

(1980) 08 KL CK 0016
In the High Court Of Kerala
Case No : M.F.A. No. 409 of 1979

Cochin Shipyard Ltd.

APPELLANT

Vs

Srinivasa Rao and Another

RESPONDENT

Date of Decision : 21-08-1980

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 41
Civil Procedure Code, 1908 (CPC) — Order 13 Rule 8, 151
Kerala Stamp Act, 1959 — Section 16, 16(1), 18(2), 19, 35
Kerala Stamp Rules, 1960 — Rule 10, 11, 12, 9

Citation : (1980) 08 KL CK 0016

Hon'ble Judges : Viswanatha Iyer, J;Narendran, J

Bench : Division Bench

Advocate : K.V.R. Shaenoi, K.A. Nayar, E.R. Venkiteswara and K. Anandavally, for the Appellant; P. Balagangadhara Menon, C. Robin and T. Raghavan, for the Respondent

Final Decision : Allowed

Judgement

Viswanatha Iyer, J.—This appeal is filed by the Cochin Shipyard Ltd., against the judgment in O.P. 81 of 1977 filed by them to set aside an award passed by a sole Arbitrator first Respondent in the dispute that arose between them and their contractor, the second Respondent. The Appellant entered into two contracts with the second Respondent one for the construction of the Building Dock, Assembly Shop Foundation and Quay No. 3 and the other for the construction of the Repair Dock and Quay Nos. 1 and 2. The claim raised by the second Respondent, which became the subject-matter of the arbitration proceedings, was that they should be reimbursed the extra cost of the imported pile driving equipment and also the cost of the foreign know-how for the operation of the said equipments. According to the Appellant-company this claim has no legal foundation on the terms of the contract and therefore they are not liable. They also denied that this is a matter covered by the arbitration clause of the agreement entered into between them and the second Respondent.

2. The nature of the dispute between them can be understood only in the background of Clauses 16, 26 and 40 of the Contract (Marked Ext. C-1 before the Arbitrator) and the Works Order Clauses 2 and 31 (Exts. C-2 or C-4).

Clause 16.--If during the progress of the works, the price of any materials incorporated in the works (not being material supplied from the Engineer-in-charge's stores in accordance with Clause 13 hereof) and/or wages of labour increase as a direct result of the coming into force of any fresh law...then the amount of the contract shall accordingly be varied, provided always that any increase so payable is not, in the opinion of the Chief Project Officer or Administrative Head (whose decision shall be final and binding)... within the control of the Contractor.

Clause 26 of the conditions of contract reads as follows:

Clause 26.--The contractor shall supply and provide at his own cost all materials (except such special materials, if any, as may in accordance with the contract be supplied from the Engineer-in-charge's Stores), plant, tools, appliances, implements, ladders, cordage, tackle, scaffolding, and temporary works requisite or proper for the proper execution of the work, whether original, altered or substituted and whether included in the specification or other documents forming part of the contract or referred to in these conditions or not, or which may be necessary for the purpose of satisfying or complying with the requirements of the Engineer-in-charge as to any matter as to which under these conditions he is entitled to be satisfied, or which he is entitled to require together with carriage therefore to and from the work. The contractor shall also supply without charge the requisite number of persons with the means and materials, necessary for the purpose of setting out works, and counting, weighing and assisting of the measurement of examination at any time and from time to time of the work or materials. Failing his so doing the same may be provided by the Engineer-in-charge at the expenses of the contractor and the expenses may be deducted from any money due to the contractor, under this or any other contract and or from his security deposit or the proceeds of sale thereof, or of a sufficient portion thereof.

Clause 2 of the Works Order dated 24th July 1973 and Clause 31 of the same Works Order read as follows:

Clause 2.--You shall provide at your cost all construction plant and machinery (including that requiring import) for all items of work including R.C.C. piling and Steel sheet piling works. Departmental machinery likely to be made available for issue to the Contractor shall be as in Annexure IV of the General Conditions of Tender.

You shall furnish an inventory of all plant and machinery proposed to be used on the works including items of imported machinery with probable date of their availability at site for use on the work. This should match with the Detailed Working Progress indicated as above.

Clause 31--The pile driving work, both cast in, in site pile and steel sheet piling, shall be carried out by the contractor as per the Tender specifications and as given below:

All piling equipment shall be procured by the contractor. However, the piling Equipment shown in Annexure IV of the General Conditions of Tender are likely to be made available to the contractor subject to the conditions mentioned therein.

Selection of equipment will be done by the Contractor, in consultation with the Cochin Shipyard Authorities.

No hire charges for the equipment procured by the Contractor is payable to the Shipyard.

All formalities for the purchase of equipment like calling of tenders, getting R.C.T.D. clearance and financial arrangement, customs and import formalities, etc. will be undertaken by the contractor.

The order for the purchase of the equipment will include conditions that the suppliers will send one or more technicians along with the equipment to erect them at the site and run them for a period of about six months to satisfy the performance and also to get contractor's staff trained.

An advance payment of 75 per cent of value of old machinery and 90 per cent of value of new machinery brought to site by the contractor will be paid. The value of old machinery will be decided by the Engineer-in-charge.

With regard to advance payment on imported new machinery, the contractor will be paid 90 per cent of the landed cost at site of each consignment on receipt of each consignment at site.

As soon as the equipment collected at site is assembled and trial runs taken, a further payment shall be made to the contractor equal to 90 per cent of the erection charges which shall be limited to Rs. 10 lakhs.

All equipment will be hypothecated to Cochin Shipyard Limited, by the contractor against advance payments.

All advance payments will carry an interest of 9? percent per annum on the outstanding balance of advance. The recovery of the advances shall be effected in the manner specified in para 14 above.

Requisite foreign exchange, for importing milling plant and machinery, spares, technical know-how and hiring of experts necessary for both the Dock works, vide: Work Order No. 13019/1/71/W. II, dated 24th January 1973 for Building Dock, etc., and Work Order No. 13012/ 15/71/W. II, dated 24th January 1973 for Repair Dock, etc., amounting to about 2 crores in all will be made available to the contractor from the 11th year Credit subject to his getting indigenous clearance and providing detailed justification. The details of such procurements shall be

furnished by contractors as soon as they are finalised.

Clause 40.--Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification Instructions, Designs, Drawings herein before mentioned and as to the quality of the workmanship or materials used on the work or as to any other questions, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, Designs, Drawings, 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 completion or abandonment thereof, shall after written notice by either party to the contract, to the other of them be referred to the Sole Arbitrator of a person appointed by the Chief Project Officer of the Cochin Shipyard Project or the Administrative Head of the Cochin Shipyard Project at the time of such appointment by whatever designation known, from a panel of names given in Annexure II.

For the purpose of appointing the Sole Arbitrator referred to above the Chief Project Officer or the Administrative Head of the Cochin Shipyard Project will, within 30 days of receipt of notice, send to the contractor a panel of three names of persons (selected from the panel given in Annexure II) who shall all be personally unconnected with the Cochin Shipyard Project. The Contractor shall on receipt of the names as aforesaid select any of the persons named to be appointed as a Sole Arbitrator and communicate his name to the Chief Project Officer within 30 days of the receipt of the names. The Chief Project Officer, Administrative Head of Cochin Shipyard shall thereupon without any delay appoint the said person as the Sole Arbitrator. If a contractor fails to communicate such selection as provided above within the period specified the Chief Project Officer/Administrative Head of the Cochin Shipyard shall make selection and appoint the selected person as the Sole Arbitrator.

If the Chief Project Officer or the Administrative Head of the Cochin Shipyard as the case may be, fails to send the Contractor a panel of three names as aforesaid within the period specified, the Contractor shall send to the Chief Project Officer/Administrative Head of the Cochin Shipyard Project a panel of three names of persons who shall be unconnected with the Cochin Shipyard Project and the Contractor from the panel of names given in Annexure II. If the Chief Project Officer/Administrative Head of Cochin Shipyard Project fails to select the person and appoint as the Sole Arbitrator within 30 days of the receipt of the panel and inform the Contractor accordingly, the Contractor shall be entitled to appoint one of the persons from the panel as the Sole Arbitrator and communicate his name to the Chief Project Officer/Administrative Head of Cochin Shipyard Project.

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another Sole Arbitrator shall be appointed as aforesaid.

The work under the contract shall continue during arbitration proceedings and

no payment due or payable to the contractor shall be withheld on account of such proceeding.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time for making and publishing the award.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of Arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

The fees, if any, of the Arbitrator, if required to be paid before the Award is made and published be paid half and half by each of the parties. The costs of the reference and of the Award (including the fees, if any, of the Arbitrator) shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof shall be paid and may fix or settle the amount of costs to be paid.

3. The dispute remained unsolved for an year and then the Respondent-Company wrote a letter to the Cochin Shipyard on 1st March 1976 (marked Ext. C-68 before the Arbitrator) which reads as follows:

Dear Sir,

Sub.--Construction of Building Dock, Repair Dock and other appurtenant structures--Compensation for increase in cost of imported pile driving equipment and technical know-how fees.

You are aware that the matter of compensation to us on the above has been pending settlement by the Shipyard for over a year. Even though we had furnished you with full details of our claim by your letter No. K-1 3012/8/75-CEC of the 6th October 1975 you have informed us that the claim cannot be entertained.

Inasmuch as a dispute has thus arisen between us regarding the above claim, we are invoking the provisions for arbitration in our contracts and referring this dispute to arbitration.

Yours faithfully,

This was replied to by the Appellant by their letter, dated 29th March 1976 (marked Ext. C-70 before the Arbitrator). That reads as follows:

Dear Sir,

Construction of Building Dock, Repair Dock and other appurtenant structures--
Claim for compensation for increase in cost of imported pile-driving equipment

and technical know-how fees.

We refer you to your letter No. 100:595:76, dated the 1st March 1976; the same has been received by us on the 3rd March 1976.

We have dealt with the merits of your claim in the previous correspondence on the subject and we reiterate that no amounts whatever are due to you in respect of these claims. It is also our view that such a claim does not fall within the purview of Clause 40 of the General Conditions of Contract and hence does not qualify for arbitration.

However, in view of your insistence and without prejudice to our position, we propose that, the following be the issues to be referred to arbitration:

1. Does the claim of M/s Tarapore and Company on Cochin Shipyard Ltd. for compensation for increase in the cost of imported pile-driving equipment and technical know-how fees fall within the purview of the first para of Clause 40 of the General Conditions of Contract entered into between the two parties?
2. If the answer to 1 is in the affirmative, in terms of the provisions of the concerned contract, are Messrs. Tarapore and Company, entitled to compensation for increase in the cost of imported pile-driving equipment and technical know-how fees to be paid to them by Cochin Shipyard Ltd.? If so what is the amount?
3. Costs.

Accordingly, we hereby notify you the panel of Arbitrators as under:

1. Sri A.K. Ramaiah, Chief Engineer (Bridges), South Central Railway, Secunderabad.
2. Sri H.C. Gupta, Ministry of Works and Housing, New Delhi.
3. Sri C. Srinivas Rao, Chief Bridge Engineer, Southern Railway, Madras.

You may intimate your choice of the Arbitrator within the specified time.

Yours faithfully,

The second Respondent chose the first Respondent from the panel and intimated the Shipyard by their letter, dated 19th April 1976. Thereafter the Shipyard referred four questions to the Arbitrator by their letter, dated 29th April 1976. That letter (Ext. C-73) reads as follows:

Dear Sir,

In terms of the Agreement, dated 29th January 1973 between Tarapore and Company, and this Company, certain disputes have arisen and it has been agreed to refer the dispute for your sole arbitration without prejudice to the position explained in the correspondence that passed between the parties and particularly letter No. 100:595:76, dated 1st March 1976 from Tarapore and Company, to Cochin Ship, yard Ltd., Letter No. IC-13012/8/75/CRC, dated 29th March 1976

from Cochin Shipyard Ltd., to Tarapore and Company, and Letter No. 100:1107:76, dated 19th April 1976 from Tarapore and Company, to Cochin Shipyard Ltd. Copies of the said three letters are attached and these will bring out clearly the disputes between the parties.

The matter which are being referred to your arbitration are the following:

1. Does the claim of Messrs. Tarapore and Company, on Cochin Shipyard Ltd., for compensation for increase in the cost of imported pile-driving equipment and technical know-how fees referred to in Clauses (2) and (3) hereunder fall within the purview of the first paragraph of Clause 40 of the General Conditions of Contract entered into between the two parties?
2. If the answer to (1) above is in the affirmative, in terms of the provisions of the contract are Messrs. Tarapore and Company entitled to compensation for increase in the cost of imported pile-driving equipment and technical know-how fees to be paid to them by Cochin Shipyard Ltd? If so, what is the amount?
3. The dispute that has arisen between Messrs. Tarapore and Company, and Cochin Shipyard Ltd., regarding the claim of Messrs. Tarapore and Company, for compensation for increase in the cost of the imported pile-driving equipment and the technical know-how fees.
4. Costs.

We shall be obliged if you will kindly accept the appointment as Sole Arbitrator, enter upon the reference and intimate further proceedings and decide the differences and disputes.

Thanking you,

Yours faithfully,

The decision of the Arbitrator on the above question is contained in paragraph III read with points (1), (2), (3) and (4) of the Award. They read as follows:

III. After going through the claim statements, counter-statements, all the documents submitted by both the parties before the Arbitrator and after hearing carefully the arguments put forth by both the parties and their counsels during all the hearings at Madras and Cochin, I, Sri C. Srinivasa Rao, do hereby make and publish my Award in respect of the points of disputes referred to me, in the manner following:

Point 1.--The claim of Messrs. Tarapore and Company on Cochin Shipyard Limited for compensation for increase in the cost of imported pile-driving equipment and technical know-how fees falls within the purview of the first paragraph of Clause 40 of the General Conditions of Contract entered into between the two parties.

Point 2.--Messrs. Tarapore and Company are entitled to compensation by the Cochin Shipyard Limited for the increase in the cost of imported pile-driving equipment and the technical know-how fees by a sum of Rs. 99 lakhs only

(Rupees Ninety-nine Lakhs only), which amount shall be payable with interest at 9 percent per annum from this date till date of payment or decree, whichever is earlier.

Point 3.--This is covered by my decision as above on points (1) and (2).

Point 4.--(a) The Arbitrators fee is fixed as Rs. 11,000 for the sittings held at Madras and Cochin and Rs. 14,000 for reading the documents of the Claimants and Respondents and making and publishing the award.

(b) The Arbitrator's fees etc. as above and the incidental expenses are to be borne and have been borne by the Claimants and Respondents equally. In respect of other costs, each party should bear its own costs.

(c) The Award has been typed on stamped paper of value Rs. 150 at Madras. If either party request the award to be filed in an appropriate Court in Kerala State, that party would have to bear the requisite stamp duty of Kerala State together with the expenses of the sole arbitrator for filing the Award.

On the Arbitrator riling the award in court the Appellant applied u/s 30 read with Section 33 of the Arbitration Act to set aside the award on the ground that there is an error of law apparent on the face of the record. Mainly two points were urged before the lower court in support of the application. Firstly it was contended that the award has not been properly stamped and hence it is invalid and unenforceable. Secondly it was contended that the Arbitrator acted in excess of his jurisdiction in interpreting Clause 40 of the contract and assuming jurisdiction on a point not covered by the Arbitration Clause. This was countered by the second Respondent by saying that the award is properly stamped and is enforceable; and secondly the dispute that has arisen is taken in by the Arbitration Clause and the Arbitrator had not acted without jurisdiction in going into the merits of the dispute. It was further contended that it is not open to the Appellant to canvass the correctness of the jurisdiction of the Arbitrator, in that it was the Appellant who submitted these disputes for decision to the Arbitrator and having got a decision they cannot turn round and attack the jurisdiction of the Arbitrator. The lower court has accepted the defence plea on all points and dismissed the application. It is against that this appeal has been filed.

4. The first point urged in support of the appeal is that the award is not properly stamped to act upon and pass a decree. The direction in the award, as seen from the last paragraph of it, is that whoever requests the award to be filed in court in Kerala State, that party would have to bear the requisite stamp duty of Kerala State together with the expenses of the Arbitrator for filing the award. We have to assume that the Respondent who filed an application to call upon the Arbitrator to file the award has met the expenses of the Arbitrator and paid the amount required for making up the stamp duty under the Kerala Stamp Act. The Arbitrator signed the award on 6th July 1977 at Madras. The award is written on stamped papers valued at Rs. 150. It is not disputed that this stamp is sufficient as per the Stamp Act in force at Madras. Since the award was required to be filed

in court in Kerala the provisions of Section 19 of the Kerala Stamp Act has to be complied with. The stamp duty for an award for this amount of Rs. 99 lakhs comes to Rs. 14,872.50, under Article 12 of the Kerala Stamp Act. What has been done by the Arbitrator is that he purchased stamp papers for the difference in amount of duty and pinned the same to the award at the time of filing it in the court. Nothing is written on the additional stamp papers nor the stamps defaced. This is not the correct way of stamping the instrument. What should have been done under the Stamp Act and Rules was the one provided for in rules 10 to 12 of the Kerala Stamp Rules, 1960. Rule 12 requires an instrument of this kind executed out of Kerala State and required to be stamped after the receipt in this State to be stamped with impressed labels. Stamp labels can be impressed only by the proper officers appointed under the Stamp Act for the purpose. Under Rule 9 they are the Superintendent of Stamps, the Treasury Deputy Collectors in charge of District Treasuries and any other officer or officers appointed in this behalf by the Government. Admittedly this was not done. Whether the Arbitrator had power to get it stamped as mentioned above is the first matter to be considered.

5. According to the Appellant when once the Arbitrator has signed the award he becomes *functus officio* and he cannot thereafter do anything with it or add or subtract from it. In support of this argument he relies on the decision of the Supreme Court in *Rikhabdas Vs. Ballabhdas and Others*, . In that case what happened was an unstamped and unregistered award effecting a partition of certain properties was filed in court by an Arbitrator. An objection was taken that no judgment can be passed on such an award. On such objection the trial court passed an order remitting the award to the Arbitrator for resubmitting it to the court on a duly stamped paper and after getting it registered. The Supreme Court held that the award can be remitted to the Arbitrators only for re-consideration u/s 16. Remitting an award for re-writing it on a stamped paper is not one remitted for re-consideration, re-consideration being on the merits of the award. Want of stamp being a defect *de hors* the award is not covered by Section 16(1)(c) of the Act. In dealing with this the Supreme Court has observed thus:

It is true that Section 41 of the Arbitration Act makes the provisions of the CPC applicable to proceedings before a court under the Arbitration Act. But it is well known that after making his award the arbitrator is *functus officio*. To cite one authority for this proposition we may quote the observations of Mollish, C.J. in *Mordue v. Palmer* (1870) 6 Ca. A 22 31:(doubt)

I think the result of the cases at law is that when an arbitrator has signed a document as and for his award, he is *functus officio*, and he cannot of his own authority remedy any mistake.

In the present case, *ex hypothesi*, the award has already been made and the arbitrator has therefore become *functus officio*. It is that award which requires stamp. Section 151 of the Code cannot give the court power to direct the arbitrator to make a fresh award; that would be against well-established

principles of the law of arbitration.

In answer to this the Respondents' counsel submitted that the rigour of the earlier decision has been diluted by the subsequent decision of the Supreme Court in *Juggilal Kamlapat Vs. General Fibre Dealers Ltd. (And Connected Appeal)*, . In this case without referring to the earlier one the Supreme Court clarified what amounts to a *functus officio*. At page 1125 it is observed thus:

It is true that generally speaking, an arbitrator is *functus officio* after he has made the award; but this only means that no power is left in the arbitration to make any change of substance in the award that he had made....

Stamping, according to the learned Counsel being a ministerial act that can be done by the Arbitrator even later. Counsel referred to the decision of this Court in *Puthivapuravil Pocker and Others Vs. V. Khalid and Another*, . A Bench of this Court had occasion to consider whether an Arbitrator can present a document for registration. In dealing with that this Court observed thus at page 123:

It must also be said that necessarily the registration must always be only subsequent to the making of the award. Unlike in the case of preparing an award on stamp paper which must necessarily precede the making of the award itself, in the case of registration it is necessarily a subsequent act. If so, it cannot be said that since by making the award the Arbitrator becomes *functus officio* he cannot register the document. That would mean that in no case could the award be registered at all. He becomes (sic) *officio* only for the purpose of deciding the dispute referred to him for Arbitration. That cannot be re-opened. Necessarily the steps he has to take for registering the award subsequently would not be affected merely because the award has already been made. The Supreme Court in the decision in *Rikhabdas Vs. Ballabhdas and Others*, was speaking only with reference to the incompetency of the Arbitrator to prepare an award afresh on stamp paper. What has been said therein cannot be taken as in any way indicating that in the case of registration the Arbitrator will not be competent to act when once he has made the award.

On the facts of this case stamping the award with the additional stamp can only be done after execution when it is received within the State. The Arbitrator has the required authority to take steps for it u/s 19 of the Act.

6. This does not meet the objection of the Appellant completely. This is not a case where the additional stamp has been impressed by the proper officer. The additional stamp papers are seen purchased partly from the *ex officio* stamp vendor and partly from a licensed stamp vendor and tacked on to the award before the same was filed in court. There is no writing on the additional stamp paper and no defacing of the stamps. Section 19(b) and (c) read together show that the Arbitrator should have taken the instrument to the Collector as provided for in Section 18(2) or to the proper officer as provided for in rules 9 and 10 of the Stamp Rules to get the impressed label. So technically this is a case where though the duty has been paid the manner of stamping the document is not in

accordance with law. But the lower court has admitted the award in evidence and acted upon it by passing a decree in terms of it. Section 35 of the Kerala Stamp Act therefore is a bar to call in question this admission and acting upon it by the lower court. The only power left to us is the one u/s 59. Section 59 gives a discretion to the appellate court to interfere where revenue is affected. Within the time allowed by law the required amount of stamp duty has been paid though in a manner different from the one prescribed by the Rules. This is a technical mistake. This is not a case where the revenue is in any way affected.

In this connection the decision of the Supreme Court in *Hindustan Steel Ltd. v. Dilip Construction Co.* AIR 1969 S.C. 1238, has been cited by the Respondents' counsel. The passage relied on reads as follows:

The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of the opponents. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument.

We are not satisfied that we should interfere in this matter u/s 59. It follows that the first point urged by the Appellant's counsel fails.

7. It is very unfortunate, but of course not illegal that the Arbitrator has not given any reason or written a speaking order to hold that the dispute between the parties is covered by Clause 40 of the contract and that 99 lakhs of rupees with interest at 90 percent should be paid by the Appellant to the Respondent. For this latter conclusion also no reason is given. Answering a reference without giving reasons was peculiar and permissible in English Law and the same is the case in Arbitrations under the India Arbitration Act as well. If one looks at the history of this aspect of the arbitration law this is a consequence of the law of England namely that an award can be set aside only if there is an error of law apparent on the face of the award. This ground though was not very much appreciated by the English Courts continued to be valid ground as can be seen from the observation of Williams, J. in *Hudckinson v. Fertile* (1857) 3 C.B.N.S. 189, at page 202:

The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying "You have constituted your own tribunal; you are bound by its decision". The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the

question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.

This was followed by the Privy Council in *Champsey Bhara and Co. v. Sivraj Balloo Co.* AIR 1923 P.C. 66, in a case from India and the same has been given statutory recognition in Section 16(1)(c) of the Act. If reasons are given in the award by the Arbitrator and if there is a legal flaw in it that used to be taken as a ground apparent on the face of the award to set it aside. Arbitrators therefore became wiser and a practice developed of not giving any reason for an award. That was upheld by the English Courts. Our Supreme Court has in more than one decision held that the failure to give any reason is not a ground to set aside an award--See *Bungo Steel Furniture v. Union of India* AIR A.I.R. S.C. 378 and *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, So that is the law of the land until it is changed by the competent legislature. In England this practice is now considered to be intrinsically undesirable and represents an obvious impediment to any system of law of appeals on points of law. So a provision is made in the Arbitration Act, 1979 requiring the Arbitrators to give reasons, if one of the parties has given notice to the Arbitrator that the reasons for the award would be required. It will be useful if such a provision is incorporated into our Act as well. That will eschew all arbitrariness in the decisions of the Arbitrators. As the law now stands we cannot find fault with the Arbitrator for not furnishing any reasons for his conclusions. We can set aside the award only if the Arbitrator has misconducted the proceedings or there is an error of law apparent on the face of the award.

8. Faced with this legal position the Appellant counsel submitted that the answer for point No. 1 given by the Arbitrator is illegal and there is an error of law apparent on the face of the record. His submission was that by relying on the wording of Clause 40 of the Contract in Point No. 1 the Arbitrator has incorporated that clause as part of the award and therefore it is open to us to look into Clause 40 and decide whether the Arbitrator has on a wrong interpretation or finding assumed jurisdiction which he does not possess. This is clear from the decisions in *Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI)*, New Delhi, , *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, and the decision in *Commander Works Engineers, Cochin v. Eapen Varghese* ILR 1977 (2) Ker 124. It cannot be disputed that if the question which the Arbitrator has taken upon himself to decide is not in fact within the Arbitration Clause the award is a nullity. The Arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission. If disputes arise under any particular contract and the parties thereupon agree to refer all disputes arising under the contract the Arbitrator cannot give himself jurisdiction by deciding that any particular dispute arises under the contract in question when it does not, in fact, so arise. The question as regards the ambit of the Arbitration Clause, is not *prima facie* within his jurisdiction, see *Produce Brokers Company Limited v.*

Olympia Oil and Cake Co. Limited (1916) A.C.314 327 and Champsey Bhara and Company v. Jivraj Balleo Co. AIR 1923 P.C. 66. This point is made further clear by the decision of the Privy Council in Birji Mulji v. Cheong Yue Steamship Co. 1926 A.C. 497 503 and by the House of Lords in Heyman v. Darwin Ltd. (1942) A.C.497 503. In the latter case Lord Forter has stated the principle thus:

The question of the arbitrator's jurisdiction must, therefore, ultimately depend on the wording of the arbitration clause. As a rule, however, the arbitrator cannot clothe himself with jurisdiction. As Lord Parker said in Produce Brokers Co. Ltd. v. Olympic Oil and Cake Co. Ltd. (1916) 1 A.C. 314, 327: "The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission. ...Where, however, the submission is contained in the contract it may be a question of construction whether such expression as "all disputes arising under this contract" includes questions as to the ambit of the submission itself. Prima facie I do not think that they would. The principle is repeated by Lord Sumner in Hirji Mulji v. Cheongyue Steamship Co. Ltd. (1926) A.C. 497, 502 and need not be further illustrated....

In Attorney-General for Manitorba v. Kelly 1922 1 A.C. 268 Lord Parmoor has stated the law thus at page 276:

Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire; Produce Brokers Co. v. Olympia Oil and Cake Co. (1916) 1 A.C. 31 327, 329. 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.

In the light of these authorities, which we respectfully feel as laying down the correct principle, we hold that the question whether the dispute is arbitrable or not cannot be finally decided by the Arbitrator because it is a matter relating to his jurisdiction. He cannot by an erroneous interpretation or construction of the clause coaler jurisdiction on himself. The court can go into the question whether the matter in dispute between the parties is covered by the Arbitration Clause.

9. Before we go into the question whether the dispute is arbitrable or not we have to deal with a contention of the second Respondent that the Appellant is estopped from urging this point as they themselves have referred this question to the Arbitrator and they cannot now turn round and challenge it. There is no estoppel for the Appellant in this matter. Clause 40 of the agreement requires the contracting parties to submit their dispute for arbitration on receipt of a notice by one party from the other and if the Company refuses to join in the reference or fails to send a panel of names for selecting one of them from it as Arbitrator, it is open to the second Respondent to send a panel of names to the company and if the company fails to choose one from it as Arbitrator to choose one and refer the

dispute to arbitration. The correspondence in this regard placed before the Arbitrator and the arbitration clause quoted earlier in this judgment and referred to by the learned Judge, clearly show that the Appellant joined the reference under protest as it has no escape out of the reference, as the contractor wants it and the clause enables an unilateral reference if the company refuses. In such a situation what can be best done is to question the Arbitrator's jurisdiction before him. That is why point No. 1 happened to be raised by the Appellant before the Arbitrator. There is no estoppel to the Appellant to impeach the Arbitrator's jurisdiction in the circumstances of this case. The lower court is clearly in error in holding that the company is estopped from contesting the jurisdiction of the Arbitrator.

10. Then the question is whether the particular dispute is covered by the arbitration clause. No doubt the arbitration clause is very widely worded. However wide it may be it cannot comprehend matters which are outside the contract. The dispute between the parties is whether the contractor, the second Respondent, can claim from the Appellant the increased cost to him of imported pile-driving equipment and also the cost of foreign know-how for the operation of the said equipment. It is not disputed that the pile driving equipment is either a plant tool or appliance and the contractor has to provide the same at his cost. This is not any material to be incorporated in the contract work and to be given to the company. The equipment will be taken back by the contractor after completing the work. It is the increase in cost from the one assumed by the contractor that it may be required to be met by them to buy the equipment, that is the claim. The latter he is not claiming. His contention before the Arbitrator as stated in para 3 of his counter filed in the lower court on 5th December 1977 to the application of the Appellant to set aside the award was "that the Petitioner (Shipyard) was aware of the basis upon which the Respondent quoted its rates and which rates were accepted by the Petitioner. This Respondent therefore contended that it was entitled to be compensated for additional expenditure resulting from increase in the cost of imported equipment and technical know-how". This is equal to saying that the terms of the written contract do not set out the true intention of the parties and that there is a subsidiary or collateral promise to compensate the Respondent in respect of the claim. This is not a claim, right, matter or thing whatsoever in any way arising out of or relating to the contract. Contract means the written contract containing the arbitration clause. Nor does this claim otherwise concern the works, its execution or failure to execute the same. Work means work contracted to be executed and not the equipment which the contractor may require to carry out the work. This is not a case where either party takes recourse to any term of the contract. The Arbitrator is also not required to refer to any term of the contract to decide the matter in dispute. Some matter outside the written contract is put forward to base a claim wide though it is Clause 40 does not take in a claim not covered by the written contract. The principles that applies is the one stated by Bose, J. in Seth Thawardas Pherumal Vs. The Union of India (UOI), at page 477:

Wide though it is, Clause 14 is confined to any matter relating to the written contract and if ration and cloth are not covered by the written contract, they are not matters that relate to it. If parties choose to add a fresh contract in addition to or in substitution for the old, then the arbitration clause cannot cover the new contract. See Lord Macmillian in 1942 A.C. 356 at P. 371.

Following that principle on the facts of this case the claim raised by the second Respondent is not covered by the arbitration clause. The unreported Single Bench decision of the Delhi High Court in Suit No. 851-A of 1976 relied on by the Respondent's counsel does not appear to us to be correct or apply to the facts of this case. In the light of this conclusion here there is a clear case of an error of jurisdiction and law apparent on the face of the award to set aside the same. We do so. As we have found that the Arbitrator has no jurisdiction, his award of Rs. 99 lakhs and interest at 9% per cent is consequently unsupportable.

In the result the appeal is allowed, the order passed by the lower court is set aside. The award passed by the Arbitrator is set aside. It follows the decree passed by the lower court also stands reversed. As the additional stamp attached to the award is not defaced, the lower court will keep the award impounded under Order XIII, Rule 8, CPC unless the same is required for any other proceeding. The award shall not be returned to any party without defacing the additional stamp paper of the value of Rs. 14,722-50 attached to it. The Appellant is entitled to his costs.