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**(2003) 03 BOM CK 0054**  
**In the Bombay High Court**  
**Case No : Appeal No. 506 of 1998**

Hindustan Construction Co. Ltd.

APPELLANT

Vs

Municipal Corpn. of Greater Bombay

RESPONDENT

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**Date of Decision :** 07-03-2003

**Acts Referred:**

Arbitration Act, 1940 — Section 16, 30

**Citation :** (2003) 3 ALLMR 90 : (2003) 3 ARBLR 212 : (2003) 5 BomCR 173 :  
(2003) 45 SCL 323

**Hon'ble Judges :** D.K. Deshmukh, J;A.P. Shah, J

**Bench :** Division Bench

**Advocate :** Iqbal Chagla, D.J. Khambatta, N. Agarwal and Harish Joshi, for the Appellant; Kevic A. Setalwad and Xavier, for the Respondent

**Final Decision :** Dismissed

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## Judgement

A.P. Shah, J.—This appeal is directed against the order of the learned Single Judge dismissing the petition under Sections 16, 30 and 33 of the Arbitration Act, 1940, hereinafter referred to as the Act. By this petition, the appellant prayed for remitting the award passed by the learned Arbitrator for reconsideration of the appellants claim arising out of foreign exchange rate fluctuation and, in the alternative, for setting aside the Award pertaining to the rejection of the appellant's said claim arising out of the foreign exchange rates fluctuation .The learned Single Judge rejected both the prayers and dismissed the petition. The relevant facts and circumstances leading upto the appeal are stated hereinafter.

2. The appellant is a company engaged in the construction business. The respondent is the Municipal Corporation of Greater Bombay. By its Tender Notice dated 4th April, 1988, the respondent invited sealed item rates tenders for the work of construction of tunnel between Sewree and Futka tank which was estimated to cost Rs. 15,03,29,970 (excluding the water charges, sewerage charges and municipal supervision charges). The appellant which was prequalified for the construction work submitted its bid to the respondent on

15th June, 1988 which was opened on the same day. The parties held discussions on certain matters between 24th and 28th June, 1988 but award of the contract was delayed for one reason or another for a long time. Eventually the respondent issued the Letter of Intent to the appellant on 10th August, 1989. One of the conditions of the contract is use of a Tunnel Boring Machine ("TBM") for excavation of the tunnel. The TBMs are not manufactured in India. Since TBMs are not manufactured in India, the appellant had necessarily to import the TBMs for construction of tunnel. The appellant entered into an agreement for hire of the TBM of WIRTH make with M/s. Murger A.G. The costs of hire of the WIRTH TBM was Swiss French 16,29,440. After receiving the approval for release of the foreign exchange the appellant applied to the respondent for payment of advance for procurement of WIRTH TBM. Accordingly, the respondent released a large advance for the import of TBM and for payment of customs duty. The TBM and allied equipments arrived in Bombay and were brought to the appellant's work site in March, 1991. Although the original cost of hiring the TBM as envisaged in the contract was Rs. 163 lacs, the rate of exchange which was Rs. 9.50 to 1 Swiss franc in May, 1988 which was the base rate went upto 20.4699 as on 9th June, 1992. Under the circumstances, the appellant raised various claims for additional payment from the respondent on account of foreign exchange fluctuation under different heads. Since the respondent refused to pay the amount claimed by the appellant the appellant asked for arbitration under Clause 97 of the contract. The parties agreed to nominate Mr. Y.V. Chandrachud (Retd. C.J.I.) as the Sole Arbitrator. In the statement of claim filed before the Arbitrator the appellant raised a claim for reimbursement of the additional expenses incurred by it on account of diverse variations at the rate of foreign exchange which was described as "first claim" under Clauses IT 18 and 75 of the contractor. The claim made by the appellant under Clause 21(c) read with Condition 73 and Clause IT 18(2) of the contract was described as "the Second Claim". The appellant also claimed for reimbursement in respect of all future extra expenses incurred by it for reasons connected with variation in the rate of exchange. The appellant sought to recover a sum of Rs. 2,63,57,181 as set out in Annexure V and sum of Rs. 2,36,99,112 as set out in annexure W to the statement of claim. The appellant claimed interest at the rate 24% p.a. on the sum payable to it and costs of the arbitration proceedings. The respondent filed its written statement to the statement of claim denying the claim in toto.

3. On the basis of the pleadings and having regard to the points in controversy, the learned "Arbitrator framed 4 issues. We are concerned with issue (c) which reads as follows:

"(c) Whether the claimant is entitled to additional cost on account of fluctuation in the foreign exchange rate."

It is the issue (c) which has been the main contest between the parties in the above petition. The determination of this issue turns purely on the construction of the various terms of the contract. This is so mentioned in paragraph 18.1 of

the Award, therein a reference is made to Clause 18(3) of the Instructions to Tenderers. The learned Arbitrator has thereafter reproduced various clauses which are as follows :

"Clause 75 : (General Conditions of Contract)

75. Subsequent Legislation.

If, after the date thirty days prior to the latest date for submission of tenders for the works, 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 the provisions of condition No. 74 in the execution of the works, such additional or reduced cost shall be certified by the Engineer and shall be paid by or credited to the Corporation and the contract price adjusted accordingly.

18(1) The unit rates and prices shall be quoted by the tenderer entirely in Indian Rupees. A tenderer expecting to incur expenditure in other currencies for the inputs to the works supplied from outside India (referred to as the foreign currency requirements") shall indicate in Schedule A "Estimate of foreign Currency Requirements" the percentage of tender price (excluding provisional sums) needed by him for the payment of such foreign currency requirements, either (i) entirely in the currency of the tenderer's home country or, at the tenderer's option, (ii) entirely in US Dollars, always provided that a tenderer expecting to incur expenditure in a currency or currencies other than those stated in (i) and (ii) above for a portion of the foreign currency requirements, and wishing to be paid accordingly, shall so indicate the percentage portion in his tender. The amounts in various currencies, calculated on the basis of the percentage indicated in the tender and by use of the exchange rates indicated in Sub-clause (2) hereinafter, shall be used for the purpose of conversion and comparison of tenders pursuant to IT. 29".

4. After analyzing of aforesaid provisions, the learned Arbitrator came to the conclusion that under IT 18(1) the unit rates and prices have to be quoted by the Indian tenderer entirely in Indian rupees. But a tenderer expecting to incur expenditure in other currencies for the inputs to the works supplied from outside India (referred to as "the foreign currency requirement") shall indicate in Schedule "A" estimate of the foreign currency requirement, the percentage of tender price (excluding provisional sums) needed by him for the payment of such "foreign currency requirements" either entirely in the currency of his home country or entirely in U.S. Dollars, Analyzing the aforesaid provisions, the learned Arbitrator concluded that the provisions contained in IT 18, apart from the opening sentence which requires the tenderer to quote his rate and prices in Indian rupees, applies to the foreign bidders. A domestic tenderer cannot incur expenditure in other currencies. He has to incur expenditure in Indian rupees on

payment of which the Government of India or the Reserve Bank of India would authorize the release of appropriate foreign exchange. According to the learned Arbitrator the entire tenor of IT 18 shows that it applies to foreign bidders because they and they alone can indicate whether they need the foreign currency to be paid either entirely or in U.S. Dollars. The learned Arbitrator observed that: "It is quite difficult to appreciate how an Indian bidder can express the need to be paid either in US Dollars or in any other currency. In fact, the words "tenderer's home country" in IT 18(1) can only mean the home country of a foreign tender. The home country of an Indian tenderer can only be India. Thereafter interpreting Clause 18(2) it is held that in the case of an Indian bidder the question of exchange risk does not arise as contemplated by IT 18(2). The learned Arbitrator concluded that it is clear from the very wording of the clause that it can only apply to foreign bidders. The reason is that the contract can provide for making payment to the contractor in foreign currencies only when the bidder is a foreign bidder. A domestic bidder is not entitled to be paid in foreign currency. The conclusion of the learned Arbitrator is summed as follows:

18.8. To sum up, the provisions contained in IT 18(2) and Clause 75 of the special Conditions of contract do not support the claim made by the claimant under this head. Accordingly, my finding on issue (c) is in the negative.

The learned Arbitrator made his award on 30-9-1994 and all the claims put forward by the appellant were rejected.

5. After the award was passed, by letters dated 22-11-1994, 5-12-1994 and 9-12-1994 the appellant's advocate informed the learned Arbitrator that the appellant had come in possession certain material documents, which went to the root of the same issue determined by the award and these documents which were earlier not in possession of appellant were not disclosed by respondent. These documents include:

(i) A letter dated 17th June from the World Bank to the BMC wherein the world Bank advised the BMC in respect of MCC's (appellant's) claim that "The devaluation of the rupee is due to action beyond the control of contractor and the contractor is entitled to review payments in respect of the agreed percentage without having to bear the foreign exchange risk, as per terms and conditions of concluded contract i.e. the rupee payments would be enhanced by the factor exchange rate at time of payment/exchange rate agreed as per terms of the contract". It was further stated that "IT 18 which is an ICB clause clearly lays out the intention to compensate for foreign currency expenditure in the manner indicated,..." and that "The Bank's legal department stated that the intent of the matter is that the payment should be made at the exchange rate used in the bid.

This view is supported by Clause 2.226 of the Procurement Guidelines which is very clear and applicable."

(ii) Questions and Answers - Bidding for Contracts in World Bank Financed Projects.

"Q. 15 What currency may a bid be made in?

A. For supply contracts, bidders may bid in their own currency or in a major currency widely used in international trade and specified in the bidding documents.

For civil works, it is common for bids to be expressed in the borrowing country's currency since the works will be carried out in that country. However, Bidders may request that a percentage of the bid price be paid in another currency to meet expenditure for foreign impute,-the exchange rate to be used must be defined in the bid. This exchange rate becomes contractual, protecting the bidder from currency fluctuation that may occur after the bid preparation date. Thus the borrower, not the bidder, takes the currency exchange risk.

To compare and evaluate bids the borrower must convert all the bids into the common currency. This is done using an exchange rate provided by an authoritative source such as the Central Bank - on a date specified in the bidding documents. The contract is written in the currency of the bid and payment is made in the same currency.

(iii) Extract of the "Guidelines-Procurement under IBRD Loans and I DA Credits" issued by the World Bank, inter alia Clause 2.26-

"When the bid price is stated in one currency but the bidder has also requested in other currencies and has expressed the requirements in other currencies as a percentage of the bid price, the exchange rates to be used for purpose of payment shall be those used by the bidder in this bid, so as to ensure that the value of the foreign currency portions of his bid price is maintained without any loss or gain".

(iv) The letter dated 23rd November, 1991 indicating that the BMC had made inquiries in respect of other World Bank assisted projects such as the Narmada Dam project and had found that the Contractors were being reimbursed in respect of the escalation due to the foreign exchange rate.

6. The learned Arbitrator replied to the above letters stating that it would be possible for him to hold meeting if the respondent, the Municipal Corporation. Gr Bombay is agreeable to his doing so. The respondent vide letter dated 10-1-1995 informed the learned Arbitrator that it is not agreeable to any further meetings being held. Thereafter the award was filed in this court on 12-1-1995 and was numbered. The appellant preferred the arbitration petition which came to be dismissed by the learned Single Judge.

7. On behalf of the appellant, Mr. Chagla strenuously contended that the documents which have been enumerated above were all in the custody of the respondent. These documents had a vital relevance to the clauses of the contract which fell for consideration of the learned Arbitrator. According to Mr. Chagla, had these documents been disclosed it is possible that the conclusions arrived by the learned arbitrator would have been wholly different from the conclusions which

have been arrived at in the absence of the said documents. Mr. Chagla submitted that the documents demonstrate that the World Bank interpreted the various clauses of the contract to mean that protection is to be given to the domestic tenderers. These observations by the World Bank particularly in the letter dated 17-6-1992 had been made by the World Bank at the request of the respondent. According to Mr, Chagla a plain reading of this letter dated 17-6-1992 coupled with extract of question and answers leaves no manner of doubt that the interpretation suggested by the appellant is the only and correct interpretation as can be seen from the view expressed by the World Bank itself in the guidelines which have been issued with regard to the procurement under IBRD Loans and IDA credits. Mr. Chagla submitted the very same clauses have been interpreted by the Engineers of the Narmada Project and in view of the provisions of the contract the contractors have been reimbursed the excess payment due to escalation of foreign exchange rate by Reserve Bank of India in remittance actually made by the contractors. Mr. Chagla submitted that the learned Arbitrator has been prevented from correctly construing the various provisions of the contract as the respondent has withheld very important documents which have been enumerated above. In this connection Mr. Chagla relied on the decision of the Supreme Court in K.P. Poulse Vs. State of Kerala and Another, . He also submitted that since the award has been made on account of the deliberate withholding of the documents by the respondent the same is liable to be set aside on the ground that it has been improperly procured or is otherwise invalid. Strong reliance is placed, on the observations of the Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath AIR 1994 SC 858.

8. In reply, Mr. Setalwad, learned counsel for the respondent submitted that the case pleaded by the appellant, even if accepted in toto would not make out any of the grounds for remitting the award u/s 16 of the Act. He further submitted that for setting aside the award u/s 30 of the Act, it would be necessary for this court to hold that the conclusions arrived at by the learned Arbitrator are totally contrary to the provisions of the clauses of the contract. It is submitted that the jurisdiction of this court to interfere with the award of the learned Arbitrator is very limited and the said parameters have been well settled by the Supreme Court in a catena of decisions. In any event learned counsel urged that the documents relied upon by the appellant will not affect the award which has been given by the learned Arbitrator. According to Mr. Satalwad documents referred are merely opinions and those opinions are not binding on any party. It is submitted that the observations made in para 2 of the letter of the World Bank clearly show that the World Bank was merely giving its observations on the view points held by the respondent. Mr. Setalwad drew our attention to the Division Bench decision of Karnataka High Court in Commander Works Engineers Bangalore v. Sarvashri Sreenivasan Foundries & Engg. Works Srinivas Nagar AIR 1976 Kar. 206, where the learned Judges of the Karnataka High Court have expressed that non production of relevant documents by either party, however, important those documents may be, for decision of dispute by arbitrator, not a

sufficient ground for setting aside the award u/s 30 of the Contract Act. Mr. Setalwad also relied upon the decision of the Kings Bench Division in *N.V. Arnold Otto Meyer v. Anne* 3 KBD 168. This decision, according to Mr. Satalwad clearly lays down that unless the documents sought to be produced are of such nature as to unsettle the award, the court would not remit the case to the arbitrator for consideration of the additional documents. In any event according to Mr. Setalwad the Supreme Court in *Ramachandra Reddy and Co. Vs. State of Andhra Pradesh and Others*, clearly held that the jurisdiction conferred on the court to remit an award by the court to the arbitrators is a discretionary jurisdiction conferred on the court and so long as the said discretion has been judicially exercised, an appellate court would not be justified in interfering with the exercise of discretion unless the discretion has been misused. This view was reiterated in *Sangamner Bhag Sahakari Karkhana Ltd. Vs. Krupp Industries Ltd.*, .

9. Under the Arbitration Act, Section 16 is the provision under which the court may remit the award for reconsideration of an arbitrator and necessity for remitting the award arises when there are omissions and defects in the award, which cannot be modified or corrected. Remission of an award is in the discretion of the court and the powers of the court are circumscribed by the provisions of Section 16 itself. Ordinarily, therefore, a court may be justified in remitting the matter if the arbitrator leaves any of the matters un-determined or a part of the matter which had not been referred to and answered and that part cannot be separated from the remaining part, without affecting the decision on the matter, which was referred to arbitration or the award is, so indefinite as to be incapable of execution or that the award is erroneous on the face of it. In *Ramchandran Reddy & Co. v. State of A.P.* (supra) Supreme Court held that an error of law on the face of the award would mean that one can find in the award or a document actually incorporated thereto stating the reasons for a judgment some legal propositions which are the basis of the award and which can be said to be erroneous. Documents not incorporated directly or indirectly into the award cannot be looked into for the purpose of finding out any alleged error. The courts are not to investigate beyond the award of the arbitrators and the documents actually incorporated therein and therefore, when there would be no patent error on the face of the award it would not be open for the court to go into the proceedings of the award. The court held that the discretion having been conferred on the court to remit an award, the said discretion has to be judicially exercised and an appellate court would not be justified in interfering with the exercise of discretion unless the discretion has been misused.

10. In the case of *Hindustan Construction Co. Ltd. v. State of J&K* [1992] 4 SCC 251 the court observed that even if, in fact, the arbitrators had interpreted the relevant clauses of the contract in making their award on the impugned items and even if the interpretation is erroneous, the court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract. Whether the interpretation is right or wrong, the parties will be bound, only if they set out their line of interpretation in the award and that is found erroneous can the court

interfere. The Bench clarified that the above principle is subject to the proposition aforesaid viz., that the arbitrator being a creature of the contract must operate within the four corners of the contract and cannot travel beyond it either by misinterpreting the terms of the contract or otherwise. In the case of *Trustees of the Port of Madras v. Engineering Construction Corporation Ltd.* [1995] 5 SCC 53 it was observed that in the case of a reasoned award, the court can interfere if the award is based upon a proposition of law which is unsound in law. The erroneous proposition of law must be established to have vitiated the decision. The error of the law must appear from the award itself or from any document or note incorporated in it or appended to it. It is not permissible to travel beyond and consider material not incorporated in or appended to the award.

11. In the instant case the learned Arbitrator, after considering Clauses 18(z) and 18(ii) came to the conclusion that the said Clauses are restricted only to foreign tenderers. The interpretation placed upon the said clauses by the learned Arbitrator cannot be said to be totally outside the permissible territory. Mr. Chagla, however, submitted that the learned arbitrator had no advantage of considering some of the important documents which are material to resolve the controversy between the parties. Mr. Chagla has placed heavy reliance on the decision in the case of *K.P. Poullose v. State of Kerala* and (*supra*). In that case the award was a speaking one and gave reasons for the decision against the contractor. The submission before the Supreme Court was that the arbitrator was guilty of legal misconducts in conducting the proceedings in as much as two very material documents Exhs P. 11 and P 16 were absolutely ignored by the arbitrator resulting in miscarriage of justice. However, an argument was advanced on behalf of the Government that these documents were not even marked before the arbitrator and thus there was no foundation for the grievance. This contention was repelled by the Supreme Court observing that "in the background of the controversy in this case even if the department did not produce the documents before the arbitrator it was incumbent upon him to get hold of all the relevant documents including Exhs P 11 and P 16 for the purpose of a just decision. The court further observed that "under Section 30(a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself or the proceedings. Misconduct u/s 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at any inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to held a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in this case." The decision in *K.P. Poulosc's* case was cited with approval in subsequent judgments in *Union of India (UOI) Vs. Jain Associates and Another*, and *M/s. Sikkim Subba Associates Vs. State of Sikkim*, .

12. In the case of *N.V. Arnold Otto Meyer* (*supra*) relieved upon by Mr. Setalwad, the question was whether the award should be remitted to the board to take

fresh evidence. The Bench observed that "Two circumstances must co-exist before this court will remit an award for the admission of fresh evidence. First, the evidence must be such that the Tribunal of fact could properly give it some weight, and, secondly, it must be evidence which the party desiring to adduce it could not, by the exercise of any reasonable diligence, have procured before the first trial." The Bench then proceeded to observe ;

"The fresh evidence which the buyers wish to adduce in the present case relates, in the case of the Kinau, to the date of the original shipment on board that vessel. They have now procured a copy of the manifest, which it is sought to say shows that the shipment was made on or after February 6. The entry in question is "added" to the previous entries, and may well be intended to represent an omission inserted late. Rule 3 of the conditions of the contract provides that the bill of lading shall be considered proof of the date of shipment in the absence of conclusive evidence to the contrary. The master of the Kinau, is equally responsible for the date on the bill of lading and for the manifest, and even if the manifest clearly stated that shipment was on Feb. 6, that could not possibly be held to be conclusive evidence that the bill of lading date was wrong. Furthermore, counsel for the buyers before the appeal board expressly admitted that the dates of shipment were correct. He says that he would not have done so except upon the assumption, which he now contends was false, that the bill of lading dates of original shipment were correct. I am not prepared to remit the award for the admission of this evidence, as the arbitrators could not in any opinion, hold that the manifest conclusively disproved the correctness or bill of lading dates."

13. In the light of the various decisions cited before us one thing is clear that the documents should not only be relevant but are material documents for arriving at a final conclusion after considering the same. This is apart from the requirement that the party is required to establish that such documents could not be procured by exercise of any reasonable and diligent efforts before the award. In the instant case even assuming the argument of Mr. Chagla with regard to the relevance of the documents is to be accepted, even then it cannot be said that the interpretation placed on the clause by the learned Arbitrator is beyond jurisdiction or that it goes to the root of the award. The documents which are now sought to be relied upon are not part of the contract but are merely opinions expressed by various parties on the construction of the clauses of the contract. The letter dated 17-6-1992 of the World Bank clearly shows that the World Bank was merely giving its opinion/observations on the view point held by the respondent. As far as the document styled as Questions and Answers is concerned, this again contains opinion expressed by the World Bank with regard to payment on a different construction of the contract. The letter dated 23rd November, 1991 by the Engineer of the BMC merely records that in respect of Narmada Dam Project the contractors were reimbursed in respect of the escalation due to the foreign exchange rate. Moreover, it would be seen that the terms of the said contract are different. Under the circumstances, the above

document cannot be said to be material document, having relevance for the interpretation of various clauses of the contract. The learned single Judge after careful analysis of the documents relied upon by the appellant held that the case does not fall within the purview of Section 16 of the Act. He has, therefore, declined to exercise the discretion after considering the submissions made by both sides. As held by the Supreme Court so long as the said discretion has been judicially exercised the appellate court would not be justified in interfering with the exercise of discretion unless the discretion has been misused. In our opinion, no fault can be found with the discretion exercised by the learned Single Judge.

In the result appeal is dismissed.