

(1982) 12 MAD CK 0052

In the Madras High Court

Case No : CRP. No's. 4375 and 4494 of 1981

Indian Oil Corporation Ltd.

APPELLANT

Vs

S. Ravindran and V. Krishnan

RESPONDENT

Date of Decision : 20-12-1982

Acts Referred:

Arbitration Act, 1940 — Section 13(b), 24(2), 31, 33, 34

Citation : (1982) 12 MAD CK 0052

Hon'ble Judges : Mohan, J

Bench : Single Bench

Advocate : C. Ramakrishnan for M/s. T.N. Vallinayagam and G. Veerapathran, for the Appellant; P. Raghavaiah and Mr. N. Ganapathy, for the Respondent

Final Decision : Allowed

Judgement

Mohan, J.—Both these revisions can be dealt with under a common judgment, since they raise identical questions of law. The facts in CRP. No. 4375/81 are as follows:- By an agreement dated 1st February 1972 the revision petitioner (defendant in O.S. 3973/81) appointed the respondent (plaintiff) as dealer in oil and oil products at Manapparai. On 20th May, 1981 the petitioner terminated that agreement. Challenging the validity of that termination, O.S. No. 3873 of 81 was filed by the respondent as plaintiff before the learned first Assistant City Civil Judge, Madras. The petitioner filed I.A. No. 8378/81 praying for a stay under S.34 of the Arbitration Act contending that since Cl.28 of the agreement provides for arbitration, it is not open to the respondent to seek an adjudication of the dispute in relation to termination of the agreement before a civil court. It may be stated even at this stage that the main point on which the application was opposed was that any Arbitrator appointed by the revision petitioner corporation would not be free from bias. Therefore, the respondent apprehends that he might not get a fair deal in arbitration proceedings.

2. The learned First Assistant Judge, City Civil Court, Madras dismissed the application filed by the petitioner/corporation upholding the defence of the

respondent. Thereupon, C.M.A. 99/81 was preferred and the learned Sixth Additional Judge, City Civil Court, Madras was of the view that this is a case in which the evidence shows that the reason for the termination was the refusal on the part of the respondent to give evidence against some of the officers of the corporation against whom certain disciplinary proceedings had been initiated. In any event, any arbitrator appointed by the Corporation would be biased in favour of the corporation. Consequently there was every justification for the apprehension on the part of the respondent that he might not get a fair deal at the hands of the Arbitrator and so he dismissed the appeal, Hence the present revision.

3. In CRP. 4494/81 the facts are as follows:- In this case the revision petitioner/defendant appointed the respondent as a dealer in light diesel oil and kerosene by an agreement Ex.B.3 dated 5th March, 1979. On 27th June, 1980 the agreement was cancelled, Questioning the correctness of the cancellation the respondent preferred O.S. 4817 of 80 on the file of the Eighth Assistant Judge, City Civil Court, Madras, for a declaration that the termination is illegal and also for an injunction. Pending that suit, I.A. 12653 of 1980 was filed by the revision petitioner herein for stay of those proceedings under S. 34 of the Arbitration Act. The contentions raised were similar to those in CRP.4375/81. Learned Eighth Assistant Judge, City Civil Court, Madras dismissed the petition, whereupon CMA.74 of 81 was preferred. That was also dismissed by the learned Sixth Additional Judge, City Civil Court, Madras. Hence, the present revision.

4. Mr. C. Ramakrishnan learned counsel for the petitioner, urges the following points:-The contracts were entered into between the parties with regard to the dealing in goods, which are essential to the community. Any contracting party will certainly be aware that if the contract is given to him he is likely to make considerable profits, because there will not be any dearth of buyers of the commodities, either kerosene or diesel or light diesel or any other oil products. Since the demand is very high the respondents vie with others to obtain a contract in a business which is highly competitive in character. The Indian Oil Corporation, which is charged with the duty of securing the supply and sale of these products to the common people imposes certain restrictions and says:-

"If ever I deal with you, it will be only subject to the conditions set out in the agreement; otherwise not." Where, therefore, the parties are bargaining on equal basis, if a clause providing for arbitration as in clause 28 states that any dispute shall be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the Corporation who may be nominated by the Managing Director, the courts must see" that this clause of the contract is enforced. Otherwise, the contracting parties who seek declaration may, after getting the declaration, turn round and say, "I am not bound by the arbitration agreement." This would amount to gaining an unfair advantage. It is this background which the courts below have forgotten to keep in mind while appreciating the respective contentions of the parties. In support of this

contention reliance is placed on Hickman & Co. v. Roberts 1913 AC 229, Ives & Barker v. Williams 1894 (2) CD 478, Eckersley v. Mersey Docks and Harbour Board 1891 (2) Queen's Bench Division, 667 Jackson v. Barry Railway Company 1893 (1) CD 238 The Central Government of India Vs. Chhotalal Chhaganlal Modi, Madhya Pradesh Housing Board, Bhopal and Others Vs. Karodi Shah Kohli, and Balsukh Refractories and Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, . Relying on the above decisions, the argument proceeds that it was wrong on the part of the Court below to have inferred that the respondent (plaintiff) had a well founded apprehension that the officers of the defendant were prejudiced against him on account of his failure to oblige him by giving evidence against some of the employees of the petitioner corporation. This is wrong for two reasons:--

(i) because there is no nexus between the term nation and the so-called refusal to give evidence against the officers of the corporation;

(ii) the arbitrator is yet to be appointed,

It cannot be said at one stroke that all the officers of the corporation irrespective of their status or position, merely because they are officers of the corporation will be biased in favour of the corporation.

5. The Court below erred in relying upon the decision reported in Union of India Vs. Coromandel Engineering Co., Madras, That was a case in which the validity of the contract itself was questioned and therefore it was held that resort could be had to one of the clauses arising under the agreement in relation to the arbitration.

6. The courts below committed a grievous error when they held that to the contract, the principles of natural justice must be made applicable. When a contract is entered into, it can be expected of the parties reasonably that they will honour their commitments under the contract. In support of this submission, Law of Contract by Cheshire, Eighth Edition, page 123 is cited. Relying on I.T. Commissioner v. Peirce Leslie & Co. AIR 1960 Mad 351=38 ITR 628 and Radhakrishna Agarwal and Others Vs. State of Bihar and Others, it is submitted that the terms of the contract are binding between the parties and therefore it is not open to the respondent to wriggle out of the arbitration clause on the ground of apprehended bias against an officer who is yet to be appointed.

7. All the cases dealt with by the court below related to "fraud" or "mala fides", but here it is not so. Under those circumstances it is the principle as laid down in Raymon Engineering Works Ltd. Vs. Union of India (UOI), , Abdul Kadir Shamsuddin Bhubere Vs. Madhav Prabhakar Oak, and Printers (Mys) Private Ltd. v. P. Joseph AIR 1969 S.C. 1156 must be applied. Even then the Corporation should have alleged fraud against the party who seeks to go to the court. But here, all that is stated is actuated by mala fides, the contract is stated to have been terminated. First of all, it is not correct. Assuming that it is so, that has absolutely no relevance to an application for stay under S. 34 of the Indian

Arbitration Act. For all these reasons, it is submitted that the orders of the courts below are liable to be set aside.

8. Opposing these arguments Mr. N. Ganapathy, learned counsel for the respondent in CRP.4494 of 81 draws my attention to paragraphs 4, 5 and 6 of the plaint and states that the allegations of mala fide have been fully set out. Under those circumstances, it is impossible for the respondent (plaintiff) to get a fair deal at the hands of the arbitrator appointed by the corporation. Even if the Managing Director happens to be the Arbitrator he will be subconsciously biased. This is a case in which it was the petitioner who terminated the contract and therefore he cannot be allowed to take advantage of his own wrong and yet contend that the parties must abide by the terms in relation to arbitration. In support of this submission reliance is placed on *Union of India v. Coromandel Engineering Co.* 1966 I.M.L.J. 171=78 L.W. 703 and *Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi*,

9. The next argument of the learned counsel is that there is a reasonable apprehension of bias on the part of the respondent (plaintiff) having regard to the events which took place prior to the termination of the contract, which is a clear case of mala fide termination of the contract. Therefore, the ratio of the rulings laid down in *Tamil Nadu Civil Supplies Corporation Ltd. v. S. Ulaganathan* 1981 T.N.L.J. 206 will squarely apply. Learned counsel also relies on *Hindustan Aluminium Corporation Ltd. Vs. Nainsukhdas Baldeodas by Partner Premnarain Daga*, and *The Union of India Vs. Kishorilal Gupta and Bros.*, in support of his contention.

10. Then again in so far as the relief of injunction cannot be granted by the Arbitrator the remedy by way of a civil suit is, competent and the parties need not go by way of arbitration, as has been laid down in *CD. Gopinath v. Gordon Woodroffe and Co. (Madras) Pvt. Ltd* 92 L.W. 531. If really with mala fide intentions the contract is terminated the principles laid down in *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, in paragraph 6 will apply. What is the result if the contract provides that it could be terminated by either party at will can be gathered from *Central Bank of India Ltd. v. Hartford Fire Ins. Co.* 1965 S.C. 1288 For these reasons it is submitted that since the courts below have on an analysis of the plaint allegations, which alone are material, come to the conclusion that the party entertains a reasonable apprehension of bias and therefore the respondent/plaintiff cannot get justice at the hands of the arbitrator. There is no warrant for interference.

11. Mr. P. Raghaviah, learned counsel for the respondent in CRP. 4375/81 contends that when the party himself asked for arbitration the revision petitioner (corporation) kept silent. Therefore, after the suit comes to be filed the petitioner corporation cannot say that it should be stayed. Reliance is also placed in this regard on *Gulabchand Gambhirmal Vs. Kudilal Govindram and Another*, and *Ramesh Sinha and Another Vs. Public Prosecutor, Lucknow*, .

12. Citing Tamil Nadu Civil Supplies Corporation Ltd. v. S. Ulaganathan 1981 2 T.N.L.J. 206 it is contended that if the party had not been vigilant and where one of the contracting parties itself wants to take advantage of the arbitration clause, the same could not be permitted. Reliance is also placed on Hindustan Aluminium Corporation Ltd. Vs. Nainsukhdas Baldeodas by Partner Premnarain Daga, . Therefore, it is submitted that there is no scope for interfering with the orders of the courts below.

13. Having regard to the above arguments, the following questions arise for my determination :--

1. What is the validity of the clause relating to arbitration and its binding nature on the parties

2. Do the principles of natural justice apply to the contract of this character?

3. Can stay u/s 34 of the Arbitration Act be refused on the ground of apprehended bias?

4. What is the effect of mala fides on the question of granting the said stay?

14. Question No. 1 :-- It is a generally accepted principle of law, that when parties enter into contracts, they will honour the commitments under the contracts. This is because, a contract means consensus ad idem. In other words, the obligations under a contract spring from the terms that were agreed to between the parties. Otherwise the very purpose of entering into a contract becomes nugatory. Once it is settled that there is a binding, enforceable contract between the parties, a contracting party cannot be released from the obligations thereafter. They must be required to complete the bargains under the contract. In this connection the passage occurring at page 123 of Law of Contract by Cheshire, Eighth Edition, may be usefully referred to : --

The English law of Contract, as Sir Frederick Pollock declared so long ago as 1881, is based upon the reasonable expectations of honest men.

Therefore, it can be reasonably expected of men that they will perform the mutual obligations under a contract, which is enforceable. In the instant case, the petitioner Indian Oil Corporation appointed the respective respondents as its dealers to deal in commodities which are so essential to the Indian community, viz., Kerosene, diesel oil and oil products Normally nothing would have prevented it from having its own agents to carry on the distribution and the sale of these commodities But it proposes to appoint dealers. Any dealer who desires to deal with these commodities will be anxious to get the dealership because of the great demand for the commodities, in view of the fact that the sales will be good and the margin of profit will also be high. He is also certain that he need not take any extra effort to push through the sale of the commodities. Under these circumstances, there is a scramble for such a dealership. The field of securing this dealership becomes highly competitive In such a situation, the Indian Oil Corporation stipulates that it will deal with a party on certain specific terms;

failing which "no", Thereafter the parties contract with each other. On an equal footing they enter into the bargain. All this is done with open eyes knowing the consequences of the various clauses contained in the agreement. Nobody compelled the respondents to enter into this contract. There was no imposition from any quarter. The respondents had every option to enter into the contract or not. Knowing fully well that there was no risk in the sale, that the commodity is easily marketable having regard to the high demand and that the profit of margin is assured, the contracting parties seek the dealership eagerly. Therefore, this is a clear case of parties bargaining on equal terms. In such a case, the passage from Cheshire's Law of Contract, quoted above, must be held to be fully applicable.

15. Of course, in a case where the parties are not dealing on an equal footing, for instance, a mortgagor and mortgagee standing in the relationship of debtor and creditor, the debtor under impecunious circumstances compelled by necessity seeks a loan. Therefore, it is the mortgages being in an affluent situation dictates terms and drives a hard bargain. Courts have always come to the rescue of the mortgagor on the footing that "necessitous men, are not truly speaking free men". That principle of equity cannot have any application whatever to a case of this character. Both parties are given the option to terminate the contract at their will. In clause 21 of the Memorandum of Agreement entered into between the parties, it is stated thus:--

"This agreement may be terminated without assigning any reason whatsoever by either party upon giving to the other not less than thirty days" notice in writing to expire at any time of the intention to terminate it and upon the expiration of any such notice the agreement shall stand automatically cancelled and revoked but without prejudice to the rights of either party against the other in respect of any matter or thing antecedent to such termination.

The above is without prejudice to the rights and remedies provided hereinabove in the agreement or otherwise in law and in the event of any such termination the Corporation will not be liable for compensation, damage or otherwise howsoever."

Therefore, at the sweet will of either party, the contract can be put an end to. In dealing with a clause of this character in an insurance policy, where clause 10 of the policy of insurance provided for termination of the policy, the Supreme Court in Central Bank of India Ltd. Vs. Hartford Fire Insurance Co. Ltd., has held :--

The contention of the appellant is based on the interpretation of clause 10. Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words, however it may dislike the result. We have earlier

set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "This insurance may be terminated at any time at the request of the insured" and the insurance may also at any time be terminated at the instance of the company. These are all the words of clause that matter for the present purpose. The words "at any time" can only mean "at any time", the party concerned likes. Shortly put, clause 10 says "either party may at its will terminate the policy". No other meaning of the words used is conceivable.

If such is the freedom, how can the parties be allowed to throw overboard the terms of contract ?

16. Again the agreement may be terminated without assigning any reason by both parties. Supposing such freedom has been conferred upon one of the parties alone, certainly the Court may say that such a clause is to be rejected as unenforceable. *Maddala Thathiah Vs. Union of India (UOI)*, is on point, wherein it is observed :--

Where there is an enforceable concluded contract between two parties subject to a condition that it is open to one of the parties to say at any time that the contract is not enforceable, such a condition has the effect of actually or possibly destroying the contract altogether at the whim and fancy of one of the parties to the contract. Such a clause has to be rejected as unenforceable. It is quite a different thing here; the clause is only in the nature of a condition or qualification without destroying the contract.

That is not the position here.

17. Now I go on to clause 28, which provides for arbitration. That clause contains several sub-clauses from (a) to (f). It is very necessary on my part to extract clause (a) in full, because the courts below have not referred to one of the provisions in this sub-clause (a) which is to the effect the dealer will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the course of his duties as an officer of the corporation he had expressed views on all or any other matters in dispute or difference. If the parties in their wisdom have chosen to enter into such contract, how is it possible for the court to say that such a clause can be bypassed? My considered answer is it cannot be so done. Otherwise, there is no solemnity attached to a contract. Of course, it is a different matter if an undue advantage is taken. Throughout the course of the arguments, I never heard a whisper of this kind that some undue advantage has been taken by the Indian Oil Corporation. The courts cannot dictate to the parties, "you do your business in this particular fashion." Certainly that is not the function of the court. The clause which I have extracted above, will have a great bearing on the question of apprehended bias on the part of the respondents. If a contract is plain in its words and is meaningful, the court cannot but enforce such a contract.

18. In this connection it is necessary on my part to refer to the leading cases, which have a bearing on this aspect. The observations of Bowen Lord Justice in Jackson v. Barry Railway Company (1893) I. Ch. D.238 at 246 are apposite and they are given below:--

It was an essential feature in the contract between the plaintiff and the railway company that a dispute such as that which has arisen between the plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiassed person but the company's engineer himself. Technically, the controversy is one between the plaintiff and the railway company; but virtually the engineer on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to expect from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might have formed he would be ready to listen to argument, and, at the last moment to determine as fairly as he could, after all had been said and heard. The quest on in the present appeal is, whether the engineer of the company has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind.

19. In The Central Government of India Vs. Chhotalal Chhaganlal Modi, following the ratio of Bowen Lord Justice, it was held (in a case where --)

the plaintiff who was a subscriber of a telephone executed a telephone hiring contract in respect of that telephone in favour of the Governor-General. One of the terms of the contract was : If any dispute shall arise touching the effect of this contract or in any way relating thereto-- the same shall be referred for decision to the Director General of Posts and Telegraphs and his decision thereon shall be final and binding on the parties. The Post and Telegraphs Department having determined the contract and disconnected the plaintiffs telephone, the plaintiff brought a suit for a declaration that the determination of contract and

the subsequent disconnection of the telephone were illegal and ultra vires and for damages for inconvenience, etc. Thereupon the defendant applied for stay of the suit under S.34 and the application was opposed by the plaintiff on the ground that the Director General of Posts and Telegraphs would not be a proper person to decide the question whether the action of his own department was wrongful,

At page 362, in paragraph 6 the question was posed as follows :--

The real question, therefore, for consideration is whether there is a good reference to arbitration in virtue of clause 19 of the agreement. The only reason why the two lower courts seem to consider that it is a bad reference is that the person to whom the dispute has been referred is the head of the department dealing with telephone connections. The question, therefore, arises how far this alleged interest of the Director General of Posts and Telegraphs as the head of the department disqualifies him from being an arbitrator in this dispute,

After elaborately discussing the relevant case law on the point, the court answered the question as follows :--

In our opinion therefore the reference to the arbitration by the Director General of Posts and Telegraphs is not a bad reference merely by reason of the fact that the Director General happens to be the head of the department which was responsible for hiring the telephone connections to the plaintiff.

20. In *Madhya Pradesh Housing Board, Bhopal and Others Vs. Karodi Shah Kohli*, it was held in paragraph 5 as follows :--

The attack, therefore, must be confined to the second ground, whether or not the Housing Commissioner-cum-Secretary was a proper person to arbitrate dispute, he being an employee of the Board or whether for reasons of bias, reference to him should not be made. It is usual to see that in agreements with the Government or Corporations, there is often an arbitration clause providing for arbitration, not by a stranger as a wholly disinterested person, but by an engineer or an architect in their employment. Employers find it in their interest to impose such terms and the contractors accept these terms so that their tenders may be accepted, and it has been held that it is no part of the duty of Judges to approach such curiously coloured contracts, with a desire to upset them or to emancipate the contractor from the burden of such a stipulation. In all such cases, the arbitrator would be, if not directly, indirectly, interested in the same that it might affect other similar transactions, but it cannot be helped. The parties agree that they might have to go to such an arbitral tribunal and they must stick to it. It cannot even be said in such a case that the arbitrator has a secret interest in the subject matter, which may vitiate the award.

21. In *Balsukh Refractories and Ceramics v. Hindusthan Steel* AIR 1971 Cal 20 at 26 it was held :--

"17. Thus on a consideration of the aforesaid decisions we have no hesitation to hold that the appointment of the opposite party No. 2 as sole arbitrator cannot

be held to be invalid on the mere plea that he is an employee of the opposite party No. 1 in the absence of any material to show that he is biased in favour of the opposite party No. 1, The question whether there has been a frustration of contract or not cannot be decided in the instant application u/s 9 read with section 31 and section 33 of the Arbitration Act. The scope of the application is to decide whether there is an arbitration agreement in the contract entered into between the petitioner and the opposite party No. 1 and whether the appointment of the respondent No. 2 as the sole arbitrator is in accordance with the provision of the Arbitration Act. The petitioner failed to supply goods in accordance with the terms of the contract. The question whether the non delivery of such goods is due to the frustration of the contract or not is a matter relating to the merits and the same is to be decided in the arbitration proceeding and not in this application. It is pertinent to refer in this connection to the decision reported in A.M. Mair and Co. Vs. Gordhandass Sagarmull, where it has been held by the Supreme Court;

"If, therefore, we come to the conclusion both the disputes raised by the respondents fall within the scope of the arbitration clause, then there is an end of the matter, for, the arbitrators would have jurisdiction to adjudicate on the disputes, and we are not concerned with any error of law or fact committed by them or any omission on their part to consider any of the matters. In this "view, it would not be for us to determine the true construction of the contract and find out whether the respondents" contention is correct or not. Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute."

In view of the above, I hold that the contracts of this character embodying arbitration clause, the Arbitrator being the Managing Director of the petitioner corporation or its nominee, is perfectly valid and enforceable in law, because such a contract has been entered into with open eyes and the contracting parties were fully alive to the consequences of entering into such a contract.

22. Question No. 2:--It is well settled by now and I need not labour upon by reference to case law that two well accepted principles constitute the edifice of natural justice. They are:-- (i) Audi alteram partem. The meaning is, hear the other side; hear both sides. No man should be condemned unheard, (ii) The second is Nemo Judex non causasua. No person can be a Judge in his own cause. It is the latter of the principles that has been applied to this case holding that in as much as the Arbitrator to be nominated under clause 28 of the agreement is the Managing Director of the petitioner corporation or his nominee, such a person cannot deal with the case in which one of the parties is the corporation itself, fairly. In other words, the corporation having terminated the contract, one of its officers, however high he may be placed, if he deals with that dispute and embarks on an adjudication, whether the termination has been validly done or not, would be judging his own cause. Therefore, the principle of Nemo Judex Non Causasua is said to be violated. For my part, such a principle founded upon the

theory of natural justice cannot be made applicable to the contracts entered into between the parties. Otherwise, it is impossible to carry on business. Unless such a power is reserved to one of the contracting parties, he may not enter into the contract at all. The case which has a bearing as to the applicability of the principles of natural justice is *Radhakrishna Agarwal v. State of Bihar* AIR 1977 S.C. 1426 At page 1503 it is stated thus :--

"23. A rather desperate argument which has been addressed to us on behalf of the appellants is that they were entitled to an opportunity to show cause against the cancellation of the leases. It was urged on the strength of *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, that the distinction made between administrative and quasi-judicial action is thin and a vanishing one. This argument appears to us to be wholly irrelevant in as much as a question of the distinction between an administrative and quasi-judicial decision can only arise in the exercise of powers under statutory provisions. Rules of natural justice are attached to the performance of certain functions regulated by statutes or rules made thereunder involving decisions affecting rights of parties. When a contract is sought to be terminated by the officers of the State, purporting to act under the terms of an agreement between parties, such action is not taken in purported exercise of a statutory power at all.

24. In *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla*, it was pointed out (at p. 1288):--

"The principles of natural justice which are so implied must always hang, if one may so put it, on pegs of statutory provisions or necessarily follow from them. They can also be said sometimes to be implied as necessary parts of the protection of equality and equal protection of laws conferred by Article 14 of the Constitution where one of the pillars of Dicey's Principles of the Rule of Law is found embodied. Sometimes they may be implied and read into legislation dealing with rights protected by Article 19 of the Constitution, They could at times, be so implied because restrictions on rights conferred by Article 19 of the Constitution have to be reasonable.

25. The limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only question which normally arises in such cases is whether the action complained of is or is not in consonance with the terms of the agreement."

Therefore, to contracts, there is no possibility of applying the principles of natural justice.

23. Question No. 3 :-- Closely on the heels of the previous discussion, the question of bias can now be taken up. The courts below have held that the proximate cause of termination is the refusal of the respondent (plaintiff) to depose against the officials of the revision petitioner/corporation. How far such a conclusion is correct will be dealt with in my discussion under Question No. 4. But, to determine when bias will disqualify an arbitrator it is necessary for me to

refer to the following case laws:--

24. In *Hickman and Co. v. Roberts* 1913 AC 229 at 234 Lord Alverstone observed thus:--

My Lords, it has to be remembered that in the great majority of cases they are the agents of the employers. It has also to be remembered that they not infrequently have to adjudicate upon masters for which they themselves are partly responsible. Both these matters have been pointed out by Lord Bowen. It is before very important that it should be understood that when a builder or contractor puts himself in the hands of an engineer or architect as arbitrator there is a very high duty on the part of that architect or that engineer to maintain his judicial position.

Again at page 239 the following observations are made:

Lord Shaw of Dunfermline: My Lords, the position of an architect in a building contract is one of great delicacy. He is placed in that position to act judicially, when, to the knowledge of both parties" the person who is his paymaster is one of the parties to the contract. It has been affirmed by Courts of law, however, that that being the case his judicial position must be accepted and it follows from that that in the peculiarly delicate situation in which such a man stands the Court of law must be particular to see that his judicial attitude is maintained.

25. Another important case is *Bristol Corporation v. John Aird and Co* 1913 AC 241. Lord Atkinson observed at page 247 as follows :--

My Lords, I do not think there is any dispute between the parties as to the law applicable to such a state of things. If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent between him and the engineer or the persons with whom he contracts, to the arbitrament of that engineer, then he must be held to his contract. Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom, he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those performed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest, man; and if it be shown in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them, "we are not satisfied that there is

not some reason for not submitting this question to the arbitrator". In the present case the question is, Has that taken place ?

At page 251 it was observed :--

My Lords, there is another matter on which Mr. Gore-Browne dwelt at some length; he says that it must have been contemplated by the parties that questions of this character would arise, and that therefore they must have been assumed to have contracted that they would go to arbitration, notwithstanding the fact that in that arbitration the arbitrator would be put in the position of judge and witness. My Lords. I cannot read anything in the contract to that effect. The parties must be held to have contemplated that they would have to go before a man with performed views, but not to have contemplated that he would put himself in the position of a witness and adjudicate under such circumstances. This is, I think to push matters to an extreme that is unwarranted.

At page 256 Lord Moulton observed :--

Lord Moulton, My Lords, I have come to the same conclusion. It has been a long settled principle of the common law of this country that no man can effectively withdraw himself from the protection of the Courts of law any more than he can effectively deprive himself of his personal freedom. But on the other hand, for many years it has been recognised that there are cases in which a well selected domestic tribunal, in which the judge is one with a special acquaintance either with the facts of the case or with the subjects to which the litigation relates, may give more complete and speedier justice than the more elaborate procedure of the Courts of law (based as it is on the principle of complete independence of the tribunal from the parties, and the case itself) is ever in a condition to render. Submissions to arbitration have therefore been more and more respected by the Legislature and by the Courts in administering the legislation relating to them, during the last sixty years. The great step which gave to them their present status was taken in the Common Law Procedure Act, 1854, Up to that time a man could repudiate a submission to arbitration, even if the arbitration was pending, and he could refuse to go to arbitration, no matter how plainly he had contracted so to do, the only remedy for his breach of contract being an action for damages, which of course was an action that was utterly ineffective, since no damages could be proved in such a case. But after the Common Law Procedure Act, 1854, matters were a very different position. The Legislature enabled these submissions to arbitration to be made the subject of indirect decrees of specific performance. A man was not deprived of his right to come to the Court and bring his disputes there, but the Court was invested with a discretion to refuse to him its assistance, if he had contractually bound himself to go to a domestic tribunal and nothing had happened which would make it unjust for the Court to insist on his keeping the bargain. In this way the right to come to the Court was preserved, while at the same time men could be forced to keep contracts which they had made as to the tribunal which should settle disputes, which contracts were in the eyes of the business world an important part of the total contract

entered into between the parties. No one who has had any experience of the contracts under which great engineering works, for instance, have been carried out in the last half-century can doubt that no well advised corporation would have accepted the offer of contractor to carry out the works which it desired to execute without having an arbitration clause in the contract, and I think I may almost go so far as to say without insisting that the engineer whom it employed for the purpose of superintending the work should be accepted as the arbitrator. Therefore, I always look upon these arbitration clauses as in a business point of view substantial portion of the contract, and I think the Courts have acted quite rightly in requiring good reason to be shown why this part of a contract should not be strictly performed.

Again at page 260 it was observed:--

It will certainly not be enough to allege that the arbitrator is not an independent person, if the parties with knowledge that this is so have nevertheless agreed to accept him as arbitrator. But it may be a different matter altogether if by some action of his own the arbitrator has already irrevocably committed himself to some particular view; and I think it is certainly a different matter altogether if there be a bona fide dispute involving substantial sums and a probable conflict of evidence on matters as to which the arbitrator himself will in the normal course be the principal witness on one side.

26. In *Ives and Barker v. Willams* 1894 2 CD 471 the headnote itself reads as follows :--

An arbitration clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his own case unless there is sufficient reason to suspect that he will act unfairly.

In elaborating this aspect of the matter at page 485 it was observed :-

Now, that is a very stringent provision, and one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well, that a dispute between the contractor and the company is in substance in this business a dispute between the contractor and the engineer whose business it is to see that the works are done for the company according to the agreement and the plans and specifications so that the real agreement between the contractor and the company is this, that if there is any dispute between them, although the engineer is to tell the contractor what to do and order him to do what he likes consistently with the agreement his decision must be final. Now what is the real explanation of that? How does it happen that a man will agree to be bound by such a very stringent provision? The explanation of it is to be found in two circumstances. First of all, competition for this kind of work is very keen, and contractors compete with each other; and, in the second place, it has been ascertained by long experience that engineers of the highest character may be trusted, and, when a contractor enters into such a very stringent provision as this, he knows the man he has to deal with. I take it that a contractor such as

Mr. Willams would not submit to be bound by a clause of that kind unless he had confidence in the engineers, and unless the engineers were persons of the highest character. If he had not confidence he would not submit to it; but knowing the engineers he does submit to it, because he has confidence in them and knows that they can be trusted, even although it is their duty to look after the work of the contractor to deal fairly with him in case of a dispute which is in substance, although not in form, a dispute between the contractor and themselves.

At Page 497 it was observed :

The other answer is this: That these parties with their eyes open entered into this contract; they agreed that the engineers' approval of the materials should be sufficient as between the contracting parties and they agreed that in any question that arose which was submitted to arbitration, those engineers should be arbitrators. Now after that agreement, when they turn round and say, we cannot accuse you of having acted dishonestly, we can only say that you approved of the materials and we allege that those materials were not good notwithstanding your approval, and therefore you cannot properly sit as arbitrators, they are not fulfilling that obligation which is incumbent upon them, namely to make out that those arbitrators, to use the language of the Master of the Rolls in the case of *Eckersley v. Mersey Docks and Harbour Board* (1894) 2 Queen's Bench Division, 667 at 670 would be so biassed when they come to exercise their duty as arbitrators that they are unfit to sit in that position.

27. In *Eckersley v. Mersey Docks and Harbour Board* (1894) 2 Queen BD 667 at 670 Lord Esher, M.R. observed

In this case it is said on behalf of the plaintiffs that there is sufficient reason for the Court to say that the disputes in the action should not be referred to the engineer of the Board, because he might be biassed. It is not a sufficient reason to say that he might be biassed, if the Court should be of opinion that there is no ground for supposing that he would be biassed. When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts but to all judges--that, not only must they be not biassed, but that, even though it be domain stated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people not necessarily reasonable people, but many people--would suspect them of being biased. Is that a rule which can be applied to such contracts as this, whereas between the contractor and his principal, both parties agree that the Chief servant of one of them shall be arbitrator? If it was not for the agreement of the parties-- if the rule applicable to judges were to be applied it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator, because some persons would suspect him of

being biased in favor of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shown. It must, in my opinion, be shown, if not that he would be biased, that at least there is a probability that he would be biased. That seems to me distinctly to have been decided in *Jackson v. Barry Ry. Co* (1893) 1 Ch. 238

At page 672 Lopes, L. J., remarked :--

Now, it is to be observed that the rule to be applied to a case of this kind is entirely different to that which is applied to judges, magistrates, or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. There is no principle better recognised than that a man is not to be a judge in his own cause; and in the case of magistrates it is well established that, if there is any reason which, it can be suggested, would influence the minds of ordinary persons, and induce them to think that the magistrates might be biased, that will be sufficient to render the tribunal incompetent. But where the parties choose their own tribunal the case is very different. In the present case it is of the essence of the submission that questions shall be submitted to the engineer as arbitrator which must involve the decision of matters connected with his own competency, care, and caution, and with the way in which he discharged his duties under the contract. The parties agree that the arbitrator is to adjudicate on matters in which he has an interest. Further, I understand it not to be disputed at the bar that, if the matter which the engineer had to decide was a matter involving the question of his own professional skill and competency, he would not be disqualified; and what additional fact is relied on as distinguishing the case from one in which his own professional skill and competency is involved? Simply this--that he would have to decide upon the professional skill and competency of his son instead of upon his own. I think that can make no substantial difference upon which this Court ought to act. I am unable to say that any reasonable probability is raised in my mind of any partiality on the part of the engineer.

28. From a reading of the above important passages extracted, one thing is definite. A bias cannot be readily presumed merely because the arbitrator happens to be an employee of the corporation. There must be some positive or tangible evidence adduced against the arbitrator so that from that evidence it can be held that the arbitrator is biased and therefore he is disqualified from hearing the matter. The Courts below have relied upon the averments in the plaint, especially in paragraphs 4, 5 and 6 and held that the proximate cause of termination of the contract is actually the failure on the part of the plaintiff to oblige the defendant, and the apprehension of bias on the part of the plaintiff is well founded. I am afraid the courts below have struck an extreme position by holding so. One thing cannot be gainsaid. In modern world, not infrequently

contracts of this type are entered into making an officer of one of the contracting parties an arbitrator.

29. Another thing is, in the instant case the arbitrator is yet to be appointed. If the courts were to say that any person appointed, however high or however low, he may be in the employ of the Indian Oil Corporation, he would be biased, it would be a wrong approach on the part of the court. Such an approach tends to ignore the basic integrity of the man. Any person as the above case pointed out, appointed as arbitrator to exercise judicial function can be expected to act honestly and fairly. Of course, it is a different matter if, as I observed above, for some reason or other, it can be presumed that he may not act so. But in this case, the most important point is there is absolutely nothing, by reason of which the court can hold so, excepting on a mere apprehension. In the course of the arguments of Mr. C. Ramakrishnan fairly stated before me that if it is necessary, an officer from any one of the North Indian States would be appointed, so that the plea of bias against him cannot be attributed. Learned counsel for the respondents, however, relies strongly on a ruling of a Division Bench of this Court, reported in *Union of India v. Coromandel Engg. Co.* 1966 I M.L.J. 171=78 L.W. 703 particularly the following passage occurring at page 175:

But we find that this view of the law has been superseded by later developments even in the United Kingdom, and by an amendment of the English Arbitration Act. Undoubtedly, principles of natural justice have subsequently received increased recognition in the cases, and, if there is a well-founded apprehension of bias on the part of an arbitrator, because of his knowledge of the special facts, or the role that he has played in any negotiations pending the litigation, that would certainly constitute a legitimate justification for avoidance of the clause. It will be a question of fact whether such apprehension is well founded, and such bias, or a reasonable possibility of it, may be inferred.

30. For my part, I am unable to subscribe that Lord Justice Bowen's dictum in *Jackson v. Barry Railway Company* 18931 CD 238 at 246, extracted above has been superseded. It requires also to be noted that the Supreme Court itself has taken the view in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, that the principles of natural justice do not apply to contracts.

31. In this connection I may also make a useful reference to *Rubalingam v. State of Madras* AIR 1960 Mad. 350=73 L.W. 209. In paragraph 2 it was observed:

The question however is whether the question of violation of the principles of natural justice would be attracted to a case where the act of the Government amounts merely to a breach of contract. The agreement in question was not under any statute, and the petitioner had no right in law--apart from the agreement to purchase rice from the Government, nor were the Government bound again, apart from contract, to sell rice to him. Of course, as incidental to and as part and parcel of this sale the Government stipulated for re-sale at a price fixed and this they could stipulate to, apart from any Statute--under the

Ordinary law. Does the mere fact therefore that the seller of the rice happens to be the Collector take the case out of the rule of law that a mere breach of contract is not remediable by a high prerogative right? In my opinion the answer can only be in the negative. The analogy is furnished by the decision relating to the licenses granted for running businesses or for import or export. Apart from statute, they might involve questions of Art. 19 . But here as I said earlier the petitioner had no legal right to insist on the supply of rice for purposes of his business by the Government and that should decide. The petition fails and is dismissed. No costs.

It requires to be noted that in the above decision the insistence was on a well founded apprehension of bias. But, in a case like the one on hand, where the arbitrator is yet to be appointed, there cannot be any reasonable apprehension of bias. To quote the words of the Supreme Court in *M/s. Amarchand v. Ambica Jute Mills* AIR 1956 S.C.1036 at 1041:

12. As to the Arbitrators to be appointed by the Indian Chamber of Commerce, Calcutta and in some of the appeals before as the arbitrators have to be so appointed, there can hardly be any ground for a reasonable apprehension. The names of the arbitrators are not known nor even their classification. The rules contemplate that the Registrar shall not appoint any person as arbitrator who for any reason within his knowledge would not be a proper person to act as arbitrator. What grounds can there be of a reasonable apprehension in such cases.

32. The law as stated in this ruling seems to be rather too wide. If this proposition is accepted, all commercial transactions embodying such clause, however advisable it may be to have such clause for the expedient conduct of the business, will be rendered nugatory.

33. In *Gulabchand Gambhirmal Vs. Kudilal Govindram and Another*, in paragraph 39 it is stated thus:--

"As to the tendency of injury to the interests of the holders-share by the contract in question, we should have thought it obvious enough without any evidence to prove it. It flows from the fundamental principles of natural justice that no man should be a judge in his own cause. It is not confined to a cause in which he is a party, but applies to a case in which he has a direct or indirect interest.

If, therefore, we think by the personal interest created by the contract in question the plaintiff subjected his independence, freedom and judgment in the matter he had to investigate according to his own conscience and convictions, to the personal interest created, it is futile to say that the contract had no tendency to injure the interests of the shareholders who had appointed the committee of enquiry.

That if a contract of this nature had been concluded between a judge and a litigant in relation to a matter sub judice before him, it would have been void as

opposed to public policy is not open to doubt. The contract would have had a tendency to divert the course of Justice and create a conflict between duty and interest. We do not see why this principle should not be applied with equal force to the functioning of a mere fact finding body of trusted men appointed by the competent authority to investigate into certain matters of public importance even if it be not a judicial or quasi-judicial body.

In these cases, indeed, adhesion to the principle is of value all the greater because its violation might be conducted in secret. It needs little imagination to visualise the danger in which company administration would stand, if by contracts of this nature, the interests of the shareholders, that is to say, the public well-being, were liable to be betrayed for the advantage of a person or persons entrusted with certain duties by the shareholders.

In our opinion, the learned Judges of the Division Bench were right in holding that the principle of public policy applied in this case as the interests of a large number of shareholders in the company were involved and the result of the enquiry was of interest to the general public also."

The basis of this ruling is clause 69 of the agreement which provides finality to the arbitration. It shuts out the court's jurisdiction. That was held to be bad and therefore the decision came to be rendered in that fashion.

34. Yet another decision cited in this regard is Ramesh Sinha and Another Vs. Public Prosecutor, Lucknow, . These cases, in my considered view, do not lay down the correct law.

35. Even otherwise there cannot be any reasonable apprehension of bias on the part of the respondent against an arbitrator who is yet to be appointed, as pointed out by the Supreme Court. In A.A.O. Nos. 166 and 167 of 1979 my learned brother, Sengottuvelan, J. has taken the following view:-

Under the circumstances when the Tamil Nadu Civil Supplies Corporation itself in a party to the agreement, the Board of Directors cannot be named as an Arbitrator in view of the fact they are themselves parties to the agreement. It will be against the principles of natural justice if the Board of Directors of Tamil Nadu Civil Supplies Corporation are permitted to arbitrate any dispute between the Tamil Nadu Civil Supplies Corporation and the Hulling Agent. In this view of the matter I hold clause 19 of Ex.A-1 does not amount to a valid arbitration agreement.

36. However, in M/s. Anna Corporation v. Food Corporation Of India ILR 1981 Mad 235 where the Food Corporation was one of the parties and the agreement provided that an Arbitrator will be appointed by the Managing Director, Food Corporation of India, its validity was upheld.

37. Yet another case relied on by the respondent, which was also being cited before the courts below is U.P. Co-operative Federation Ltd. v. Sunder Bros, Delhi AIR 1969 S.C. 249. After referring to House of Lords in Bristol Corporation v.

John Aird And Co. 1913 AC 241 it was observed at P. 253:

"It is manifest that the strict principle of sanctity of contract is subject to the discretion of the Court under S. 34 of the Indian Arbitration Act, for, there must be read in every such agreement an implied term or condition that it would be enforceable only if the court, having due regard to the other surrounding circumstances, thinks fit in its discretion to enforce it. It is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to accept that he will act unfairly or that he has been guilty of continued unreasonable conduct. We have already stated, the respondent has alleged in the present case that the Registrar, Co-operative Societies has approved the termination of the contract of Managing Agency with the plaintiff and the Registrar was the Chairman of the defendant-Society. We are accordingly of the opinion that the High Court properly exercised its discretion under S.34 of the Indian Arbitration Act in not granting a stay of the proceedings in the suit. It has to be borne in mind that this was a case in which the underlined portion in the above extract, makes the vital difference, because in this case the Arbitrator is yet to be appointed. Looked at from this point of view the following observations in paragraph II of the Order of the Lower Appellate Court in C.M.A. No. 99 of 1981 and the similar observations in C.M.A. 74 of 1981.

"11. The apprehension of the plaintiff that any superior officer of the defendant appointed as arbitrator is bound to be interested in the defendant Corporation does not appear to be without any basis and cannot be brushed aside. Clause 28 provides that the plaintiff cannot even object to the appointment of any of the Officers of the defendant corporation as arbitrator even if that arbitrator had to deal with the matters or had actually expressed views in all or any other matters in dispute or difference, such wide powers reserved under clause 28 might even result in the Managing Director appointing the very officer who terminated the dealership as the arbitrator. Courts cannot be silent spectators for the violation of the principles of natural justice. Further the plaintiff has contended that the arbitration clauses void, not enforceable and not binding on him. This is a difficult question of law which can be decided only by the court and it is not desirable to leave that question for decision by any of the officers of the defendant Corporation. On a consideration of all the several circumstances, discussed above, I am satisfied that as laid down by the Supreme Court in Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, that there is a good ground for apprehending that the arbitrator will not act fairly in the matter and that it is also improper that the question of validity of the arbitration clause should be left to the decision of the arbitrator himself. It, therefore, follows, that the trial Court has correctly come to the conclusion that it is not just and necessary to stay the suit under S 34 of the Arbitration Act" (vide paragraph II of the Judgment in C.A.No. 99 of 1981),--

do not take note of the actual situation and has not correctly applied the dictum

of the Supreme Court.

38. To say that merely because an officer of the Corporation will be the arbitrator, there can be presumption of bias, runs counter to very many judicial decisions. In *The Union of India (UOI) Vs. Firm Vishydhya Ghee Vyopar Mandal*, it was held that in the case of a contract between the Government and a private person, the fact that the Secretary to the Government of India, Ministry of Food or his nominee is to be the arbitrator, cannot be a ground for refusing the stay.

39. In *Daulat Ram Rala Ram Vs. State of Punjab*, the Superintending Engineer was to be the arbitrator. Therefore, it was held that in as much as it has not been established that he was biased merely because he is employed and paid by the Government he could not be disqualified from acting as an arbitrator.

40. The same line of reasoning prevails in the Calcutta High Court when it rendered a decision in *Satyendra Nath Mitra Vs. Union of India (UOI)*, where, when the agreement provided that the Director General of Posts and Telegraph Office was to be the sole arbitrator, it was held that it could not be stated that a Government Official acting in a judicial capacity will be biased merely because he is a Government employee. To the same effect are the decisions in *Devan Chand v. State of Jammu And Kashmir AIR 1961 J&K 58* and *B.K. Dhar (Private) Ltd. Vs. Union of India (UOI)*, , *Ardeskar Sarahji v. State AIR 1965 M.P. 13*, *Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others*, and *Madhya Pradesh Housing Board, Bhopal and Others Vs. Karodi Shah Kohli*, am unable to hold, as has been held by the lower appellate court, that bias can be presumed even before an arbitrator is appointed. I have already pointed out that the departure in English Law has not been established and the decision in *Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi*, has not been properly appreciated by the court below. For all these reasons, I am of the view that, where an arbitrator is yet to be appointed there cannot be any reasonable apprehension and to say that any arbitrator appointed by the revision petitioner/corporation, being in the employ of the petitioner/corporation will be biased will amount to swimming against the current of well accepted notions as settled by series of decisions, quoted above.

41. Question No. 4 : The last of the arguments of the learned counsel for the respondent is, having regard to the allegations of mala fides contained in paragraph 4, 5 and 6 of the plaint, the discretion under S. 34 of the Arbitration Act must be exercised in favour of the respondent/plaintiff and the further argument is when the respondent asked for arbitration, the petitioner/corporation remained silent. I am unable to accept either of these arguments. Mala fides with regard to termination of contract will have no bearing. As far as the matter being decided by an arbitrator, certainly if the termination has been for extraneous reasons, the arbitrator is bound to declare so.

42. In *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, in paragraph 6 it was stated thus :-

"6. S.34, Arbitration Act, runs thus : Where any party to an arbitration commences any legal proceedings against any other party to the agreement in respect of any matter agreed to be referred, any party to such legal proceedings may apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

"From the language of section, it is quite clear that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the court is bound to refuse a stay. In the words of Viscount Simon, L.C. in *Heyman v. Darwins Ltd.* (1942) A.C. 356(A) the answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute, and (b) what disputes the arbitration clause covers. If the arbitration agreement is broad and comprehensive and embraces any dispute between parties "in respect of" the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself where, however, the party seeks to avoid the contract for reasons de hors it, the arbitration clause cannot be resorted to as it goes along with other terms, of the contract. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies upon a contract, he must rely on it for all purposes. Where, however, an arbitration clause is not so comprehensive and is not drafted in the broad language which was used in the House of Lords case, namely, "in respect of any agreement", or "in respect of something arising out of it", that proposition does not hold good. The arbitration clause is a written submission agreed to by the parties in a contract and like every written submission to arbitration must be considered according to its language and in the light of the circumstances in which it is made."

43. The instant case is not one of that type. Then again, as rightly contended by the learned counsel for the petitioner, the allegation of "fraud" must be against the party who is seeking an order of the court for stay. Here, it is the converse case. It is the plaintiffs who allege that the termination has been done mala fide.

44. In *Raymon Engineering Works Ltd. Vs. Union of India (UOI)*, the plaintiff alleged "fraud" against the petitioner, who desired to have the dispute tried by the arbitrator. It was held that the suit should not be stayed. The following observations are very relevant for the point in issue :

"17. The last case relied on by Mr. Rudra is the case of *Bilasraj and Co. v. Tolaram Nathmall* (1948) 52 Cal.W.N. 858. It lays down that where the contract

is void, on the plea of fraud or miss-representation, the court should not stay the suit as it ousted the jurisdiction of the arbitrators. That is not the case here. In the instant case, the party charged with perpetration of fraud has applied for stay of the suit. It must be noted here that the fraud as pleaded in the plaint does not specify any person who perpetrated the fraud; Union of India, or for that matter, the Railway Board, is not a person in that sense.

"18. In England now, under S.24 (2) and (3) of the Arbitration Act, 1950 if a dispute involving a charge of fraud arises under an arbitration agreement the court has the power to order the agreement ceases to have effect and to refuse the stay of an action brought in breach of the agreement. In India that is not the position and we are governed by the position prevailing in England prior to the enactment of the said statutory provision. In the instant case the charge of fraud is levelled against the petitioner who however desires to have the disputes tried by the Arbitrators.

"19. For the reasons stated above and on the basis of the aforesaid authorities, I am unable to accept the contention of Mr. Rudra that the allegation of fraud as pleaded by the plaintiff, is a sufficient cause why this suit should not be stayed. This contention of Mr. Rudra must therefore, fail."

45. In Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, at 411 it was observed thus:-

"17. There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russell's case (1880) 14 Ch.D. 471. In that case these were allegations of constructive and actual fraud by one brother against the other and it was in those circumstances that the court made the observations to which we have referred above. Even so, the learned Master of the Rolls also observed in the course of the judgment at p.476 as follows:

Why should it be necessarily beyond the purview of this contract to refer to an arbitrator question of account, even when those questions do involve misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to in the second branch of the case before the Court, the Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties".

"We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on

that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russell's case (1880) 14 Ch. D. 471 to order an arbitration agreement to be filed and will not make a reference. We may in this connection refer to Minifie v. Railway Passengers Assurance Co (1881) 44 LT 552. There the question was whether certain proceedings should be stayed; and it was held that notwithstanding the fact that the issue and the evidence in support of it might bear upon the conduct of a certain person and of those who attended him and so might involve a question similar to that of fraud, or no fraud, that was no ground for refusing stay. It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitrator agreement to be filed and in refusing to make a reference"

46. The above rulings fully support the stand of the revision petitioner that the termination of the contract even if mala fide will have nothing to do with the exercise of discretion under S.34 of the Arbitration Act. As to how the discretion under S.34 should be exercised can be seen by a reading of The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, at page 1159. It was held :-

(8) In exercising its discretion under S.34 the court should not refuse to stay the legal proceedings merely because one of the parties to the arbitration agreement is unwilling to go before an arbitrator and in effect wants to resile from the said agreement, or can stay be refused merely on the ground that the relations between the parties to the dispute have been embittered or that the proceedings before the arbitrator may cause unnecessary delay as a result of the said relations. It may not always be reasonable or proper to refuse to stay legal proceedings merely because some questions of law would arise in resolving the dispute between the parties. On the other hand, if fraud or dishonesty is alleged against a party it may be open to the party whose character is impeached to claim that it should be given an opportunity to vindicate its character is an open trial before the court rather than before the domestic tribunal, and in a proper case the court may consider that fact as relevant for deciding whether stay should be granted or not. If there has been a long delay in making an application for stay and the said delay may reasonably be attributed to the fact that the parties may have abandoned the arbitration agreement the court may consider the delay as a relevant fact in deciding whether stay should be granted or not. Similarly, if complicated questions of law or constitutional issues arise in the decision of the dispute and the court is satisfied that it would be inexpedient to leave the decision of such complex issues to the arbitrator, it may, in a proper case, refuse to grant stay on that ground; indeed, in such cases the arbitrator can and may state a special case for the opinion of the court under S. 13(b) of the Act. Thus, the question as to whether legal proceedings should be stayed under S. 34 must always be decided by the court in a judicial manner having regard to the relevant facts and circumstances of each case.

47. Examined in the light of the above dictum, who is the party against whom fraud or dishonesty is alleged? Not a word of fraud is alleged, excepting the unilateral statement of the plaintiffs/respondents that the terminal was for extraneous reasons. This is only a mere assertion. It is true that for granting or refusing stay under S.34 of the Arbitration Act, as laid down in C.D. Gopinath v. Gordon Woodroffe and Co. (Madras) Pvt., Ltd. 92 L.W. 531 the plaintiff allegation alone will have to be looked into. But, by a mere statement for which there is no adequate material before the court to conclude one way or other, no party can be allowed to resile from the contract and plead that there cannot be an arbitration.

48. In Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd., in Paragraph 13 it was observed thus:- "(1) We now turn to the legal position which seems to us to be quite clear. Before the Court exercises its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method for the settlement of disputes. Parties not wishing the law's delays know or ought to know, that in referring a dispute to arbitration they take arbitrator for better or worse, and that his decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the Court has no doubt these circumstances in view, and considers that the parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them, (See Russel on Arbitration 16th edition, page 54). The grounds on which leave to revoke may be given have been put under five heads:

1. Excess or refusal of jurisdiction, by arbitrator;
2. Misconduct of arbitrator.
3. Disqualification of arbitrator.
4. Charges of Fraud.
5. Exceptional cases.

We have held that there were no such exceptional circumstances in these cases as would justify us to come to the conclusion that the appointed arbitrator would be disqualified as a result of bias by reason of a conflicting class interest. In view of this finding it is unnecessary to examine the decisions, English or India, as respects the principle that an interest of which the parties were fully aware at the time of the arbitrator's appointment will not in general disqualify him, nor will the fact that he stands in a particular relationship to the parties or to the matters in dispute, if it can be said that the parties selected him with knowledge that this was or must be so. Nor are we concerned with the "exception to which the aforesaid rule is subject in relation to arbitrators appointed to determine future disputes, and the statutory changes made in English law relating thereto."

In my considered view, the case does not answer the tests laid down by the

Supreme Court, as above. Therefore, I conclude that the courts below erred in refusing to grant stay and the judicial discretion vested under S. 34 of the Arbitration Act has been improperly refused to be exercised.

Accordingly, the civil revision petitions will stand allowed. I do not make any orders as to costs in the circumstances of the case.