
(2005) 08 OHC CK 0006

In the Orissa High Court

Case No : ARBA No. 9 of 2002 and CRP No. 42 of 2002

Indian Rare Earths Limited and Others

APPELLANT

Vs

Unique Builders Limited
 Unique Builders Limited Vs
Indian Rare Earths Limited and Others

RESPONDENT

Date of Decision : 05-08-2005

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 39(1), 8, 9
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2005) 08 OHC CK 0006

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Rath and N.R. Rout, in ARBA No. 9 of 2002 S. Mohanty, P.K. Dash, S.P. Mishra and S. Misra, in Crp No. 42 of 2002, for the Appellant; S. Mohanty, P.K. Dash, S.P. Mishra and S. Misra, in ARBA No. 9 of 2002 R.K. Rath and N.R. Rout, in Crp No. 42 of 2002, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—This appeal has been filed u/s 39(1)(vi) of the Arbitration Act, 1940 (hereinafter referred to as "the Act") challenging the order dated 29.4.2002 passed by the learned First Additional Civil Judge (Senior Division), Cuttack in Misc. Case No. 78 of 2000 dismissing the application filed by the Appellants for setting aside the award.

2. The facts leading to initiation of these two cases are that M/s. Unique Builders Limited (hereinafter referred to as "the claimant-Respondent") was engaged by Indian Rare Earths Limited (hereinafter referred to as "the Appellants") for execution of certain work on the basis of an agreement entered into between both of them. The agreement contained an arbitration clause and the said clause provides that in case of a dispute between the parties, the same shall be referred to arbitration. The case of the claimant-Respondent is that after executing the agreement it executed the work to the best of its capability, but a dispute arose with regard to certain items of works done by/projected to be done by the

claimant-Respondent. The matter was brought to the notice of the Appellants vide letter dated 19.7.1982. There being no response from the side of the Respondent, a reminder was also sent and again there was no response. The claimant having no other way, wrote a letter on the 20th of November, 1982 reiterating the stand taken by it and raised a dispute for reference to arbitration. In view of the dispute which remained unsettled, the claimant could not continue the work any further and decided to invoke the arbitration clause for settlement of its claims and filed a petition u/s 8 of the Act in the Court of the Subordinate Judge, Cuttack vide Misc. Case No. 117 of 1983. The learned Subordinate Judge referred the matter to Justice B.K. Ray (Retd.) for adjudication of the dispute in the year 1992. Subsequently, the reference was recalled on the allegation made by the Appellants that Justice B.K. Ray (Retd.) was related to the claimant and ultimately, Justice K.P. Mohapatra (Retd.) was appointed as the arbitrator by order dated 10.5.1994. From the impugned order, though it appears that both the Retired Judges were appointed on consent of the parties, it was seriously disputed by the learned Counsel for the Appellants. However, after appointment of Justice K.P. Mohapatra (Retd.) as the arbitrator, he entered into the reference and after hearing the parties, passed an award of Rs. 19,55,368/- with pendent lite interest at the rate of 15 per cent per annum from the date of institution of the suit till the date of the award and the Appellants were directed to pay the said amount to the claimant-Respondent within sixty days from the date of the award. The award was signed on 19.12.1996 and copies thereof were sent to the parties. The award was also submitted before the learned Subordinate Judge, Cuttack to make it the rule of the Court. After receipt of the award from the arbitrator, the learned Subordinate Judge registered the same as T.S. No. 574 of 1996 and issued notice to the parties inviting objections. After hearing the parties, the learned Subordinate Judge in the impugned order made the award rule of the Court but did not pass any order with regard to future interest. Challenging the said award, this appeal has been filed and against the order not granting future interest, the claimant-Respondent has filed C.R.P. No. 42 of 2002. Since both the cases arise out of the same award, they were clubbed and heard together and are disposed of by this common judgment.

3. Shri R.K. Rath, learned Counsel appearing on behalf of the Appellants, has challenged the award as well as the impugned order on several grounds. Referring to the arbitration clause, it was contended by Shri Rath that the appointment of the arbitrator was not in accordance with the arbitration clause and therefore the very appointment of the arbitrator by the learned Subordinate Judge is without jurisdiction. He also submitted that the Appellants at no point of time had consented to the appointment of arbitrator by the learned Subordinate Judge and the observation made by the learned Subordinate Judge in the impugned order that the Appellants had consent for either Justice B.K. Ray (Retd.) or Justice K.P. Mohapatra (Retd.) being appointed as the arbitrator is without any basis.

4. Shri S.P. Mishra, learned Counsel appearing for the claimant-Respondent, on

the other hand, submitted that Justice B.K. (Retd.) had been appointed as an arbitrator on the consent of the Appellants, but later on, on the objection raised on the ground that the said arbitrator is related to the claimant, the order was recalled and after appointment of two more arbitrators, ultimately Justice K.P. Mohapatra (Retd.) was appointed as the arbitrator on consent of the parties.

5. Before deciding the question as to whether the arbitrator was appointed in accordance with the terms of the arbitration clause, it is necessary to scrutinise the different orders passed by the learned Subordinate Judge from time to time appointing different arbitrators. From the orders passed by the learned Subordinate Judge, it appears that after removal of Justice B.K. Ray (Retd.) as an arbitrator, the learned Subordinate Judge by order dated 25.9.1993 had appointed Justice B.K. Behera (Retd.) as the arbitrator. However, before Justice B.K. Behera (Retd.) entered into reference, he was removed by order dated 24.1.1994 and in the very same order Justice G.K. Mishra (Retd.) was appointed as an a arbitrator. Again, before Justice G.K. Mishra (Retd.) entered into reference, the order was recalled and Justice K.P. Mohapatra (Retd.) was appointed as an arbitrator by order dated 10.5.1994. After closure of hearing of the appeal while going through the appeal records when I found that Justice B.K. Behera (Retd.) at one point of time was appointed as an arbitrator though he had not entered into reference, learned Counsel for both parties were orally asked as to whether or not this Bench should hear this appeal. Since both the counsel for the parties stated that they have no objection for hearing of this appeal as well as the revision by this Bench, I proceed to examine the grounds raised in the appeal and the revision.

6. The first ground, as indicated above, taken by the learned Counsel for the Appellants is with regard to the jurisdiction of the learned Subordinate Judge in appointing an arbitrator contrary to the provisions contained in the arbitration clause. Clause 16.2 provides for settlement of disputes by arbitration. The said clause is quoted below.

16.2 All disputes and differences of any kind whatsoever arising out of or in connection with the Contract or the carrying out of the Works (whether during the progress of the Works or after their completion and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and settled by the Consulting Engineer who shall state his decision in writing. Such decision may be in the form of final certificate or otherwise. The decision of the Consulting Engineer with respect to any of the excepted matters shall be final and without any appeal as stated in Clause 16.1. But if either the Employer or the Contractor be dissatisfied with the decision of the Consulting Engineers on any matter, question or dispute of any kind (except on any excepted matters) or as to the withholding by the Consulting Engineers of any certificate to which the Contractor may claim to be entitled then and any such case either party (the Employer or the Contractor) may within 28 days after receiving notice of such decision give a written notice to the other party through the Consulting Engineer

requiring that such matters in dispute be arbitrated upon. Such written notices shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of single Arbitrator to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of single Arbitrator to the arbitration of two Arbitrators one to be appointed by each party which Arbitrators shall before taking upon themselves the burden of Reference appoint an Umpire.

The Arbitrator, Arbitrators or the Umpire shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice save in regard to the excepted matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference the cost of and incidental to the Reference and Award respectively shall be in the direction of the Arbitrator, Arbitrators or the Umpire who may determine the amount thereof or direct the same to be taxed as between Attorney and the Client or as between party and party and shall direct by whom to whom and in what manner the same shall be borne and paid. The submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration Act 1940 or any statutory modification thereof. The award of the Arbitrator, Arbitrators or Umpire shall be final and binding on the parties. Such References except as to the withholding by the Consulting Engineers of any certificate under Clause 13.4 to which the Contractor claims to be entitled shall not be opened or entered upon until the completion or alleged completion of the Works or until after the practical cessation of the Works arising from any cause unless with the written consent of the Employer and the Contractor. Provided always that the Employer shall not withhold the payment of Interim Certificate nor the Contractor except with the consent in writing of the Consulting Engineer in any way delay the carrying out of the Works by reason of any such matter, question or dispute being referred to Arbitration, but shall proceed with the work with all due diligence and shall until the decision of the Arbitrator or Arbitrators or Umpire be given abide by the decision of the Consulting Engineers and no Award of the Arbitrator or Arbitrators or Umpire shall relieve the Contractor of his obligations to adhere strictly to the Consulting Engineer's Instructions with regard to the actual carrying out of the works.

As is evident from the aforesaid clause, in case of any dispute or difference arising out of or in connection with the contract, the same shall be referred to and settled by the Consulting Engineer who shall state his decision in writing. If either of the parties is dissatisfied with the decision of the Consulting Engineer, it may within twenty-eight days of receiving notice of such decision give a notice to other party through the Consulting Engineer requiring that such matters in dispute be arbitrated upon and such written notices shall specify the matters which are in dispute and such dispute or difference on which such written notice has been given and no other shall be and is hereby referred to the arbitration

and final decision of single arbitrator to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of single arbitrator to the arbitration of two arbitrators one to be appointed by each party which arbitrators shall before taking upon themselves the burden of reference appoint an Umpire. Referring to the said arbitration clause, it was contended by the learned Counsel that the claimant-Respondent has to initially raise the dispute before the Consulting engineer and only in the event he is dissatisfied with the decision of the Consulting Engineer, he can seek for appointment of a single arbitrator. It was further contended by Shri Rath that as per the said arbitration clause, the Appellants at no point of time have agreed to the names suggested either by the claimant or by the Court with regard to the appointment of a single arbitrator and hence the learned Subordinate Judge had no jurisdiction to appoint a single arbitrator and should have called upon the parties to appoint their respective arbitrators.

7. So far as the reference to the Consulting Engineer is concerned, it appears from the record that several letters have been written by the claimant-Respondent to the Consulting Engineer and there was no response. Therefore, no fault can be found with the claimant-Respondent in approaching the learned Subordinate Judge for appointment of an arbitrator. Now, the question therefore arises as to whether or not the Appellants had consented for appointment of a single arbitrator.

8. From the record, it appears that the claimants-Respondent had filed the application u/s 8 of the Act before the learned Subordinate Judge, Cuttack vide Misc. Case No. 117 of 1983. The objection raised before this Court at present was also raised before the learned Subordinate Judge. The learned Subordinate Judge in his order dated 5.1.1985 held that he had jurisdiction to try the case. It was also observed in the said order that though the disputes were brought to the notice of the Consulting Engineer, no action was taken by him and therefore the claimant was entitled to seek for adjudication of the disputes by an arbitrator by moving the Court. In the said order, the parties were directed to submit a panel of names for appointment of arbitrator. Said order was challenged by the Appellants in a revision before this Court vide C.R. No. 63 of 1985. This Court remanded the matter for fresh disposal and the case was again taken up by the learned Subordinate Judge. The Appellants again raised the question of territorial jurisdiction before the learned Subordinate Judge to be decided as a preliminary issue and by order dated 15.4.1988, the prayer was turned down and the parties were directed to adduce evidence. Ultimately, the parties filed separate panel of names for appointment of an arbitrator. There being no common name in both the lists, the learned Subordinate Judge appointed Justice B.K. Ray (Retd.) as an arbitrator. At a later stage, again an objection was raised by the Respondent that Justice B.K. Ray (Retd.) was related to the Appellants and accordingly, the learned Subordinate Judge recalled the earlier order and appointed Justice B.K. Behera (Retd.) as an arbitrator. Said order was again recalled by order dated 24.1.1994 and Justice G.K. Mishra (Retd.) was appointed as an arbitrator. Again

the appointment of Justice G.K. Mishra (Retd.) was recalled and by order dated 10.5.1994 Justice K.P. Mohapatra (Retd.) was appointed as an arbitrator. Said order is quoted below.

Misc Case No. 671/93

171. 10.5.94 The Petitioner filed a petition u/s 151 CPC to recall the order dt. 24.1.94 and reheard and dispose of the matter considering the objection filed by the Petitioner.

The O.Ps. filed objection to the petition denying the allegations made in the petition.

However the learned advocate for the parties were heard in the matter. The main grievance of the Petitioner is to appoint Anr. Arbitrator instead of Sri G.K. Mishra, Retd. Justice of the Hon'ble Court. The learned advocate for the Opp. Party has also no objection if any other Arbitrator is appointed in place of the Arbitrator as per the order dt.24.1.94. Under such circumstances the order dt.24.1.94 is hereby recalled.

Sri K.P. Mohapatra, Retired Justice of the Orissa High Court is appointed as Arbitrator in place of Sri G.K. Mishra, Retd. Chief Justice for adjudication of the dispute between the parties. Issue a letter of request to Mr. Mohapatra, Retd. Justice in order to obtain his consent for his appointment as Arbitrator in the above case, after which the letter of appointment would be issued.

The petition of the Petitioner is accordingly disposed of.

Dictated and corrected by me.

Sd/- Sd/- Civil Judge-I Civil Judge-I (Sr. Division) (Sr. Division) Ist Court, Cuttack.

9. It is evident from the aforesaid order that the learned Counsel appearing for the Appellants before the learned Subordinate Judge had no objection if any other arbitrator is appointed than Justice G.K. Mishra (Retd.) and taking the same into consideration, the learned Subordinate Judge appointed Justice K.P. Mohapatra (Retd.) as the arbitrator. It is therefore clear that the learned Counsel appearing before the learned Subordinate Judge agreed for appointment of Anr. arbitrator in place of Justice G.K. Mishra (Retd.) and did not object to the appointment of Justice K.P. Mohapatra (Retd.) as an arbitrator. This finding also gets support from the fact that after appointment of Justice K.P. Mohapatra (Retd.) as an arbitrator, parties appeared before him and participated in the proceeding till an award was passed. In this connection, relevance of certain judgments cited by both the parties are required to be examined.

10. Shri Rath, learned Counsel appearing for the Appellants, submitted that the agreement being the foundation, consent cannot confer jurisdiction on the Court to entertain an application u/s 8 for appointment of an arbitrator. Reliance was placed by him on a decision of the Apex Court in the case of Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., . The Apex Court in the

aforesaid judgment held that an agreement is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, between the parties at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. The Apex Court further observed that this defect is not cured by the appearance of the parties in those proceedings, because it is well settled that consent cannot confer jurisdiction. I am afraid, this judgment has no application to the facts of the present case, as admittedly the agreement provides an arbitration clause and interpretation of the same is to be examined by the Court. This question has been set at rest by this Court. While the matter was pending before the learned Subordinate Judge, Cuttack, the Appellants approached this Court in Civil Revision No. 545 of 1988 challenging the order dated 8.7.1988 passed by the learned Subordinate Judge. This Court while disposing of the revision held that the learned Subordinate Judge had jurisdiction for appointment of an arbitrator and the said judgment is reported in 71 (1991) CLT 294. It appears from the said judgment that the question raised now before this Court with regard to jurisdiction was also considered by this Court in the aforesaid case and a decision was taken against the Appellants. I am, therefore, of the view that the point having been set at rest by this Court earlier between the same parties arising out of the same proceeding, a different view cannot be taken at this stage.

11. The next point raised by Shri Rath is that the appropriate provision under which an arbitrator could be appointed is Section 9 of the Act. Section 9 provides that where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, such appointment shall be made under the said provision. Relying on the aforesaid provision it was contended by Shri. Rath that Section 8 of the Act has no application to the facts of the present case. In this connection, he also relied on several decisions which I do not think necessary to refer. The arbitration clause itself provides that if either party disagrees or is dissatisfied with the decision taken by the Consulting Engineer, it can seek for appointment of a single arbitrator. Only when there is dispute with regard to the appointment of a single arbitrator, the question of appointment of two arbitrators, one by each party, will arise. In the present case, on consent of the learned Counsel appearing for the parties, Justice K.P. Mohapatra (Retd.) was appointed as an arbitrator and therefore applicability of Section 9 of the Act does not arise.

12. The next ground on which the award is challenged is on the question of granting escalation charges. Shri Rath, learned Counsel appearing for the Appellant, referring to the agreement, submitted that there is no provision in the agreement under which the claimant can seek for payment on escalation in prices of material and labour. Referring to the claim petition, Shri. Rath submitted that the claimant-Respondent had claimed Rs. 22,13,368.38 only on escalation and the total claim was Rs. 31,09,040.36 and, therefore, the major claim was escalation charges. The learned arbitrator having awarded Rs. 19,55,368/-, it is obvious that the award includes the claim on escalation. It was

further contended by Shri. Rath that there being no escalation clause in the agreement, the arbitrator has travelled beyond the scope of the agreement and therefore even if the award is a non-speaking award, the Court can interfere and set aside the same. Reliance was placed by the learned Counsel on two decisions of the Apex Court in this regard. The first decision relied on by the learned Counsel is the case of *State of Orissa Vs. Sudhakar Das (Dead) by Lrs.*, . In paragraph 2 of the judgment, the Apex Court observed that in absence of any escalation clause, an arbitrator cannot assume any jurisdiction to award any amount towards escalation. That part of the award which grants escalation charges is clearly not sustainable and suffers from a patent error. The decree, in so far as the award of escalation charges is concerned, cannot, therefore, be sustained. The other decision on which reliance is placed by the learned Counsel for the Appellant is the case of *V.G. George Vs. Indian Rare Earths Ltd. and Another*, . In the said case also the Apex Court observed that when the agreement does not provide for escalation charges, award of escalation charges is beyond the scope of agreement and therefore amounts to misconduct on the part of the arbitrator in awarding escalation charges. In this connection, Shri. Rath also submitted that where the question of arbitrability is concerned, a plea of non-speaking award cannot protect the same and the arbitrator must consider the question of arbitrability before proceeding to decide the matter on merits. In this connection, reliance was placed on a decision of the Apex Court in the case of *Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others*, . The Apex Court in the said decision observed that the arbitrator cannot clothe himself conclusively with the jurisdiction to decide or omit to decide the arbitrability of a particular item of claim made by the parties. When a specific reference has been made to the arbitrator and the parties raise the dispute of arbitrability, with the leave of the Court by a direction of the Court in a proceeding u/s 33, he is to decide the arbitrability of the dispute and make a decision while giving reasons in support thereof. The decision of the arbitrator in granting a particular sum by a non-speaking award, therefore, hinges upon the arbitrability of a dispute arising under the contract or upon a particular item claimed there under. He is required to give the decision thereon. In the said case, the arbitrator was enjoined to decide the arbitrability of the claims set up by the Respondents therein and disputed by the Appellant. The arbitrator passed a non-speaking award granting lump-sum amount. The award did not contain any decision on the arbitrability of the claims. Under such circumstances, the Apex Court set aside the award even though the award was a lump-sum award. I have not referred to the other decisions cited by Shri. Rath on this point, since in all the said decisions more or less same view has been taken by the Apex Court.

13. Shri Mishra, learned Counsel appearing for the claimant-Respondent, on the other hand, submitted that there is nothing in the agreement prohibiting payment of escalation charges and in absence of any specific provision contained in the agreement prohibiting payment of escalation charges, the arbitrator had jurisdiction to award escalation charges. Apart from the above, it was also

contended by Shri Mishra that so far as the non-speaking awards are concerned, the Court has no jurisdiction to interfere with the awards. Reliance was placed by the learned Counsel on the decisions of the Apex Court in the cases of M/s. Kundale and Associates Vs. M/s. Konkan Hotels (P) Ltd., , M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, , Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, , State of Orissa and Others Vs. Lall Brothers, , National Fertilizers Vs. Puran Chand Mangia [OVERRULED], . In all these cases, the well settled law has been repeated to the extent that if the arbitrator has considered the oral and documentary evidence placed before him and has passed a non-speaking award, the Court cannot read into the mind of the arbitrator and set aside the award.

14. The main dispute as it appears is with regard to the arbitrability of the claim in relation to escalation charges. It was contended by Shri. Rath that the agreement does not provide for payment of escalation charges whereas Shri Mishra contended that there is no provision in the agreement prohibiting payment of escalation charges. Form the above contention, it is clear that there is no clause in the agreement which entitles the claimant-Respondent to claim compensation on escalation. Looking at the claim petition, it appears that the claimant-Respondent had claimed different amounts on different heads. The heads of claim are quoted below:

STATEMENT OF CLAIM OF M/S. UNIQUE BUILDERS LIMITED AGAINST INDIAN RARE EARTHS LIMITED FOR CONSTRUCTION OF OSCOM/S-3 STRUCTURAL STEEL AND CLADDING WORK IN BULKWAREHOUSES, BEFORE THE HON"BLE ARBITRATOR JUSTICE B.K. RAY.

1 Escalation as per annexure and the same submitted to M/s. Dastur and Co Rs. 22,13,368.38

2. 40% of the overheads as per enclosed statement (Annexure-2) Rs. 2,00,672.48

3 Encashment of bank guarantee (Letter at Annexure-3) Rs. 2,50,000.00

4 Loss due to complete damage of workshop and store shed made of steel column, trusses with A.C. Sheet-1,200 sq. ft. " Rs.200/- per sq. ft.. Rs. 2,40,000.00

5 Loss of Welding Machine, Drilling Machine, Jigs, Tools, Tackles, Electrodes, Store items (As per Annexure-5) Rs. 1,30,000.00

6 Legal expenses for fighting the Rs. 75,000.00 Rs.31,09,040.8

7 Interest " 18% form 11.8.82 to 31st December, 1992 (Annex.7) Rs. 58,13,991.42

8 Loss for extra liability for Payment of income tax by not availing of the adjustment of loss of Rs.16,62,223.00 upto previous eight years form the account year starting form Accounting year 82-83, i.e., 50% of the above loss of

Rs.16,62,223.00 (Annx.8) Rs. 8,31,111.50

Rs. 97,54,143.78

15. There is no dispute that the award passed by the arbitrator is a non-speaking award. The arbitrator in his award has directed that a sum of Rs. 19,55,368/- with pendent lite interest at the rate of 15 per cent per annum from the date of institution of the suit till the date of the award shall be paid to the claimant-Respondent. It is evident from the claim statement that the total claim was Rs. 97,54,143.78 and it clearly shows that the claimant not only claimed escalation charge but also overheads, encashment of bank guarantees, loss due to complete damage of workshop and store, loss of welding machine, drilling machine and other machinery, legal expenses, loss towards extra liabilities as well as interest. The award being a non-speaking award, it is difficult to conclusively say that the same includes a part of the claim towards escalation charges. In the case of *M/s. Arosan Enterprises Ltd. v. Union of India and Anr.* (supra), while interpreting Section 30 of the Arbitration Act, 1940, the Apex Court held as follows:

In any event, the issue raised in the matter on merits relate to default, time being the essence, quantum of damages-these are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem it fit-the Courts have no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has thus exceeded its jurisdiction warranting interference by this Court. As regards issues of fact as noticed above and the observations made hereinabove obtains support from a judgment of this Court in the case of *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others*, .

In the case of *Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhar Rao*, as well as in the case of *National Fertilizers Vs. Puran Chand Mangia* [OVERRULED], , the Apex Court has held that in law it is not permissible for the Court to probe into the mental process of the arbitrator in case of a non-speaking award. There is no need of referring to some other decisions cited at the Bar since under the Arbitration Act, 1940, an arbitrator could pass a non-speaking award and the Apex Court and this Court also in several decisions have held that it is not permissible for the Court to read into the mental process of the arbitrator in order to find out whether the award is justified or not. In the present case also, the total claim being more than Rs. 97 lakhs and an award of little more than Rs. 19 lakhs having been passed, it is not permissible for the Court to probe into the mind of the arbitrator to find out whether any part of the escalation charge has been allowed in the award or not. Accordingly, on this score also I do not find any merit in the contention raised by the learned Counsel for the Appellant. I have also perused the entire record placed by the arbitrator before the Court and it appears that not only oral evidence was adduced but also

documentary evidence were produced and on perusal of the entire evidence on record, the arbitrator has passed the award and therefore, it cannot be said that the arbitrator has not applied his mind to the respective cases of the parties while passing the award.

16. The next ground on which the learned Counsel has challenged the award is that the arbitrator has concluded the proceeding in undue haste and in violation of the principles of natural justice. It was contended by Shri Rath that the prayer for adjournment was not allowed by the arbitrator even on the ground of illness and the award was passed in undue haste. Form the record, it appears that the arbitrator entered into the reference on 26.4.1994 and the proceeding continued form day to day till the award was passed in the year 1996. Much reliance was placed by the learned Counsel for the Appellant on the order dated 16.12.1996 passed by the arbitrator to support his claim that sufficient opportunity hearing was not given to the Appellant. However, form the order sheet it appears that at the instance of the Appellant, several adjournments were granted prior to that date when the proceeding was at its last stage and had been posted for argument. The order dated 21.11.1996 passed by the arbitrator shows that both parties were present and argument of the Appellant was heard in part and the proceeding was adjourned to 16.12.1996. On 16.12.1996, a prayer for an adjournment was made on behalf of the Appellant. The arbitrator in his order dated 16.12.1996 has observed that the Appellants have repeatedly applied for adjournments at every stage of the proceeding as well as in course of argument. It was also observed that adjournment were granted very liberally with the expectation that the proceedings will end smoothly. The arbitrator has also observed that the Advocate expressed that he would conclude his arguments that day but again sought for adjournment. However, the prayer for adjournment was allowed and the proceeding was posted to 17.12.1996. Again on 17.12.1996, a prayer for adjournment was made on behalf of the Appellant. The arbitrator having granted several adjournments to the Appellant even at the argument stage, rejected the prayer and proceeded with the passing of the award. The order sheet itself shows that the arbitrator did not pass the award in haste. On the other hand, the Appellant tried its best to drag the proceeding as far as possible by taking several adjournments before the arbitrator. I am, therefore, of the view that the above ground raised by the learned Counsel for the Appellants has no legs to stand.

17. Shri Rath, learned Counsel appearing for the Appellant, challenged the award on the ground that it is shockingly high and disproportionate. In this connection, he referred to certain decisions of the Apex Court and other High Courts. The claim statements itself indicates that the claim was more than Rs. 97 lakhs and the arbitrator has awarded a little more than Rs. 19 lakhs. This itself shows that neither the award is shockingly high nor is it disproportionate. Merely because the claimant-Respondent had been paid the agreement value and the award is over and above the agreement value, it cannot be said that the award is shockingly high. The arbitrator having found justification for awarding certain

parts of the claim which is permissible under law, there is no reason or scope to interfere with the same.

18. The last point raised by Shri Rath is with regard to interest. Relying on two decisions of the Apex Court in Ghaziabad Development Authority Vs. Balbir Singh, and Rajni Kumar Vs. Suresh Kumar Malhotra and Another, , it was contended that interest at the rate of 15 per cent per annum is unjustified. The award having been passed in the year 1996, grant of interest at the rate of 15 per cent per annum does not appear to be on the higher side. I am therefore also not inclined to interfere with the award on this score.

19. In view of the discussions made above all the grounds raised in the appeal having failed, the appeal considers no merit and is accordingly dismissed.

20. Shri S.P. Mishra, learned Counsel appearing for the claimant-Respondent, submitted that the while making the award the rule of the Court, the trial Court did not grant any future interest which is the subject-matter of C.R.P. No. 42 of 2002. According to the learned Counsel, while making the award the rule of the Court, the trial Court should have granted future interest as the arbitrator had not granted any such interest in the award. I have perused the judgment carefully. At no point of time, the claimant-Respondent had claimed for grant of future interest before the trial Court and the impugned order does not reflect that even if at the time of argument the claimant-Respondent claimed future interest. Apart from the above, the arbitrator having granted interest at the rate of 15 per cent per annum from the date of the suit till the date of the award, I am of the view that there is no need for grant of future interest from the date the award was made the rule of the Court. Accordingly, I do not find any merit in the revision and the same is also dismissed.

There shall, however, be no order as to costs.