
(1999) 08 BOM CK 0062
In the Bombay High Court
Case No : Arbitration Petition No. 212 of 1997

HMG Engineering Pvt. Ltd.	Vs	APPELLANT
Union Bank of India and others		RESPONDENT

Date of Decision : 02-08-1999

Acts Referred:

Arbitration Act, 1940 — Section 20 , 33
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 20
Defence Service of Engineers (Recruitment and Conditions of Service) Rules, 1991 — Rule 3
Evidence Act, 1872 — Section 3, 61

Citation : (1999) 4 ALLMR 653 : (2000) 1 BomCR 221 : (1999) 3 MhLj 670

Hon'ble Judges : S. Radhakrishnan, J

Bench : Single Bench

Advocate : B. Colabawala and A.V. Vazirani instructed by Hariani and Co, for the Appellant; S.M. Shah and Asokan instructed by y H.P. Chaturvedi, for the Respondent

Judgement

S. RADHAKRISHNAN, J.—Heard the learned Counsel for the petitioner and the learned Counsel for the respondents. Perused the petition, its exhibits, the impugned Award, an Affidavit in reply of Mr. S.C. Jain as well as an Affidavit in Rejoinder of Mr. C.T. Khubchandani.

2. This petition challenges an Award dated 15th February, 1997. The brief facts pertaining to this case are as under :-

It appears that on 26th July, 1986, the petitioner had received a tender form from the 2nd respondent for construction of residential accommodation for staff of DGI at Ghatkopar. Thereafter on 11th November, 1986 the petitioner had submitted its tender which was duly accepted by the 2nd respondent on 9th July, 1988. Based on the aforesaid acceptance of the tender, an agreement (contract) was entered into between the petitioner and the respondents on 20th September, 1988. In the said contract the petitioner is defined as Contractor and the 1st respondent through the 2nd respondent as the Principal. It appears that on 16th

August, 1988 the 3rd respondent had issued works order to commence work and complete the same by 15th August, 1990. It is the case of the petitioner that because of the diverse breaches on the part of the 3rd respondent the work could not be completed by 15th August, 1990. Ultimately the 3rd respondent was pleased to extend the time upto 31st August, 1992.

3. It appears that with regard to the work carried out by the petitioner certain disputes and differences had arisen between the petitioner and the respondent No. 2. Under the circumstances, the petitioner by its letter dated 6th January, 1995 had made a request to the 4th respondent to appoint an Arbitrator in terms of Clause 70 of the Conditions of Contract. Thereafter, a reminder letter dated 25th September, 1995 was sent by the petitioner. Finally, since the 4th respondent had failed and neglected to appoint an Arbitrator an Arbitration Suit came to be filed by the petitioner being Arbitration Suit No. 4673 of 1995 u/s 20 of the Arbitration Act 1940. After a copy of the said Arbitration suit was served on the respondent Nos. 1 to 4, the 4th respondent purported to appoint the said Arbitrator as the Sole Arbitrator. In these circumstances the said suit became infructuous.

4. Thereafter it appears that the 4th respondent by its letter dated 24th January, 1996 purported to refer disputes set out in Appendix "A" to the said letter, and alleged that the petitioner's claims listed in Appendix "B" to the said letter were allegedly outside the ambit of the said Arbitration clause. Thereafter it appears that the learned Arbitrator by his letters dated 17th February, 1996 and 6th April, 1996 had called upon the parties to file their pleadings before him. It appears that the 4th respondent had restricted the reference only with regard to the disputes set out in Appendix A and not with regard to Appendix "B". Under the circumstances, the petitioner were left with no other alternative but to approach this Court by way of an Arbitration Suit No. 2126 of 1996. Ultimately, on 9th September, 1996 this Court had directed the said Arbitrator to decide whether the disputes referred to in Appendix "B" can be arbitrated upon or not and the respondent Nos. 2 to 4 were also directed to refer all the disputes to the said Arbitrator including the disputes referred to in Appendix "B". It appears that against the said order dated 9th September, 1996 the respondent Nos. 2 to 4 appear to have preferred an appeal before the Division Bench of this Court and the said appeal appears to have been dismissed on the ground of non-removal of office objections. In view thereof the order dated 9th September, 1996 subsists and the same is binding on all the parties.

5. The petitioner by its letters dated 11th December, 1996 and 19th December, 1996 had raised an objection that the learned Arbitrator was not an "Engineer Officer" and was therefore not qualified to be nominated as an Arbitrator by the 4th respondent. It appears that on 19th December, 1996 when this issue was taken before the learned Arbitrator the 2nd respondent had pointed out that in view of the judgment and order of the Jammu & Kashmir High Court, the appointment of the Arbitrator was correct. Thereafter the learned Arbitrator had

fixed up a hearing on 15th January, 1997 at Hyderabad. Prior to that on 3rd June 1996 when the above matter was before the learned Arbitrator, the same was adjourned by consent of both the parties. Thereafter on 3rd July, 1996 when the matter had appeared before the learned Arbitrator the same was adjourned on the ground of sickness of Mr. C.T. Khubchandani, the representative of the petitioner who was familiar with the facts of the case on behalf of the petitioner herein. Thereafter, on 19th December, 1996 the petitioner herein had challenged the authority of an Arbitrator to proceed with the Arbitration in the sense that he was not an Engineer Officer and therefore not qualified to be nominated as an Arbitrator by the 4th respondent. Thereafter, the meeting took place before the learned Arbitrator on 15th January, 1997 on which date again Mr. C.T. Khubchandani, the representative of the petitioner who had executed the contract and who was conversant with the facts of the matter, was not well and the matter was adjourned to 6th February, 1997. On 6th February, 1997 again an application was made on behalf of the petitioner that Mr. C.T. Khubchandani was not well and had prayed for an adjournment. It appears that the learned Arbitrator proceeded with the matter in the absence of the petitioner's representative on 6th February, 1997, and thereafter on 15th February, 1997 an Award was made and published by the learned Arbitrator.

6. The learned Counsel for the petitioner challenges the impugned Award mainly on the following grounds:

I. That the learned Arbitrator had whimsically declined to grant an adjournment on 6th February, 1997 inspite of medical certificate being produced, thereby depriving the petitioner a reasonable opportunity of presenting its case, and hence violated the principles of natural justice, and therefore the learned Arbitrator had misconducted himself in the proceedings before him;

II. That the learned Arbitrator had declined to decide the issues mentioned in Appendix B, despite this Court's judgment and order dated 9th September, 1996 passed in Arbitration Suit No. 2126/96 which was fully binding on the learned Arbitrator. Thus the learned Arbitrator had failed to exercise the jurisdiction vested in him, thereby misconducted himself:

III. That the respondents were allowed to produce additional evidence in the form of documents and statements on 6th February, 1997 and that too in the absence of the petitioner, and the copies of such additional evidence were not furnished to the petitioner to enable them to rebut the same.

IV. That no fair and reasonable opportunity was given to the petitioner to conduct the said arbitration proceedings before the learned Arbitrator. The arbitration proceedings were conducted once at Bombay, once at Hyderabad and four times at Lucknow, whereas according to the petitioner all the evidence, the entire record and material relating to the arbitration was available in Bombay, the parties were residing in Bombay and the works site for construction was also in Bombay.

V. That the learned Arbitrator was not an "Engineer Officer" but was a "Surveyor of Works" cadre officer and as such, he had no jurisdiction to decide the disputes, in the sense the learned Arbitrator had no authority to decide the matter.

7. In this context it may be noted that though the proceedings were held on 3rd June 1996, 3rd July 1996, 19th December 1996, 15th January 1997, 6th February 1997 and 7th February 1997, it is an admitted position that the respondents herein had filed their say with regard to the disputes referred in Appendix B, only on 15th January, 1997. In view thereof, the first effective date of hearing could only be 6th February, 1997 and not prior thereto. On 6th February, 1997 when the arbitration meeting was held at Lucknow, the request was made on behalf of the petitioner for adjournment on the ground of illness of Mr. C.T. Khubchandani, the petitioner's representative who was conversant with the facts of the case. The medical certificate to that effect was also produced before the learned Arbitrator. The learned Counsel for the petitioner in this behalf relied upon a judgment of Calcutta High Court in the case of Indian Iron and Steel Co. Ltd. Vs. The Sautna Stone and Lime Co. Ltd., . In the said judgment, the Calcutta High Court had taken a view that if a party fails to appear on first date of effective hearing, and if such an absence of a party is not intentional, then the ex parte Award passed by the Arbitrator would be violative of principles of natural justice and amounts to legal misconduct. The Calcutta High Court further observed that in a Court case in the case of an ex parte decree an application can be made for setting aside the same under Order 9, Rule 13 of the Code of Civil Procedure, whereas, no such opportunity is available in the case of an ex parte Award, and as such the Arbitrator ought to give a fair opportunity to the party concerned.

8. With regard to the second objection raised by the petitioner that the learned Arbitrator had declined to decide the issues mentioned in Appendix B and therefore failed to exercise jurisdiction vested in him and acted against public policy, in this behalf one may refer to the judgment and order of this Court dated 9th September, 1996 passed in the Arbitration Suit No. 2126/96. In the said judgment and order this Court has held as under :-

"There is no dispute as regards the extent or validity of the arbitration agreement contained in the Contract Agreement dated 20th September, 1988. According to the defendants the disputes mentioned in Appendix "B" in the said letter are not referable to arbitration since the same are outside the ambit of the arbitration agreement. The arbitrability of the disputes mentioned in Appendix "B" to the said letter can be decided by the 5th defendant who has been appointed as the Sole Arbitrator but the decision of the 5th defendant in respect thereof shall not be conclusive."

9. In the said judgment, this Court had also directed the defendant Nos. 2 to 4 to refer all the disputes raised by the plaintiffs including those mentioned in Appendix "B" to the letter dated 24th January, 1996. The learned Counsel for the

petitioner pointed out that this judgment was totally binding on the learned Arbitrator, and inspite of that the learned Arbitrator has declined to decide the disputes referred to in Appendix "B" and had even not decided whether the issues referred to in Appendix "B" were arbitrable by him or not. Therefore according to the learned Counsel for the petitioner the learned Arbitrator ought to have decided the issues referred to in Appendix "B" or ought to have decided the arbitrability thereof.

10. In this behalf the learned Counsel for the petitioner had relied upon the judgment in the case of *Lingam Dasaradharamayya Vs. Kanuri Raja Rao and Others*, . In this case it is very categorically held that "It was bounden duty of the Arbitrator to have given a definite finding on the vital issues referred to him and or; his failure to do so, the award could not be sustained merely on the ground that it was an intelligible decision which determined the rights of the parties to a certain extent." In this context the observations in Halsbury's Laws of England (Volume I-2nd Edition at Page 663) dealing with the scope of the Award may be noted, which are as under :-

"The award must determine all the differences which the parties by their submission referred to arbitration; and, on the other hand, it must not purport to determine matters which were not comprised in the submission. An award which does not decide the differences referred to arbitration is bad and unenforceable. So also is an award which purports to determine matter not comprised in the submission, unless the part of the award which was beyond the scope of the arbitration can be severed from that which deals with the matters comprised in the submission, in which case the latter part will be held good and valid."

11. The learned Counsel for the petitioner also referred to a judgment in the case of *Union of India (UOI) Vs. Firm J.P. Sharma and Sons*, . In this case also the Rajasthan High Court has held that if the reference specifically requires him to deal with certain disputes and if he fails to give his decision on those specific points or disputes, then the award stands vitiated." In this context it may be noted that in Para 2 of the Rejoinder filed by the petitioner before the learned Arbitrator, the petitioner has categorically taken a stand that the Appendix "B" claim, ought to be decided.

12. The third ground of objection raised by the petitioner is that the learned Arbitrator had allowed the respondents herein to produce the additional evidence and documents on 6th February, 1997 in the absence of the petitioner, and the copies of the same were not furnished to the petitioner and as such the petitioner was not able to rebut the same. A perusal of the pleadings of the parties before this Court clearly shows that the petitioner had not received the said additional documents or evidence to enable them to rebut the same. In this context the learned Counsel for the petitioner relied upon the judgment reported in Lloyd's List Law Reports 1963 1 214 in the case of *Government of Ceylon v. Chandris*. In this case the Court has observed that "It is a basic principle in arbitrations as much as in litigation in the courts (other, of course, than ex parte

proceedings), that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it, or make submissions on it. No custom or practice may override that basic principle."

13. The learned Counsel for the petitioner also relied upon a judgment of the Apex Court in the case of Food Corporation of India Vs. Joginderpal Mohinderpal, . In this case the Apex Court has held that "The law of arbitration should be made simple, less technical and more responsive to the actual realities of the situation, but must be responsive to the canons of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done." The learned Counsel for the petitioner submitted that, in the instant case, by allowing the respondents to adduce an additional evidence in the absence of the petitioner has totally eroded the confidence in the learned Arbitrator and thereby justice has been denied to the petitioner.

14. Fourthly, the learned Counsel for the petitioner objected to the arbitration being held at different places viz. at Bombay, Delhi and Lucknow, which according to the learned Counsel for the petitioner it ought to have been held only in Bombay where all the documents were available and the parties were also available in Bombay. In this context the learned Counsel for the petitioner had relied upon. "Russell on Arbitration" 20th Edition, at Page 257, where it is mentioned that "In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into, consideration are the place where most of the witnesses reside, the situation of the subject-matter of the dispute, and the balance of convenience and expense." Therefore, according to the learned Counsel for the petitioner, the learned Arbitrator by holding the hearings at different places viz. Lucknow, Bombay and Delhi, has misconducted himself.

15. Fifthly, the learned Counsel for the petitioner had raised an objection that the learned Arbitrator was not an "Engineer Officer". According to the learned Counsel for the petitioner the post, known as "Engineer Officer" under the Military Engineering Services and the post known as "Surveyor of Works" are not inter-changeable. The learned Counsel for the petitioner submits that the learned Arbitrator was not an "Engineer Officer" but was a "Surveyor of Works" cadre officer, and therefore he was not entitled to be an Arbitrator nor the 4th respondent was empowered to nominate him as an Arbitrator. However, in this context, it may be noted that, now, after the arbitration proceedings in the instant case were commenced before the learned Arbitrator, the post known as "Surveyor of Works" has also been included in the category of "Engineer Officer".

16. The learned Counsel for the petitioner therefore submits that, on the

aforesaid five grounds, the impugned Award passed by the learned Arbitrator cannot be sustained and the same ought to be quashed and set aside.

17. Mr. S.M. Shah, the learned Counsel for the respondents brought to my notice that on 3rd June, 1996, the learned Arbitrator had held his first hearing and had adjourned the same by consent to 3rd July, 1996. It appears that on 3rd July, 1996 the petitioner had sought an adjournment on the ground of illness of the representative of the petitioner Mr. C.T. Khubchandani. Thereafter, it appears that the learned Arbitrator had taken up the matter on 19th December, 1996 on which date the petitioner had raised an objection to the jurisdiction of the learned Arbitrator in the sense that the learned Arbitrator was not an Engineer Officer, and as such, he could not act or continue to act as an Arbitrator in the matter. After 19th December, 1996 the matter came up before the learned Arbitrator on 15th January, 1997 on which date the representative of the petitioner Mr. C.T. Khubchandani was not present due to illness. Thereafter, the next hearing was fixed on 6th February, 1997 to be held at Lucknow. On 6th February, 1997 the petitioner's representative was still unwell and the petitioner's Advocate had requested for adjournment on the ground of illness of Mr. C.T. Khubchandani and the medical certificate in that regard was also produced before the learned Arbitrator. On behalf of the petitioner it was brought to the notice of the learned Arbitrator that only Mr. C.T. Khubchandani, the representative of the petitioner was familiar with the facts of the case, and the Advocate of the petitioner was unable to proceed with the hearing in the absence of the said representative of the petitioner, and therefore the learned Arbitrator was requested that the matter may be adjourned for three to four weeks. However, it appears that the learned Arbitrator had declined to grant an adjournment and proceeded with the matter ex parte. The learned Advocate who was present on behalf of the petitioner, also left the proceedings since he was unable to proceed further in the absence of the petitioner's representative Mr. C.T. Khubchandani. It appears that on 6th February, 1997, after the learned Advocate who was present on behalf of the petitioner had left the proceedings, the respondents herein had produced certain documents and evidence by way of an additional evidence. The copies of the said documents and evidence were not furnished to the petitioner.

18. Mr. S.M. Shah, the learned Counsel for the respondents contended that on 3rd July, 1996 an adjournment was sought on behalf of the petitioner on the ground of illness of their representative Mr. C.T. Khubchandani, and again on the same ground of illness another adjournment was sought on behalf of the petitioner on 15th January, 1997, and therefore, the learned Arbitrator was fully justified in rejecting an application for adjournment. According to Mr. Shah, the whole attempt of the petitioner was not to appear before the learned Arbitrator on some pretext or the other so as to avoid the arbitration proceedings.

19. With regard to the second objection raised by the petitioner, viz that the learned Arbitrator had declined to decide the issues mentioned in Appendix "B"

inspite of this Court's judgment and order dated 9th September, 1996 passed in Arbitration Suit No. 2126/96, the learned Counsel for the respondents submitted that the learned Arbitrator probably did not decide the same in view of the facts that the respondents had preferred an appeal before the Division Bench of this Court against the said judgment and order dated 9th September, 1995. However, the learned Counsel for the respondents fairly conceded that there was no stay against the said judgment and order dated 9th September, 1996.

20. With regard to the third objection viz. that the learned Arbitrator ought not to have permitted the respondents to produce an additional documents and evidence in the absence of the petitioner, the learned Counsel for the respondents Mr. Shah contended that the petitioner was not keen in participating with the arbitration proceedings on some pretext or the other. He further submitted that the petitioner was avoiding the proceedings, and therefore the learned Arbitrator had no other choice but to proceed with the matter and that in why the learned Arbitrator had permitted the respondents to produce additional documents and evidence. According to Mr. Shah, the petitioner had deliberately chosen to remain absent and keep avoiding the learned Arbitrator and therefore the learned Arbitrator cannot be faulted with for allowing the respondents to produce an additional documents and evidence, as obviously the petitioner was not keen to appear before the learned Arbitrator.

21. With regard to the fourth objection raised by the petitioner, viz. that the arbitration proceedings ought to have taken place only at Bombay, and not at Lucknow & Delhi, the learned Counsel for the respondents contended that at no point of time the petitioner had raised such an objection with regard to the place of arbitration. Mr. Shah pointed out that the petitioner had only requested that the arbitration proceedings should be conducted at Bombay for their convenience, and that the petitioner had never objected that the proceedings could not be held at Lucknow and Delhi.

22. With regard to the fifth objection raised by the petitioner, viz. that the learned Arbitrator was not an "Engineer Officer" and as such he had no jurisdiction to decide the disputes and he could not have acted upon as an Arbitrator, the learned Counsel for the respondents relied upon a judgment dated 20th March, 1996 of the Jammu and Kashmir High Court, in the case of M/s. Mulla Raj Mehta & Sons Engineers and Contractors v. Union of India. The learned Counsel for the respondents contended that Mr. S.K. Rao who is the learned Arbitrator in the instant case was also the learned Arbitrator in the said case decided by the Jammu Kashmir High Court. A similar objection was raised before the Jammu & Kashmir High Court that Mr. S.K. Rao was not an "Engineer Officer" and that he was only belonging to the other cadre viz. "Surveyor of Works". In that context the Jammu & Kashmir High Court has held as under :-

"Merely because in a particular Department, there might be two cadres of service, on of "Engineers" as they may be called, and the other of the "Surveyor of Works", it is reiterated that, in the absence of the definition of the term

"Engineer Officers" either in the Rules of the Services of either of these two cadres, or any where else, every person, belonging to whatever service, so long as he is performing the duties of an Engineer can safely be called an "Engineer Officer". The contention, therefore, is wholly misconceived. It is held that respondent No. 4 is an "Engineer Officer" as contemplated by Clause 70, which is the Arbitration Agreement between the parties."

The Jammu & Kashmir High Court, in the abovementioned judgment, came to the conclusion that Mr. Rao was an "Engineer Officer" as contemplated under Clause 70, and as such, was entitled to act as an Arbitrator.

23. Mr. Shah, the learned Counsel for the respondents tried to distinguish the judgment of the Calcutta High Court in the case of Indian Iron and Steel Co. Ltd. Vs. The Sautna Stone and Lime Co. Ltd., . An Award passed in the said case was an ex parte Award and therefore the Calcutta High Court had observed in that manner, whereas in the present case, according to the learned Counsel for the respondents, the present Award is not strictly an ex parte Award, in the sense that the petitioner herein was appearing in the matter and ultimately on adjournment being declined to the petitioner on 6th February, 1997, the Advocate for the petitioner had left the arbitration proceedings. Therefore, according to the learned Counsel for the respondents, the ratio of Calcutta High Court holding that the Arbitrator ought to give a reasonable and fair opportunity, would not apply in the instant case as a reasonable opportunity was afforded to the petitioner on a number of occasions.

24. The learned Counsel for the respondents further tried to distinguish the judgment of the Rajasthan High Court in the case of Union of India (UOI) Vs. Firm J.P. Sharma and Sons, , on the ground that the claims of the petitioner herein under Appendix "B" would be separate from those under Appendix "A" and therefore according to the learned Counsel for the respondents, the learned Arbitrator was justified in not considering the claim under Appendix "B". However, Mr. Shah, the learned Counsel for the respondents, also fairly conceded that the judgment of this Court delivered on 9th September, 1996 in Arbitration Suit No. 2126/96 was subsisting and that the learned Arbitrator ought to have followed the said judgment and order dated 9th September, 1996 passed by this Court.

25. The learned Counsel for the petitioner in rejoinder submitted that the first effective date of hearing was only the 6th February, 1997, in as much as the pleadings with regard to the issues in Appendix "B" were filed only on 15th January, 1997, and even on an earlier occasion on 19th December, 1996 the respondents had filed their reply with regard to the claims in Appendix "B". Therefore, according to the learned Counsel for the petitioner, as the filing of the pleadings were completed only on 15th January, 1997, the first effective date of hearing with regard to the arbitration was 6th February, 1997 and therefore on the said medical ground the learned Arbitrator ought to have given time to the petitioner and the learned Arbitrator ought not to have adjourned the matter.

26. The learned Counsel for the petitioner also relied upon the case of H.C. Whitehouse and another v. Kahn Kahn and Co. and others, reported in AIR 1914 Sind. 148, to the effect that if a party is able to show sufficient cause for his non appearance before the learned Arbitrator, the Court can set aside an Award passed ex parte by the learned Arbitrator against that party.

27. The learned Counsel for the petitioner had also relied upon Schedule I to the Regulations of the Military Engineer and pointed out that the Arbitrator in the present case in the category of "Surveyor of Works" does not figure within the categories of "Engineer Officer", whereas, now, after these arbitration proceedings were commenced before the Arbitrator, the same has been amended to include "Surveyor of Works".

28. After hearing both the parties at length, so far as the first ground of objection is concerned, the issue is whether the learned Arbitrator ought to have given an adjournment on 6th February, 1997 on medical ground or whether the learned Arbitrator was right in proceeding ex parte in the absence of the petitioner. In this context it may be noted that, as rightly pointed out by the learned Counsel for the petitioner that till 19th December, 1996 the respondents had not filed their say with regard to the Appendix "B" claims, and that they had filed their say with regard to the said claims only on 15th January, 1997 before the learned Arbitrator, and therefore, the first date on which the effective hearing could have taken place, would be 6th February, 1997. On that date, the petitioner's Counsel had made an application alongwith the medical certificate for adjournment of hearing on the ground that Mr. C.T. Khubchandani, the representative of the petitioner, who was familiar with the facts of the case was seriously ill and that is why he was unable to proceed with the matter. Therefore, it appears that for all practical purposes 6th February, 1997 was only first effective date of hearing and as such, the parties ought to have been given a reasonable and fair opportunity to represent their case and even thereafter. In this context the following observations of the Apex Court in the case of Food Corporation of India Vs. Joginderpal Mohinderpal, , would be relevant.

"We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done."

29. Therefore, in the light of the abovementioned facts and circumstances, the learned Arbitrator ought to have given one more fair opportunity to the petitioner and ought not to have totally shut them out and proceeded with the matter on 6th February, 1997 in their absence and ought not to have made and published an impugned Award on 15th February, 1997. The learned Arbitrator has misconducted himself by not granting an adjournment on 6th February, 1997. In this connection it may be noted that the conduct of the Arbitrator should always inspire confidence between the parties, however in the present case the conduct

of the learned Arbitrator by not granting an adjournment was not proper and valid, and thus the learned Arbitrator has violated the principles of natural justice thereby has misconducted himself,

30. With regard to the second objection viz. that the learned Arbitrator was enjoined to decide the issues in Appendix "B" or at least decide the arbitrability part of it, the judgment and order of this Court in Arbitration Suit No. 2126 of 1996 dated 9th September, 1996 is very specific, by which it is clear that the Arbitrator ought to have decided issues in Appendix "B" or at least decided the arbitrability part of it. In this context, both the parties concede that the above judgment and order dated 9th September, 1996 was subsisting and was binding on the learned Arbitrator. Under these circumstances, especially by not following the judgment and order of this Court dated 9th September, 1996 the learned Arbitrator has misconducted himself by not deciding and considering the issues referred to in Appendix "B", or at least should have decided the arbitrability thereof. The learned Arbitrator has also acted against the public policy by not following the aforesaid judgment and order of this Court dated 9th September, 1996.

31. With regard to the third objection viz. that the learned Arbitrator ought not to have permitted the respondent to produce additional documents and evidence in the absence of the petitioner on 6th February, 1997, the observations of the English Court reported in Lloyd's List Law Reports 1963 1 214, in the case of *Government of Ceylon v. Chandris*, are very relevant, which are as follows:

"It is a basic principle, in arbitrations as much as in litigation in the courts (other, of course, than *ex parte* proceedings), that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it, or make submissions on it. No custom or practice may override that basic principle."

It may be noted here that, admittedly, the copies of such additional documents and evidence which the learned Arbitrator had allowed to be produced by the respondents on 6th February, 1997, were not given to the petitioner. On this count also it is very clear that the learned Arbitrator has committed a legal misconduct in permitting the respondents to produce such an additional evidence and documents behind the back of the petitioner without offering them an opportunity of rebutting the same.

32. With regard to the fourth objection viz. that the learned Arbitrator ought not have conducted the proceedings at different places viz. at Bombay, Lucknow and Delhi, whereas the learned Arbitrator ought to have conducted the proceedings only at Bombay, from the records it becomes clear that the petitioner was requesting the learned Arbitrator to conduct the proceedings at Bombay, which place was very convenient, as all the parties as well as the witnesses were available in Bombay, and that the entire record and the documents were also

available in Bombay. However, it may be noted that the petitioner had never objected at any point of time that the learned Arbitrator ought not to conduct the proceedings at Lucknow and Delhi. There was no categorical objection from the petitioner on this count. Therefore, I am of the view that the impugned Award cannot be quashed on this ground that the learned Arbitrator ought not to have conducted the proceedings at Bombay, Lucknow & Delhi, but ought to have conducted the proceedings at Bombay only. Therefore, I do not find any substance in the fourth objection that the learned Arbitrator ought to have conducted the proceedings in Bombay only.

33. With regard to the fifth objection that the learned Arbitrator was not an "Engineer Officer" but was only a "Surveyor of Works" cadre officer, and as such he had no jurisdiction to decide the disputes, and he was not qualified to act an Arbitrator, the learned Counsel for the petitioner has brought to my notice the Notification of Government of India, Ministry of Defence, regarding Indian Defence Service of Engineers (Recruitment and Conditions of Service) Rules, 1991, which is annexed as Exh. S-1 to the petition. It is provided in Rule 3 that "There shall be constituted a service to be known as the Indian Defence Service of Engineers consisting of posts specified in Schedule I." The said Schedule I provides for the posts of Additional Director General, Chief Engineer, Additional Chief Engineer, Superintending Engineer, Executive Engineer and Additional Executive Engineer. Therefore, according to the learned Counsel for the petitioner the post "Surveyor of Works" was obviously not part of this category. However, in this connection, it may be noted that, now, it is an admitted position that the cadre "Surveyor of Works" has been included in this category of Indian Defence Service of Engineers. It is also an admitted position that, the "Surveyor of Works" is a qualified engineer, in the light of the reasoning given by the Jammu and Kashmir High Court that the duties of the said office of "Surveyor of Works" are directly related to the planning, designing, execution of works and supervision etc. The Jammu and Kashmir High Court has taken a view that if an Engineer is not involved in the execution of work at site and is only concerned with its planning or designing of the work while sitting in the office, he does not cease to be either an "Engineer" or an "Engineer Officer". The Jammu and Kashmir High Court also observed that if a qualified Engineer, by reason of his official duties, acts as an Advisor in the matters of engineering alone, to the Head of the Institution, then he also performs the duties of an Engineer. As has been rightly held by the Jammu and Kashmir High Court, an Engineer, so long as he is discharging the functions relating to his job, whether by involving himself in actual execution at site, by planning, designing or rendering advice or assistance, will remain as an Engineer, and if, he is in the category of "Officer" he can and should be called as an "Engineer Officer". In the instant case, there is no dispute that the learned Arbitrator was an officer and he had the qualification of an Engineer, but was working as a "Surveyor of Works". Over and above, another important aspect to be noted is that the same person viz. Mr. S.K. Rao, the learned Arbitrator in the present case was also the Arbitrator in the case before

the Jammu and Kashmir High Court. Under the circumstances, I am in full agreement with a view taken by the Jammu and Kashmir High Court that the present learned Arbitrator is an "Engineer Officer". There is also no dispute that Mr. S.K. Rao was performing the duties as an Engineer, though he may be belonging to the cadre of a "Surveyor of Works". Under these circumstances, the last objection viz. that the learned Arbitrator was not an "Engineer Officer" as contemplated under Clause 70, has no substance. I hold that the learned Arbitrator Mr. S.K. Rao was an "Engineer Officer" for the purposes of an arbitration as contemplated under Clause 70.

34. Under the aforesaid facts and circumstances, I am of the view that the learned Arbitrator has misconducted himself by declining to grant an adjournment on 6th February, 1997. I am also of the view that the learned Arbitrator has acted against the public policy and has committed a legal misconduct by not following the judgment and order of this Court dated 9th September, 1996 thereby not deciding the issues referred to in Appendix "B" inspite of the directions of this Court to do so. Similarly, I am also of the view that the learned Arbitrator has misconducted himself by permitting the respondents to produce additional evidence and documents on 6th February, 1997 behind the back of the petitioner. The act of the learned Arbitrator in allowing the respondents to produce additional evidence, the copies of which were not furnished to the petitioner to rebut the same, and thereafter, relying on the said evidence, and making and publishing an Award is nothing but a legal misconduct on the part of the learned Arbitrator. I am therefore satisfied that the petitioner has succeeded in establishing the case that an impugned Award is liable to be quashed on the above grounds.

35. Under the aforesaid facts and circumstances, an impugned Award dated 15th February, 1997 passed by the learned arbitrator is hereby quashed and set aside.

36. Both the learned Counsel for the petitioner and the respondents are agreed that as per Clause 70 of the Conditions of Contract, the Engineer-In-Chief, Army Headquarter, viz. the respondent No. 4 herein, will directly nominate one member from the Panel of Arbitrators. But it is made clear that the Engineer-In-Chief, Army Headquarter, shall do so without consulting Mr. S.K. Rao (who had acted as an Arbitrator in the present case and who has now been promoted as a Chief Surveyor of Works). The learned Counsel for the respondents states that the said Engineer-in-Chief will nominate one of the members from the Panel of Arbitrators, as an Arbitrator in this matter within a period of four weeks from today, and as far as possible, the said arbitrator who will be appointed by the Engineer-in-chief will complete the entire arbitration proceedings within a period of four months thereafter.

37. It is made clear that the petitioner will fully co-operate in the arbitration proceedings so as to enable the said Arbitrator to complete the same within a period of four months.

38. Arbitration petition stands disposed of in terms of the above, however, with no order as to costs.

39. Parties to act on an ordinary copy of this order duly authenticated by the Associate.