

(2003) 07 KAR CK 0094
In the Karnataka High Court
Case No : M.F.A. No. 3683 of 2000

Karnataka State Road Transport Corporation and Another
Vs

APPELLANT

M. Keshava Raju

RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16 (2), 34, 37 (1) (b), 4

Citation : AIR 2004 Kar 109 : (2004) 1 ARBLR 507 : (2003) 4 KCCR 301 SN

Hon'ble Judges : S.R. Nayak, J;K. Ramanna, J

Bench : Division Bench

Advocate : R.V. Jayaprakash, for the Appellant; G. Gangireddy, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Nayak, J.—This Miscellaneous First Appeal preferred by the Karnataka State Road Transport Corporation u/s 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short "the Act"), is directed against the Judgment and Order dated 20th June, 2000 passed in Arbitration Suit No. 6 of 1998 on the file of the Court of the VI Addl. City Civil Judge, Bangalore. By the impugned judgment and order, the Court below has dismissed the petition filed by the appellant u/s 34 of the Act and Section 30 of the Arbitration Act, 1940.

2. The facts of the case in brief be noted first and they are as follows : The respondent herein is a Class-1 Contractor and an agreement was executed between the respondent and the appellant, whereby the respondent was entrusted the work of construction of permanent bus-station at Shidlaghatta in Kolar District under Contract No. 20/93-94, dated 23-9-1994. The cost of the work was Rs. 28.60 lakhs and the stipulated period for completion of the work was 12 months.

3. The work could not be completed within the stipulated period and as a result the contract between the parties was terminated. The same work was entrusted

to some other agency and got it completed. The respondent raised a dispute and requested for arbitration in terms of Clause 29 of the agreement executed between the parties. As the dispute was not adjudicated by the named arbitrator, the respondent filed a petition u/s 11 of the Act. This Court in C. M. P. No. 4 of 1996 appointed Sri. H. S. Bhat, 599, 10th Cross, 7th Block, Jayanagar, Bangalore as an Arbitrator for adjudication of the dispute between the parties under the contract. Accordingly, the learned Arbitrator entered the reference and after issuing notice to the appellant and the respondent and after hearing them, passed an award dated 15-10-1998 whereby he has allowed some of the claims of the respondent and rejected the others. The Arbitrator (Award) passed by the Arbitrator is improper, illegal and vexatious; the claims of the respondent are covered and governed by the provisions of the Arbitration Act, 1940, whereas the Arbitrator conducted the proceedings under the new Act.

4. In the suit, it was contended by the appellant that it had a right under the contract to vary the quantum of contract; the appellant was vested with the right to stop the work for certain reasons for a specified period; the appellant was vested with the right to vary or curtail the drawing and specification of the tender work; the appellant did not violate any terms and conditions of the agreement dated 23-9-1994; the respondent stopped the work of construction of bus-station without any justification; the Arbitrator did not afford reasonable opportunity to the appellant to adduce evidence; the respondent would not have earned more than 10% of the profit by investing men, money and material, whereas the Arbitrator has granted 20% of the profit with 18% interest as bonus without, considering the terms and conditions of the agreement; the award passed by the Arbitrator is improper, illegal and vexatious.

5. The respondent-Contractor filed his objections inter alia contending that although the respondent was required to complete the work within 12 months and he was ready to complete the work within the stipulated time with men and material, he was asked to stop the work for a period of 1 month and again the quantum of work was reduced in breach of the terms and conditions of the agreement; due to consistent non-co-operation of the appellant, the respondent-Contractor could not complete the full quantum of work as originally envisaged and that the appellant arbitrarily terminated the contract; the award passed by the Arbitrator is valid and in conformity with the settled law.

6. The Court below after hearing both sides and their respective pleadings, framed the following points for determination :

1. Whether the petitioner proves that the appointment of Arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996 is not proper?
2. Whether the petitioner proves that the claim for damages as awarded is illegal?
3. Whether the petitioner proves that the interest awarded is wrong?
4. Whether the disputes raised are not arbitrable?

7. The Court below on consideration of the evidence on record, oral and documentary, answered all the points in the negative and dismissed the petition filed by the appellant u/s 34 of the Act. Hence, this appeal by the aggrieved K. S. R. T. C.

8. We have heard Sri R. V. Jayaprakash, learned counsel for the appellant and Sri. Gangireddy, learned counsel for the respondent. Sri Jayaprakash would contend that Clause-29 of the agreement executed between the parties is not an arbitration clause which entitles the respondent to seek for adjudication of the claim by referring the same to an Arbitrator; therefore, the order passed by this Court in C.M.P. No. 4 of 1996 appointing Sri. H. S. Bhat, Advocate as an Arbitrator for adjudication of the dispute between the parties is one without jurisdiction and consequently the award dated 15-10-1998 passed by the Arbitrator and the Order dated 20-6-2000 passed by the Court below in Arbitration Suit No. 6 of 1999 are nullity in the eye of law. Sri. Jayaprakash would next contend that the Arbitrator has acted Illegally in law in awarding a sum of Rs. 2,85,000/- towards reimbursement of the overhead charges and further sum of Rs. 2,85,000/- as compensation for loss of profits. According to Sri. Jayaprakash, there is absolutely no evidence on record to show that the respondent has sustained any loss on overhead expenditures and the compensation for the said loss is not admissible as per Clause 15(a) of the agreement.

9. Sri. Gangireddy, learned counsel for the respondent, on the other hand, at the threshold would point out that two contentions now raised by the learned counsel for the appellants were not raised either before the Arbitrator or before the Court below, and therefore, the appellants are not entitled to raise those pleas for the first time in this appeal. Sri. Gangireddy in support of his submission, would draw the attention of the Court to the provisions of Section 16 of the Act and maintain that if the appellant had any good reason to question the order of this Court made in C.M.P. No. 4 of 1996 appointing the Arbitrator, it ought to have raised such contention at the threshold of the proceedings before the Arbitrator as envisaged under Sub-section (2) of Section 16 of the Act and having failed to do so, it is not permissible for the appellant to raise such plea for the first time in the appeal. Sri. Gangireddy would also maintain that even the second contention based on Clause -15 (a) of the agreement was not at all raised before the Arbitrator and not raised specifically before the Court below. Be that as it may. Sri. Gangireddy would maintain that the Arbitrator as well as the Court below have given cogent and acceptable reasons for awarding a sum of Rs. 2,85,000/- towards reimbursement of overhead charges and another sum of Rs. 2,85,000/- towards compensating the loss of profits and, therefore, no exception can be taken. In reply, Sri. Jayaprakash would maintain that, since the first point raised by him goes to the root of the matter and the award passed by the Arbitrator is a nullity in the eye of law, such plea can be urged by the appellant in this appeal also in view of the Judgment of the Apex Court in the case of Kiran Singh and Others Vs. Chaman Paswan and Others, . Sri Jayaprakash would draw our

attention to sub-para (1) of Para 17-A of the plaint filed by the appellant in the Court below and would maintain that the appellant in fact in the above suit has raised the contention based on Clause 15 (a) of the agreement.

10. Having heard the learned counsel for the parties, the following points arise for our decision :

(1) Whether the appellant can be permitted to raise the ground regarding the alleged want of jurisdiction in this Court to refer the dispute between the parties to an Arbitrator u/s 11 of the Act, for the first time, in this appeal.

(2) Whether the ground regarding the legality and justification on the part of the Arbitrator to award a sum of Rs. 2,85,000/-towards reimbursement of overhead charges and another sum of Rupees 2,85,000/- towards compensating the loss of profits was raised before the Court below, and if it was not raised, whether such plea can be allowed to be raised in this appeal for the first time and if the above plea was in fact raised before the Court below, whether the Arbitrator is justified in awarding a sum of Rs. 2,85,000/- towards reimbursement of overhead charges and another sum of Rs. 2,85,000/- towards compensating loss of profits having regard to Clause 15(a) of the agreement.

11. POINT No. 1 : Before dealing with the point, whether appellant can be permitted to raise the plea that Clause 29 of the agreement executed between the parties, is not an arbitration clause and, therefore, the order made by this Court in C.M.P. No. 4 of 1996 appointing Sri H. S. Bhat as an Arbitrator for adjudication of the dispute and the award dated 15-10-1998 passed by the Arbitrator and the Order dated 20-6-2000 passed by the VI Addl. City Civil Judge, Bangalore in Arbitration Suit No. 6/1998 are nullity in the eye of law, it is appropriate to consider the effect of the provisions of Section 16 of the Act in the decision-making.

12. Section 16 of the Act reads as follows:

"16. Competence of arbitral tribunal to rule on its jurisdiction-- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall

be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or subsection (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or subsection (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

13. The controversy in regard to the competence of the Arbitral Tribunal to rule on its own jurisdiction that existed under the Arbitration Act of 1940 has now been put at rest by Section 16 of the new Act. Section 16 adopts the important principle that it is initially and primarily for the Arbitral Tribunal itself, to determine whether it has jurisdiction subject to ultimate control of the Court. Sub-section (1) of Section 16 grants the Arbitral Tribunal, the power to rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. This power conferred on the Arbitral Tribunal often referred to as "Kompetenz - Kompetenz" is an essential and widely accepted feature of modern arbitration, particularly, the international arbitration. As per the principle of kompetenz-kompetenz, an Arbitral Tribunal is competent to rule on its own jurisdiction in relation to the arbitral proceedings. Sub-section (2) deals with possible plea of a party that the Arbitral Tribunal does not have jurisdiction to decide the case before it or that it is exceeding the scope of its authority. Subsection (2) of the Act aims, in particular, at ensuring that any such objections are raised without delay. The respondent is required to invoke lack of jurisdiction in the Arbitral Tribunal before the submission of statement of defence, unless the Arbitral Tribunal admits a later plea since it considers the delay justified. Further, the Arbitral Tribunal under Sub-section (5) of Section 16 is required to decide a plea of lack of jurisdiction in the first instance. This requirement is very much implied under the provisions of Sub-section (5). Thus, Section 16 empowers the Arbitral Tribunal to rule on its own Jurisdiction as well as on objections with reference to the existence or validity of the Arbitration Agreement. Empowerment of such power on the Arbitral Tribunal u/s 16 indicates the intention of the Parliament and its anxiety to see that the Arbitral Proceedings is set in motion without allowing any hurdle in future.

14. Section 16 does not state whether a party's failure to raise his objections within the time limit prescribed under Sub-section (2) of Section 16 has the effect at the post award stage. It needs to be noticed that the Working Group in its report has pertinently stated that a party who fails to raise plea as required under Article 16(2)(a) which corresponds to Section 16(2) should be precluded from raising such objection not only during the later stages of the arbitral proceedings but also in other contexts in particular, in setting aside proceedings

or enforcement proceedings subject to certain limits such as public policy, including those relating to any objection with respect to the existence or validity of the arbitration agreement. Since Sub-section (2) of Section 16 says that a plea that Arbitral Tribunal does not have jurisdiction should be raised along with (not later than), the statement of defence and since Section 16 does not state that the party's failure to raise his objection within the time limit set by Section 16(2) has any effect of affecting the award at the post-award, stage, the question to consider is whether the plea with regard to want of jurisdiction of the Arbitrator raised by the appellant, for the first time, in this appeal, is required to be entertained.

15. In our considered opinion, the above plea cannot be entertained for more than one reason. Firstly, one of the objects in enacting the Act is to have early completion of arbitration proceedings minimising the supervisory role of Courts in arbitral process. Sections 4, 5 and 16 of the Act have been enacted to give effect to that object. Secondly, even the method of arbitration as a dispute resolution mechanism and the procedure envisaged for that are intended to reach the finality to resolve the dispute between the parties as quickly as possible. Therefore, it is imperative that the party raising jurisdiction point, should raise such plea at the earliest, that is to say, at the threshold of the proceeding. If that is not insisted, it is trite, the very object in enacting the Act, on the basis of the "Uncitral Modern Law", would be defeated. The jurisdiction plea now raised for the first time in the Memorandum of Appeal was not raised either directly or by necessary implication before this Court in C.M.P. No. 4/1996 or before the Arbitrator or before the Court below. The appellant having acquiesced in the jurisdiction of the Arbitral Tribunal without any demur and protest, having participated in the proceedings and having suffered an award cannot now turn round and raise the plea that the orders of this Court in C.M.P. No. 4 of 1996, the award of the Arbitrator and the judgment of the Civil Court dated 20-6-2000 in Arbitration Suit No. 6 of 1998 are nullity.

16. Thirdly, the appellant should be deemed to have waived his right to object to the jurisdiction of the Arbitrator to pass the impugned award in terms of the provisions of Section 4 of the Act. Section 4 reads as follows :--

"4. Waiver of right to object

A party who knows that --

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, without that period of time, shall be deemed to have waived his right to so object"

17. Section 4 narrates the circumstances in which the party, who knowingly fails

to object the non-compliance of any non-mandatory provisions of Part-I or any requirement under the arbitration agreement by the other party, is deemed to have waived his right to object. This section is based on general principles such as "estoppel" or "venire contra factum proprium". It is intended to help the arbitral process function efficiently and in good faith. If there is non-compliance of any non-mandatory provision of Part I or of any requirement of the arbitration agreement by a party to an arbitration agreement of which the other party to the agreement though has the knowledge of such non-compliance but does not object without undue delay, or If a time limit is provided for stating that objection and no objection is taken within that period of time, such a party later on can neither raise objection about that non-compliance of any provision of Part I nor any requirement of the arbitration agreement since such party shall be deemed to have waived its objection. Though, in order to apply the doctrine of waiver by invoking Section 4, the first condition is that the non-compliance must be of non-mandatory provision of Part I or of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, sub-sections (2) and (3) of Section 16 are one of such mandatory provisions. Section 16(2) of the Act provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 16(3) of the Act provides that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

18. In *Radheshyam Kedia Vs. Srinivas Pandit and another*, , the Calcutta High Court has held :

"Where the parties submitted to the jurisdiction of the Arbitrator by filing statement of claim and the counter-claim without raising the question of jurisdiction of the Arbitrator, the award cannot be challenged on the ground of want of jurisdiction."

19. In the case of *Sarkar Enterprise Vs. Garden Reach Shipbuilders and Engineers Ltd.*, , while negating the contention of the petitioner therein that though he did not take the point before the Arbitrator with regard to the jurisdiction of the Arbitrator, he can take such point before the Court u/s 13(5) of the Act, the Calcutta High Court held thus:--

"I am afraid that such submission is true interpretation of the Act. The new Arbitration Act is prepared so liberally by following United Nation Commission on International Trade Law (UNCITRAL) that the question of jurisdiction can be agitated even before the Arbitrator. Section 16 of the Act speaks for the same. Both the aforesaid sections are arising out of different Chapters. Section 13(5) is provided under Chapter III of the Act made for general procedure for arbitration and challenges thereunder. It is not spelt out Jurisdiction particularly unlike Chapter IV where u/s 16 is provided for making application to challenge the jurisdiction before the Arbitrator Special supersedes general. It cannot be the

intention of the Legislature that in each and every stage jurisdiction will be questioned and the motto of expeditious disposal will be spoiled."

20. Fourthly, the question raised in the appeal cannot be said to be a pure question of law. The contention is that Clause 29 of the agreement executed between the parties is not an arbitration clause. Therefore, the question to consider by this Court is whether Clause-29 is an arbitration clause or not. In order to answer the question, it becomes necessary for the Court to interpret and construe the provisions of Clause-29 of the Agreement. This Court in the appeal cannot undertake the interpretation and construction of Clause 29 of the Agreement. In our considered opinion, such course is not opened to this Court in the appeal. The Supreme Court in the case of P.V. Subba Naidu and Others Vs. Government of A.P. and Others, , held as follows :

"In the present case all the claims in question were expressly referred to Arbitrator and were raised before the Arbitrator. The High Court was, therefore, not right in examining the terms of the contract or interpreting them for the purpose of deciding whether these claims were covered by the terms of the contract."

21-22. Therefore, if this Court were to undertake interpretation of Clause 29 of the Agreement, the Court would be committing the same mistake which was disapproved by the Apex Court in the above case. In the case of Paradip Port Trust and Others etc. Vs. Unique Builders etc., , the Apex Court held that an award will not become Invalid merely because by process of inference and agreement it may be demonstrated that the Arbitrator has committed some mistake in arriving at his conclusion. Further, the Apex Court in Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, , a case arising under the 1940 Act held as follows ;

"In this case the arbitration clause is widely worded. The dispute which was referred to the Arbitrators, inter alia, related to the construction of the contract. The contract did visualise the Contractor raising a claim for revision of rates. The dispute was as to when such a claim could be raised. According to the appellant herein this being an interim rate contract the revision of rates could take place, only in accordance with Clause 12-A when there was a deviation of more than 20 per cent with regard to individual items. On the other hand the terms of the contract, according to the claimant, permitted a claim being made of revision in rates if there was an increase of 20 per cent of the total value of the contract. The dispute before the Arbitrator, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The Arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the Arbitrators."

23. The Apex Court having held so, took exception to the Division Bench of the High Court in exceeding its jurisdiction in entering into the facts of the case and interpreting the agreement between the parties and correspondence which was a part of the said agreement and held as follows :

"Even assuming that the Arbitrator had committed an error in coming to the conclusion that the appellant was entitled to the claim of the escalated price of the commodity (hard coke) under the terms of the agreement and the Division Bench felt that the conclusion should have been otherwise, it was not open to it to interfere with the Award on that score."

24. It needs to be noticed that by virtue of the judgments of the Supreme Court in *State of Rajasthan Vs. Puri Construction Co. Ltd. and Another*, ; *Sudarsan Trading Co. Vs. Government of Kerala and Another*, ; *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, ; *U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd.*, and in *K. R. Raveendranathan v. State of Kerala* 1998 (3) Raj 378, it is not within the legitimate power of the Court to undertake interpretation of the contract between the parties. In other words, the Court by purporting to construe the contract cannot take upon Itself the burden of saying that it was contrary to the contract and as such beyond jurisdiction. That is exactly what the appellant seeks before this Court in this appeal.

25. The rules of interpretation are not Rules of law and are not to be applied like the rules enacted by a competent Legislature in an interpretation Act. They only, provide guides to strike a balance between letter and spirit in the process of understanding the real intendment of an enactment or instrument. Interpretation of Clause 29 would involve reading its provision in its context thereby meaning the arbitral agreement as a whole in order to ascertain the real intendment shared by the parties to the contract, Such a process cannot be equated to a process to determine the jurisdiction of the Arbitral Tribunal de hors context and without piercing through the factual penumbra of the case.

26. In the case of *State of Rajasthan and Another Vs. Nav Bharat Construction Co.,* , a counter-claim/set off based on Clause 23 of the Agreement was pressed into service before the Court for the first time. The counter-claim/set off was opposed by contending that the claim was not pleaded in the written statement nor proved by the appellant therein before the Arbitrator and, therefore, such plea would not be allowed to raise for the first time before the Court. The Supreme Court while upholding the contention that such counter-claim for the first time before the Court cannot be entertained, held thus :

"7. Lastly, in the present case, the award passed by the Arbitrator is reasoned one. The contention raised by the learned counsel for the appellant that under Clause 23 of the Agreement between the parties, Contractor was not entitled to recover any interest on delayed payment was neither raised before the Arbitrator, the District Court or before the High Court. This question depends upon the evidence which may be led by the parties as well as interpretation of Clause 23

by the parties and the Arbitrator. The parties have understood that there is no bar on granting interest on delayed payments. It appears that no such contention was raised on behalf of the State of Rajasthan. In this view of the matter, it cannot be held that Arbitrator has committed any error apparent on the face of the record or has misconducted himself in passing the impugned award. It is settled law that scope for setting aside the award is limited to the ground available under the Arbitration Act which have been well defined by long line of decided cases. In this view of the matter, it is not necessary for us to consider the contention of the Contractor that similar clause is interpreted by this Court in Harish Chandra and Company's case (1998 (1) SCC 63 : 1998 (8) JT (SC) 744) (supra) and it is held that there is no bar on granting interest. In our view as the contention was not raised before the Arbitrator or at any stage thereafter, it is not necessary for us to deal with or decide the same in this appeal.

27. In the light of the above authoritative pronouncement of the Apex Court, at this distance of time, it will be totally unjust, improper, and totally prejudicial to the interest of the award-holder to permit such plea being raised. Although Sub-section (2) of Section 16 contemplates that, the plea with regard to jurisdiction may be raised by a party even after submission of statement of defence, in order to entertain such plea, the respondent shall show sufficient and satisfactory cause, to raise such plea at a belated stage. In the instant case, there is total lack of explanation offered by the appellant for not raising the jurisdictional plea either before the Arbitrator or before the Civil Court.

28. In conclusion, we are of the considered opinion that the plea raised by the appellant for the first time in the appeal that Clause 29 of the Agreement is not an arbitration clause, cannot be entertained. Accordingly, we answer Point No. 1 in the negative.

29. POINT No. 2: The contention of the learned Counsel for the appellant is that the Arbitrator is acted illegally in law in awarding a sum of Rs. 2,85,000/- towards reimbursing overhead charges and further sum of Rs. 2,85,000/- towards compensating loss of profits.

30. The above question raised before the Court could hardly be a question of law. It is essentially a question of fact. However, Sri Jayaprakash placing reliance on Clause 15(a) of the Agreement, would maintain that the respondent is not entitled to the above two sums of money awarded under the above two heads. Sri Jayaprakash would draw our attention particularly to the provisions of Clause 15(a) of the Agreement. It provides that the Contractor shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full but, which he did not so derive in consequence of the full amount of the work not having been carried out, or on account of any loss that he may be put on account of materials purchased or agreed to be purchased, or for unemployment of labour recruited by him. Sri Jayaprakash would contend that the Arbitrator in awarding a sum of Rs. 2,85,000/- towards reimbursing overhead charges and further a sum of Rs.

2.85.000/- towards compensating loss of profits, has completely ignored the bar contained in Clause 15(a) of the agreement, Sri Jayaprakash would contend that the illegality committed by the Arbitrator being a jurisdictional error, the appellant can raise the above plea in this appeal. In support of the contention, Sri Jayaprakash placed reliance on the judgment of the Apex Court in the case of Grid Corporation of Orissa Ltd. and Another Vs. Balasore Technical School, . Per contra, Sri. Gangireddy would contend that the above factual plea was not raised before the Court below and, therefore, such factual plea cannot be permitted to be raised in this appeal. Sri Gangireddy would also maintain, alternatively, that the review of a finding of the fact is not within the domain of this Court. At this stage, Sri Jayaprakash would draw our attention to paragraph h(i) of the amended memorandum of plaint filed before the Court below u/s 34 of the Act and maintain that the above plea was in fact raised before the Court below. Paragraph h(i) of the amended plaint reads as follows :

"1. The Hon''ble Arbitrator has failed to notice that the Petitioner would have earned not more than 10% profit by investing men, money and material, whereas merely granted 20% profit with 18% interest at bonus, without considering the terms and conditions of the agreement especially clauses 13, 15, 29, 03 of the Agreement dated 23-9-1994 in the nature of "Form P.W.D.65 schedule of contract form"."

31. From the above extracted portion of the plaint, it cannot be said that the ground raised by the appellant in the memorandum of appeal was in fact raised before the Civil Court. The ground urged in para h(i) before the Court below is as vague as it could be. Be that as It may, from the judgment of the Court below, we find that, what was urged before the Court by the appellant was that the award of the claims for damages is not based on any evidence and, therefore, the award is bad in law. The argument that by virtue of Clause 15 (a) of the Agreement, the respondent-Contractor is not entitled to damage, does not seem to have been addressed to the Court below. The Arbitrator has awarded Rs. 2,85,000/- towards reimbursing overhead charges and further a sum of Rs. 2,85,000/- towards compensating the loss of profits and allowed claims 1 and 3 of the respondent-Contractor placing reliance on the judgment of this Court in Government of Karnataka v. Sudhakar Reddy, MFA 2485 of 1991 and the judgment of the Apex Court in case of A.T. Brij Paul Singh and Others Vs. State of Gujarat, respectively.

32. In the case of Sudharkar Reddy, (supra) the Contractor had a site office, for which he has produced some vouchers and those vouchers were produced before the Court. This Court taking into account the expenditure incurred by the Contractor on the site office, expenditure on head office and establishment, travel costs and all other miscellaneous items, nature of the work and circumstances, awarded 10% of the cost of the overhead charges. In the case of Brijpal Singh, the Supreme Court had allowed loss of profit in similar circumstances. Therefore, on merit also, it cannot be said that the award of Rs.

2.85.000/- towards reimbursing overhead charges and further sum of Rs. 2,85,000/- towards compensating loss of profits is illegal or arbitrary.

33. In conclusion, we hold that the plea contained under Clause 15(a) of the Agreement was not specifically raised before the Court below, though there is some reference to Clause 15 generally in para h(i) of the amended plaint. Be that as it may the award of Rs. 2.85.000/- towards reimbursing overhead charges and further a sum of Rupees 2,85,000/- towards compensating loss of profits is also justified, legal and in conformity with the law laid down by this Court and the Apex Court.

In the result and foregoing reasons, we dismiss the appeal with cost. The Advocate's Fee is fixed at Rs. 1000/-.