
(2007) 09 MAD CK 0190
In the Madras High Court
Case No : OP No. 244 of 2005

Ennore Port Limited

APPELLANT

Vs

Skanska Cementation India Limited and Others

RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 43, 43(3)
Contract Act, 1872 — Section 138, 141, 142, 28, 55
Limitation Act, 1963 — Section 21

Citation : (2008) 2 ARBLR 598

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Judgement

Prabha Sridevan, J.—According to the petitioner, the award suffers from illegality and the arbitrators have exceeded the parameters of the power and have committed misconduct and, therefore, the award deserves to be set aside.

2. The petitioner called for competent offers by open tender for construction of port site access roads and bridges for the proposed Coal Port Project (Contract No. ECPP-C2). Trafalgar House Construction (India) Ltd. submitted their offer. The respondent is the successor-in-interest of Trafalgar House Construction (India) Ltd. Haskoning Royal Dutch Consulting Engineers and Architects of Netherlands were engaged as project consultants for planning, design and implementation of the project. The petitioner is the successor-in-interest of Madras Port Trust. There was a formal agreement incorporating the letter of acceptance, clarifications, specifications, terms and conditions and was executed on 28.06.1996. The work was to be completed within 15 months from the date of commencement. The date of commencement is 30.06.1996 and, therefore, the due date for completion would be 03.09.1997. The work could not be completed within the stipulated period. An extension was granted till August 1998. The project was completed only on December 1998. The contract provides for issue of defects liability certificate by the Engineer, who is none other than the project consultant regarding satisfactory completion. This certificate was issued along

with a covering letter dated 25.01.2000. According to the respondents, the delay was "due to various reasons not attributable to themselves" and since all outstanding works have been completed to the satisfaction of the Engineer, the respondents felt entitled to make certain claims arising out of differences in the interpretation of certain clauses of the contract and on account of the breach. A claim statement was submitted by the respondents on 09.05.2000. The petitioner's contention that this is a final statement of claim is denied by the respondents. According to them, the notice under Clause 67.1 was issued only on 07.01.2002. This was rejected on 05.06.2002. The arbitration commenced. The respondents filed their statement of defence and a written statement was filed where a supplementary claim was made by the petitioner. According to them, Claim Nos. 1 and 9 are not arbitrable. Claim Nos. 7, 9 and 10 are not included in the final statement and, therefore, liable to be rejected. No oral evidence was adduced by either party and they relied mainly on documentary evidence. The following claims were made:

Claim Name	of the Claims	Amount Claimed	Amount Awarded	Nos.
I. Payment towards	Rs. 10,00,000.00	Rs. 3,00,000.00		
Rs. 10,00,000.00				
Rs. 3,00,000.00				
Rs. 80,23,568.00				
Rs. 43,50,000.00				
Rs. 23,49,435.00				
Rs. 14,32,760.00				
Rs. 15,14,517.00				
Rs. 8,40,042.20				
Rs. 3,36,896.00				
Rs. 2,36,896.00				
Rs. 22,71,150.00				
Rs. 14,25,126.00				
Rs. 1,17,17,284.00				
Rs. 67,82,018.00				
Rs. 5,03,21,446.00				
Rs. 89,97,993.00				
Rs. 12,40,000.00				
Rs. 11,60,000.00				
Rs. 3,26,12,082.00				
(i) Interest at 12% interest on p.a. on amounts payments due awarded in Claim Nos. 2, 3 and 4 from the respe- ctive dates of certification by the Engineer. (ii) Interest at 12% p.a. on amount awarded in Claim No. 9 from 23.11.1999. (iii) Future interest at 12% p.a. from the date of the award on all principal amounts awarded till the date of payment. Total Rs. 11,13,86,378.00				

3. The learned Counsel for the petitioner submitted that the scope of works and the description of the same is set down in the agreement. Technical specifications of the contract can be referred to in paragraph nos. 301.1, 301.2 and 301.3, etc. The settlement of disputes initially by the department that is the Engineer's decision would be crucial and thereafter, there is dispute resolution by the arbitrator. The manner in which the dispute shall be referred for the Engineer's decision is as per Clause 67.1. It could be amicably settled as per Clause 67.2 and a decision in respect of which the Engineer's decision has not become final and binding pursuant to Clause 67.1 and an amicable settlement has not been

reached within the period mentioned in Clause 67.2, shall be referable for arbitration as per Clause 67.3. Clause 67.3 has been subsequently amended and there is no dispute that this amended Clause 67.3 alone rules the field now. The learned Counsel submitted that the arbitrator's power to review and revise the decision, opinion, instruction, determination, certificate or valuation of the Engineer relating to the dispute is subject to the limits prescribed under Clause 67.5. Clause 67.5 provides for matters which are exceptions to Clause 67.3 and matters which shall not be a subject of reference to arbitration. The draft final statement which is to be submitted by the contractor upon completion would contain the details specified in Clause 60.11. The learned Counsel submitted that contents of the draft final statement are exhaustive of the claim and no claim can be made. In spite of this bar, the arbitrators had proceeded to consider matters which are outside the draft final statement ignoring the objections of the petitioners. The learned Counsel submitted that on 26.04.2000 under Exhibit C-21, the respondents had called upon the Engineer who is the project consultant to give his decision under Clause 67.1 of the conditions of contract and the Engineer had by his letter dated 06.05.2000, in response to their letter requesting him to give his decision under Clause 67.1, arrived at the conclusion that the first respondent is not eligible to payment for work not done. The respondents should have referred the matter to arbitration in accordance with Clause 67.5 by 15.07.2000. The matter was referred only on 09.04.2002 and, therefore, it is not arbitrable.

4. According to the learned Counsel for the petitioner, the words "subject to the Clause 67.5" must be construed strictly. The tribunal cannot say that to so construe Clause 67.5 would render 67.3 otiose. The arbitrators do not have inherent powers to deal with matters that are not arbitrable and they are circumscribed by the terms of the agreement. The learned Counsel referred to the following judgments:

- (i) McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, ;
- (ii) Bharat Coking Coal Ltd. Vs. L.K. Ahuja, ;
- (iii) New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, ;
- (iv) Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, ;
- (v) Vishwanath Sood Vs. Union of India (UOI) and Another, ;
- (vi) State of Maharashtra and Others Vs. Saifuddin Mujjaffarali Saifi, ;
- (vii) General Manager Northern Railways and Another Vs. Sarvesh Chopra, ;
- (viii) Executive Engineer, R.E.O. Vs. Suresh Chandra Panda (Dead) Through Lrs, ;
- (ix) M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another, ;
- (x) Delhi Development Authority v. Sudhir Brothers 1995(2) Arb. LR 306 (Del.);

- (xi) Associated Engineering Co. Vs. Government of Andhra Pradesh and another, ;
- (xii) HCG Stock and Share Brokers Limited Vs. Gaggar Suresh, ;
- (xiii) National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, ;
- (xiv) New Delhi Municipal Committee v. Tirath Ram Ahuja (P) Ltd. AIR 1980 Delhi 185;
- (xv) Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, ;
- (xvi) Tarapore and Co. Vs. State of M.P., ;
- (xvii) A.T. Brij Paul Singh and Others Vs. State of Gujarat, .

5. According to the learned Counsel, the Claim Nos. 1, 2, 3, 5, 6 and 9 are barred by Clause 67.5 and the arbitrators cannot construe the clause so as to invest themselves with a power to deal with "excepted matters". The parameters of the arbitrator's jurisdiction are fixed. The learned Counsel submitted that as regards the Claim Nos. 1, 2 and 9, they are hit by Clause 67.1. The claimants cannot say that out of ignorance or inadvertence the persons-in-charge had referred to Clause 67.1 and that it was only in 2002, notice under Clause 67.1 was given and thus try to free themselves from the time restraint imposed by the agreement. The learned Counsel submitted that when the letter clearly indicates a reference to the Engineer for resolution of the dispute under Clause 67.1 and when the Engineer has given his decision immediately under Clause 67.1 by issuing another notice referring to the same clause again two years later would not make the dispute arbitrable. The learned Counsel submitted that as regards Claim Nos. 2, 3 and 4, the Engineer has certified a certain amount which the respondents objected to and raised a claim. The arbitrators went into this question though it would be an excepted matter but came to the conclusion that the decision of the Engineer cannot be interfered with. Therefore, the petitioners are bound to satisfy the claim under this head not because the arbitrator had jurisdiction to go into the matter, but because the Engineer has certified it to be correct. As regards Claim No. 5, according to the learned Counsel for the petitioner, the Engineer had rejected this claim and, therefore, it would be an excepted matter but the arbitrator had awarded a sum of Rs. 2,36,896 against the claim of Rs. 3,36,896 without any evidence against Claim No. 5, this relates to the outlet channel that had to be constructed by the respondents. According to the learned Counsel, the claimants had agreed to receive lump sum payment; the claimants knew the channel had to be watertight; the claimants admitted that the Barrier 1 had been badly done.

6. As regards Claim No. 7, this is covered by Clause 70.2. Clause 70.2 deals with addition or reduction in the cost due to subsequent legislation. According to the learned Counsel, the claimant had withdrawn his claim for escalation and he had not proved that he had suffered financial loss by incurring the extra expenses in paying to the sub-contractor. This clause also has undergone variation. With

regard to this claim the respondent had claimed escalation with reference to Clause 70.1 and required that the escalation charges shall be payable as per the formula against labour or materials and fuel consumption. The minutes of the bid committee meeting on 19.03.1996 show that the bidder had agreed to withdraw escalation condition (Clause 14, Vol. 1) and Clause 70.1, Vol. 2 (conditions of particular application) and abide by the bid stipulations.

7. The learned Counsel also submitted that from the materials on record it will be seen that the claimant has sub-contracted this work and the subcontractor has not been paid the escalation amount and, therefore, the claimant is not entitled to this claim. The learned Counsel submitted that the reference to the increase because of the subsequent legislation must find a place in the monthly statement. The learned Counsel submitted that the particular method of computation of the escalation charges which was agreed upon cannot be ignored. As regards Claim No. 8, this deals with overstay compensation. The contract was for 16 months. The contract was extended. The Hudson's method was adopted but there is no evidence. The cause of action for this claim arose in 1998 and, therefore, this claim is beyond time. This claim is also found in the draft final statement. Paragraph no. 12 of the rejoinder indicates that this claim is not in terms of the contract but *de hors* that and, therefore, the claim to be made from the date on which the contractor suffered injury. The conclusion that because the employer has granted extension of time they are bound to reimburse the contractor was not correct. The extract of the meeting which has been produced would indicate to the contrary. For all these reasons, it was prayed that this award be set aside

8. The learned senior counsel appearing for the contractor would first submit that the extent to which this Court can interfere in such matters is very limited and referred to various decisions in this regard. The learned Counsel submitted that the term "Engineer" has been defined and what is the Engineer's duty should be understood to find out what are excepted matters too. The scope would only be the instructions and directions, which can be given by the Engineer who is employed by the employer and who is the technical expert in implementation of the contract, Clause 67.5 must be construed very narrowly. If Clause 67.5 is construed liberally then all the matters under dispute will become non-arbitrable. Clause 67.5 must be construed in such a way that the Engineer's decision will be final only where it relates to technical details and this would be clear from the language of the clause. As regards the notice allegedly issued under Clause 67.1 it does not satisfy the conditions laid down in Clause 68.2. The subsequent notice which specifically mentions Clause 67.1 alone is relevant. The arbitration has been commenced in time if this notice is taken into account. The learned senior counsel submitted that until the final statement is prepared the claim cannot be made and it would not be correct to contend that the draft final certificate will contain all the disputed claims and no claim can be made which does not find a place in the "draft final statement". The very fact that the words used are "draft final statement" would show that it is not actually the final statement. The

learned senior counsel submitted that the period of limitation which is found in the contract cannot be invoked to deny the contractor his rights. Section 28 of the Contract Act, as amended, would show that no such clause can be invoked to bar the remedy. The learned Counsel also made his submissions with regard to each claim on merits.

9. The learned senior counsel for the respondent cited the following judgments where the scope of challenge to the arbitrator's award u/s 34 of the Arbitration and Conciliation Act, 1996 has been spelt out:

- (i) U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd., ;
- (ii) Sudarsan Trading Co. Vs. Government of Kerala and Another, ;
- (iii) Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., ;
- (iv) Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, ;
- (v) Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission, ;
- (vi) The Tata Hydro-Electric Power Supply Co. Ltd. and Others Vs. Union of India (UOI), ;
- (vii) Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, ;
- (viii) Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., ;
- (ix) M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, ;
- (x) Ennore Port Limited, (Successor of Chennai Port Trust with regard to the Ennore Port Project) Vs. Hindustan Construction Company Limited and Others, .

10. From the judgments cited by the learned senior counsel and referred to above with regard to the scope of Section 34 of the Arbitration and Conciliation Act, 1996 it is clear that the Supreme Court has held that where the arbitrator has applied his mind to the pleadings, the evidence adduced and the terms of the contract there is no scope for reappraisal of the matter as if it were an appeal and that even if another view is possible the view taken by the arbitrator would prevail; and that, this Court cannot reappraise evidence or examine the correctness of the arbitrator's conclusion. Therefore, it is with great caution that the arbitrator's award is looked into and I have scrupulously tried to avoid as far as possible the examination of the materials on record but I have tried to examine the legality of the arbitrator's award from the award itself and I have classified the claims in categories.

11. The following clauses of the contract are relevant:

Clause 67.1 of the contract is extracted hereunder:

If a dispute of any kind whatsoever arises between the employer and the

contractor in connection with or arising out of the contract or (he execution of the works, whether during the execution of the works or after their completion and whether before or after repudiation or other termination of the contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this clause. Not later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the employer and the contractor. Such decision shall state that it is made pursuant to this clause.

Unless the contract has already been repudiated or terminated, the contractor shall, in every case, continue to proceed with the works with all due diligence and the contractor and the employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the employer or the contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the employer or the contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to such dispute and, subject to Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the employer and the contractor and no notice of intention to commence arbitration as to such dispute has been given by either the employer or the contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the employer and the contractor.

Clause 67.3 reads as follows:

Any dispute in respect of which:

- (a) the decision, if any, of the Engineer has not become final and binding pursuant to Clause 67.1, and
- (b) amicable settlement has not been reached within the period stated in Clause 67.2

shall be finally settled, unless otherwise specified in the contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction,

determination, certificate or valuation of the Engineer related to the dispute.

Arbitration may be commenced prior to or after completion of the works, provided that the obligations of the employer, the Engineer and the contractor shall not be altered by reason of the arbitration being conducted during the progress of the works.

Clause 67.5 is added and shall read as under:

The following matters shall be exceptions to the provision of Clause 67.3 and shall not be the subject of reference to arbitration:

(a) In the contract whenever there is a discretion or exercise of will by the Engineer during the progress of work, the mode or manner of the exercise of discretion, shall not be matter of arbitration.

(b) Whenever the employer is given discretion to do any act under the contract, the exercise of discretion by the employer shall be final, conclusive and binding on all parties and the manner of exercise of such discretion shall not be called in question and the matter cannot be referred to arbitration.

(c) The decision of the Engineer shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions and as to the quality of workmanship or materials and drawings and instructions concerning the work or the execution of or failure to execute the same arising during the course of the works and in the maintenance period. The above shall not be the subject of arbitration.

Clauses 70.1 and 70.2 are extracted hereunder:

Clause 70.1--There shall be no adjustment of the contract price in respect of variation in the cost of labour or materials or any other matters affecting the cost of execution of works. The unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such variations of costs.

Clause 70.2--If, after the date, 3 days prior to the latest date for submission of tenders for the contract there occur changes to any national or state statute, ordinance, decree or other law or any regulation or bye-law of any local or other duly constituted authority, or the introduction of any such state statute, ordinance, decree, law, regulation or bye-law which causes additional or reduced cost to the contractor, other than under Clause 70.1, in the execution of the contract, such additional or reduced cost shall, after due consultation with the employer and the contractor, be determined by the Engineer and shall be added to or deducted from the contract price and the Engineer shall notify the contractor accordingly, with a copy to the employer.

12. The following sections are also relevant:

Section 28 of the Contract Act, 1872

28. Agreements in restraint of legal proceedings, void--Every agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent.

Exception 1--Saving of contract to refer to arbitration dispute that may arise--This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2--Saving of contract to refer questions that have already arisen--Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Application of Section 28 of the Contract Act

The agreement was entered into in 1996. The amended Section 28 came in 1997. The question whether the amended section would apply to the contracts entered into prior to 1997 was raised but not seriously argued since according to both the counsel even without raising the issue of retrospective operation of the section they would be able to sustain their respective stands. In any event I am bound to refer to a decision where a Division Bench of this Court in *Oriental Insurance Company Limited v. Karur Vysya Bank Limited* 2001 (2) CTC 400 has held as follows:

Though elaborate arguments were advanced on this aspect, we are of the view that it is unnecessary to refer the same since the amendment to Section 28 was brought into effect only on 08.01.1997. In the absence of any specific reference in the amended provision regarding its operation, it is presumed that it is only prospective. Though it is clear that by the Indian Contract (Amendment) Act, 1997, the original Section 28 has been replaced by a new paragraph in which such extinction of right unless exercised within a specified period of time, if not beyond the period of limitation, is also rendered void. As observed earlier, in the absence of any specific reference in the amended Act, it is prospective in nature and the same cannot affect the contract made earlier.

Section 43 of the Arbitration and Conciliation Act, 1996

43. Limitations--

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

(I) Claims confirmed because Engineer's decision is accepted by arbitrator

13. Claim Nos. 2, 3 and 4 are confirmed because the Engineer's decision has not been challenged. The employer ought to have challenged it. They have not done so and, therefore, it has become final. And the arbitrators have confirmed the employer's decision. Though before this Court the employer has challenged the arbitrability of these claims on the ground that these decisions would fall in "excepted matters", I do not intend to go into this question, as regards these claims; since even if we accept the employer's case that they are excepted matters they still have to make payments as per the Engineer's decision, since the claims have become final.

(II) Claims which are not arbitrable because of non-compliance of Clause 67.1

(i) On 07.01.2002, the claimants raised their claims allegedly under Clause 67.1. They referred to the relevant clauses:

The contract between us provides for settlement of disputes through the process of arbitration. The general conditions of contract provided in Part I read with conditions of particular application provided under Part II prescribes a detailed procedure to be followed before submitting the disputes to arbitration. Clause 67.1 requires the disputes to be referred in writing to the Engineer, in the first place, with a copy to the other party and the Engineer to give notice of his decision to the parties upon such disputes within 84 days therefrom. If any of the parties is not satisfied with the decision of the Engineer, it enables the aggrieved

party to notify the other party of its intention to commence arbitration within 70 days from the date of receipt of the Engineer's decision. The same procedure applies in case the Engineer renders no decision. Clause 67.2 further requires the parties to make an attempt for amicable settlement after the notice of intention to commence arbitration is issued and before commencing the arbitration proceedings. This clause also enables the aggrieved party to proceed with the commencement of arbitration any time after the expiry of 56 days from the date of notice of intention to commence arbitration is issued. After the above formalities are completed, Clause 67.3 enables commencement of arbitration as provided under the said clause....

On earlier occasions when the respective issues were presented for the kind consideration as a measure of seeking settlement of the claims, either by inadvertence or because of wrong interpretation of the clauses, we had mentioned Clause 67.1 in some of our letters. In reply to all such letters, you as the Engineer representing the employer had chosen to reject our claims. Only upon such rejection of claims, the issues have now fructified into disputes and we have become entitled to seek your decision as "The Engineer" as provided under Clause 67.1. This representation is being submitted to "The Engineer" without prejudice to our earlier submissions, in case, they are construed as compliance with Clause 67.1.

(ii) It is acknowledged that earlier they had made claims under Clause 67.1. These are : Claim No. 1, where it is stated that they had addressed a letter on 19.06.1998 requesting the Engineer to accord approval for the payment and on 07.07.1998 it was rejected. As regards Claim No. 2, it is stated that payment towards general items, they had made a claim on 31.03.1998 and it was rejected by the letter dated 29.06.1998. As regards Claim No. 3, it is stated that payment towards wrongly deducted quantities against sand and gravel, claim was made on 14.11.1998 which was rejected by the letter dated 16.03.1999. As regards Claim No. 4, it is stated that payment disallowed in certification of bills. As regards Claim No. 5, their claim for reimbursement for diesel generator sets was rejected on 03.03.2000. As regards Claim No. 6, under Exhibit C-80 dated 02.12.1999, a claim was made for recovery of a sum of liquidated damages for the delay with regard to port access road and village service road. In this respect a dispute was raised under Clause 67.1 as follows:

We understand, as mentioned above, that a sum of Rs. 12.4 lakhs has been deducted from our bill by the employer towards liquidated damages from September 1998 to December 1998...hence the LD as deducted above is also a dispute. Also please refer to Clause 67.1 which specifies that the liquidated damages shall be the only monies due from the contractor for such default.... We request to give your decision on the disputes in terms of Clause 67.1 of General Conditions of Contract (106 and 101) and direct employer to pay the balance with 18% interest p.a. for the amounts due for delayed periods.

As regards Claim No. 9, a claim was made under Clause 80 and there was no

reply by the Engineer.

Payment towards providing well point dewatering at cooling water channel and on account of barrier leakage. The request was rejected on 17.12.1999. It is the claimants' case that, though the earlier letter cited Clause 67.1, the actual claim under Clause 67.1 is only made in 2002.

(iii) Clause 67.1 refers to settlement of disputes and has spelt out the steps to be taken before institution of arbitration:

1st Step--Notice to the Engineer in writing mentioning it is made under Clause 67.1.

2nd Step--(a) Within 84 days from 1st step Engineer gives notice of his decision.

(b) Within 84 days Engineer does not give decision.

3rd Step--If--

(a) Within 70 days from 2nd step aggrieved party commences arbitral proceedings by giving notice of intention to commence arbitration.

(b) Within 70 days after lapse of 84 days aggrieved party commences arbitral proceedings by giving notice of intention to commence arbitration.

The claimant had started the procedure by taking the 1st step, the Engineer had taken the 2nd step and now third step should follow.

(iv) The following decision in *Krishna Exports and Ors. v. Raju Das* (2004) 13 SCC 498 gives us guidance as to what should be done when a litigant after having taken the "first step" forward does not do what the law requires him to do and then after a lapse of time tries to get a fresh lease of life in his litigation by taking another step which he now calls the "first step":

A similar contention advanced on behalf of the respondent has been negated by this Court construing the relevant provisions of Sections 138, 141 and 142 of the Act in *Sadanandan Bhadrans Vs. Madhavan Sunil Kumar*, . This court observed that a combined reading of Section 138 and Section 142 leaves no room for doubt that cause of action within the meaning of Section 142(b) arises and can arise only once. At para 9 it was clarified, as under:

9. Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too, within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour, a fresh right and not cause of action accrues in his favour. He may, therefore, without taking preemptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during

the validity of the cheque. But once he gives a notice under clause (b) of Section 138, he forfeits such right, for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawee expires.

This judgment which has been followed in the subsequent decisions supports the appellant's contention. Faced with this difficulty, the learned Counsel for the respondent submits that the first notice dated 15.02.1995 is really not a notice as contemplated by clause (c) of the proviso to Section 138 and it cannot be construed to have given rise to a cause of action to file the complaint. According to the learned Counsel for the respondent, the earlier notice was only in the nature of a communication which does not speed out in clear terms a demand to make the payment. We find it difficult to accept the contention. On a reading of the letter dated 15.02.1995, it is plainly clear that the respondent required immediate payment of the amount of cheque to be arranged failing which he threatened to take legal action in the matter.

In that case also, the complainant tried to adopt the same ruse that the claimant in the present case has attempted.

(v) Though the notice is the prerequisite for commencement of arbitration and subject to Clause 67.4, no arbitration can commence unless this notice is given. Clause 67.4 deals with the failure to comply with the Engineer's decision which means if either of the parties though agreed do not give notice of intention within the period stated in Clause 67.1 then it has become final and binding and there may be reference to arbitration in respect of that decision which is not complied with. For reference to arbitration under Clause 67.4 the parties need not go through the procedure contemplated in Clause 67.1. In whatever manner Clause 67.1 is construed, it is not a clause which extinguishes the right of the parties. What Clause 67.1 provides for is a procedure to be adopted which is prerequisite for reference to arbitration. Without the third step no arbitration can commence. The claimant knew what he was doing when he issued the notice in 1998 under Clause 67.1. It is difficult to accept the contention on behalf of the claimant that the addresses were not correct and, therefore, it is not a notice under Clause 67.1. The claimant knew that he was issuing a notice under Clause 67.1. The Engineer understood it to be a notice under Clause 67.1 and rejected the claims, or did not respond to the claims within the time prescribed. After three years, the claimant, becoming wiser, has tried to backtrack by saying that the mention of Clause 67.1 was by inadvertence. It is not possible to ignore the mandatory tone of Clause 67.1. In any event the arbitrators cannot do that being bound to act within the four corners of the contract. With regard to this issue, the award reads thus:

9.7. The claimants, in their rejoinder, have stated that they submitted the

disputes for the decision of the Engineer under Clause 67.1 only on 07.01.2002 (Exhibit C-5). They submitted that may be out of ignorance or inadvertence of the persons-in-charge of Engineer during the execution of the work. The entire scheme of the various clauses cannot give rise to any inference that every claim and each dispute should be adjudicated upon by different arbitration tribunals. Clause 67.1 is an enabling provision to facilitate the adjudication of disputes and differences between the employer and the contractor and cannot be construed so as to take away the right of such adjudication, inasmuch as no time limit is provided for submitting the disputes for the decision of the Engineer. Further, Clause 67.1 also takes within its fold all disputes as to any opinion, instruction, determination, certificate or valuation of the Engineer. The amended Clause 67.3 provides the arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute within the limits of exceptions referred to in Clause 67.5.

9.8. The question is whether Claim No. 1 is arbitrable or the claimants have placed themselves in a position whereby they cannot seek arbitration because they have failed to adhere to the time limits laid down in Clause 67.1 of the contract. The respondents hold that unless claimants seek extension of time from a competent court u/s 43(3) of the Arbitration and Conciliation Act, 1996, Claim No. 1 has ceased to be arbitrable. The claimants respond to this argument by taking the stand that in reality there was no reference under Clause 67.1 until 07.01.2002, that reference under Clause 67.1 can be made at any time within the period of limitation, that all claims made before the Engineer are not disputes with the employer, that the Engineer has a dual role, viz. first as representative of the employer and second as independent consultant empowered to give decisions on matters of dispute between the employer and the contractor. Claimants submit that Clause 67.1 has to be read with Clause 60.11. Clause 67.1 can be invoked only when an issue becomes a dispute and becomes applicable only after the stage of Clause 60.11. The contention of the claimants gains credence when viewed in the context that although Clause 67.1 has been referred, notice has not been issued formally to the address stipulated for the employer in Clause 68.2 either by claimants or by the Engineer. Further, Clause 67.1 presupposes a dispute between the employer and the contractor. In none of the letters in Exhibits C-15 to C-21 is there any reference to such dispute. The Engineer while purporting to give his decision in Exhibit C-22 prefaces his ruling with the remark. "This appears to be" a long pending issue which has not been resolved with the Engineer's representative". From this background, it would certify that references to Clause 67.1 are erroneous.

(vi) Clause 67.1 lays down the procedure of initiation of disputes. A reading of Exhibits C-15 to C-21 by the arbitrator is palpably wrong. In Exhibit C-15, the word "dispute" is used as under:

Hence, we dispute under Clause 67.1 regarding the non-measurement of the

Item No. 1.117 and its subsequent non-payment.

Exhibit C-19 is extracted as follows:

Dt. 24.02.1999

To, Haskoning/Ritos Ennore Road Port Project Ennore, Chennai - 600120

Sub. : Payment totwards Item No. 1.117 "Maintenance of Diversion Road" -ECP-C2-C1. No. 67.1-Reg.

XXX XXX XXX We once again dispute regarding your non-certification of payment for the maintenance of diversion road as per Item No. 1.117 from November 1997 to August 1998 till opening of PAR.

XXX XXX XXX This letter is issued pursuant to Clause 67.1 of contract agreement.

In Exhibit C-21, the following extract is relevant:

We, therefore, request you to give your decision as "Engineer" under Clause 67.1 of General Conditions of Contract and direct the employer to pay for the said Item No. 1.117 as billed.

And in response, the claimant is informed:

In response to the above mentioned letter to me requesting to give my decision under Clause 67.1 of the General Conditions of Contract and direct the employer to pay for BOQ Item No. 1.117 regarding Maintenance of Diversion Road, based on a review of the relevant files and documents my decision is as follows.

Exhibit C-80 with regard to Claim No. 9 also refers to Clause 67.1:

The technical plea is taken that the earlier request given inadvertently under Clause 67.1 has not been issued formally to the address as mentioned in Clause 68.2 and, therefore, only the present request in 2002 must be reckoned as a request under Clause 67.1. But both these communications were sent to the same address. The Engineer had given his decision stating clearly that the disputes are not excepted.

Then, the notice to commence arbitration must be given as per Clause 67.1.

(vii) In *Continental Construction Co. Ltd. v. State of M.P.* (supra), at page 87 (para 5 at page 405 of Arb. LR) the Supreme Court held:

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

he cannot go back to the agreement simply because it does not suit him to abide by it....

(viii) In *New Delhi Municipal Committee v. Tirath Ram Ahuja (P) Ltd.* (supra) the following paragraph is relevant:

In the present case the very right to refer the dispute to arbitration was to be alive only for 28 days after the issue of final certificate by the architect. So the very right to refer the disputes to arbitration ceased to exist after the expiry of 28 days from issuance of final certificate of architect. There was no such right which could be enforced. Hence, there was a limit to the very existence of the right and there was no limit on the enforcement of the same and that being so stipulation in the present case was not hit by the provisions of Section 28 of the Contract Act.

(ix) In *Vishwanath Sood v. Union of India* (supra), at page 666 (page 363 of Arb. LR) the Supreme Court held:

9. The Division Bench has construed the expression in Clause 2 in parenthesis that "the Superintending Engineer's decision shall be final" as referring only to a finality qua the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the government. After referring to certain judicial decisions regarding the meaning of the word "final" in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under Clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in Clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words "except where otherwise provided in the contract" would become meaningless. We are, therefore, inclined to hold that the opening part of Clause 25 clearly excludes matters like those mentioned in Clause 2 in respect of which any dispute is left to be decided by a higher official of the department. Our conclusion, therefore, is that the question of awarding compensation under Clause 2 is outside the purview of the arbitrator and that the compensation, determined under Clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.

(x) In *G.M., Northern Railway v. Sarvesh Chopra* (supra) it was held as follows:

8. In our opinion those claims which are covered by several clauses of the special conditions of the contract can be categorized into two categories. One category is of such claims which are just not leviable or entertainable. Clauses 9.2, 11.3 and

21.5 of special conditions are illustrative of such claims. Each of these clauses provides such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railways", or "no claim will/shall be entertained". These are "no claim", "no damage", or "no liability" clauses. The other category of claims is whether the dispute or difference has to be determined by an authority of Railways as provided in the relevant clause. In such other category falls such claims as were read out by the learned Counsel for the respondent by way of illustration from several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clauses 2.4.2(b) and 12.1.2. The first category is an "excepted matter" because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within "excepted matters" because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to the second category of "excepted matters".

(xi) In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises* (supra), at page 299 (para 20 at page 362 of Arb. LR) the Supreme Court held:

21. ...In the award, the arbitrator has specifically mentioned that he has given due weightage to all the documents placed before him and has also considered the admissibility of each claim. However, while passing the award basic and fundamental terms of the agreement between the parties have been ignored. By doing so, it is apparent that he has exceeded his jurisdiction.

(xii) In *Tarapore & Co. v. State of M.P.* (supra), at page 532 (page 351 of Arb. LR) the Supreme Court held:

25. ...It has to be seen whether the term of the agreement permitted entertainment of the claim by necessary implication. It may be stated that we do not accept the broad contention of Shri Nariman that whatever is not excluded specifically by the contract can be subject matter of claim by a contractor. Such a proposition will mock at the terms agreed upon. Parties cannot be allowed to depart from what they had agreed. Of course, if something flows as a necessary concomitant to what was agreed upon, courts can assume that too as a part of the contract between the parties.

(xiii) In *HCG Stock & Share Brokers Ltd. v. Gaggar Suresh* (supra), at page 282 (para 5 at page 460 of Arb. LR) the Supreme Court held:

...All claims, differences or disputes referred to in Bye-laws (1), (1-A), (1-B) and (1-D) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the relevant authority to administratively resolve the claim, differences or disputes shall be excluded for

the purpose of determining the period of six months.

According to the appellant, the cause of action has arisen on or about 21.03.2003. Whether really the cause of action has arisen to the appellant on 21.03.2003 or prior to that, is the question to be decided....

Reference to this communication leaves no manner of doubt that the dispute had already arisen on 08.02.2001 and the last date for resolving the dispute was 19.03.2001. Therefore, even if we take the last cut-off date to be 19.03.2001 then too the last date for filing the complaint would be September 2001. In fact, the complaint was filed in the month of September 2003. Therefore, the complaint was hopelessly barred by time.

(xiv) This extract is taken from *Associated Engineering Co. v. Government of A.P.* (supra), at page 102 (paras 23, 26 and 27 at pages 188-189 of Arb. LR):

23. ...The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction [See *Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others*,]

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

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency [See *Muslill and Boyd's Commercial Arbitration*, 2nd Edit., P. 641]. He commits misconduct if by his award he decides matters excluded by the agreement [See *Halsbury's Laws of England*, Vol. II, 4th Edn., Para 622]. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. Vide *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.* (supra).

No arbitration can be commenced if the notice is not given as per Clause 67.1.

The claimant knew that Clause 67.1 has to be followed for initiating arbitration that is why he termed the earlier request under Clause 67.1 as inadvertent and started the procedure afresh. It was not his case before the arbitrator that the clause is void and hit by Section 28 of the Contract Act. If so, he could have straightaway asked for appointment of arbitrator on the ground that from the date of rejection he had three years. He does not do so. He again issues a notice under Clause 67.1. Section 43 of the Arbitration and Conciliation Act has been enacted to deal with a contingency where time has to be extended to take the step towards arbitration. The arbitrators have no power to do that and only the court has the power. Much less can the arbitrators think that the earlier request as "erroneous" and proceed to accept the second request under Clause 67.1 which is what it is.

Can a party unilaterally revive his right, by again making a request purported under Clause 67.1. No party could revive his "dead right" unilaterally. Therefore, the claim for which there was a decision by the Engineer under Clause 67.1 and notice was not given within the period of 70 days from the expiry of the 84th day or the date on which the Engineer is ready with the decision, those claims could not have been decided. The reference to arbitration given after 2002 is not in compliance with Clause 67.1.

(III) Claims which are covered by Clause 67.5 and, therefore, "excepted"

(i) As regards excepted matters, the arbitrators have held that:

The conclusion which we inevitably draw from our appreciation of the course of events is that Claim No. 1 is not excluded from arbitration. In our view the claimants have not actually taken recourse to Clause 67.1 prior to 07.01.2002. Consequently, the question of the claim being adjudged barred by the shorter time schedule envisaged in the clause does not arise. The invoking of Clause 67.5 by the learned Counsel for the respondents is also on tenuous ground in view of the power given to arbitrators in Clause 67.3 to review decisions taken by the Engineer. Unlike in the case cited by the learned Counsel for the respondents, there is no clear description of excepted matters; Clause 67.3 would become otiose if Clause 67.5 is understood to put all rulings by the Engineer beyond the purview of arbitration. On balance, we have to conclude that our jurisdiction is not excluded.

The arbitrators are bound to decide whether a particular dispute comes within Clause 67.5. They cannot ignore Clause 67.5.

(ii) The quality of the barrier is definitely a matter which falls within the jurisdiction of the Engineer and his decision will have to be taken as final as per Clause 67.5 and is an excepted matter. It is not difficult to understand the language of Clause 67.5 in this agreement. Even the learned senior counsel appearing for the respondents submitted that the jurisdiction of this Engineer was with regard to technical aspects and not anything else. The question whether the barrier was watertight and whether it was because of the poor

quality of the barrier that mere dewatering has been done is definitely the technical matter and, therefore, accepted.

(iii) The judgments referred to above in *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises (supra)*; *Associated Engineering Co. v. Government of A.P. (supra)*; and *G.M., Northern Railway (supra)*, with regard to the arbitrator's duty to remain within the four corners of the contract and with regard to excepted matters apply to this category also. In *Prabartak Commercial Corpn. Ltd. v. Chief Administrator, Dandakaranya Project (supra)*, at page 499 (page 283 of Arb. LR) the Supreme Court held:

3. ...The respondents pointed out that the arbitration agreement was contained in Clause 14 and that clause specifically excluded any dispute arising under Clause 13-A. Disputed rates were matters which came within the ambit of Clause 13-A. Such disputes were not covered by the arbitration agreement. The awards were, therefore, made without jurisdiction and were void.

4. The learned judge of the High Court held that Clause 14 containing the arbitration agreement had no application to the dispute in question which fell under Clause 13-A and, therefore, the arbitrator had no jurisdiction in the matter. He held that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void.

5. We are in complete agreement with the reasoning of the learned judge. The appeal is accordingly dismissed with costs throughout.

(iv) The arbitrators cannot enlarge their jurisdiction by stating that if they were to strictly follow the Clauses 67.3 and 67.5, then there would be few disputes referable to arbitration. The parties choose their terms for arbitration between themselves, and if certain disputes are placed beyond the realm of arbitration, then the arbitrator must accept the wisdom of the parties which chose to contract in such a manner.

(IV) Claims awarded though there is no evidence

It is well settled that where there is no legal evidence no award can be granted and the following decisions are to the effect that even if arbitrators are not bound by technical rules of evidence, the principle, what is sought to be proved must be supported by evidence, is a basic principle which cannot be ignored:

(i) In *McDermott International Inc. v. Burn Standard Co. Ltd. (supra)*, at page 222 (para 122 at page 535 of Arb. LR) the Supreme Court held:

In the assessment of damages, the court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.

A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given

case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed Mil to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.

(ii) In *Bharat Coking Coal Ltd. v. L.K. Ahuja* (supra), at page 118 (para 24 at page 662 of Arb. LR) the Supreme Court held:

Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "Loss or Profit". It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profit could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.* (1940) 1 KB 740 : (1940) 2 All ER 97 by the court of appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000 awarded to the claimant.

(iii) In *Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others*, the Supreme Court held:

17. It is equally well settled that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are either his ipso dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated. The industrial tribunal or the arbitrator or a quasi-judicial authority can reject not only such findings but also the conclusion based on no legal evidence or if it is merely based on surmises and conjectures unrelated to evidence on the ground that they disclose total non-application of mind. Viewed from either angle, the conclusions of the enquiry officer as well as of the arbitrator Mr. Kakkar are wholly perverse and hence unsustainable. The High Court, in our opinion, was clearly in error in declining to examine the contention that the findings were perverse on the short, specious and wholly untenable ground that the matter depends on appraisal of evidence.

(iv) In *Central Bank of India Ltd. Vs. Prakash Chand Jain*, the Supreme Court held:

It is in this connection that importance attaches to the views expressed by this Court in the cases cited above where it was pointed out that a finding of a

domestic tribunal may be perverse if it is not supported by any legal evidence. It is true that, in numerous cases, it has been held that domestic tribunals, like an enquiry officer, are not bound by the technical rules about evidence contained in the Indian Evidence Act; but it has nowhere been laid down that even substantive rules, which would form part of principles of natural justice, also can be ignored by the domestic tribunals. The principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom the enquiry is held and that statements made behind the back of the person charged are not to be treated as substantive evidence, is one of the basic principles which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act. In fact, learned Counsel for the appellant bank was unable to point out any case at all where it may have been held by this Court or by any other court that a domestic tribunal will be justified in recording its findings on the basis of hearsay evidence without having any direct or circumstantial evidence in support of those findings.

(v) The basic principle that the claimant must have a case cannot change because the deciding authority is a court not an arbitral tribunal.

14. These are the broad categories. Now each claim will be dealt with one by one.

(i) Claim No. 1

The following extract from arbitrators' award is relevant:

Claimants have not produced any evidence in support of payment having been made under this until October 1997. Respondents have also contended that the cost of maintenance of the road would have to be scaled down as the length of the road was only 176 metres as against the BOQ of 500 metres. Payment under Item No. 1.117 has been totally denied by the Engineer on the ground of failure to maintain the road in spite of repeated instructions. Claimants reject the allegation of failure to maintain the road and point out that until 02.09.1998 the entire traffic including heavy duty vehicles were moving only on this road....

While pointing out that claimants have not led any evidence to show that they had maintained the diversion road, respondents for their part, have not shown that traffic has not moved or that any loss was suffered by any party on account of the poor condition of the road. Thus, we have a bare assertion on the one side that the road has been maintained and on the other that it has not been. No doubt, the Engineer's ruling has to be given due weight but it is difficult to accept the view that no payment whatsoever should be made under Item No. 1.117. The cost of the diversion road as indicated in Item No. 1.116 is Rs. 2,000 per metre and the cost of maintenance as indicated in Item No. 1.117 is about 10% of this amount per month. For a road of length of 176 metres, the cost of formation as per Item No. 1.116 would be Rs. 3.52 lakhs and maintenance cost at 10% per month would be Rs. 35,200. Thus, but for the Engineer's non-certification, claimants would be entitled to at least Rs. 35,200 per month

towards maintenance of the actual length of diversion road. Claimants pitch their claim at the rate stipulated in Item No. 1.117 without making allowance for the fact that the actual length of the diversion road is only one-third of the length provided in the BOQ. This cannot be conceded nor can respondents' and the Engineer's contention that nothing is due as no maintenance was done. This is a fit case where we can review the decision of the Engineer on the simple ground that the diversion road existed and was used by all traffic until September 1998.

Clause 67.5 has already been extracted and it consists of three parts. Sub-clause (a) provides that the manner in which the Engineer exercises his jurisdiction is not "arbitrable"; where the employer has given any right under the contract, the exercise of discretion is not arbitrable; according to Sub-clause (c) the decision of the Engineer is final on the following clauses--(a) manner of specifications, designs, drawings and instructions; (b) quality of workmanship, materials and drawings and instructions concerning the work or the execution of or failure to execute the same arising during the course of work.

First, the claimants have not led any evidence to show that they had maintained the road.

The Engineer has stated as seen from the award that nothing is due as no maintenance was done. While the arbitrators decide to review the decision on the ground that a diversion road existed and was used by all traffic until September 1998, where the decision relating to quality of workmanship, execution of work or failure to execute the work are made non-arbitrable as per Clause 67.5. From the decision cited below of the Supreme Court, it is clear that the arbitrator cannot in violation of the terms of the contract assume to himself the power to review the decision of the Engineer stating that if one were to accept the case of the employer then Clause 67.5 will be otiose.

In fact, the arbitrators have observed that the claimants should be allowed maintenance expenses of Rs. 30,000 per month for 10 months and that a deduction of Rs. 5,200 per month from the deemed costs to maintain the shorter length is justified by the failure to satisfy the Engineer regarding maintenance of the required standards. Therefore, the arbitrators are aware that it is the Engineer who decides the quality of the work done and he has expressed his dissatisfaction and has ruled that nothing is due with regard to this claim since no maintenance was done. According to me this is clearly hit by Clause 67.5 and comes under "excepted matters".

Claim No. 1 is rejected, because a claim had been made under Clause 67.1 in 1998 and the notice under Clause 67.1 had not been given within the time specified and that no arbitration could have been commenced in respect of this claim, Claim No. 1 is a matter covered by Clause 67.5, Claim No. 1 is a matter where claim is not supported by evidence. For all the above reasons this is rejected.

(ii) Claim No. 2 is also a matter in respect of which according to the employers

the claimants had invoked Clause 67.1 earlier. However, as regards Claim No. 2, though the employers object to this as being hit by Clause 67.1, it is seen from the award that:

Respondents seek review of the decision of the Engineer in this matter without prejudice to their contention that the claim is not arbitrable and should not be entertained at all in view of the claimants having invoked Clause 67.1 of the contract long-back and failed to conform to the deadlines set in that clause.

...We are, therefore, allowing the claim to the extent of the amount which has been certified by the Engineer and not accepted by the employer. Claim No. 2 is thus allowed in respect of an amount of Rs. 43.5 lakhs.

Therefore, though the employers want the decision of the Engineer to be reviewed, they have not challenged it in accordance with Clause 67.1 and the arbitrators have accepted the decision of the Engineer and, therefore, Claim No. 2 is confirmed.

(iii) Claim No. 3

As regards this claim, the arbitrators have accepted the amount certified by the Engineer. So though they have exercised the discretion that Clause 67.5 should be read harmoniously with Clause 67.3 and have examined the correctness of the Engineer's decision, this claim is not interfered with because the employers have not challenged the Engineer's decision. The question whether the arbitrators can examine matters which are excluded as non-arbitrable as Clause 67.3 has already been dealt with earlier.

(iv) Claim No. 4

As regards this claim, the award reads thus:

Respondents contend that since this claim relates to the decision of the Engineer as to the quality of the workmanship and execution arising during the course of works, as per Clause 67.5, the decision of the Engineer shall be final, conclusive and binding and the claim shall not be subject to arbitration, being an "excepted matter".

...Respondents have also contended that the claimants have not challenged the action of the Engineer in the manner envisaged in the contract. In the circumstances, we are not persuaded to allow the claim as regards Rs. 6,74,474.90 is not certified by the Engineer. So far as the amount of Rs. 8,40,042.30 disallowed by respondents despite certification by the Engineer is concerned, we have considered the objections of the respondents. The respondents too have not challenged the action of the Engineer in the manner laid down in the contract. However, they urge us to revise the decision of the Engineer in six items listed above on grounds of unsatisfactory work or wrong measurement.

This claim is not interfered with because the Engineer's certification has become

final and the Engineer's certification is accepted by the arbitrator. The question whether they can deal with the "excepted matters" has already been extracted.

(v) Claim No. 5

Claim No. 5 had arisen because of the failure of the respondents to guarantee continuous and adequate supply of power and delay in providing a connection from the grid.

Clause 102.5 is extracted hereunder:

Where required by the Engineer, at or near the site, including, but not by way of limitation, the buildings provided for in Clause 102.4.1, the contractor shall arrange for, provide and install everything necessary to ensure adequately--

the supply of potable or non-potable water, whichever is required, for construction, office use and all other purposes;

the supply of electricity and other sources of power and light;

the disposal of sewage;

the drainage.

In this respect the employer shall provide for the contractor's use, within a maximum distance of 25 metres from the boundary of the contractor's area, a connection point into the port site electricity supply system, for a 250 volt single phase supply and a 440 volt three phase supply, both 50Hz, AC, with a total rated capacity of 150KVA. The cost of energy consumed by the contractor, plus meter hire charges shall be charged to the contractor by the employer, at the bulk tariff rates prevailing from time to time.

The employer does not guarantee the continuity or adequacy of the power supply and the contractor shall provide at his own cost a suitable backup system in case of discontinuity or inadequacy of the supply provided by the employer. The contractor shall not be entitled to claim damages for shortage or cuts in the power supply provided by the employer. In making use of the power supply, the contractor shall make the necessary arrangements to ensure the power factor does not fall below 0.9.

The contractor shall be responsible for making suitable connections from any such connection point and no overhead crossings of site roads by electricity cables shall be permitted.

The contractor shall provide, install and construct adequate sanitary conveniences on the site. The contractor shall not obtain water by the construction of and pumping from wells on the site.

All provisions installed by the contractor on the site shall comply with the regulations and requirements of the relevant statutory authorities in all respects and the contract shall be that the respondents do not state that they had fulfilled

their obligation to provide an action without any delay.

The arbitrators rejected the employer's case that the clause made no difference between the case when access to grid power is not at all there and the case where there is a cut or interruption in grid power and the arbitrators were not persuaded to accept the employer's contention that the claimants were obliged to cope with both situations at their cost. In this case, the arbitrators have construed the above clause to mean that it would arise only when there is discontinuity or inadequacy of power supply and it would not apply in a case where there was no supply at all.

I am not inclined to interfere with the way the arbitrators construed this clause since this is one possible construction that can be reasonably made. Therefore, Claim No. 5 is confirmed.

(vi) Claim No. 6

On 02.12.1996, variation order was issued and the varied works relate to the conversion of the channel completely in concrete. The Variation Order Clause 2.2 lists the additional work items:

(1) Construction of diversion channel in accordance with the attached drawings and bill of quantities, and the contract specification.

(2) Construction of road across NMTPP outlet channel in accordance with the attached drawings and bill of quantities, and the contract specification. This variation order was accepted by the claimant by the letter dated 12.11.1997 marked as Exhibit R-50. It says, with reference to the above, we are herewith confirming our acceptance of the Variation Order Clause 2.2. The cost of construction of the diversion channel was shown in the variation order as Item Nos. 104.1 and 104.2. It is contended by the claimant that they had repeatedly requested the Engineer to allow for increase in cost and these are Exhibit C-44 where the Engineer is addressed to reimburse the additional cost. This is dated 21.03.1997. Again on 24.11.1997 by Exhibit C-45 the request is made for finalising and reimbursing the additional cost and again by Exhibit C-46, it is agreed that the request is made for reimbursement of additional cost and this is on 24.11.1997. The priced bill of quantities which forms part of the contract reads as follows:

The contractor will be held to have familiarised himself with all site conditions, at the port site, whether all site investigation records available, means of access and the locality of any existing service and working restrictions, due existing site features or particular local events, in order to execute the works.

The contractor shall note that the average ground water table is about +1.5m referred to CD and is influenced by the tidal fluctuations. The rate quoted by the contractor, for various items of work which is influenced by such fluctuations and the resulting inflow of water therein shall be inclusive of all cost of pumping and/or special dewatering techniques like multiple, multistage well point pumping

system or any other approved method as may be required for the individual items of work.

General directions and descriptions of work and materials are not necessarily repeated or summarised in the bill of quantities. References to the relevant sections of the contract documentation shall be made before entering rates or prices against each item in the bill of quantities.

The method of measurement is described in the following preambles and/or is demonstrated in the measured items included in the bill of quantities.

Lump sums included and so designated in the bill of quantities are invariable prices and excepting as otherwise provided for in the contract there shall be no addition to or deduction from the contract price by reason of the actual cost being higher or lower than estimated when fixing these prices.

The proposed work method submitted by the contractor-claimant also shows that he was aware of the fact that the flow of water has to be diverted:

However, in case of Box Cell Bridge (BC2) across NMTPP outlet channel, it is required to divert the existing flow of water. For this, as per the proposal given by the client, it is required to build a diversion channel, a temporary foot bridge across the diversion channel and a coffer dam to block the flow of water to BC2. We propose the following sequence of operations.

The excavation for the diversion channel and the foundation work of the foot bridge will be taken up simultaneously. Adequate precaution will be taken to prevent the existing channel from getting joined to the diversion channel during construction of the same. Moreover, we propose to deploy an appropriate dewatering system between the diversion channel and the existing channel to prevent heavy seepage of water from the existing channel to the diversion channel during construction.

Therefore, the claimant knew the nature of work, the claimant knew that seepage of water had to be prevented though the claimant had claimed increased costs and reimbursement for the same; what was agreed upon was lump sum quotation and ultimately he accepted the variation order in November 1997:

With reference to the above we are herewith confirming our acceptance of the Variation Orders C2.02 Cooling Water Diversion & C2.13-Concrete Grade M40.

Reference was made to the minutes dated 08.03.1997 in the letter dated 24.11.1997 marked as Exhibit C-40 to prove that the minutes showed that any extra payments found on account of dewatering will be reimbursed subsequently. The claimants had submitted the rate analysis for the extra payment by letter dated 21.03.1997, Exhibit C-44. By the letter dated 24.11.1997, Exhibit C-46, the claimants explained that Barrier 1 was not strong enough to sustain the water pressure due to waterhead. The materials show that:

...Barrier 1 was supposed to be constructed watertight before taking up works like dismantling of existing channel wall and joining the new channel to the existing one. Since you could not succeed in constructing the Barrier 1 watertight as desired, the dismantling of the existing channel wall was permitted only on your assurance that dewatering be arranged to reduce and maintain the water level on the eastern side of Barrier 1 at the lowest possible level until the water be diverted through new channel. Hence, expenditure incurred in extra dewatering, if any, is due to your failure to construct the Barrier 1 properly....

Exhibit C-59 shows:

...It is seen that the Engineer has finally rejected your claim under payment towards dewatering for Barrier 1...the work of erecting the temporary barrier was carried out under Item No. 104.1 of the Variation Order (C2.02) and only a lump sum provision has been made. It is obvious that the barrier has to be constructed watertight in order to divert the flow of the coolant water and to facilitate the dismantling of the wall of the existing structure. As such you are deemed to have taken into account all the requirements for the watertight construction and quoted the rate of this item in the variation order. However, it is seen that you have not been able to construct a watertight structure and you were permitted by the Engineer to proceed with the work only on your assurance that the required dewatering on account of your inability to construct a watertight barrier has to be borne by you. Therefore, your claim for reimbursement for the expenditure incurred on account of dewatering is hereby rejected.

The arbitrators thereafter summed up their conclusion as follows:

The Variation Order C2.02 was accepted by claimants for a lump sum rate. They took up with the Engineer and the respondents as early as in the review meeting on 08.03.1997 the issue of reimbursement of additional cost on account of dewatering because Barrier 1 could not be made watertight. They were advised not to hold up the work and were informed that any additional expenditure would be looked into if they furnished details until 23.12.1997, by which time the work was presumably completed. Were claimants informed by the Engineer that additional expenditure arose because of their failure to comply with the requirement of a watertight Barrier 1. This decision was endorsed by respondents in April 2000 after Engineer had refused to reconsider his decision in December 1999. Thus, there is some substance in claimants' plea that they were led to believe that their case for reimbursement of additional expenditure on dewatering would be considered on their providing necessary details. It was not contended by the Engineer or the respondents at that time, i.e. in March 1997, that Barrier 1 had to be watertight and reimbursement of additional expenditure on dewatering was ruled out. In the circumstances, we are of the view that Clause 67.3 permits us to review the decision of the Engineer and this cannot be treated as an "excepted matter" because of Clause 67.5.

The issue of reimbursement of additional cost arose because Barrier 1 could not be made watertight. According to the arbitrators, the claimant was led to believe that reimbursement on additional expenditure on dewatering will be considered on providing necessary details. According to the arbitrators neither the Engineer nor the respondents stipulated in March 1997 that Barrier 1 had to be watertight and, therefore, the expenditure on dewatering was ruled out. Therefore, the arbitrators can review the decision of the Engineer and it cannot be treated as an excepted matter. The arbitrators themselves accept that there was "failure to make the barrier watertight". This relates to quality. The Engineer's certification regarding quality is covered by Clause 67.5.

In *State of Maharashtra v. Saifuddin Mujjaffarali Saifi* (supra) the Bombay High Court held (pages 576-578 of Arb. LR):

17. ...The contractor in such a case cannot rely on his ignorance of such matters as defects in the soil nor any implied warranty by the employer that the bills of quantities, plans and specifications are accurate or that the work is capable of performance in the manner set out in the invitation to tender or limit his liability to exactly excavated stated quantities of work. More particularly, when there is a clause that the contractor shall himself acquaint with the site, with the locality and all matters relating to the contract, he cannot back out from this condition and say that the quantities mentioned therein may not be complete or that nature of soil is unknown. He should visualise all probable contingencies and also all other matters which could in anyway influence tender or the contract. This risk in such contracts has to be taken by the contractors. He cannot resile and say that he was unaware of the soil or local conditions.

20. Incidentally, the work regarding dewatering is also mentioned in the tender. Now, when we look to the specifications attached to the said tender, Specification No. 2 clearly provides that no extra rate would be paid for the additional dewatering arising out of additional depth, width and length of foundation. When we take into consideration all these conditions, we feel satisfied that the work of excavation, work of providing coarsed rubble trap, work of dewatering are incidental to the construction of the bridge. By no stretch of imagination, it could be said that the work of additional excavation, the work of dewatering or the work of providing coarsed rubble trap were not at all in contemplation between the parties when the tender was accepted. On the other hand, these works are salient in the bridge construction contract and it cannot lie in the mouth of the contractor to say that these works were not in contemplation when the tender was entered into. If the contractor makes an attempt to say that he never intended that he would be required to dig to the extent of 3 mtrs. as against the designed level of 1/2 mtrs., that cannot be swallowed by any stretch of imagination. On the other hand, when the contractor was required to examine the nature of the work he was undertaking, it must be uppermost in his mind that he would be required to do digging in uncertain conditions, which may invite more excavation. Ultimately, what is provided in the tender conditions is the

approximate conditions, approximate quantities and approximate designs. Said matters must be within the mind of the contractor as also the employer/State Government. We are, therefore, of the view that the claims preferred by the contractor in this behalf are the part and parcel of the tender and Condition No. 14 binds down the contractor to claim the rates which are provided in the tender.

This decision squarely applies to this case. Here too, dewatering is mentioned in the tender. The arbitrators accept that claimants agreed to accept lump sum payment. The variation order was signed in November 1997 and, therefore, what is recorded in the minutes dated 08.03.1997 is of no avail and though before me it was contended on behalf of the claimants that the parties originally thought that some seepage was permitted and that is why the boulder diversion was originally conceived and this absolutely watertight diversion was a subsequent development or a variation which required concrete diversion cannot be accepted. This is not their case projected before the Engineer. The documents referred to by the arbitrator only show that construction of Barrier 1 could not be made watertight as desired and since they failed to comply with the requirement of a watertight barrier whatever additional cost they had incurred on account of dewatering could not be allowed.

Exhibit C-58, on 18.02.2000, the claimants addressed the petitioner as follows:

Sub.: Construction of Port Access Road & Bridges for Ennore Coal Port Project ECCP/C2, notice of intention to commence arbitration of disputes under Clause 67 of Conditions of Contract No. ECPP-C2, Agt. 29 of 1996 Reg.

We refer to our Letter No. 1145/M2001/99 dt. 13.12.1999 wherein certain disputes including dispute as to opinion, instruction, determination, certificate or valuation arose. The dispute was referred to the Engineer for his decision under Clause 67.1 of contract and we have received his decision on 20.12.1999 vide his Letter No. A 5528. 23-023, 16.01; 80.01/72.B0279/MM/rk dt 17.12.1999 (copy enclosed) and are dissatisfied with the said decision. We hereby give notice under said Clause 67.1 of conditions of contract to commence arbitration as provided in said Clause 67 of contract. The dispute is not a matter accepted under Clause 67.5 of contract.

If in case you desire to settle the dispute (claim) kindly let us know within 56 days from the receipt of this notice.

In this, it is specifically stated that the dispute was referred to the Engineer for his decision under Clause 67.1 of the contract and that they had received the decision on 20.12.1999 and are dissatisfied with the said decision and, therefore, gave notice under Clause 67.1 as this dispute is not a matter excepted under Clause 67.5 and that within 56 days from the receipt of this notice the petitioner should let the claimant know whether he wants to settle the disputes.

Exhibit C-48 deals with reimbursement for dewatering in Barrier 1 and the claimant is informed that "expenditure incurred in extra dewatering, if any, is due

to your failure to construct the Barrier 1 properly and as such your request for reimbursement to additional cost for dewatering is not acceptable".

Again by Exhibit C-59 on 18.04.2000 the petitioner has informed the claimants that the Engineer has rejected their claim for payment towards dewatering and that the work of erecting temporary barrier was carried out under Item No. 104.1 of the Variation Order C2.12 and only lump sum provision has been made and that the barrier has to be constructed watertight in order to divert the flow of the coolant water and to facilitate the dismantling of the wall of the existing structure and, therefore, all the requirements for watertight construction must be deemed to have been taken into account and any additional cost on account of the claimants' inability to construct the watertight barrier cannot be reimbursed.

Again, on 29.04.2000, the claim for dewatering is rejected:

Two questions arise here. When the Engineer rejects the claim on the ground that the barrier was not made watertight he is definitely referring to the quality and this comes under Clause 67.5 and is an excepted matter. Even assuming without admitting that it is not an excepted matter, the claimants have made their claim under Clause 67.1 and ought to have commenced arbitration within the time provided by the contract. They knew what their rights and liabilities under the contract were. They were aware that they have to commence the arbitration as per Clause 67.1, yet, they "revive" their right, by writing in 2002 that the reference to Clause 67.1 or Clause 67.5 in the earlier correspondence was by inadvertence and that actually only now they are making their claim. I do not think they can circumvent the parameters of the contract by saying that what they said earlier was by mistake; and issue another notice and claim that "the stop watch will start now".

The claimants ought to have familiarised themselves with the ground condition. *State of Maharashtra v. Saifuddin Mujjaffarali Saifi* (supra) applies on all fours to this case and Claim No. 6 is rejected for the same reason; this claim is also rejected since the Engineer had given his decision regarding quality and is an "excepted matter" under Clause 67.5, it also deserves to be rejected because the notice under Clause 67.1 has not been given in accordance with the said clause and no arbitration can be commenced without such a notice; and no permission u/s 43 of the Arbitration and Conciliation Act, 1996 has been obtained.

(vii) Claim No. 7

Claim No. 7 relates to the increase or decrease of cost arising out of subsequent legislation. According to the claimants notwithstanding the lack of clarity as to the combined effect of the Clauses 70.1 and 70.2 the intention is that if there is an increase or decrease in prices due to changes in legislation then it would necessitate a corresponding amendment in the contract price and since there was upward revision in the cost of labour and fuel subsequent to the submission of tender on account of changes in legislation or regulations, the respondents are entitled to the corresponding increase. Their claim in this regard was rejected by

the Engineer stating that Clause 70.2 is rendered redundant by the all encompassing statement of Clause 70.1. According to the claimants, the Minimum Wages Act was amended and fuel is a controlled commodity. Both of them would fall under the increase in price because of the subsequent legislation. The petitioners contend that the claimants agreed to withdraw the escalation condition and to abide by the bid stipulation and that has been recorded in the minutes of the bid committee meeting. On the other hand on behalf of the claimants it was contended that the approach of the Engineer that Clause 70.2 can be rendered redundant by Clause 70.1 must be rejected and they must be read harmoniously. The claimants have based their claim on statutory notifications issued by the Regional Commissioner (Central), Chennai and their calculation for fuel cost on the variation data obtained from the Hindustan Petroleum Corporation. According to the respondents, Clause 70.1 originally had a formula for assessing escalation, but it was withdrawn and the formula is no longer in the contract and Clause 70.2 does not have any formula and the amount of increase has to be proved and established. The arbitrators were not persuaded to accept that Clause 70.1 rules out escalation and that Clause 70.2 which speaks of additional cost of the contractor other than under Clause 70.1 by subsequent legislation is rendered otiose. This construction of the clause does not appear to be unreasonable and I cannot sit in appeal over it.

The following paragraphs from the award are relevant:

15.14. The various obligations imposed on the contractor in regard to compliance with labour laws, payment of fair wages read with Clause 70.2 clearly imply that the employer is required to reimburse the additional cost of labour on account of subsequent legislation. Since during the years 1996 to 1998, petroleum products were covered by an administered pricing system, the import of Clause 70.2 is that additional cost incurred by claimants on account of upward revisions of the prices of POL products would be reimbursable by respondents.

15.15. Clause 70.2 charges the Engineer with the determination of the additional cost in consultation with the employer. Claimants have not only to refer to changes made by statute or regulations, i.e. subordinate legislation, but also lead evidence to prove that they have incurred higher cost thereby and the quantum of such increase. The correspondence placed before us and the arguments of the learned Counsel for the parties show that neither side has approached the problem in a constructive manner with the object of ascertaining the true financial impact of subsequent legislation. Whereas claimants set out their demand in the terms of an abandoned formula as interpreted by them, the Engineer dismissed their claim saying that it has not at all been substantiated by any evidence and is apparently based exclusively on assumptions. Engineer's further conclusion that Clause 70.2 could only become operable if there were a change in legislation having a direct effect on the cost of the contractor, which could be easily calculated appears to be an abdication of the responsibility cast upon him in Clause 70.2 to make an effort to ascertain the additional cost in

consultation with the employer.

15.16. Claimants could have prevailed upon the Engineer to take up the determination of additional cost under this provision by presenting evidence of actual costs incurred by them on labour and petroleum products in juxtaposition with the costs as they might have been at the rates prevailing three days before the last date for the submission of the tender. The Engineer could not have ignored such a claim based on actuals notwithstanding the stand taken by him earlier. The failure on the part of claimants to re-submit their claim with actual cost data which would have been within their knowledge and their argument that the respondents do not dispute the quantum but only hold that they are not liable to reimburse do not strengthen their case. Respondents, inter alia, submit that Clause 70.2 requires two conditions to be fulfilled; changes in cost by subsequent legislation; proof of the impact of the additional cost on the claimants.

15.17. Clause 70.2 as revised does not lay down any method of computation. Computation of actual expenses incurred on the items on which increases due to subsequent legislation are reimbursable has not been attempted. Claimants have used the formulae which are found in the unamended Clause 70.1.... With this amendment we are satisfied that the formula is reasonably sound method of determining the additional cost which we can substitute for the determination on the basis of actuals which should have been but has not been made.

15.19. We are of the view that it would not be reasonable to reject outrightly the claim for escalation on account of subsequent legislation on the grounds urged by respondents. There is an undertaking in the terms of Clause 70.2 to reimburse the additional cost of changes brought about in wages and prices, by subsequent legislation. If the subcontractor had made similar demand on the claimants, they would have been placed in the same position. As the court observed in *Tarapore & Co. v. State of M.P.* 1994(1) Arb. LR 341 (SC), the contractor cannot be expected to incur the cost of statutory increases by cutting into his profits. So far as two corporate bodies are concerned, the concept of unjust enrichment by exercise of contractual right by the one at the expense of the other would not arise. It is for the sub-contractor to work out his rights vis-a-vis the contractor.

15.20. As pointed out by us, both claimants and respondents could have taken steps to quantify escalation in a more accurate manner on the basis of actuals but did not attempt to do so.

However, there is a real flaw in the award repeatedly, the arbitrators have referred to the formula that was "abandoned" and observed that the claimants had demanded in terms of an abandoned formula and that neither side had approached it constructively with a view to ascertaining the financial aspects of subsequent legislation. The arbitrators held that it is not enough if the claimants refer to the changes but they must lead evidence to prove that they have

incurred higher cost. The arbitrators held that the claimants should have prevailed upon the Engineer to take up the determination of additional cost. The arbitrators held that there is a failure on the part of the claimants to resubmit their claim with actual cost data which would have been within their knowledge. The arbitrators held that the claimants have used the formula which is found in the unamended Clause 70.1. But the arbitrators at this juncture did not bear in mind that this formula was abandoned by the contractor. When the formula is abandoned the claimants should have let in evidence of actual cost. The arbitrators cannot award stating that the formula is reasonable.

The petitioners have also raised the issue that when there is no proof that the claim has been paid to the sub-contractor, he cannot demand the escalation on account of subsequent legislation. The arbitrators rejected this objection and I am not inclined to interfere with the same. However, the fact remains that the arbitrators have accepted a claim made on an abandoned formula while acknowledging that there was failure on the part of the claimants to prove the actual cost. When the award shows that the evidence of actual cost should have been let in but has not been done, the arbitrators cannot proceed on some notion of equity. On the face of the award itself, and on the findings of the arbitrators this claim should have been rejected and is rejected. The judgments referred to "supra" regarding awards based on no evidence are applied and Claim No. 7 is rejected.

(viii) Claim No. 8

Claim No. 8 is sought for overstay for a period of 16 months beyond the contract period. The award on examination shows that the arbitrators have considered the general conditions of contract, the time for completion and extension if any granted under the contract. As regards the question of limitation, there does not appear to be any dispute regarding the fact that extension of time up to August 1998 was granted only by the letter dated 23.08.1999. Therefore, until then the claimants had no way of knowing on what terms the extension will be granted and since the letter granting extension is only dated 23.08.1999, the claim for arbitration made on 09.04.2002 is not out of time. The injury or loss would arise only when the respondents are put on notice that the petitioner does not intend to compensate him for the overstay period. Before that, time cannot start to run and, therefore, on the question of limitation, the arbitrators have not committed any error.

However, as regards quantum it is clear that there is no evidence. The following extracts are relevant:

Claimants in Annexure C to Exhibit C-5 have computed overheads and profits at 20% contract value and sought Rs. 4,13,21,445.97 for 16 months" overstay along with Rs. 90 lakhs for additional expenses towards plant and equipment during overstay period. Such a computation without a shred of evidence can hardly be entertained....

There is no doubt that in a very competitive tender there is no scope to build a profit of 20% into the various rates. In the absence of any evidence whatsoever, we find no justification for allowing anything more than 5%, going by the estimate in Hudson of between 7%. The period would also be 12 months and not 16 months. Respondents have pointed out that the final value of the contract was only Rs. 16,62,77,510.10 and not Rs. 19,36,94,278 as originally estimated. Some additions will arise out of this award. Allowing for such increase we consider that the compensation should be calculated on a contract value which is 90% of Rs. 19,36,94,278. On this basis the overstay compensation for head office overheads and profit is Rs. 69,72,993 (one fourth of nine tenths of Rs. 25,82,590.37 x 12).

So far as the claim of Rs. 90 lakhs for additional expenses towards plant and equipment is concerned, once again, Hudson's observations regarding the manner of dealing with such a claim are illuminating.

The standing time of unproductive plant is frequently claimed by contractors on the basis of hire rates, which may result in the capital value of a new place of plant being claimed over a relatively short period of time. Hire rates may sometimes be adopted by the courts, where satisfied that a loss of profit has occurred, and where evidence of that particular loss exists, but in the absence of evidence of loss of profit opportunity only depreciation and maintenance may be allowed.

The claimants, who have given some cost data in the case of generators, dewatering pumps, etc. Claim Nos...and...here make a lump sum claim of Rs. 90 lakhs. In the absence of detailed break-up and supporting evidence, a claim of this order cannot be allowed.... We find the proposition of Hudson that in the absence of evidence of loss of profit opportunity only depreciation and maintenance may be allowed to be most reasonable...this amounts to recognizing that some additional expenses on plant and equipment would have been incurred even though claimants have failed to submit any evidence in this regard.

Therefore, it is clear that no evidence has been adduced by the claimants to support their case. The arbitrators have considered the rival contentions with regard to the non-completion of the contract within the stipulated period. The arbitrators have also referred to the letter informing the respondents that their request for extension of time will be reconsidered in due course and again advised the contractor to deploy more men and increase the supply of materials to carry out all the works on urgent basis. On a perusal of all the documents the arbitrators found that while the claimants sought extension of time without laying down any conditions the respondents granted extension of time long after the event without stipulating at any time that no claim for additional cost would be countenanced. The grounds for extension are: obstruction by local people, hindrance by NMTPP officials, lorry strike, delay in issue of variation orders. The arbitrators concluded that the claimants were denied the overstay of 16 months

but granted 12 months because some percentage of delay was on account of the poor performance of the claimants. But since the delay was also on account of these other factors not attributable to the claimants, the arbitrators felt that they had suffered a loss for no fault of them and for that overstay, they should be compensated. The arbitrators were also of the opinion that all through the period when the claimants were asking for extension of time, instead of granting it, the petitioners had delayed the indication of their decision, while urging the claimants to complete the project. The claimants had no way of knowing that for the overstay they would not be compensated. As regards the question whether any amount could have been given without any evidence, the fact remains that the arbitrators themselves have observed that "there is not a shred of evidence". The claimants made a lump sum claim but they had not given detailed breakup and supporting evidence and, therefore, the arbitrators scaled down the claim to 75% of Rs. 90 lakhs since the arbitrators were of the opinion that compensation could be given only for the period of extension that was sanctioned. The arbitrators felt that the preposition of Hudson in the absence of evidence of loss of profit, depreciation and maintenance shall be allowed to be most reasonable. But this is directly contrary to *McDermott International v. Burn Standard Co. Ltd.* (supra), where the Supreme Court has required the arbitrator to consider strict legal obligations and not expectations of a contractor, however reasonable, and proof of actual damages may be insisted upon, and recourse to one formula or the other may not be allowed. This claim is admittedly without any shred of evidence and the award is set aside.

(ix) Claim No. 9

Claim No. 9 is with regard to recovery of a sum of Rs. 12.8 lakhs as liquidated damages by the respondents for delay in port access road and village service road. The objection of the employer is that the claim is not arbitrable since a reference was made under Clause 67.1 on 02.12.1999 by Exhibit C-80.

The relevant paragraphs of Exhibit C-80 are extracted hereunder:

The Engineer Haskoning Royal Dutch Consulting Engineers & Architects Ennore Coal Port Project Ennore, Chennai

Dear Sir,

Kind Attn. Mr. Leo Mayboom

Subject : Disputes in Payment of Interim Payment Certificate No. XXII dated 05.07.1999 for Rs. 10,082,073. Decision under Condition of Contract No. ECPP/C2 Port Site Access Roads and Bridges.

Ref. : Your letter Ref. A5528.23-14.05/72-B0227/VPP/rs dt. 28.07.1999. The port access road has been completed on 02.09.1998 (ref. taking over certificate dt. 18.05.1999) and also defect liability certificate issued by Engineer vide Letter No. A5528.23-02/72-0257/MDA/B dated 25.10.1999. Our bill dated 05.07.1999 was certified by the Engineer's representative (on behalf of Engineer) for Rs.

10,082,073 (Rupees Ten million eighty two thousand seventy three only).

XXX XXX XXX We understand as mentioned above that a sum of Rs. 12.4 lakhs has been deducted from our bill by the employer towards liquidated damages from September 1998 to December 1998. We have categorically highlighted, through our various letters, that the delay beyond August 1998 is not attributable to us hence the LD as deducted above is also a dispute. Also please refer to Clause 47.1. (Liquidated Damages) which specifies that the liquidated damages shall be the only monies due from the contractor for such default (though we said we are not in default). In such circumstances, the other monies against the actual work done under general Item Nos. 1.108, 1.109, 1.112, 1.115 and 1.119 for the period of September 1998 to December 1998 may be included in the next payment certificate and the owner may please be directed to pay the same. The value of work done against the above items from September 1998 to December 1998 is Rs. 30.11 lakhs (approx.).

We request you to give your decision on the disputes in terms of Clause 67.1 of General Conditions of Contract (106 and 101) and direct employer to pay the balance with 18% interest p.a. for the amounts due for delayed periods.

No reply was received from the Engineer, in which case the claimants would have had to comply with Clause 67.1 by taking the third step as mentioned in para 15(iii) above. With regard to this claim also a fresh dispute is raised on 07.01.2002 in which it is stated that the earlier mentioning of Clause 67.1 was by inadvertence or by wrong interpretation. Hence, this claim is rejected.

(x) Claim No. 10

This claim is with reference to interest. The interest was awarded with regard to Claim Nos. 2, 3 and 4 and a portion of Claim No. 9 and future interest for the entire award, less the component of interest, since Claim Nos. 2, 3 and 4 alone have been confirmed and not Claim No. 9. Interest awarded with regard to these three claims are confirmed and as regards future interest, it would be at the rate of 12% p.a. on the claims awarded, less any component of interest.

The O.P. is partially allowed, confirming Claim Nos. 2, 3, 4 and 5; rejecting Claim Nos. 1, 6, 7, 8, 9 and award is set aside with regard to these claims and ordering Claim No. 10 in terms of the awarded claims. No costs.