

(1962) 01 KAR CK 0010

In the Karnataka High Court

Case No : Civil Revision Petition No. 140 of 1960

Kapila Textile Mills Ltd.

APPELLANT

Vs

Madhava and Co.

RESPONDENT

Date of Decision : 18-01-1962

Acts Referred:

Arbitration Act, 1940 — Section 15 A, 16 (1) (c), 20, 8

Citation : AIR 1963 Kar 39

Hon'ble Judges : A. Narayana Pai, J

Bench : Single Bench

Advocate : N. Bheemacharya, for the Appellant; T. Krishna Rao and Shamalapapu, for the Respondent

Judgement

A. Narayana Pai, J.—The petitioners are a public Company Limited by shares called "The Kapila Textile Mills, Ltd." now under liquidation and represented by the Official Liquidator. The respondents, Messrs. B.S. Madhava and Co., are a firm of partners carrying on business as Engineers and Builders. The matter arises out of certain arbitration proceedings. In the course of the arbitration proceedings the petitioners are referred to as the defendants and the respondents as the plaintiffs. For the sake of convenience I shall refer to them likewise in this order.

2. On the 20th of November 1948, the parties entered into an agreement, hereinafter referred to as the Building Contract, under which the plaintiffs agreed to do the work of fabricating and erecting certain steel trusses and columns and asbestos cement roofing as well as certain other items of work for the defendants-Mills at Nanjangud, subject to the terms and conditions set out in the Building Contract. Among the conditions of the contract, condition No. 72 provides for arbitration in the following terms:

"In case of any dispute or difference between the parties to the contract concerning the execution of work or as to the interpretation of the contract, or as to any matter or thing arising thereunder then either party shall forthwith give to

the other notice of such dispute or difference and such dispute or difference shall be referred to an arbitrator agreed upon by both the parties (hereinafter called the "arbitrator") and the award of such arbitrator, shall be final and binding on the parties. If the parties do not agree to one arbitrator, then, each party shall appoint an arbitrator who shall "be an engineer or architect of good standing and status, and the two arbitrators shall appoint an umpire whose decision shall be final in all matters of dispute and binding on both the parties."

3. The plaintiffs executed certain works and tendered bills in respect of the same from time to time. There were delays and disputes in regard to the payment of the said bills. Consequently, the plaintiffs called upon the defendants pursuant to the arbitration clause extracted above to appoint an arbitrator for settlement of the disputes, giving a panel of three names. Complaining that the defendants failed to do so and were trying to evade the issue, the plaintiffs filed Miscellaneous Case No. 77 of 1953 on the file of the District Judge, Mysore, under Sections 8 and 20 of the Arbitration Act. The learned District Judge made an order on the 11th of August 1954 holding that the case was one in which the Court should interfere and appoint an arbitrator u/s 8 of the Arbitration Act, but having regard to the provisions of the arbitration clause which contemplated the appointment of Engineers or Architects of good standing and status to act as arbitrators, called upon the parties to suggest the names of persons of that description to enable the Court to appoint an arbitrator, because none of the three persons suggested by the plaintiffs was either an Engineer or an Architect.

4. The plaintiffs thereupon filed a Revision Petition No. 498 of 1954 before the erstwhile High Court of Mysore which accepted the Revision Petition and directed the District Judge to appoint one of the three persons named by the plaintiffs as the sole arbitrator to decide the disputes between the parties.

5. Pursuant to this order, the District Judge appointed Mr. A.R. Nageshwara Iyer as the arbitrator. Before the arbitrator the parties delivered pleadings setting out in detail their claims and counter-claims and the answers of each to the claims made by the other. Further, draft issues were filed before the arbitrator by the plaintiffs on the 14th of June 1955 and by the defendants on the 18th of June 1955. Both the parties filed several documents before the arbitrator in support of their respective cases. The arbitrator also visited the premises of the Mills in the presence of both the parties where structural works had been done with a view to understand the pleadings.

6. In the meanwhile, the defendants appealed to the Supreme Court of India by special leave. On such leave being granted, the Supreme Court by order dated the 28th of July 1955 stayed all further proceedings before the arbitrator.

7. During the pendency of the appeal before the Supreme Court, the parties arrived at a settlement out of Court in terms whereof the appeal was disposed of by the following order:

"1. That the appellant and the respondent do each appoint an Engineer Arbitrator

in this matter on or before the 25th May 1956 and the said Arbitrators shall take up their duties on the aforesaid date.

2. That the aforesaid Arbitrators shall continue the proceedings from the stage at which they now stand and shall give their decision on or before the 25th August 1956, but they shall have liberty to apply to the District Judge, Mysore, for one month's extension of time.

3. That in the event of the aforesaid Arbitrators differing Shri A.R. Nageswara Iyer, the Arbitrator appointed by the District Judge, Mysore, shall act as an umpire.

4. That the parties herein do bear and pay their respective costs of these proceedings throughout.

5. That save and except as aforesaid the Appeal be and is hereby dismissed and the order of this Court dated 26th September 1955 in C. M. P. No. 751 of 1955 staying further proceedings pending before Shri A.R. Nageswara Iyer, the Arbitrator appointed by the District Judge, Mysore in pursuance of the Mysore High Court's Order dated 28th January 1955, be and is hereby vacated."

8. Pursuant to the above consent order, the plaintiff and the defendants appointed respectively V. Ganesh Iyer and S. Seetharaman as arbitrators to decide the disputes between them. The said arbitrators agreed on some points making a joint award in regard to them but differed out other points and made separate award in regard to them on the 17th of September 1956.

9. Consequent upon such disagreement, the matter was placed before the Umpire Mr. A.R. Nageswara Iyer who made an award on the 30th of December 1958.

10. It would appear that during the proceedings before the arbitrators, the parties had filed a joint memo agreeing that in respect of the bills marked Exs. P. 3 to P. 12 and P. 15 to P. 23, the sum due by the defendants to the plaintiffs was Rs. 1,09,104-1-0. The Umpire accepted this figure and proceeded to consider the disputes in regard to other bills. He also considered the evidence and arguments in respect of the other issues and summarised his ultimate conclusions as follows:

"The position -of the parties is thus as follows:

A. The plaintiffs are entitled to recover from the defendants:--

(1) Rs. 1,32,602 3 9 on bills P3-to P-12. and P15 to P29. (2) Rs. 5,000 0 0 Security deposit. (3) Rs. 60,000 0 0 damages (4) Rs. 73 940 0 0 interest, and (5) Rs. 6,500 0 0 costs. ----- Rs. 2,78,042 3 9

"B. The plaintiffs are liable to account for---

(1) Rs. 13,653 11 0 Iron & Steel a/c (2) Rs. 14,968 0 0 receipts for A. C. Gutters and rain water pipes. (3) Rs. 10,414 8 4 Interest at the same rate of

10 per cent from 9-5-58. ----- Rs. 39,036 3 4

Omitting annas and pies, the difference is Rs. 2,39,005/-.

In the result I award that the defendants do pay to the plaintiffs Rs 2,39,005/- (Rupees two laks thirty nine thousand and five only) in round figures."

11. The Umpire filed the award into the District Court of Mysore on the 3rd of January 1959. Thereupon the plaintiffs made an application to the said Court praying that the Court be pleased to issue notice of the filing of the award to the defendants, pronounce judgment according to the award and pass a decree directing the defendants to pay them the sum found due to them, by the Umpire with future interest and costs of the petition. The defendants also filed what is described as an application setting out certain objections to the award, contending that the same is unfair, inequitable and liable to be remitted back for modification and praying that the award be not accepted but remitted back for modification.

12. The District Judge by his order dated the 26th of June 1959 rejected all the objections of the defendants and directed the passing of a decree in terms of the Umpire's award with future interest at four per cent on the principal sum adjudged by the award.

13. Hence, this Revision Petition by the defendants.

14. The attack against the award by the defendants before the District Court related principally to interest, damages and costs. Regarding damages and interest, the objections stated were that the Umpire's assessment of damages was unwarranted and not based on any tangible evidence, that the assessment of interest at ten per cent was unfair and not based on any tangible evidence and that the assessment of interest and damages simultaneously amounts to penalty and therefore illegal. In regard to costs, the objection was that the Umpire exceeded his jurisdiction in respect of the directions regarding costs and that the costs awarded were excessive.

15. In the present Revision Petition, it is contended that both in respect of interest and damages and also in regard to a portion of the principal amount awarded by the Umpire, he has gone beyond the scope of the reference made to him. As to the principal amount, the argument is that the scope of the reference must be taken to be limited to the bills set out in the annexure to the petition filed in August 1953 in Miscellaneous Case No. 77 of 1953 before the District Judge of Mysore or at any rate to the amount mentioned in the joint memo filed before the Engineer-arbitrators in respect of the bills marked Exs. P3 to P12 and P15 to P23.

16. The exact contention in respect of costs is not quite clear in ground No. 9 which is the only ground dealing with it reading:

"The learned District Judge ought to have set aside the award when the costs recovered by the Umpire were excessive and unreasonable."--

nor was any clarification suggested or made in the course of the arguments on behalf of the petitioners.

17. On behalf of the respondents-plaintiffs, it has been argued that the only matter in respect of which the defendants complained that the Umpire has acted in excess of his jurisdiction was the question of costs and that in respect of interest and damages, the objection to the award was not that those matters fell outside the scope of the Umpire's jurisdiction but that the amounts awarded by him for interest and damages were excessive. The objection regarding costs is said to be wholly untenable. It is further contended that the point now raised in revision that in respect of these matters as well as in respect of a portion of the principal money itself the Umpire has acted beyond the scope of the reference and therefore beyond his jurisdiction is a new point and should not be permitted to be raised.

18. The respondents have also raised a preliminary objection to the maintainability of this petition. The argument is that the objections are in substance those germane to a claim for the setting aside of the award, that the order of the District Court rejecting or overruling those objections must therefore be deemed to be an order refusing to set aside an award which is expressly made appealable under Clause (vi) of Sub-section (1) of Section 39 of the Indian Arbitration Act, 1940.

19. On the question of costs, the argument on behalf of the respondents has to be accepted. u/s 3 of the Arbitration Act, an arbitration agreement, unless a different intention is expressed therein, is deemed to include the provisions set out in the First Schedule to the Act. Paragraph 8 of the First Schedule in clear terms vests in the arbitrator or Umpire full discretion in regard to costs. The Umpire in this case cannot therefore be said to have acted beyond his jurisdiction to any extent in the matter of awarding costs, nor is it made out that even discretion in that regard has not been properly exercised. This part of the case of the petitioners has therefore to be rejected.

20. But, I do not think that the preliminary objection raised on behalf of the respondents can be sustained. The objections to the award filed by the defendants in the Court below did not pray for the setting aside of the award. At the very commencement of the statement of objections described as an application, the defendants stated that the award was liable to be remitted back for modification. It concluded with a prayer that the award should not be accepted but remitted back for modification. The only basis or the scope for raising a preliminary objection of this type is, it appears to me, furnished by a certain mixing up of ideas in the course of the arguments addressed on behalf of the petitioners.

As already stated, his principal grievance against the award is in respect of the

amounts directed to be paid by the defendants for interest and damages. In trying to get rid of these two items the attempt of the learned counsel for the petitioners has been to proceed on two alternative lines,-- firstly by trying to make out that these are matters not referred to arbitration, that such part of the award as deals with them can be separated from the other part dealing with matters within the scope of the reference without affecting the decision on the latter part and that therefore the award should be modified or corrected by deleting the former part, -- and secondly or alternatively, by trying to show that the award in so far as it deals with interest and damages suffers from an illegality apparent on the face of it.

Viewed in the correct perspective, the attempt 13 clearly to bring the matter either u/s 15(a) or Section 16(1)(c) of the Arbitration Act. But, the learned counsel for the petitioners while developing the former idea did at one stage of his arguments go so far as to contend that that part of the award dealing with interest and damages which he said is separable from the rest 01 .it, is liable to be set aside on the ground that it is "otherwise invalid" within the meaning of that expression occurring in Section 30(c) of the Act.

21. I do not think that the last argument of the learned counsel for the petitioners is at all available to him to support his client's case or to the learned counsel for the respondents to support his preliminary objection. In the statement of objections filed in the Court below, it was no part of the case of the defendants to get the award set aside for any of the reasons set out in Section 30 of the Act. The clear attempt was to get the award modified in respect of interest, damages and costs. The express prayer was for remitting the award back to the arbitrator for reconsideration in respect of those matters. Further, the argument in this Court which the learned counsel for the respondents describes as a new point raised for the first time here in revision is, as I have pointed out, merely an attempt to get the Court itself to modify or correct the award on the ground that the question of interest and damages was not a matter referred to arbitration and the award is therefore capable of correction by the Court itself deleting the part thereof dealing with those topics without affecting the decision on the main matter.

22. Now, whether the matter falls u/s 15(a) or 16(1)(c) of the Act, the question really is whether the legal position in this case is such as to deprive the award of the finality which the law confers on it by virtue of an agreement of parties to submit their disputes for a final adjudication by an arbitrator to the exclusion of a Court, and to attract the jurisdiction of the Court to act in respect of the award either u/s 15 or u/s 16 of the Act. If the case is of such a nature, then, the Court below by declining to act under one or other of the sections mentioned above must be held to have failed to exercise the jurisdiction vested in it by law, which failure is open to correction by this Court u/s 115 of the Code of Civil Procedure. If, on the other hand, the petitioner-defendants fail to make out that the case is of that nature, the Court below cannot be said to have committed any error of

jurisdiction. The points raised on behalf of the petitioners therefore cannot strictly be described as entirely new points, because whether the matter is viewed u/s 15(a) or 18(1)(c) of the Act the real question for consideration is one of jurisdiction.

23. I may, however, add that from the objection filed by the defendants in the Court below and the discussion contained in the order under revision, it would appear that the Court was invited to act u/s 16(1)(c) rather than u/s 15(a) of the Act. It also appears to me, for reasons which I shall state presently, that the matter falls more appropriately u/s 16(1)(c) rather than u/s 15(a).

24. Considerations bearing upon the determination of the scope of the reference and those that determine whether Court has or has not the jurisdiction to interfere with an award of an arbitrator are closely related to each other and are governed by more or less the same principles of law. It is therefore not possible to discuss them as two independent topics. It is further desirable first to ascertain the principles of law governing the situation before proceeding to discuss the facts relating to the same.

25. Practically all the important aspects of this question are found discussed in the judgment of the Supreme Court in the case reported in Seth Thawardas Pherumal Vs. The Union of India (UOI), .

26. In that case, a dispute arising out of a contract entered into by the appellant therein with the Dominion of India for the supply of bricks to the Central Public Works Department was pursuant to one of the clauses of the contract referred to arbitration without the intervention of Court. When the award made by the arbitrator was filed into Court for a decree being passed thereon, the Dominion of India filed certain objections. It was held that the decision of the arbitrator was in certain respects wrong in law. The question arose whether and if so, to what extent, it was open to correction by the Court.

27. His Lordship Vivian Bose J. delivering the Judgment of the Supreme Court made the following observations:

"There can therefore be no doubt that the arbitrator was wrong in his law. His construction of the terms of the contract was at fault. The question now arises whether his decision on this point .is final despite it being wrong in law.

In India this question is governed by Section 16(1)(c) of the Arbitration Act of 1940 which empowers a Court to remit an award for reconsideration "where an objection to the legality of the award is apparent upon the face of it."

This covers cases in which an error of law appears on the face of the award. But, in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred.

If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he has decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature."

28. In summarising the law that way, His Lordship referred particularly to two cases decided by the House of Lords in England reported in *Government of Kelantan v. Duff Development Co., Ltd.* 1923 AC 395 and *P.R. Absalom, Limited v. Great Western (London) Garden Village Society, Ltd.* 1933 AC 592, the principles stated in which had been applied by the Judicial Committee of the Privy Council to India in AIR 1949 334 (Privy Council) .

29. In 1923 AC 395, Viscount Cave, L. C., after holding on a review of the pleadings delivered by the parties before the arbitrator that there had been a specific reference made to the arbitrator as to the true construction of a certain deed of cancellation concerned in that case, stated the law in the following terms:

"If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally -- for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose."

Lord Parmoor at pages 416 and 417 of the Report quoted the following two passages from a judgment of the Privy Council in *Attorney General for the Province of Manitoba v. Thomas Kelly, Ltd.* (1922) 1 AC 268, as authoritatively laying down the correct position in law.

"In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award.

Where a question of law has not specifically been referred to an umpire, but is

material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award. . . .".

Lord Trevethin also makes the same distinction at p. 421 of the Report;

"If your Lordships should be of opinion that the award is bad in law upon its face, it should be set aside, for this is not in my view a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own. This deed contains a general submission under which disputes as well of fact as of law might arise, it raises no specific question of law"

30. In the subsequent case reported in 1933 AC 592, the House of Lords reviewed several previous leading cases on the subject and came to the same conclusion. Briefly stated, their Lordships' conclusion was that where disputes are referred to an arbitrator in the decision of which a question of law becomes material the Court can interfere if and when any error of law appears on the face of the award, but in a case in which a specific question of law has been referred to the arbitrator for decision, e.g., the express submission of the true effect of a contract on the basis of undisputed facts, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face, and they pointed out that the crucial question which arises in such cases is to which class of cases does the reference in question belong.

31. Having referred to the above cases, their Lordships of the Supreme Court in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, next addressed themselves to the question whether the arbitrator in that case had been specifically asked to construe a particular clause of the contract or whether any question of law was specifically referred to him. In deciding this question, their Lordships pointed out--

"A reference requires the assent of "both" sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court u/s 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4)."

In the case before their Lordships there was no document signed by both the parties which could be described as a reference to arbitration. The disputes sprang out of a series of claims made in a number of letters written by the Contractor culminating in a petition in which he summarised his claims. On receipt of that document the Public Works Department invoked the jurisdiction of the arbitrator by a letter and the arbitrator wrote to the contractor asking him to

submit his statement of claims. As a material document setting out the terms of the reference was not available, their Lordships accepted the suggestion made to them by both sides that they could infer what the terms were from the contractor's statement of claims and the recitals in the award. Having done so, they arrived at the conclusion that there was nothing like a specific reference to the arbitrator on a point of law.

32. In the light of the principles stated in the above cases, the crucial questions for decision in the case before me would be--

(1) What is the scope of the reference:

(2) If it comprises the topics of interest and damages, whether any question of law was specifically referred to the arbitrator or a decision on the question of law became incidentally material in order to decide the questions relating to interest and damages;

and

(3) Whether it is apparent on the face of the award that the Umpire has acted illegally in reaching his decision.

33. Now in this case, as in the case before the Supreme Court cited above, there is no document signed by both the parties which may be described as a reference to arbitration.

34. It will be remembered that the defendants having omitted to act under the arbitration clause contained in the Building Contract, the plaintiffs applied to Court under Sections 8 and 20 of the Act in consequence whereof the Court made an appointment u/s 8 and reference u/s 20. The argument of the learned counsel for the Petitioners that the subject of reference must be confined to the list of unpaid bills annexed to their original application in Miscellaneous Case No. 77 of 1953 is impossible of acceptance. The said application can by no means be described as a reference to arbitration but is only in the nature of a complaint by the plaintiffs against the defendants' failure to act upon the arbitration clause in the Building Contract with a prayer to compel them to submit the disputes to arbitration pursuant to that clause. The observations contained in the first order of the District Judge dated the 11th of August 1954 and the order of the erstwhile High Court of Mysore dated the 28th of January 1955 in Civil Revision Petition No. 498 of 1958 clearly indicate that both the Courts came to the conclusion that certain disputes arising out of and relating to the Building Contract have arisen between the parties which in terms of Condition No. 72 in the Building Contract should be submitted to arbitration, but that the Courts did not themselves make any attempt to formulate those disputes and refer them to arbitration.

35. Before the arbitrator Mr. Nageshwara Iyer who came to be appointed by the District Judge pursuant to the order of the High Court, the parties submitted detailed statements of their cases and also tiled draft issues for determination by

the arbitrator.

36. In paragraph 8 of their statement of claims, the plaintiffs distinctly state that the present dispute has arisen in connection with the work done by them for which the defendants have not paid, and in paragraph V of their statement of claims the defendants state that the main difference and dispute between the parties has been with regard to delay by the plaintiff in the execution of the work, poor quality of work turned out by the plaintiffs, non-execution of the work according to the schedule, etc.

37. The plaintiffs after giving details pertaining to their bills remaining unpaid in paragraphs 9 to 11 of their statement of claims proceed to refer in para 12 to what they describe as mala fide refusal by the defendants to pass the bills for payment, and formulate their claims for interest and damages in paragraphs 13 and 14 which "read as follows:

"13. Under Clause 67 of the conditions of contract, of Ex. P-2, the Defendants had to pay the amount of the Bills within 14 days of its certification. Since the defendants have wrongfully withheld payment, they are liable to pay interest by way of damages at 12% per annum from date of bill till date of payment: the interest due on each bill is tabulated as on this date in the annexure Ex. P-30 amounting to : Rs. 38,066-1-0.

14. Whereas time is the essence of the contract, the Defendants by delaying to furnish the necessary plans and the supply of steel categories, by instructing the plaintiffs not to proceed with North light glazing, doors and windows by constant prevention of work and deliberately withholding payments on bills submitted to them, have dragged on the work which would normally have been finished in about ten months to many years, and thus crippled the plaintiff In business. The plaintiffs have thereby lost the profits they could reasonably have earned during these years of delay. The plaintiffs are entitled to a lump sum compensation of Rs. 60,000/- on these accounts."

The defendants traverse these claims in Paragraphs XI and XII of their written statement and expressly repudiate the said claims of the plaintiffs for interest and damages in Paragraph XVI. Further, in Paragraph IX and XVII of their written statement, the defendants themselves claim that the plaintiffs are entirely responsible and liable to pay damages to them for the delay in execution of the work according to the contract and make counter claims for damages, loss, etc., in the sum of Rs. 6,82,710/- up to 30-6-1954 and further loss that they may suffer based upon what they describe as average trade profits till the matter is finally settled.

38. Among the draft issues filed by both the plaintiffs and the defendants, there are issues expressly raising these questions of interest and damages. See issues 9, 10 and 12 field by the plaintiffs reading:

"(9) Are the plaintiffs entitled to Rs. 60,000/- by way of damages?

(10) Have the defendants suffered any damages, and are plaintiffs responsible for the same and are defendant* entitled to Rs. 6,82,710/- by way of such damages?

(12) Are the plaintiffs entitled to claim interest and if so what is the interest that the plaintiffs are entitled to get?" and issues 7 and 9 filed by the defendants reading--

"(7) Are the plaintiffs entitled to damages claimed and are defendants entitled to the damages as claimed by them?

(9) Are the plaintiffs entitled to any interest?".

39. By the consent order which both the parties secured from the supreme Court in the appeal before it which I have already extracted in extenso, they expressly agreed that the arbitrators to be appointed pursuant to that order should continue the proceedings from the stage at which they then stood.

40. In the face of these indisputable facts appearing on record, it is impossible to contend that the scope of the reference was limited in the manner contended for on behalf of the defendants or that the topics of interest and damages were not referred to the arbitrator. The further argument that the joint memo filed by the parties before the Engineer-arbitrators in respect of bills Exs. P3 to P13 and Exs. P-15 to P23 must alone be held to be the subject-matter of the reference is equally unacceptable. When several matters in dispute arising out of the Building Contract had thus been referred to the arbitrators the fact that in the course of the proceedings before them the parties settled their claim in respect of some of them does not mean either that the arbitration was at an end or that such matters so settled by the parties should alone be considered to be within the scope of the reference. On the contrary, the fact that there were still some matters on which the parties were at variance and in respect of which they sought the decision of the arbitrators and led evidence and addressed arguments in respect of them is itself clearly indicative of the fact that the parties wanted the arbitrators to decide the rest of the matters in respect of which they could not come to a settlement among themselves.

41. I hold therefore that both the topics of interest and damages were within the scope of the reference and that the arbitrators had jurisdiction to adjudicate upon them.

42. The original Engineer-arbitrators having differed on certain matters, the Umpire automatically acquired the jurisdiction in respect of them by force of the order made by the Supreme Court by consent of parties.

43. The next question is whether it could be said that any question of law had been specifically referred to arbitration in such a way as to make it possible to infer that the parties had agreed to take as final and binding upon them the decision of the arbitrator and give up their right to approach the Court for correcting an error, if any, committed by the arbitrators or the Umpire. This

question has to be dealt with by me only with reference to the topics of interest and damages. There can be hardly any doubt in regard to this question. The issues on this topic already copied above which the parties wanted to be decided in arbitration clearly raised two subsidiary question, viz.,

1. Whether the plaintiffs are entitled to damages and interest and

2. What should be the quantum of damages and interests. Both these are composite questions of fact and law. The answer to the question whether the plaintiffs are entitled to damages or interest or both depends upon finding facts on the strength of which the plaintiffs make the claim and also on finding whether the facts established are sufficient in law to award interest and damages to the plaintiffs. The quantum of damages or interest is very largely a question of fact, the only legal element therein being the principle if any, derived from statutes or custom or usage laying down any particular mode of calculation. On none of these relevant facts was there any agreement between the parties. Every one of the facts and circumstances relied upon by the plaintiffs was denied or seriously questioned by the defendants. Hence this is certainly not a case in which the parties specifically submitted to the arbitrator any specific question of law arising on undisputed facts and sought his decision thereon.

44. I therefore hold that in respect of damages and interest the questions that were referred to arbitration in this case were composite questions of fact and law, that no clear question of law arising out of undisputed facts was specifically referred to arbitration and that the questions of law relating thereto arose incidentally and a decision thereon became material for the purpose of deciding the questions of interest and damages referred to arbitration.

45. The remaining question is whether in deciding the questions of law material to the issues on interest and damages, the Umpire has acted illegally or committed an error of law apparent on the face of the award attracting the jurisdiction of the Court to correct the same.

46. The defendants' claim for damages failed for lack of evidence. No further reference to it is necessary.

47. I have already extracted fully paragraphs 13 and 14 of the plaintiffs' statement of claims in which they have formulated their case in regard to interest and damages. It will be noticed that the principal or the sole basis for the claim of interest is the wrongful withholding of payment of bills by the defendants, and the damages claimed are in essence for loss of profits said to have been caused by the circumstances set out in paragraph 14 (one of which is the withholding of payment of bills) resulting in what is described as a crippling of the plaintiffs' business.

48. The Umpire has devoted three paragraphs to the question of damages and two to that of interest. I copy them below:

". . . .Time was the essence of the contract. The evidence is clear that most of

the delays were due to the lapses of the defendant Mills. Indeed, the bills were not paid as per terms of agreement and on several occasions, heavy sums were withheld from the plaintiffs which necessitated their suspending work and they were within their right in so doing (Hudson on Building Contracts P. 172). They had themselves borrowed moneys from the Banks and maintained heavy establishments for purposes of the contract to complete the work within the short period fixed. Ex. 88 proceedings of the Meeting of the Board of Directors shows that over Rs. 1,75,000/- was outstanding on plaintiffs' bills.

For these reasons, they claim Rs. 60,000/- by way of damages. Ex. P-214 furnishes details of overhead charges, etc. Deductions are reasonably made therein on account of small contracts taken up by the plaintiffs during the period. As regards the Defendants, they made full use of all the "bays" that had been constructed without honouring the plaintiffs' bills in accordance with the agreement as and when they were presented. The claim for damages is therefore valid and justified.

It is a recognised principle "that determination of damages or compensation is an inexact science and the sum reached by whatever method will never be more than an approximation". Mr. Madhava has stated that they could not take up any major work as their dues were not paid and their moneys were thus locked up. In Ex. 214 referred to above they have fairly given deduction to what they earned during the period, and it supports the plaintiffs claim for Rs. 60,000/- by way of compensation, as he maintained a heavy establishment to carry out the work expeditiously within the period stipulated in the contract. In the circumstances, Rs. 60,000/- must be awarded as damages to the plaintiffs. (Issue No. 9).

Interest at 12% is claimed on the amounts due to the plaintiffs. A statement was filed by the plaintiffs before me showing the interest due on bills P. 3 to P. 12 and P. 15 to P24 calculating interest from after a fortnight after the presentation of the bills according to the contract up-to 1-12-1958 at 12% which amounts to Rs. 83,186-8-3. As regards the figures no objection was raised for the defendants. It was only urged that the rate of interest claimed was high. There is some force in this contention. However, the plaintiffs who are businessmen, could not afford to have their moneys locked up, as they had to pay interest to their creditors. In the circumstances allowing interest at 10% per annum seems equitable. It would be Rs. 69,942-1-6 up to this date.

They are also entitled to interest on Rs. 5000/- given to the defendants as security deposit from 9-5-1955, the date of filing their statement in the arbitration proceedings, at 6%, i.e., for 3 years 7 months and 20 days, viz., Rs. 1,091/-. In respect of Rs. 11,867-5-9 due on bills P-26 to P-29, interest prior to 9-5-1955 is not prayed for and is not allowed but for the later period interest is awarded only at 6 per cent up to date which comes to-Rs. 2,220/-. In all, Rs. 73,402-11-6 must be awarded as interest to the plaintiffs. (Issue No. 12)."

49. it is seen that the Umpire has awarded interest because he considered it equitable to do so, and the ground! stated is that the plaintiffs, who are businessmen, could, not afford to have their moneys locked up as they had to pay interest to their creditors. Plainly therefore the Umpire has accepted the plaintiffs' contention in paragraph 13 of their statement of claims that they were entitled to interest by reason of the defendants having wrongfully withheld the payment of the bills which according to Clause 67 of the Building contract had to be paid within fourteen" days of certification.

50. It is not claimed that there is any express provision in the Building Contract for payment of interest, nor has the Umpire awarded interest on that footing.

51. Apart from stating that interest was not a matter referred to arbitration (which contention I have already rejected) the only alleged illegality in the matter of awarding interest pointed out by the learned counsel for the petitioners is that there is something in Clause 68 of the Building Contract indicating that interest was not payable at all. Clause 68 reads as follows:

"Interest on money due to the Contractor:-- The contractor shall not be entitled to interest upon earnest money, security deposit and the withheld or retention amounts.

(b) Whenever the withheld amount reaches Rs. 5,000/-or a multiple thereof, the contractor may, at his option, deposit with the Employers an equal amount in sums of Rs. 5,000/- or a multiple thereof, in any of the forms of interest bearing securities recognised for the purpose by the Employers and subject to the provisions contained therein in which case the equivalent withheld amount held under "deposits" shall be paid to him forthwith. The contractor will be permitted to exercise the option in this clause, subject only to the condition that the rate of progress contained in the Articles of Agreement is properly maintained."

This clause does not help the plaintiffs except perhaps in respect of the security deposit of Rs. 5,000/- to which I shall refer later. The expression "withheld or retention amounts" obviously refers to ten per cent of the certified amounts in respect of every bill retained under Clause (SIC) of the Building Contract, one half of which is to be paid when the works are completed provided there are no recoveries or forfeitures, and the balance six months thereafter or subsequently when defects, if any, have been rectified by the contractor.

52. The learned counsel for the plaintiffs-respondents has contended that there is no error whatever on the face of the award so far as the finding in regard to interest is concerned. He points out that from the discussion of the Umpire regarding the main question of the amounts due under several bills submitted by the plaintiffs it is clear that the principal ground stated by the defendants for delay in the payments, viz., the necessity for certification of bills by Modern Architects was unfounded and that therefore it follows that the defendants had been guilty of unlawful withholding of payments as contended for by the plaintiffs. He further states that according to the law applicable to Building

Contracts, such withholding of payments amounts to fraud and the principle on which interest is granted in cases of this nature is that such fraud confers upon a Court the equitable jurisdiction to grant interest. I have not been shown any authority that the mere delay in the payment or the retention of money which should have been paid out by itself constitutes fraud.

53. At page 121 of Emden and Watsons Building Contracts and Practice, Fifth Edition, it is stated--

"There is no mercantile usage that interest is payable on a debt due under a Building Contract except as an item of loss in assessing damages."

To the same effect are the principles stated at page 312 of the Eighth Edition of Hudsons' Building Contract, the relevant passage therein being the following:--

(d) Interest

"This can be an important matter in practice, as final accounts are frequently settled by architects and engineers long after the work has been completed, despite provisions in the contract to the contrary. In the absence of express agreement, or mercantile usage, interest was not recoverable at common law upon a" debt due..... and no such usage has been established in relation to building contracts..... There are, however, two important exceptions to the general rule. In the first place, where money has been obtained or retained by fraud, interest is recoverable as an item of damage". (The second exception relates to a statutory provision in England with which we are not here concerned.)

54. The Umpire himself has not proceeded on the basis that there has been any fraud on the part of the defendants entitling the plaintiffs to claim interest. On the contrary, I find that while discussing the question whether certification of bills by the Modern Architects was or was not necessary, the Umpire refers to a resolution of the Board of Directors of the Defendants Company Ex. P-30 dated 10-5-1950 according to which the bills of the plaintiffs shall be passed for payment by Messrs. B.K. Murthy and Janakiram and that payments shall not on any account be delayed for more than a fortnight after receipt of the bills. That apparently furnishes, in my opinion, the reason for the Umpire accepting the plaintiffs' calculations of interest, from after a fortnight of the presentation of the bills. Under Clause 68 of the Building Contract interest was not payable on the security deposit of Rs. 5,000/-, the Umpire has granted interest only from 9-5-1955 the date of filing the; plaintiffs' statement of claims, apparently on the, ground that the plaintiffs had made a written demand for payment of their dues to which he makes a reference while holding that the security deposit has become refundable to the plaintiffs.

55. The result of the foregoing discussion is that the basis for the Umpire awarding interest to the plaintiffs was neither any term in the Building Contract nor any fraud, but that the plaintiffs had suffered loss by their funds getting locked up on account of unreasonable and unjustifiable delays on the part of the

defendants in making the payments and by having in the interim to pay interest to their (Plaintiffs') creditors.

56. On the question of damages, there is hardly any discussion by the Umpire. He has summarised or paraphrased the averments contained in paragraph 14 of the plaintiffs' statement of claims and wholly accepted the calculation made by the plaintiffs in Ex. P-214. After stating that the determination of damages is an "inexact science", he has proceeded on the basis that Ex. P-214 correctly represents the position in regard to damages. Now, Ex. P-214, merely consists of some sheets of paper containing certain calculations. By themselves they mean nothing. The figures and the calculations contained therein have, however, been explained by B.S. Madhava deposing on behalf of the plaintiffs. Obviously therefore, I should proceed on the basis that the Umpire has actually incorporated in his award Ex. P-214 and the oral evidence of B.S. Madhava in relation thereto in such a way as to be regarded as part of his own award containing or furnishing the reasons in support of his award of damages. Hence, any error of law arising from or appearing on any one of these documents, viz., the paragraphs in the award dealing with the question of damages, Ex. P-214 and the oral evidence of B.S. Madhava in relation thereto, will have to be regarded as an error apparent on the face of the award within the meaning of Section 16(1)(c) of the Arbitration Act.

57. I have already pointed out that delay in paying the bills or what the plaintiffs describe as a deliberate withholding of payment of the bills is a ground stated in support of both the claims, -- one for interest and the other for damages and that in awarding interest the Umpire has actually relied upon this ground.

58. Ex. P-214 being merely a list of calculations, one has to read Madhava's evidence in explanation thereof. I copy it below in extenso:--

"Damages:-- I have claimed damages on the following main counts.

1. Prevention due to suspension of work.
2. Delay in supplying steel sections, more particularly, the categories that were ready at Nanjangud,
3. Delay caused by the Employer's other contractors,,
4. Delay in giving the layout plan, and
5. Prevention of completion by not supplying the truss-working drawings.

The determining principle on which I have grounded the damages is that a contractor is entitled to be put in as good a position, peculiarly, as he would have been by the due performance of the contract.

The elements that go to make up the amount I have claimed as damages are the overhead expense and the depreciation charges. Overhead expenses include salaries (or drawing account) paid to Principals and Office Staff, Office rent,

Power and Light, telephone and telegraph, stationery, drawing, Office supplies, technical journals, Motor car and upkeep, insurance and taxes. The total amount expended on overhead must be paid for by the work obtained during the year before any profit is earned. The period for which these two elements of damages are calculated are three years and four months. I have arrived at this period as follows:

My tender was accepted on 9-11-1948 and I signed the agreement on 20-11-1948. So, I take the month of November 1948 as the starting point. On the 28th of February 1953 Mr. A.H. Krishna Rao died. Thereafter I have done no work at the Mill site, and so I take that month as the end Month. The total duration from November 1948 to end of February 1953 is four years and four months. Providing for all contingencies, 10 to 12 months is a safe workable period for completion. After deducting this one year from the duration of 4 years 4 months 3 years and 4 months is the period for which the two elements of overhead and depreciation are calculated.

(Exhibit P 214 being the statement relating to the damages was filed before the Arbitrators and a copy given to the Counsel for the defendant.)

The overhead charges noted in my statement are taken from my account books and represent actual expenditures; the depreciation figures are from Income Tax returns, as allowed by Income Tax regulations. I have brought the Books of Account and Income Tax statement returns. During this period I took up some small contracts and the statement P. 214 gives a list of the works executed by me and the value received. All the figures shown in the statements are actual and not estimates. The amount of damages according to the working based on (these figures is Rs. 65,603/- and I have claimed only Rs. 60,000/-."

59. Two things that clearly appear from this evidence are (1) that the basic factor in the calculation of damages is no other than the delay which the witness states to be three years and four months and (2) that the amounts claimed by way of damages cover or comprise every conceivable expenditure incurred by the plaintiffs through out this period without making any attempt to show how those items may be said to be connected with the work under the Building Contract and in what manner the defendants can be held responsible therefore.

60. Reliance has been placed on behalf of the plaintiffs on the following statement of law contained in paragraph 957 at page 488 of the Third Volume of Halsbury's law of England, Third Edition, the relevant portions of which are the following:

"957. Damages for the default of the employer. As before stated, claims by the contractor on account of defaults by the employer fall into two classes: first, where there is a breach by the employer going to the root of the contract, and the contractor does not proceed with the work; and secondly, where the contractor treats the breach as partial and continues the work.

In the second class, where the contractor continues the work, the most usual circumstances which give rise to claims are delay in giving the contractor possession of the site or in the supply of drawings, or suspension of the works caused by some act or omission of the employer and a consequent increase of expense in the performance of the works: and the contractor may be able to recover damages for delay caused by the employer notwithstanding that an extension of time for completion has been granted in respect of such delay. Such claims also arise where the contractor becomes liable in damages to a sub-contractor through the default of the employer, in which case, if the existence of the sub-contract is known to the employer, it would seem that the contractor may claim, as an element of damages against the employer, the damages which he has to pay to the sub-contractor.

A contractor may also be entitled to damages for the loss of the use of his plant kept idle in consequence of the default of the employer and various other items of damage depending on the circumstances."

61. But, it has not been made out how the several items of expenditure related by the witness and set out in the calculation memo Ex. P. 214 can be brought under the principles stated in the above paragraph. One of the fundamental rules in awarding damages is that the damage complained of must be such as would flow from the breach of duty in the ordinary and usual course of things and remoteness of, connection between the breach and the loss claimed is one of the grounds for refusing to grant damages. Secondly the party entitled to damages is required by law to take steps in mitigation of damages. Both these ideas underlie the statement of law contained in paragraph 957 of Halsbury's Laws of England cited above, from which it appears that the several acts or omissions on the part of the employer which give rise to a claim for damages must be such as to lead to the consequence of increase of expense in the performance of the works. In other words, the damages claimed, whether for maintaining a special establishment or a special plant or machinery or for other reasons must be clearly shown to have added to the expenses of the performance.

Bills of Contractors or builders in the position of the plaintiffs are calculated on the basis of rates which are such as to cover both the normal or contemplated expenses of the performance in accordance with the relevant building contract and also a reasonable margin of profit for the contractors. The learned counsel for the plaintiffs has drawn my attention to a sentence occurring in another portion of the evidence of B.S. Madhava to, the effect that for the purpose of erection of steel structures, the plaintiffs had engaged a special set of men versed in hoisting trusses and erecting steel columns and those men were not the regular employees of the plaintiffs. But, there is nothing to show for how long those men were expected to work in normal circumstances and how much longer their services had to be retained as a direct consequence of the delays on the part of the defendants. As to the rest of several items of expenditure enumerated by the witness in the course of his deposition and calculated, in Ex. P. 214, there

is absolutely nothing to indicate that the entire expenditure or any part thereof represented or constituted an increase in the expense of the performance of the contract by the plaintiffs consequent upon the delays on the part of the defendants.

62. The real position therefore appears to be that the only complaint against the defendants which the Umpire has held that the plaintiffs have succeeded in establishing is long delay, and on that single ground two claims have been made by the plaintiffs, one for interest and the other for damages. The claim for interest, as already pointed out, is not based on the contract nor on mercantile usage, but on loss caused to the plaintiffs by reason of the delay on the part of the defendants by which the plaintiffs' funds on which they were paying interest to the creditors, got locked up for unduly long time.

63. Hence, the award for payment of interest can be supported only on the ground that interest has been awarded as an item of damage and consequently the awarding of an additional sum of Rs. 60,000/- by way of damages loses all basis either in law or on proved facts.

64. In the circumstances, I hold that the decision of the Umpire on the question of law material for deciding the plaintiffs' claim of interest cannot be said to be erroneous but that his decision on the point of law material for deciding the plaintiffs' claim for damages is erroneous in law and that he has acted illegally in that respect. His award, therefore, to the extent it grants damages of Rs. 60,000/- to the plaintiffs in addition to and apart from the amount separately granted for interest is vitiated by an error apparent on the face of the award. The learned District Judge therefore had the jurisdiction to correct this error acting u/s 16(1)(c) of the Arbitration Act. In deciding to do so, he must be held to have failed to exercise the jurisdiction vested in him by law.

65. I, therefore, allow this Revision Petition to the extent mentioned above and direct the District Judge, Mysore, to remit the award to the Umpire for reconsideration of that part of it which grants damages of Rs. 60,000/- to the plaintiffs in the light of this order. The Umpire shall submit to the Court of the District Judge, Mysore, his decision after such reconsideration before the 28th of February 1962. In case of need, the District Judge of Mysore may extend the said time by not more than two weeks.

66. The parties will bear their own costs in this Revision Petition.

67. The papers of this case will be dispatched to the Court of the District Judge Mysore, without delay.