
(2001) 11 BOM CK 0012

In the Bombay High Court

Case No : Arbitration Petition No. 499 of 2001 and Chamber Summons No. 1496 of 2001

G. Tech Stone Limited

APPELLANT

Vs

BFIL Finance Limited

RESPONDENT

Date of Decision : 28-11-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28, 31, 34
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : (2002) 2 BomCR 271

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : Janak Dwarkadas and A.S. Doctor, instructed by and Hariani and Co., for the Appellant; Ravi Kadam and Shyam Diwan and C. D" Souza, instructed by . and Crawford Bayley and Co., for the Respondent

Judgement

D.K. Deshmukh, J.—The facts that are material for deciding this petition are that the petitioner is a public limited company, having its registered office at Chennai, engaged in the business of manufacture and export of granite slabs. The respondent is also a public limited company having its registered office at Bombay, carrying on business in finance and investments.

2. On 22nd February, 1995 the parties have entered into an agreement for the placement with the respondent of 540000 secured optionally fully convertible debentures issued by the petitioner at the rate of Rs. 95/- per Debenture, carrying interest at the rate of 9.5% per annum. The recitals in the petition show that the petitioner proposed to increase the paid up equity capital to a minimum of 300 lakhs and a maximum depending upon the conversion price and get the equity shares of the company listed on all of the recognised Stock Exchanges, or failing listing on the recognized Stock Exchanges in the over the Counter Exchange of India.

3. The petitioner allotted to the respondent 54 lakhs OFCDs on 7th February,

1994. On 14th August, 1995 the respondent addressed a letter to the petitioner stating that in view of the on going discussion related to the proposed off loading of shares, the matter was likely to take some time before the action plan was drawn and requested to the respondent to extend the dead line date of 31st August, 1995 under Clause 2.7 of Article II of the agreement by one more month to 30th September, 1995. The said extension was granted by the petitioner on 16th August, 1995. The respondent thereafter addressed another letter dated 14th September, 1995 to the petitioner in terms similar to the earlier letter dated 14th August, 1995 and requested the petitioner for a further extension of the said dead line to 30th October, 1995. The petitioner agreed to the said extension also. However, one week thereafter the respondent by its letter dated 21st September, 1995 addressed to the petitioner referring to the placement of 54 lakhs secured OFCDs and offered the OFCDs to the petitioner for redemption, in terms of Clause 2.7 of Article II of the said agreement. The petitioner by its letter dated 4th October, 1995 addressed to the respondent expressed surprise at the respondent's letter and alleged that the respondent has chosen to get out of the agreement, because of some extraneous reasons. The petitioner requested the respondent to withdraw its offer for redemption of the OFCDs. The respondent by its letter dated 26th October, 1995 addressed to the petitioner, regretted its inability to accept the request of the petitioner not to press for redemption and stated that if the dues of the claim were not received by it within 15 days from the date of the said letter the respondent claimed over the charges of 3% p.m. as per normal condition. The petitioner by its letter dated 1st November, 1995 stated that the petitioner had converted the OFCDs into equity shares as per the provisions of paragraph 2, 3(v) of the agreement. The respondent by their Advocate's letter dated 8th May, 1996, set out what was transpired and contended that the respondent had exercised its option under Clause 2.7 of the agreement not to go for public issue and alleged that the respondent has failed to act in accordance with the Article II of the agreement, and by the above act of not redeeming the OFCDs, the respondent has right to terminate the said agreement as per Clause 6.1(xi) of the said agreement. The said Advocate's letter states that the said agreement stands terminated from the date of the said letter and the petitioner was bound to purchase all the outstanding OFCDs at a price of Rs. 150/- per OFCD and to pay interest at the rate of 2% per month on the amount due from the date of demand of the amount being the date of the said letter. The petitioner by their letter dated 29th May, 1996 denied that they were bound to convert the OFCDs under Clause 2.6 and 2.7 of Article II of the said agreement. The petitioner further alleged that the notice given by the respondent in exercise of the alleged option was not proper. In the correspondence which ensued between the parties thereafter, the parties have stated their respective stands.

4. The respondent sent another letter dated 22nd October, 1996 after referring to Clause 8.2 of Article VIII of the agreement which provides for arbitration in case of any claim, disputes or differences between the parties arising out of them

in relation to or in any manner connected with them. By the said letter the respondent gave notice to the petitioner that he has appointed Mr. Justice M.L. Pendse former Chief Justice of Karnataka High Court as its arbitrator and called upon the petitioner either to agree to Mr. Justice M.L. Pendse as a sole arbitrator or to appoint its own arbitrator. The petitioner failed to act upon the said notice and therefore the respondent filed an application u/s 11 of the Arbitration Act. On that application an order was made by this Court and Mr. Justice S.C. Pratap former Chief Justice of High Court of Andhra Pradesh was appointed as arbitrator on behalf of the petitioner and Mr. Justice M.H. Kania former Chief Justice of India as a Third Arbitrator (Presiding Arbitrator).

5. The respondent filed its claim before the arbitrator which was based on its offer made under Clause 2.7 of Article II of the agreement and for the recovery of the amount as per that clause. The petitioner contested that claim by filing reply. The case of the petitioner was that though under Clause 2.7 of the agreement the respondent was entitled to offer the OFCDs for redemption to the petitioner, the petitioner was under no obligation to accept the offer. It appears that during the pendency of the proceeding before the arbitrators, two applications for amendment to the statement of claim were made. By the first application for amendment the respondent wanted to add a ground relying on the contents of OFCDs. The second application for amendment was made on the basis of recitals contained in Article VI Clause 12 of the said agreement. The case sought to be put up by the second amendment is that as the petitioner has failed to come out with public issue as per the agreement the respondent became entitled to terminate the said agreement and in the event of such termination, respondent becomes entitled to the amount as per Clause (b) of the Article VI. The arbitrators decided to pass orders on both the amendment applications at the time of making their final award. According to the petitioner along with the communication dated 14th June, 2001 which was signed by all the three arbitrators, they received the Majority Award, which was signed by two arbitrators namely Mr. Justice M.L. Pendse and Mr. Justice M.H. Kania whereby the petitioner was directed to make payment to the respondent at the sum of Rs. 8 crores 10 lakhs. The minority award was signed by Mr. Justice S.C. Pratap whereby it was held that the respondent is not entitled to the amount claim and therefore the claim was dismissed with liberty to the respondent to invoke the arbitration clause in the agreement in respect of disputes and differences regarding any condition or clause in the agreement or Clause 2.1. Along with the letter dated 14th June, 2001 the arbitrators had also forwarded to the petitioner the order as per Majority Award. That order is also dated 14th June, 2001. This order is signed by all the three arbitrators and had reproduced in the operative part of the Majority Award.

6. As per the prayer clause of the petition, the petitioner prays for an order setting aside the award dated 14th June, 2001, copy of which is at Exhibit V of the petition, on various grounds. This petition has been opposed by the respondent. The preliminary objection, it appears was raised, about the

maintainability of the petition on the ground that the Majority Award at Exhibit V, which is challenged in the present petition, is not an award and that it is only an order dated 14th June, 2001, which is signed by all the three arbitrators, is an award within the meaning of the Act therefore the petition is not maintainable. In view of this objection, the petitioner has taken out a chamber summons being Chamber Summons No. 1496 of 2001 seeking amendments in the petition. By paragraph 1 of the schedule the petitioner seek leave to amend the petition, the effect of which would be to describe the document at Exh. X which is an order in terms of the majority award signed by all the three arbitrators, which is presently described as final award. One more ground is being added by paragraphs 2 and 3 of the schedule to the Chamber Summons, for challenging the award. By paragraph 5 of the schedule the petitioner has prayed for a declaration that there is no valid and legally subsisting arbitral award.

7. I have heard the parties on the chamber summons as also on the arbitration petition and I am first taking the chamber summons for consideration. It is clear from the communication dated 14th June, 2001 that alongwith that communication three documents were forwarded to the petitioner, (1) Majority award, (2) Minority award and (3) an order as per the majority award. The question to be considered is whether the majority award which is at Exh. V to the petition is the award within the meaning of the Act or the order as per the majority award which is signed by all the three arbitrators, would constitute an award within the meaning of the Act. For consideration of this question provisions of section 34 are relevant. Perusal of section 34 makes it clear that an application can be made to the Court for setting aside an arbitral award. The definition of the term arbitral award found in section 2(1)(c) of the Act, is inclusive definition. In my opinion it is the provisions of section 31 which are crucial for deciding the question. The sub sections (1), (2) and (3) of section 31 of the Act are relevant and it reads thus,

31. Form and contents of arbitral award.---

(1) An arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless-

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms u/s 30.

8. It is clear from the perusal of provisions of section 31 quoted above, that the arbitral award against which an application u/s 34 can be made has to be signed by the members of the Arbitral Tribunal. It further lays down that if there are

more than one arbitrator, signatures of the majority of all the members of Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated. If an award is signed by the majority of the members of the Arbitral Tribunal then it can be termed as an arbitral award for the purpose of section 34. The only requirement is that the reason why the remaining arbitrator has not signed the award, is to be stated. In so far as the present case is concerned, the award at Exh. V has been signed by two of the three members of the Arbitral Tribunal and the reasons from the letter dated 14th June, 2001, itself is clear that the third member of the Arbitral Tribunal has not signed the majority award because he has delivered his own award which does not agree, with the majority award. In my opinion, therefore, though the award at Exh. V is not signed by the all members of the Arbitral Tribunal, still it will be an arbitral award for the purpose of section 34 and the document at Exh. X cannot be termed as an arbitral award because as per the provisions of sub-section (3) of section 31, the arbitral award has also to disclose the reasons. The document at Exh. X does not disclose any reason and the arbitrators themselves have described the document Exh. X as an order made in terms of the majority award. Perusal of the document at Exh. X shows that it is merely reproducing the operative portion of the majority award. Therefore, it is clear that it is an order which is made pursuant to the majority award and it is not an award itself. In the petition the petitioner has challenged the award at Exh. V. Therefore in my opinion it is clear that the petition is competent. By paragraph 1 of the schedule of chamber summons the petitioner is merely trying to correct the position which is obvious and therefore in my opinion, the petitioner is entitled to include para 1 of the schedule. So far as the other paragraphs of the schedule are concerned, the learned Counsel appearing for the respondent has relied upon the observations of the Division Bench of this Court in its judgment in Vastu Invest and Holdings Pvt. Ltd. Vs. Gujarat Lease Financing Ltd., which held that after expiry of the period of limitation even the additional ground challenging the arbitral award cannot be included. Though I have reservation regarding the proposition of law which is laid down by the Division Bench that no ground can be added after the period of limitation to a petition and I am bound by the law laid down by the Division Bench.

9. The chamber summons is therefore granted by permitting the petitioner to carry out the amendment in the petition only to the extent of paragraph 1 of the schedule.

10. So far as the controversy on merit is concerned, it is clear from the letter terminating the agreement issued by the respondent, that the respondent was relying on Clause 2.7 of the agreement between the parties which reads as follows:

2.7 "The bought-up investors at their sole discretion shall have the option not to go ahead with the public issue after giving 15 days notice in writing to the company. However, in such a case, it shall be incumbent on them to offer their

OFCDs to the company to be redeemed at a price which shall yield a return, together with the interest payable on the OFCDs of 24% p.a. on their investment. The return will be calculated with reference to the period elapsing between the actual date on which the moneys have been given to the company and the moneys are received back from the company. In addition to this the bought-out investors will be reimbursed by the company the actual expenses if any incurred by them towards the public issue. This option is exercisable anytime before 31-8-1995."

11. According to the respondent as per this clause, it had offered its debentures to the petitioner and the petitioner was under an obligation to purchase the same and therefore the respondent was entitled to terminate the agreement. The majority of the arbitrators have found against the respondent on this and have held that though respondent was entitled to make an offer, the petitioner was under an obligation to accept the offer. The learned Counsel for the respondent also accepted this finding and did not even urge that the finding of the arbitrators in this regard is erroneous. Perusal of the award of the majority of the arbitrators also shows that the ground sought to be raised by the first amendment application has also not been permitted by the majority of the arbitrators. However, the arbitrators have not only permitted the respondent to carry out the amendment sought by the second amendment application, but the majority of the arbitrators have allowed the claim of the respondent. On the basis of the grounds raised by the second amendment application. Therefore in so far as this petition is concerned, it is only the ground raised by the second amendment application, which is required to be considered and submissions of the learned Counsel for both the sides were also restricted to the same.

12. The learned Counsel appearing for the petitioner submits that the majority of the arbitrators have committed a grave error in allowing the second amendment application because by the second amendment application, a plea which was totally inconsistent with the plea raised in the claim petition was sought to be included and the said plea was also called barred by the law of limitation. On the other hand it is submitted on behalf of the respondent that in the claim statement, the claim was made on the ground that the agreement between the parties has been terminated. By the amendment application an additional ground has been raised in support of the claim. Therefore according to the learned Counsel the majority of the arbitrators have rightly allowed the second application for amendment filed on behalf of the respondent.

13. So far as the merits of the controversy are concerned, on behalf of the petitioner it is submitted that the majority of the arbitrators have held that the agreement between the parties was merely for financing the petitioner and therefore the respondent was entitled to get the money back, which it had given to the petitioner. According to the learned Counsel, the relationship between the parties regarding the transactions were governed by the agreement and therefore the respondent would be entitled to get its money back only in terms of

the agreement. The learned Counsel relying on the provisions of sub-section (3) of section 28 of the Act submitted that the arbitrators have to make their decision in accordance with the terms of the contract and they can take into account only the usage applicable to the contract. The learned Counsel submits that the respondent was relying on Clause 12 of Article 6.1 (xi) of the agreement. According to that clause the respondent becomes entitled to the amount, if there is failure on the part of the petitioner to come up with the public issue. The learned Counsel submits that there is no material placed on record which would even indicate that there is failure on the part of the petitioner to come up with the public issue. The learned Counsel submits, relying on the decision of the Supreme Court in the case of *The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another*, that while considering the terms of the contract the Court must take into consideration the conduct of the parties. The learned Counsel submits that the interpretation put in terms of the agreement by the Majority of the arbitrators is impossible and therefore the award is liable to be set aside. On the other hand on behalf of the respondent it is submitted that the agreement between the parties was an arrangement for financing the petitioner and therefore as there has been no public issue, the respondent is entitled to the return of the same. According to the learned Counsel this interpretation placed by the arbitrators on the terms of the agreement is a possible interpretation and therefore considering the extremely limited jurisdiction of this Court u/s 34 of the Act to interfere with the award given by the arbitrators, this Court should not disturb the arbitration award. The learned Counsel for the respondent placed reliance on the judgment of a Division Bench of this Court in case of *Vijaya Bank Vs. Maker Development Services Pvt. Limited*, .

14. Now from the rival submissions and the record, it is clear that for deciding this petition this Court has to consider two questions, (i) whether by the majority award the second amendment has been rightly allowed and (ii) whether the view taken by the arbitrators that because of the provisions of Article 6 Clause 6.1 (xii) of the agreement, the respondent was entitled to terminate the contract and to claim the money back is a possible view and whether in taking that view, the arbitrators have taken into consideration all the aspects that are relevant and material.

15. Now taking up the second question for consideration first, it is clear that this ground has been for the first time raised by the respondent in the second application for amendment. It is claimed in the amendment application, that the necessary conditions for the application of Clause 6.1 (xii) stand fulfilled in the present case. The claimants state that the respondent failed to convert the OFCDs into equity shares. Even assuming (whilst denying) the respondents issued the equity shares, they failed to come out with a public offer and in any event failed to agree on a date prior to 30th September, 1995 or any other mutually extended date as the date of public issue as contemplated under Clause 6.1 (xii). The claimants in terms of their contractual rights, by their Advocates

letter dated 8th May, 1965 terminated the said agreement. The Clause 6.1 (xii) which is relied on, reads as under :-

6.1(xii) "Where the company after issuing the OFCDs fails to convert the same into equity shares or having converted the OFCDs into equity shares fails to come out with the public offer or fails to agree with the bought-out investor/ITC-BFIL or the merchant banker on a date prior to 30-9-1995 as the date of public issue."

16. It is clear from the award as also from the submissions made before me that though in the amendment application the claim has been made that the petitioner has failed to issue the equity shares, that ground is not pressed. Therefore the question that was considered by the arbitrators was, failure of the petitioner to come out with the public issue after conversion of the OFCDs into equity shares, and failure of the petitioner to agree with the respondent on the date of public issue. So far as the majority award is concerned, the only consideration of this aspect of the matter is to be found in paragraph 27 of the award which reads as follows :-

27. "It is clear that in the present case, that the respondent has not been able to come out with a public issue nor has it been able to arrive at any agreement with the claimant (bought out investor) regarding the date of such an issue or about the public issue at all. In these circumstances, there is no answer to the claim of the claimant that they are liable to be compensated for the shares allotted to them on conversion of OFCDs held by them into equity shares."

17. Thus it is clear from the above observations that the arbitrators have held that the petitioner has not been able to come out with a public issue and therefore the respondent was entitled to terminate the agreement. These observations clearly disclose non application of mind by the learned arbitrators to the terms of the agreement. For consideration of the question whether the petitioner has failed to come out with a public offer, after the OFCDs were converted into equity shares, in my opinion, it was necessary for the arbitrators to take into consideration the recitals in Clause 2.3 (v, vi, vii and x) of the agreement which read as under.

2.3(v): The OFCDs issued will be converted into equity shares of the company earliest within one month prior to the date of offer for sale and in any case not later than September 1995 at a price to be determined in accordance with the earnings per share (EPS) actually achieved by the company for the financial year 1994-95. The method of arriving at the conversions price is laid out in Annexure II to this agreement. For the limited purpose of the calculation of the conversion price it is specifically agreed that the pro rata effect of the bonus shares issued to the promoters be ignored and that the no. of outstanding shares as on 31-3-95 be taken as 30, 00,000 only.

(vi) Out of the aforesaid shares so allotted to ITC BFIL or bought-out investors pursuant to conversion, ITC-BFIL will have a first option of retaining a maximum

of so much equity shares as will constitute 2% of the post public issue equity capital of the company.

(vii) Subject to the reservation as aforesaid in (vi) above, ITC-BFIL and the bought out investors agree to make an offer to the public, equity shares of the company allotted to them as a consequence of the conversion clause as in (v) above, together with a public offering from the company of so much shares as to make the total equity shares offered to the public at least 25% of the post issue equity capital of the company. Both the parties hereby agree that they will fulfill their respective obligations necessary to enable the public offer to take place in the month of June 1995. ITC-BFIL may, in consultation with the company, determine the offer price, provided that such offer price is permitted by and is in accordance with all applicable rules, laws, guidelines, regulations, bye-laws and notification for the time being in force. ITC-BFIL: and/or bought-out investors shall, without prejudice to their other remedies provided elsewhere in the contract, be entitled to an extension of the aforesaid period in the event that the company fails to meet any of the conditions in the contract or the market conditions, at that time, according to ITC-BFIL, are such that it is not possible to make a public issue.

(x) The prospectus, offer for sale or other document by whatever name called by which the said shares are offered to the public or for syndication shall be finalised by ITC-BFIL after considering the comments if any, of the company.

18. Section 28(3) casts a duty on the arbitrators to decide the dispute before them in accordance with the terms of the contract. Section 28(3) reads as under:

28(3): "In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

19. Therefore there is a statutory obligation cast on the arbitrators to decide the dispute in terms of the contract. It is therefore obvious that the arbitrators are under an obligation to refer to and discuss the relevant terms of the contract for deciding the dispute. Perusal of Clause 6.1(xii) shows that after the OFCDs are converted into equity shares, that event in this case has admittedly taken place on 1-11-1995, there has to be failure on the part of the petitioner to come out with public issue or failure to agree with the respondent on a date of public issue. It is common ground before me that in terms of the agreement between the parties and the subsequent correspondence between the parties, the date by which parties could have come out with the public issue is 30-11-1995. Therefore what is to be considered is whether the petitioner has failed to come out with the public issue or has failed to agree with the respondent on a date of public issue on or before 30-11-1995. So far as the question of failure of the petitioner to agree with the respondent on the date of public issue is concerned, it obviously presupposes the proposal from the respondent to the petitioner for the public issue and once such a proposal is there, in case the petitioner without any valid

reason does not agree on the date of the public issue, then it can be termed as its failure. In the present case, it is nobody's case that after 1-11-1995 the respondent submitted the proposal to the petitioner for a date of the public issue. Therefore the only question that remains to be considered is whether in the facts and circumstances of this case, it can be said that the petitioner has failed to come out with the public offer on or before 30-11-1995. Perusal of Clause 2.3 (vii) shows that a public offer can be made only on an agreement being reached between the petitioner and the respondent to make a public offer. There has also to be an agreement between the parties about the offer price and in the public offer it is not only the shares held by the company that are to be offered, but the shares held by the respondent are also to be offered. Therefore unless there is a meeting of minds between the petitioner and the respondent, there is no question of there being any public offer. Therefore making of public offer in terms of the agreement cannot be a unilateral decision of the petitioner. It is always to be an agreed decision between the petitioner and the respondent and it is for this reason that Clause 6.1(xii) uses the words fails to come out with the public offer. It presupposes that after the respondent takes all the steps that are necessary to be taken by him, the petitioner without any valid reason does not co-operate with the respondent and therefore he fails to come out with the public offer. The situation as is disclosed on record existing during the month of November 1995 was that the respondent had invoked Clause 2.7 and were insisting that the petitioner is duty bound to purchase their debentures. That offer was rejected by the petitioner. That rejection has been found to be valid by the arbitrators. Though the debentures were converted into shares, it is clear from the subsequent correspondence between the parties that the respondent refused to take cognizance of the conversion.

20. It is therefore clear from the conduct of the respondent that they were not in favour of public issue and they had taken no steps for the public issue. Therefore in my opinion it cannot be said that there is failure on the part of the petitioner to come out with the public offer. I have already observed above that to take benefit of provisions of Clause 6.1 (xii) the respondents were duty bound to establish before the arbitrators that there is failure in terms of the agreement on the part of the petitioner to come out with the public offer and therefore the terms of various clauses of the agreement referred to and quoted above were relevant material to be considered by the arbitrators in arriving that conclusion. Really speaking though the case of the respondent before the arbitrators was based on Clause (xii) and though for recording a finding in favour of the respondent it was obligatory on the part of the arbitrators to record a finding that there has been failure on the part of the petitioner in coming out with the public offer in the majority award, there is no finding recorded that there is failure on the part of the petitioner to come out with the public offer. The only finding that has been recorded in paragraph 27 of the majority award is that the petitioner has not been able to come out with the public issue. It is a settled law that observance of principles of natural justice by every adjudicating authority in

India is necessary. In my opinion it can be safely said that the observance of the principles of natural justice by an adjudicating authority which is adjudicating on the rights of rival parties including arbitrators is public policy of India. It is also settled principles of law that non application of mind by any adjudicating authority to the relevant facts and law amounts to breach of principles of natural justice. In order to comply with the principles of natural justice, an adjudicating authority is on duty bound to take into consideration relevant facts and law and not to omit from its consideration the relevant facts and law. Taking into consideration by an adjudicating authority, any irrelevant facts and law amounts to breach of principles of natural justice. Similarly omission from consideration of relevant facts and law also amounts to breach of principles of natural justice. In the present case, the arbitrators have clearly failed to take into consideration the factors that were necessary for recording a finding that because of the provisions of Clause (xii) the respondent was entitled to terminate the contract. In fact for recording a finding that the respondent was entitled to terminate the contract, the finding that the petitioner has failed to come out with a public offer was absolutely necessary. Failure of the arbitrators to record such a finding amounts to non application of mind to the relevant and crucial factor. Non application of mind by adjudicating authority to a relevant and material aspect also amounts to breach of principles of natural justice. Therefore, in my opinion it can be safely said that the majority award suffers from breach of principles of natural justice.

21. I have already indicated above, that the question that arose for consideration before the arbitrators in the face of the contents of the 2nd amendment application was whether the petitioner has failed to come out with the public offer. An order in favour of the respondent could have been made by the arbitrators only after recording a finding that there is a failure on the part of the petitioner to come out with the public issue, in the entire length and breadth of the majority award. I do not find such a finding recorded by the arbitrators. Making of an order for payment of amount by the petitioner without recording a finding that there is failure on the part of the petitioner to come out with a public offer is impossible. Therefore, in my opinion majority award is liable to be set aside.

22. It is further to be considered that the arbitrators have held that it appears from the agreement that the intention of the parties was that the claimants was merely financing the respondent and if the respondent was not able to off load the debentures or the shares in the market then the respondent has a right to get back his investment with some return. Therefore they have made an order for refund of the amount. However, for making these observation and recording of such a finding the arbitrators have not taken into consideration the provisions of the agreement, though there is a statutory obligation cast by section 28(3) on the arbitrators to do so. It is clear from the agreement that a right is created by the agreement in favour of the respondent to claim the amount from the petitioner only in three contingencies.

1. Clause 2.6 which reads as under :-

"The company as its sole discretion and with prior notice in writing to ITC-BFIL of at least 15 days, shall have the option, at any time before the conversion of OFCDs into equity shares, not to go ahead with the public offer. It shall, in such a case be incumbent on the company to purchase for redemption the entire outstanding OFCDs at a price of Rs. 150/per OFCD and the company shall do all things necessary to enable the same. This option is exercisable only before 31-8-1995 or before the OFCDs are converted into equity shares. Where however the company decided not to go ahead with the public issue before September 1995, converted the OFCDs into equity shares, it shall be incumbent on the company to compensate the bought-out investors at a rate of Rs. 150/- per every equity share held by them. Where however the OFCDs are converted into shares at a rate less than Rs. 95/- then the rate of compensation will stand reduced on the same proportion as the actual conversion price bears to Rs. 95/-."

23. In the present case it is nobody's case that Clause 2.6 comes into operation. Therefore under this clause the respondent was not entitled to get back the amount from the petitioner. The second eventuality is provided for by Clause 2.7 which reads as under :-

2.7 The bought-out investors at their sole discretion shall have the option not to go ahead with the public issue after giving 15 days notice in writing to the company. However, in such a case, it shall be incumbent on them to offer their OFCDs to the company to be redeemed at a price which shall yield a return, together with the interest payable on the OFCDs of 24% pa. on their investment. The return will be calculated with reference to the period elapsing between the actual date on which the moneys have been given to the company and the moneys are received back from the company. In addition to this the bought-out investors will be reimbursed by the company the actual expenses if any incurred by them towards the public issue. This option is exercisable anytime before 31-8-1995."

24. This clause was invoked by the respondent but there is a finding recorded in the majority award itself that the respondent is not entitled to get back the amount under this clause.

25. The third and the last contingency in which the respondent was entitled to get back the amount from the petitioner is contemplated by Article 6 Clause 6.1, which relates to default and remedies. The petitioner was relying on Clause (xii) and I have already held above that the arbitrators have not recorded a finding that the petitioner has failed to come out with the public offer. I find that the arbitrators were right in observing that the agreement contemplates the respondent getting back their amount by two methods. One is by selling the shares in the market and two, getting back the amount from the petitioner. We are concerned with the second mode namely getting back the amount from the petitioner and as observed above the contract contemplates only three situations

in which the respondent can claim the amount from the petitioner. Therefore the arbitrators could not have directed payment by the petitioner to the respondent without recording a finding that there is failure on the part of the petitioner to come out with the public issue. Thus the directions issued by the arbitrators for payment by the petitioner to the respondent travels beyond the scope of the agreement. Not only it travels beyond the scope of the agreement but it is contrary to the terms of the agreement. Therefore the majority award is contrary to the provisions of section 28(3) of the Act which obliges the arbitrators to decide in accordance with the terms of the contract. The arbitrators have no jurisdiction to make an award which is beyond the terms of the contract or which is contrary to the terms of the contract. Therefore the majority award is without jurisdiction and therefore as it is an award without jurisdiction it is capable of being set aside under the provisions of section 34 of the Act.

26. Now taking up the second issue regarding the correctness or otherwise of the order of the arbitrators in allowing the second amendment application, it is clear from the observations in paragraph 26 of the majority award, that one of the objections raised to the amendment being that the claim was barred by the law of limitation. This submission has been referred to by the arbitrators, and they have observed that :-

"It was submitted by Mr. Murarni that if the right or claim accrued on the termination of the agreement on 8th May, 1996 or on the receipt of the letter of 8th May, 1996, the claim sought to be urged in the amendment was barred by limitation."

27. Thus the submission was that the claim made by the second amendment application was barred by the law of limitation. Now this argument has been considered by the arbitrators in the following manner :

"If the matter was considered from a strictly legalistic or technical point of view, it cannot be denied that there is some substance in the submission of the learned Advocate for the respondent."

28. In my opinion these observations are not correct. The objection was that the claim is barred by the law of limitation and it is a settled law that an objection of limitation goes to the jurisdiction of the authority or the Court and therefore the objection of limitation is never a technical objection. Perusal of these observations therefore shows that the arbitrators have misdirected themselves in considering this aspect of the matter. It is further to be seen here that in paragraph 26 the arbitrators have observed thus :

"Really speaking, the amendment sought is, in a way, essentially clarificatory in nature."

29. These observations indicate that according to the arbitrators the amendment in the claim statement sought by the second amendment application was merely clarificatory of the claim already made in the claim statement. However the

arbitrators in paragraph 24 have further observed thus :

"It is true this application has been made at a very late stage and the claim therein is on a different basis than the one made in the statement of claim."

30. It is clear from these observations that according to arbitrators the claim made in the second amendment application was totally on different basis than the claim made in the claim statement. If the very basis of the claim in the amendment application is different, I really fail to see how the contents of the second amendment application can be termed as essentially clarificatory of the claim made in the claim petition. These observations to my mind also show that the arbitrators have misdirected themselves in considering the claim made in the second amendment application. So far as the power of the arbitrators to grant amendment in the claim statement is concerned it is to be found in section 23(3) of the Act which reads as under :

23(3) : "Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the Arbitral Tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

31. Perusal of the provisions of section 23(3) shows that in considering an application for amendment in a claim statement, the arbitrators have to apply their mind to two aspects. (i) whether it would be proper to allow the amendment application and (ii) whether the claim made by the amendment is delayed. It is therefore obvious that in considering an application for amendment in a claim statement the arbitrators are obliged to consider the aspect of delay. It implies that therefore the arbitrators will have to go into the reasons why the claim that is being made by the amendment was not made earlier and whether there is any justification for not making the claim earlier. It therefore follows that if a claim is being made by the amendment only as an after thought, then it will not be appropriate or proper for arbitrators to allow the amendment. So far as these aspects are concerned perusal of the majority award shows that on the aspect of the delay that the aspect has been brushed aside merely by observing that mere delay in making application for amendment does not merit rejection of the application. The majority award does not consider the reasons for the delay. In my opinion in terms of the provisions of section 23(3) the arbitrators are duty bound to consider reasons for the delay. If they find that the claimant was justified in not making the claim earlier, and the finding has also been rendered that it would not be appropriate to grant amendment, then the amendment application can be granted. But the aspect of the delay and the reasons for the delay have to be considered by the arbitrators. Thus I find that in deciding the second amendment application also not only that the arbitrators have recorded contradictory findings but they have also omitted from consideration the relevant law and the relevant facts. It goes without saying that the delay is one of the important aspects which has to be considered by the arbitrators. Perusal of the second application for amendment dated 23-12-1999 shows that there is no

reason whatsoever disclosed by the claimants for not making the application at an earlier point of time in other words there is no attempt to be found, made by the respondent for explaining the delay. In my opinion therefore for all these reasons, the majority award is infirm in as much as it granted the second amendment application.

32. For all these reasons therefore this petition is granted, in terms of prayer Clause (a). Petition is accordingly disposed off.

Parties to act on the authenticated copy of this order.