corporation godown worked from 9.30 am to 5.00 pm with one our lunch break from 1.00 pm to 2.00 pm. Thus, there was a direct loss of four precious hours. Shortage of staff in the Corporation's godown further compounded the problem. The bunching of rakes at the Railway Goods shed further complicated the problem apart from the Force Majure condition occurring during the contract period such as All India Lorry Strike and incessant weather and heavy rains which were beyond the control of the first respondent. Inspite of explaining everything in detail to the Corporation, the Corporation did not come forward to rectify the shortcomings of their system, which, according to the first respondent, was the reason for the occurrence of Demurrage and wharfage charges. The second respondent arbitrator after going through the entire evidence let in by both the parties in this regard, accepted the reasons given by the first respondent and held that the blame for this adverse factors had to be shouldered squarely by the petitioner corporation, which led to occurrence of demurrage and wharfage charges. The second respondent Arbitrator found the following adverse factors namely:

1. The time taken at the single Weigh Bridge;
2. Existence of single Entry/out Gate coupled with stoppage of Receipts while issuing;
3. Incongruent timing of the Railway yards and the Warehouse;
4. Non-payment of bills;
5. Shortage of staff at the Central Warehouse; and
6. Force Majure condition like lorry strike and inclement weather/rains.

21. It is also relevant to note that the second respondent arbitrator himself inspected the Warehouse on 25.03.2004 and found that the manually operated Weigh Machine was also one of the reasons, as contended by the first respondent. That apart, the arbitrator considered the fact that whenever the Demurrage charges and Wharfage charges are levied by the Railways, the Food Corporation of India applies for waiver and only the net amount after applying the waiver is required to be paid to the Railways. Out of this net amount, the Food Corporation itself decides how much is to their own account while the balance is deducted by the Food Corporation of India from the Corporation's account/bills. The Corporation, in turn, recovers this amount from the contractor without going into the question whether the amount accepted by the Food Corporation of India is adequate or inadequate. The arbitrator also found that no opportunity was given by the petitioner corporation to the first respondent contractor to ascertain whether the amount being recovered is justified. During hearings, it was also found by the arbitrator that the petitioner corporation's representative admitted that whatever amount indicated by the Food Corporation of India is accepted by the corporation as Gospel Truth. Considering the overall

situation, the second respondent arbitrator was of the considered view that the demurrage and wharfage charges are to be shared by the petitioner corporation and the first respondent contractor in the ratio of 90% and 10% respectively. After going through Ex. CVII, which is a letter dated 18.04.2004 submitted by the petitioner corporation, the arbitrator found that a sum of Rs. 23,40,266/- was recovered by the Food Corporation of India and accordingly, a sum of Rs. 2,34,027/- was awarded in favour of the petitioner corporation under the first claim.

22. The counter claim No. 3 raised by the first respondent is also with regard to the refund of demurrage and wharfage charges to be refunded by the petitioner corporation amounting to a sum of Rs. 24,86,602/-. As the arbitrator while dealing with claim No. 1 of the petitioner, already adjudicated that sharing of demurrage and wharfage charges is to be done in the ratio of 90% and 10%, he applied the same proportion to this counter claim also.

23. A perusal of the findings of the learned arbitrator with regard to Claim No. 1 and counter claim No. 3 will clearly establish that the arbitrator rendered those findings on the basis of the evidence adduced before him and also after making personal inspection of the godowns of the Corporation. Proper reasons have been given which are reasonable and logical. Therefore, I do not find any grounds as set out u/s 34 of the Act 1996 to interfere with the same.

24. The learned Counsel for the petitioner corporation submitted that the findings arrived at by the second respondent/arbitrator for these two issues are perverse as there is no basis for fixing the liability of the corporation and the Contractor, in the proportion of 90% and 10% respectively. He further submitted that as per the conditions of the contract, it is the contractor who is responsible for the demurrage charges and wharfage charges and even otherwise, this issue could not be adjudicated before the Arbitral Tribunal as the same is an excepted matter under the contract. Therefore, according to him, the Tribunal has no jurisdiction at all to adjudicate the issue of Demurrage and wharfage charges and therefore, the award is bad in law. The learned Counsel further submitted that the All India Lorry strike which was put forward by the first respondent contractor as a reason for incidence of Demurrage charges and wharfage charges could not be accepted at all as it would not come under the Force Majeure clause.

25. I am unable to accept the arguments of the learned Counsel for the petitioner.

26. Condition XII (a) of the Terms and conditions of the contract for transport, unloading/loading of foodgrains/fertilizers at Central Warehouse and Rail Heads stipulates that the Contractor shall be liable for all cost, damages, demurrages, wharfages, forfeiture of wagon registration fees, charges and expenses suffered or incurred by the Corporation due to the contractor's negligence and unworkman like performance of any services under this contract or breach of any terms thereafter on their failure to carry out the work with a view to avoid occurrence demurrage, etc. and for all damages and losses occasioned to the

corporation or in particular to any property or plan belonging to the Corporation due to any act whether negligence or otherwise of the contractors themselves or their employees. The decision of the Regional Manager regarding such failure of the contractor and their liability for the losses etc. suffered by the corporation shall be final and binding on the contractor.

27. Conditions XVII stipulates that the contractors will not be responsible for delay which may arise on account of reasons beyond their control, of which, the Regional Manager shall be the final Judge. It further states that strikes by contractor's labour on account of any disputes between the contractors and their labourers as to wages to otherwise, will not be deemed to be reasons beyond the contractor's control and the contractor shall be responsible for any loss or damage which the corporation may suffer on this account.

28. Clause XXI(21) states that the contractor shall be responsible for unloading/loading the wagons within the free period allowed by the Railways and also for loading/unloading the trucks/carts/any other transport vehicles expeditiously. The contractor shall be liable to make good any compensation demurrage/wharfage or other charges or expenses that may be incurred by the corporation on account of delays in loading/unloading of trucks/carts and unloading of wagons/rakes unless the delay is for reason beyond the control of the contractor. The decision of the Regional Manager in this respect shall be final and binding on the contractor.

29. Relying on these terms and conditions, the learned Counsel for the petitioner submitted that as per the conditions, the first respondent contractor who is liable to make good the demurrage and wharfage charges recovered from the corporation and even otherwise, the dispute with regard to demurrage and wharfage charges should only be decided by the Regional Manager and therefore, this issue is not at all arbitrable as it comes within the excepted matters.

30. First of all, the terms and conditions will not put the liability with regard to the demurrage charges and wharfage charges on the contractor at all times. It only stipulates that if the delay is not for the reasons beyond the control of the contractor, then only the contractor is liable in this regard. The learned arbitrator after going through the merits and de-merits of the case, on the basis of the evidence adduced before him, found that the charges incurred towards the demurrage charges and wharfage charges, are due to the shortcomings and mistakes committed by the corporation and the first respondent contractor gave acceptable reasons to explain that they were not responsible for these charges. This is purely a factual finding and therefore, this could not be gone into by this court in this Original petition.

31. Secondly, the question of jurisdiction and arbitrability with regard to the particular claim of demurrage and wharfage charges could not be raised before this court for the first time after keeping quiet before the arbitrator and after finding that the award is not to their liking. It is well settled that the question of

jurisdiction should always be raised at the earliest point of time and if not raised, then, it is deemed that the party has waived its right and therefore, it is estopped from raising the same after suffering an award. That apart, the Arbitration and Conciliation Act, 1996 and its provisions make it very clear that such issues should be raised at the appropriate time and not later, that too, after suffering an award.

32. Section 4 of the Act, 1996 makes it very clear that a party who knows that any provision of Part I of the Act, from which, the parties may derogate or any requirement under the Arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or if a time limit is provided for stating that objection within that period of time, shall be deemed to have waived his right to so object.

33. Section 16 of the Act is also very relevant as it deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. According to Section 16(1), the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for this purpose, an arbitration clause which forms part of a contract, shall be treated as an agreement independent of the terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail, ipso jure, the invalidity of the arbitration clause.

34. Section 16(2) makes it very clear that the plea of jurisdiction or lack of jurisdiction shall be raised not later than the statement of defence. However, a party shall not be precluded from raising such a plea merely because that he is appointed or participated in the appointment of an arbitrator.

35. As per Section 16(3), a plea that the tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

36. As per Section 16(5), the tribunal shall decide on a plea referred to in Section 16(2) and Section 16(3) and if the tribunal rejects the plea, it will continue with the proceedings and make an arbitral award. A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award u/s 34 of the Act.

37. In view of Section 4 and Section 16 of the Arbitration and Conciliation Act, 1996, it is not now open to the petitioner to contend that the issue of wharfage and demurrage charges is not at all arbitrable after having failed to take such objection before the second respondent/arbitrator, in consonance with the provisions of Section 16. Therefore, the arguments made by the learned Counsel for the petitioner in this regard are rejected.

38. For the very same reasons, I am rejecting the argument of the learned Counsel for the petitioner that the award is bad as the second respondent

arbitrator conducted fresh arbitration proceedings instead of continuing from where his predecessor left.

39. According to condition XIX of the Terms and conditions governing the contract, all disputes and differences arising out of or in any way touching or concerning this agreement whatsoever, (except the matter referred to in Sub-clause 30 of Clause XXI and as to any matter, decision of which, is expressly provided for in the contract) shall be referred to the sole arbitration of any person appointed by the Managing Director of the Corporation. It is further stipulated in Clause XIX that in the event of such arbitrator to whom the matter is originally referred to, being transferred or vacating his office or being unable to act for any reason, the Central Warehousing Corporation at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of this contract. Such person shall be entitled to proceed with reference from the stage at which it was left by his predecessor.

40. It is true that as per the above said Clause XIX, if the first arbitrator could not continue due to any of the reasons mentioned therein, another arbitrator has to be appointed, who shall proceed from the stage at which it was left by his predecessor. It is also an admitted fact that in this case, the arbitrator who was first appointed, heard the entire matter and reserved passing award. Before the award could be passed, he passed away. Consequently, the second respondent was appointed by the Managing Director and it is also not in dispute that he started the entire proceeding afresh by calling for fresh claim statement and counter statement from both the parties. It is also an admitted fact that both the petitioner and the first respondent complied with the directions from the second respondent/Arbitrator without any demur and therefore, having filed a fresh claim statement without any protest and without making any objections, as contemplated under Clause XIX of the contract, it is too late in the day for the petitioner to make such objection before this court after suffering an award. Therefore, the arguments advanced on behalf of the petitioner in this regard are also rejected.

41. Similarly, I am not accepting the contention of the learned Counsel for the petitioner that fixing of liability by the second respondent/arbitrator with regard to recovery of wharfage and demurrage charges on the petitioner and the first respondent at 90%: 10% is perverse. I am of the considered view that the learned arbitrator has given proper reasons for fixing this proportion of 90% and 10% on the petitioner and the first respondent respectively. Hence, it cannot be termed as perverse.

42. Before the arbitrator, the petitioner claimed a sum of Rs. 7,06,274/- towards losses sustained by them, in view of the expenditure incurred for pending clearance of wagons. This is claim No. 2 before the arbitrator and according to the petitioner, during the course of the contract period, the unworkman like performance of the first respondent contractor led to stoppage of work by the

labourers due to non-payment of wages. The petitioner corporation being the principal employer was forced to settle the dues of the workers and cleared the wagons, thereby incurring expenditure and the first respondent contractor is liable to compensate the expenses incurred by them.

43. While considering this claim the arbitrator referred to Clause XXI(37) of the contract agreement, according to which, in case the petitioner corporation is obliged to pay any amount of wages to a worker employed by the contractor in execution of a contract, the corporation can recover from the contractor the award of the wages so paid without prejudice to the rights of the corporation. But, before the arbitrator, no documents have been submitted by the petitioner corporation to support this claim. In fact, a time limit was fixed by the arbitrator and directed the corporation to produce the supporting documents on or before 20.04.2004. But, no documents were submitted by them. The arbitrator has also adverted to the fact that four months expired after the stoppage of the work by the first respondent contractor and in the absence of any supporting documents such as the period for which the payment has not been made, etc. it was not possible for him to award this amount and accordingly, he rejected the major portion of this claim excepting a sum of Rs. 14,634/- against the claim of Rs. 7,06,274/-. Even this amount of Rs. 14,634/- is awarded as this amount was claimed for the demurrage and wharfage charges, amounting to a sum of Rs. 1,46,336/- which form part of claim No. 1. Therefore, applying the ratio 90:10 this sum of Rs. 14,634/- was awarded in favour of the petitioner.

44. A perusal of the findings of the arbitrator with regard to claim No. 2, will show that this finding is a reasonable one and therefore, this court cannot interfere with the same also.

45. While considering claim No. 3, which is for a sum of Rs. 2,50,738/-, for the losses suffered towards the damaged stocks due to unworkmen like performance of the first respondent contractor, the arbitrator after going through the entire evidence, held that the corporation ought to have given specific notice of such claims to the first respondent contractor with full details as to the damages, date, time, place of damage and actual loss/damage which occurred to goods to enable the contractor to refute or admit the same or to compensate it then and there. Since this opportunity has been denied to the Contractor, according to the learned arbitrator, it would be unfair to make the contractor responsible for the same at this stage.

46. I have gone through the findings of the arbitrator, in this regard and I find it reasonable and logical and therefore, such findings based on evidence could not be assailed before this court u/s 34 of the Act, 1996.

47. While considering the claim No. 4, which is for a sum of Rs. 4340/- for the loss suffered by the petitioner due to payment of wages to casual labourers at differential rate for unexpired period of the contract, the arbitrator found that no supporting documents have been furnished by the corporation for this claim.

After going through the relevant clauses contained in the contract, the arbitrator was of the view that this claim is to be rejected. This finding is also reasonable and beyond the scope of Section 34 of the Act to enable this court to interfere with.

48. Claim No. 5 is for a sum of Rs. 6,77,185/- towards losses suffered on account of re-booking and freight charges incurred by the petitioner's depositor viz., FCI.

49. After evaluating the evidence adduced on both sides, here also, the learned arbitrator found that it is the petitioner corporation who is to be blamed for adverse factors which led to delays in clearance of rakes and goods and the same has to be shouldered by the petitioner and the respondent in the ratio of 90:10 respectively and applying the same ratio, the arbitrator awarded a sum of Rs. 61,719/- for this claim and I do not find any grounds as set out u/s 34 of the Act 1996 to assail this finding of the arbitrator while deciding claim No. 5.

50. Claim No. 6 is for forfeiting Security Deposit and also demanding interest at 18% per annum. According to the petitioner corporation, they suffered losses/damages amounting to a sum of Rs. 39,78,802/- due to the failure of the first respondent Contractor to discharge the H & T work. An amount of Rs. 1 lakh furnished by the first respondent towards the Security Deposit has been forfeited as the first respondent's breach of contract and an amount of Rs. 17,44,135/- was left unsettled towards pending bills and payment which has been adjusted in the total claim of Rs. 39,78,802/- and therefore, the first respondent contractor is liable to compensate an amount of Rs. 22,34,667/- suffered by the petitioner due to the unworkmanlike performance of the first respondent. Further, the petitioner claimed the accrued interest at the rate of 18% per annum from 23.01.1995 till the date of payment.

51. The work under the contract came to a standstill on 23.01.1995 which according to the arbitrator was attributable to the "System Deficiency" on the part of the petitioner corporation, for which, the petitioner has been held responsible by him. The arbitrator has also adverted to the fact that the contract was never terminated by the petitioner and therefore, he held that the forfeiture of Security Deposit is not in order and in terms of Clause XII(f) of the contract agreement.

52. As the work came to a standstill on 23.01.1995, the entire H&T work was got done by the petitioner thereafter by engaging a parallel contractor. This right was exercised by the petitioner corporation as per Clause X of the contract agreement, but, according to the arbitrator, it was an unfair application and therefore, held that the Security Deposit became due for release by 22.12.1995.

53. The above finding of the learned arbitrator is to be read along with his findings for counter claim No. 1 and counter claim No. 6.

54. While dealing with counter claim No. 1, which is for the non-payment of the

pending bills by the petitioner, to the first respondent, amounting to a sum of Rs. 17,44,135/-, after evaluating the evidence and also after going through the basic terms and conditions of the contract, the learned arbitrator instructed both the parties to prepare and jointly submit statement of bills preferred and paid. The same was submitted on 17.03.2003 by the petitioner corporation, but, the first respondent gave certain remarks thereon. Accordingly, the arbitrator directed the Presenting Officer of the corporation to carefully prepare the same and in response to that, a revised statement has been received, according to which, the following position emerges:

1. Total amount claimed by the first respondent. .. Rs. 1,27,36,333 2. Payment released. .. Rs. 1,13,88,198 3. Amount withheld. .. Rs. 13,48,135

The break-up of the withheld amount of Rs. 13,48,135/- is as follows: (a) Salvaging ... Rs. 5,665.00 (b) Demurrage charges & wharfage charges Rs. 12,78,799.00 (c) Spillage Rs. 5,234.00 (d) Miscellaneous payments not made Rs. 58,437.00 ----- Total Rs. 13,48,135.00 -----

55. However, it was found by the arbitrator that amount of Rs. 1,13,88,198/- included the following payments which need to be excluded from payments made due to reasons indicated below:

1. Temporary advance of Rs. 1,96,000/- paid on 16.6.1994 was recovered on 24.06.1994.

2. Temporary advance of Rs. 2,00,000/- paid on 7.5.1994 was recovered on 21.05.1994;

3. An amount of Rs. 1,50,139/- was refunded to the first respondent on account of waiver of demurrage and wharfage charges granted by the Railways.

56. Taking the above into consideration, the arbitrator worked out the amount not paid by the petitioner to the contractor to Rs. 6,04,576/- and the same was awarded to the first respondent contractor.

57. While considering the counter claim No. 6, the arbitrator found that the work under the contract came to a halt on account of continuing breach of contractual conditions by the petitioner corporation and therefore, the Security Deposit need to be refunded to the contractor. Accordingly, this issue was decided in favour of the first respondent contractor.

58. A perusal of the findings of the learned arbitrator for claim No. 6, counter claim No. 1 and counter claim No. 6 would make it very clear that they are based on evidence and sound reasoning and therefore, it is not possible for this court to interfere with the same within the narrow scope of Section 34 of the Act, 1996.

59. Counter claim No. 2 is in respect of shortage of distance of 1 K.M. between the Railway Goods Shed and Warehouse Godowns and a sum of Rs. 18,00,145/- was claimed under this claim. According to the first respondent, in the tender itself, it was provided that place of operation was that of the petitioner's own

godowns and it was stated that they were situated at a distance of 6 Kms from the Railway station. But, the actual distance would be 8.5. Kms for Unit I and not less than 7 Kms for Unit II. When the fact of the incorrectness was pointed out, the warehouse Manager at Madurai along with the first respondent measured the distance by travelling in his own jeep and found that the statement of the first respondent was correct. On representation, the Food Corporation of India also measured the distance and admitted that it is more than 6 Kms. Though a number of representations have been made in this regard to give increases in charges pro-rata on the basis of distance being 7 KM instead of 6 KM, it was not at all considered. This was resisted by the petitioner by stating that the tenderer was required to get himself acquainted with the size and location of the godown and he shall not be entitled to any compensation arising out of any discrepancy in size and location of the godown found later on. The tender documents were relied on by the petitioner in this regard. Based on the evidence produced by both the parties, the arbitrator found that the distance between the Railway Goods Shed (MG Unloading point) and to control Warehousing godowns at Bypass Road (Unit II) was 5 Kms which has been the basis of payment to H&T contractors since the last several years, as on 2.9.1993, when the tender documents for this work was prepared by the corporation. The contract was awarded on 10.11.1993 and the H&T work commenced on 23.11.1993. The said distance remained 5 Kms during this period also. But, distance by available route between the two points got increased to 6 Kms during 1994 when goods started arriving by BG goods trains instead of by MG Goods Trains on gauge conversion by Railways. The arbitrator himself accompanied by representative of both the parties, measured the distance on 23.05.1994 by travelling in a Car fitted with Electronic Distance Meter. The arbitrator on the basis of the inspection as well as on the documents filed before him, found that neither the size of the godowns nor the location of the godowns as undergone any change, but, the location of the Railway Goods Shed including a change due to change over from MG to BG. Accordingly, the route connecting the two godowns got increased by 1 KM due to the development which took place after signing of the contract agreement. Therefore, it was a post contractual development. After referring to para(h) of Clause XX of the Contract agreement, the arbitrator held that the action of the Railways literally and physically shifted the Railways Goods shed resulting in increased distance and therefore, the corporation was bound to revise the rate under this contract provision as post-contractual development. Accordingly, the first respondent is entitled to be paid for 6 Kms distance between BG Goods Shed and Central Warehouse Madurai Unit II whereas he was paid Rs. 7/- M.T. which is the rate per 5 Km. Based on the evidence, he further worked out a sum of Rs. 9,13,920/- being the amount payable by the petitioner to the first respondent in respect of shortage of distance.

60. I am of the considered view that these findings of the arbitrator are also unassailable as cogent and proper reasons were given by the arbitrator for deciding this issue. But, the learned Counsel for the petitioner contended that

the arbitrator wrongly referred to para 4 of Clause XX of the tender documents which dealt with shifting of goods shed and in fact, the goods shed was never shifted and therefore, the award in this regard is bad.

61. I am unable to accept the submissions made by the learned Counsel for the petitioner in this regard. Even the arbitrator is very much aware that what is contemplated in para H of Clause XX of the contract agreement is shifting of the goods shed resulting in variation in the distance. But, he adverted to the fact that neither the size of the godown nor the location of the godown has undergone any change. But the location of Railway Goods Shed underwent a change due to change over from MG to BG, which is a post contractual development, which amounts to shifting the Railway Goods Shed and therefore, the Contractor is entitled to a revised contract rate for transportation. Therefore, it cannot be said that the arbitrator has disregarded or wrongly placed reliance on para H of Clause XX and therefore, I do not find any illegality or infirmity in the award in this regard. It is also settled law that the arbitrator within his jurisdiction to interpret a clause and if the interpretation is not perverse and not illegal, it is not open to this court to interfere with the same u/s 34 of the Act, 1996.

62. In so far as counter claim No. 4 is concerned, it is for the actual loss of profit suffered for one year by the first respondent due to the termination of contract and therefore, the petitioner is bound to pay compensation for the profit which the first respondent could have earned. They claimed a sum of Rs. 20,16,000/- in this regard. This was resisted by the petitioner herein by stating that it was the petitioner who lost its image due to the indifferent attitude and breach of the contract by the first respondent. The learned arbitrator found that the contract was never terminated by the petitioner. The contract came to a halt on 23.01.1995 as an act of desperation on the part of the first respondent for continuing breach of contractual obligation on the part of the petitioner. Therefore, the period from 23.01.1995 to 22.11.1995 was treated by the arbitrator as no work allotted and no work done. Thus, a breach of condition was committed by the petitioner, due to which, the first respondent suffered loss of profit. After referring to Section 73 of the Indian Contract Act 1872 and after going through the judgment of the Hon'ble Supreme Court reported in A.T. Brij Paul Singh and Others Vs. State of Gujarat, the Arbitrator arrived at a sum of Rs. 7,32,119/- in this regard which was the amount of compensation to be given to the first respondent.

63. Even though this was assailed by the learned Counsel for the petitioner that it was based on no evidence and there was no basis for awarding this amount, I find no merits in the contention of the learned Counsel for the petitioner. The learned arbitrator gave valid reasons which are not perverse for awarding this amount and the reasonableness of the reasons given by the arbitrator could not be gone into by this court u/s 34 of the Act.

64. After rejecting the counter claim No. 5, in which, a sum of Rs. 10 lakhs was

claimed by the first respondent towards loss of goodwill and reputation, the arbitrator considered interest to be awarded in Claim No. 7. After discussing the matter in detail, the arbitrator considered a rate of interest at 12% per annum as reasonable and accordingly, the arbitrator awarded interest at the rate of 12% per annum. He also awarded future interest at the rate of 18% per annum.

65. Though the learned Counsel for the petitioner has not seriously challenged the interest awarded by the arbitrator, he took exception to the grant of interest given by the arbitrator on the Security Deposit amount, by contending that as per the clauses contained in the contract, interest is not at all payable by the petitioner corporation for the Security Deposit amount.

66. I find force in the submission of the learned Counsel for the petitioner in this regard. Sub-clause (d) of Clause XI of the contract makes it very clear that the petitioner corporation shall not be liable for payment of any interest on the Security Deposit or any depreciation thereof for the time it is held by the corporation. When such is the condition, the same has been overlooked by the arbitrator in granting interest at the rate of 12% by disregarding Sub-clause (d) of Clause XI and therefore, I am inclined to interfere with the award to this extent of setting aside the interest granted by the learned arbitrator on the Security Deposit amount of Rs. 1 lakh. Excepting to this, I do not find any illegality or infirmity in the award warranting interference by this court u/s 34 of the Act, 1996.

67. In the result, the award under challenge is upheld, excepting the award of interest given by the learned arbitrator on the Security Deposit of Rs. 1.0 lakh.

68. The Original petition is disposed of No costs.