
(1990) 09 BOM CK 0071

In the Bombay High Court

Case No : Arbitration Petition No. 47 of 1989 in Award No. 126 of 1988

La"Builde Corporation

APPELLANT

Vs

Hira Investment Pvt. Ltd.

RESPONDENT

Date of Decision : 13-09-1990

Acts Referred:

Arbitration Act, 1940 — Section 15, 20, 20(1), 30

Citation : (1990) 3 BomCR 777

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : Pravin Samdani, instructed by Pravin Mehta and Co, for the Appellant; A.Y. Bookwala., instructed by Bhatt and Co., for the Respondent

Judgement

D.R. Dhanuka, J.—The petitioners have filed this petition to set aside an Award dated 13th September, 1988 made by the Arbitrators-Shri K.K. Desai former Chief Justice of our High Court, and one Shri D.A. Kothari. By the said Award, the learned Arbitrators have directed the petitioners to pay a sum of Rs. 1,66,000/- to the respondents with interest thereon at the rate of 12% per annum from 16th July, 1984 till payment. The said Award is a lump sum Award in respect of claims Nos. 1 and 4 made by the respondents in their Statement of Claim dated 16th July, 1984 filed before the Arbitrators. By the said Award, the learned Arbitrators have rejected claims Nos. 2 and 5 appearing in the Statement of Claim and have declared that claim No. 3 as premature. Accordingly, reference would be made in subsequent paragraphs of this judgment only to claims Nos. 1 and 4.

2. It was agreed between the Counsel at the hearing that the learned Arbitrators could not award interest having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of M/s. Hind Builders Vs. Union of India, and other recent cases. Mr. Bookwala, learned Counsel for the respondents, rightly conceded that the Award by modified by deleting the direction contained therein for payment of interest. I accept the said concession and modify the Award

accordingly. It has been repeatedly held by the Hon"ble Supreme Court that serious anomalies are discovered in the existing law by reason of the arbitrators being not entitled to award interest pendente lite. Such anomalies have been highlighted in the above-referred judgment of the Hon"ble Supreme Court in the case of Hind Builders v. Union of India It is unfortunate that this serious lacuna is still not remedied by the Legislature which should be ever vigilant to remove injustice whenever noticed and whenever pointed out. I shall refer to the urgency of law reform on this aspect in the later part of this Judgement.

3. The petitioners have challenged the Award on several grounds. The petition has been argued at length. The petition has a chequered history, as would be obvious from the bare narration of facts to follow. After careful consideration of all the submissions urged on behalf of the petitioners, I have come to the conclusion, for the reasons set out in the later part of this Judgment, that there is no merit in the challenge and the challenge made by the petitioners to the Award is liable to fail, except in respect of claim for interest. before the grounds of challenge are set out and are dealt with, it is necessary to refer to the basic facts of the case, the facts leading to the "first reference" to arbitration under Agreement of Reference dated 26th July, 1979 culminating in Award dated 26th June, 1981 and also leading to making of "second reference" and the "impugned Award".

Basic facts

(a) At all material times, the respondents were owners of a large plot of land situate at Kurla bearing Survey No. 292, Hissa No. 1 (Part) admeasuring 23, 825 square yards = 19,920 square metres or thereabouts. The respondents applied to the Municipal Corporation of Greater Bombay for saction of lay-out and subdivision of the said plot. The Municipal Corporation sanctioned the lay-out and sub division on various conditions inter alia on the condition that the respondents would be liable to construct 22 feet wide access road and 60 feet wide D.P. Road. Plans were sanctioned for construction of seven buildings. The respondents incurred expenditure on filling up of the land Certain garden plots were required to be kept reserved as a part of the scheme for development of the said entire plot, including the portion thereof developed by the petitioners as set out hereafter. By an Agreement dated 9th December, 1974, the respondents appointed one M/s. Makwana & Sons as their contractors for construction of seven buildings on the said plot.

(b) By an Agreement of Development dated 30th May, 1978, the respondents conferred development rights on the petitioners to construct buildings "B" and "E" on part of the said plot for the consideration and on the terms and conditions set out therein. By clause 2 of the said Agreement, it was provided that the petitioners shall pay a sum of Rs. 17,48,000/ to the respondents as the price in respect of F.S.I. to be consumed by the petitioners in respect of the said buildings "B" and "E" i.e. to the extent of 64,195 square feet of the built-up area, towards the cost of the land for garages, piling and development work

carried out by the respondents. It was stated in the said clause that the said agreed price of Rs. 17,48,000/- included a sum of Rs. 1,06,000/- towards the cost for the development work including the filling up of the land consisting of buildings "B" and "E" which work was done by the respondents through their contractors M/s Makwana & Sons. By Clause 6 of the said Agreement, it was provided that the respondents could carry out the construction work in respect of buildings "B" and "E" through M/s Makwana & Sons or any other contractor. It was, however, provided in the said clause that in the event of the petitioners changing the contractors or not carrying out the work through M/s. Makwana & Sons, the petitioners shall be liable to bear and pay the proportionate cost of the development work and of carrying out of the terms and conditions of the lay-out on the relevant date in the ratio of the F.S.I. being developed by the petitioners out of the total F.S.I. available. By Clause 7 of the said Agreement, the respondents undertook responsibility to carry out all the terms and conditions of the lay-out, including the construction of substation, access road, D.P. Road, etc. Relevant portion of Clause 32(a) of the said Agreement provided that the petitioners shall be liable to pay municipal taxes for the land under development "in respect of the buildings "B" and "E" and the proportionate N.A. assessment for the said two buildings from the date of the Agreement till occupation certificate etc. Rest of the clauses of the said Agreement pertain to other claims which were not accepted by the learned Arbitrators, i.e claims Nos. 2, 3 and 5 in the Statement of Claim dated 16th July, 1984 filed by the respondents before the Arbitrators Shri K.K. Desai and Shri D.A. Kothari, and have no relevance to this petition.

(c) On 26th July, 1978, a Supplement Agreement was arrived at between the petitioners and the respondents, the said Agreement being part and parcel of the Agreement dated 30th May, 1978. Clause 2 of the Said Supplement Agreement constitutes the arbitration clause. It is, therefore, necessary to reproduce Clause 2 of the said Supplemental Agreement. The said clause reads as under :---

"2. The parties hereto hereby agree that all the matters, differences and disputes arising out of or in connection with the said agreement dated the 30th day of May, 1978 and in the carrying out of the terms conditions and provisions contained therein and incidental thereto shall be referred to two arbitrators one to be appointed by each party and in case of difference between the arbitrators to an Umpire to be appointed by the arbitrators before entering into the references in accordance with the subject to the provisions of the Arbitration Act, 1940."

(d) The respondent paid municipal taxes in respect of building "B" and building "E" which were payable by the petitioners for different periods varying from 1st April, 1978 onwards. The respondents also paid municipal taxes in respect of various garden plots forming part of the common lay-out for the period 1st April, 1980 to 31st March, 1982. By their letter dated 28th January, 1979 M/s. Makwana & Sons forwarded an estimate to the respondents in respect of the

proposed expenditure on proposed access road required to be built, etc. On 28th January, 1979 the respondents called upon the petitioners to pay a sum of Rs. 81,800/- being the alleged pro rata share of the petitioners in respect thereof. By letter dated 31st March, 1979, the respondents also called upon the petitioners to reimburse the respondents in the sum of Rs. 25,795/- on account of property taxes paid in respect of buildings "B" and "E". Disputes and differences arose between the petitioners and the respondents which led to appointment of arbitrators and execution of the first Agreement of Reference dated 20th July, 1979. The petitioners appointed M/s. Makwana & Sons as their contractors for completion of buildings "B" and "E" Disputes and differences arose between the petitioners and M/s. Makwana & Sons leading to filing of Bombay City Civil Court Suit No. 2180 of 1980. In the suit, claims were referred to one Mr. Roshanally Namavati, architect, for evaluation. The petitioners caused the construction of the said buildings "B" and "E" to be completed by making some other arrangement, i.e not through M/s. Makwana & Sons, thus attracting Clause 6 of the Agreement.

(e) It shall be now necessary to summarise the facts relating to "the first reference" and the Award made pursuant thereto.

First Reference

(f) By an Agreement of Reference dated 26th July, 1979, the petitioners and the respondents referred their various claims and counterclaims to the arbitration of Shri K.K. Desai and Shri J.G. Bodhe. The respondents filed their Statement of Claim and Counter-claim before the said Arbitrators. In paragraph 7 of the said Statement of Claim, it was stated by the respondents that the respondents were entitled to recover a sum of Rs. 81, 800/- from the petitioners, being the proportionate share of "development cost" in view of the estimate received from M/s. Makwana & Sons for carrying out certain development work. It was stated in paragraph 12 of the said Statement of Claim that the petitioners were also liable to pay a sum of Rs. 25,795/- on account of proportionate taxes pertaining to buildings "B" and "E" for the period upto 31st March, 1979. The petitioners filed their reply to the said Statement of Claim and Counter-Claim before the learned arbitrators inter alia contending that the petitioners could not be liable to pay their share of cost of development work merely on the basis of estimate received by the respondents from M/s. Makwana & Sons. To quote the words of the petitioners from the Statement of Reply filed by the petitioners in the first reference, the petitioners stated as under:---

"The payment of development cost can never be on the estimate furnished by the contractor and that too in advance."

As regards the claim for Rs. 25,795/- is concerned, the petitioners raised disputes and contentions in paragraph 18 of their Statement of Reply, even though the petitioners had at one stage deposited a sum of Rs. 25,795/- with their common architect on or about 4th April, 1979 by cheque, which cheque was

later on returned by the architect to the petitioners. On 26th June, 1981, Shri K.K. Desai and Shri J.G. Bodhe made and published their first Award in respect of the claims which were subject-matter of the first reference, holding that the respondents herein were not entitled to recover any amount from the petitioners and the petitioners herein were entitled to recover a sum of Rs. 1,34,600/- from the respondents. A decree was passed in terms of the said Award dated 26th June, 1981 and the amount payable under the said Award was paid by the respondents to the petitioners. It may be stated in passing that construction of the said buildings "B" and "E" was completed sometime in March 1981 and the occupation certificate in respect thereof was received by the petitioners by that time. It shall now be appropriate to refer to the material fact which led to the making of the second reference culminating in the impugned Award.

Second Reference

(g) By their Advocates' letter dated 2nd April, 1983, the respondents made a demand inter alia in respect of their claim for Rs. 13,493/- on account of property taxes in respect of buildings "B" and "E" for Rs. 8,815. 60 p. being the proportionate share of property taxes of garden plots for the period 26th June, 1980 to 31st March, 1982. It is not necessary to refer the other claims set out in the said letter. In view of the contentions urged on behalf of the petitioners at the hearing, it is necessary to state that no claim was made in this letter seeking any contribution from the petitioners in respect of "development cost" In terms of Clause 6 of the Development Agreement of other wise. In paragraphs 3 and 4 of the said letter, it was stated that the respondents reserved their rights to make additional claims receivable by the respondents from the petitioners under the Development Agreement dated 30th May, 1978. By the said letter, the respondents made a total claim of Rs. 1.37, 658.60 P. By their letter dated 5th October, 1983, the respondents called upon the petitioners to appoint their arbitrator within 15 days from the receipt of the said letter. In this letter also, no reference was made of the alleged outstanding liability of the petitioners to contribute amounts towards the "development cost". By their Advocates' letter dated 21st October, 1983, the petitioners disputed the claims made by the respondents and also contended that the appointment of Shri D A. Kothari as an arbitrator was not valid. By their Advocates' letter dated 10th November, 1983 addressed to the advocates for the respondents, the petitioners appointed Shri K.K. Desai, former Chief Justice of our High Court, as their arbitrator. It was stated by the Advocates for the petitioners in the said letter that the appointment of Shri K.K. Desai as an arbitrator was made by the petitioners "without prejudice to all the rights and contentions of their clients and in particular without admitting the existence of any arbitration agreement for the reference of the claim for Rs. 1,37,658. 60 P. and interest...." Along with his letter dated 21st November, 1983, the Advocate for the respondents forwarded a draft of the Agreement for Reference to Shri K.K. Desai and Shri D.A. Kothari for approval by the petitioners, particularising the claims of the respondents in greater detail. The petitioners did not approve the said draft. On 2nd December,

1983, the respondents herein filed an application u/s 20 of the Arbitration Act, 1940, registered as Arbitration Suit No. 2494 of 1983, for filing of the Arbitration Agreement contained in the said supplemental Agreement dated 26th July, 1978 forming part of the said original agreement dated 30th May, 1978 and for a direction to make the reference in respect of the claims in terms of the above-referred draft Agreement of Reference, a copy where of was annexed as Exhibit C. to the plaint in the said Arbitration Suit No. 2494 of 1983. In paragraphs 17, 23 and 25 of the plaint in the said Arbitration Suit No. 2494 of 1983 no reference is to be found to the respondents' claim on account of the petitioners' alleged liability to pay pro-rata cost of development and layout in terms of Clause 6 of the development Agreement dated 30th May, 1978. However, one finds specific reference to the said claim of the respondents under the head of "Development Cost" in the annexure to the above referred letter dated 21st November, 1983, i.e. draft agreement of reference. In the said draft agreement of reference, being Exhibit "O" to the plaint in the said Arbitration Suit No. 2494 of 1983, claims of the respondents were particularised and one of such claims reads as under:---

"For Rs. 3,08,604/- being the amount payable by the Developers to the owners on account of the cost of development and lay out in terms of Clause 6 of the Development Agreement in view of the change of contractors and/or discontinuing the contractors M/s. Makwana & Sons as per the said Clause 6 of the Development Agreement dated 30th May, 1978."

Thus, at least by November 1983, it was made clear to the petitioners by the respondents that the claims of the respondents to be referred to arbitration were not restricted to the claims specified in the said letters dated 2nd April 1983 5th October, 1983 and included the claim of the respondents against the petitioners on account of the cost of development and lay-out in terms of Clause 6 of the said Agreement dated 30th May, 1978. By 21st November, 1983, it was communicated to the petitioners by the respondents, as is obvious from the covering letter dated 21st November, 1983 forwarding draft of the proposed Agreement Ex. "O" that such a claim in the sum of Rs. 3,08,604/- was required to be arbitrated upon and referred to arbitration. On 15th November, 1983, M/s Pravin Mehta & Co., Advocates and Solicitors, representing the petitioners, requested Shri K.K. Desai and Shri D.A. Kothari, arbitrators, to enter upon the reference and call a preliminary meeting for the purpose of necessary directions. Thus reference was made to the arbitrators under Chapter II of the Arbitration Act, 1940 On 29th November, 1983, notice was issued by the learned Arbitrators calling a preliminary meeting on 7th December, 1983. It is not necessary to refer of the particulars of meetings called by the learned arbitrators. It is obvious to me on perusal of the record of the arbitration proceedings forwarded by the learned arbitrators that the parties made a reference to the learned Arbitrators under Chapter II of the Arbitration Act, 1940. This is not a case of arbitration through intervention of the Court under Chapter III of the Act, i.e. where the arbitration agreement was first filed in Court and the arbitration proceeded thereafter in pursuance of order of reference made by the Court. It appears to be

a well-settled proposition of law that if the parties proceed with the arbitration without intervention of Court under Chapter II of the arbitration Act, 1940, the parties cannot thereafter invoke section 20 of the arbitration Act, 1940, for filing of the arbitration agreement, as the remedies available to the parties to proceed with the arbitration under Chapter II or Chapter III of the Act are available in alternative. In other words, if the parties to the arbitration agreement take resort to proceed to arbitration under Chapter II of the Arbitration act, 1940, and make necessary appointment of the arbitrator and proceed with the arbitration without intervention of the Court, question of filing of the arbitration agreement and resorting to Chapter III of the Arbitration Act, 1940, reads as under :-

"20. (1) Where any persons have entered into an arbitration agreement before of the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court."

The above-referred provision of law will have to be borne in mind for the purpose of interpreting the order dated 9th March, 1984 passed by this Court is Arbitration Suit No. 2494 of 1983 referred to hereafter. On 9th March, 1984, the Hon'ble Mr. Justice S.C. Pratap passed the following order disposing of Arbitration Suit No. 2494 of 1983 :-

"As the parties have already made a reference and as the arbitrators are also seized thereof, the arbitrators will proceed therewith on its own merits, taking into consideration all the objections of the respective parties including objections of the defendant that part of the dispute now sought to be referred to arbitration already stands covered by the earlier reference either expressly or impliedly and, therefore, the said dispute is barred. Order accordingly on this petition, which in view thereof, no longer survives.

2. Petition disposed of No. order as to costs."

(The Bold words are done to supply emphasis).

It is obvious to me that the above-referred order cannot be interpreted to mean an order for filing of arbitration agreement and making of order of reference under Chapter III of the Arbitration Act 1940. It shall now be convenient to make a brief reference to the proceedings held before the learned arbitrators Shri K.K. Desai and Shri D.A. Kothari, as the facts relating thereto are germane for appreciating some of the contentions urged on behalf of the petitioners. In relation to the impugned Award.

Proceedings of Second Reference and the impugned Award

(h) The learned Arbitrators held large number of meetings. The arbitrators have maintained minutes of these meetings and recorded notes of arguments urged on behalf of both sides. The arbitrators gave full opportunity of hearing to the

parties, including the opportunity to file pleadings and compilations. The said meetings were held on 25th January, 1984, 25th June, 1984, 11th October, 1984, 19th November, 1984, 11th December, 1984, 1st February, 1985, 27th May, 1986, 19th June, 1986, 7th July, 1986, 25th July, 1986, 6th August, 1986, 17th September, 1986, 26th September, 1986, 9th September, 1987, 18th September, 1987, 25th September, 1987, 29th October, 1987, 7th November, 1987, 11th December, 1987, 18th December, 1987, 30th December, 1987, 6th April, 1988, 20th April, 1988, 23rd June, 1988, 8th July, 1988, 15th July, 1988, 5th August, 1988, 12th August, 1988, and 16th August, 1988. The arbitrators served notice of closing of reference for the parties. Time for making of the said Award was extended by consent of the parties from time to time and the last of such extension for the period upto 30th September, 1988 was agreed upon between the petitioners and the respondents on 16th August, 1988. On 16th August, 1988, a written application was made by the petitioners and the respondents through their learned advocates that the date for making of the Award be extended from 31st August, 1988 to 30th September, 1988. It is not necessary to refer to all the orders of extension passed by the Hon'ble Court or by the arbitrators with consent of the parties. The said consent application dated 16th August, 1988 clearly shows that the parties had no genuine grievance in respect of the said arbitration proceedings and were quite willing that the arbitrators should make their award on merits by 30th September, 1988. Now since the award has against the petitioners, all sorts of contentions have been raised by and on behalf of the petitioners.

(i) The learned Advocates for the parties made detailed oral arguments before the learned arbitrators. The gist of the said arguments is obvious from the notes of hearing maintained by the arbitrators. On 12th July, 1988, for the first time, the learned Advocate for the petitioners tendered written arguments before the learned arbitrators, which the arbitrators declined to take on record. On 5th August, 1988, the said written arguments were forwarded by the petitioners to the arbitrators by post with a covering letter. The minutes of the meeting held on 5th August, 1988 read as under :-

"Same appearances. 5-8-88

In spite of ruling that arbitrators will not accept written arguments respondents have forwarded by post to the arbitrators the written arguments. We have returned the copies to Miss Joshi."

On behalf of the petitioners an application was thereafter made by Mr. Samdani, learned Advocate for the petitioners, to the learned arbitrators on 16th August, 1988 that the learned arbitrators should make a reasoned award. The said application was rightly rejected. On the same day, parties signed their consent application for extension of time to the making of the award by the arbitrators from 31st August, 1988 to 30th September, 1988. On 13th September, 1988, the learned arbitrators made and published their award

Submissions of Counsel

(i) Mr. Pravin Samdani, the learned Counsel for the petitioners, has impugned the said award on the following grounds:-

(i) (a) The learned arbitrators had no jurisdiction to decide the claim of the respondents for municipal taxes in respect of garden plots and the said claim was beyond the scope of the reference.

(b) The learned arbitrators had no jurisdiction to determine the claim of the respondents in the sum of Rs. 3,00,000/- (approx.) on account of cost of development alleged to be referable to Clause 6 of the Development Agreement dated 30th May, 1978, as the said claim was not the subject-matter of Pratap, J., dated 9th March, 1984 in Arbitration Suit No. 2494 of 1983.

(ii) The Arbitrators misconducted the arbitration proceedings by not giving reasonable opportunity of hearing to the petitioners and particularly by returning the written submission.

(iii) The arbitrators did not applied their mind to the facts of the case and disregarded material documents. The arbitrators disregarded the plea of the petitioners to the effect that at least part of the respondents' claim was barred by limitation and a part of the respondents claim was barred by principles analogous to res judicata, the same having been made the subject-matter of the first reference and rejected under the first award.

(iv) The impugned award was not in accordance with law.

(v) The impugned award was perverse.

(vi) The arbitrators were biased against the petitioners.

4. Mr. Bookwala, learned Counsel for the respondents, seriously contested the validity of each of submissions made on behalf of the petitioners. Mr. Bookwala contended that the arbitrators were entitled to make a lump sum award in respect of claims Nos. 1 and 4 in the Statement of Claim dated 16th July, 1984 and it could not be, therefore, said as to which of the claim of the respondents was accepted and to what extent. Mr. Bookwala contended that it was not permissible for the petitioners to ask the Court to speculate and probe into the mental process of the learned arbitrators in view of the said award, being a lump sum award without disclosing any reasons. Mr. Bookwala contended that the claim of the respondents was covered by the arbitration clause, i.e. Clause 2 of the Supplemental Agreement and the said award was a lawful award. Mr. Bookwala made reference to Exhibit "O" to the plaint in Arbitration Suit No. 2494 of 1983 and contended that the claim of the petitioners seeking to set aside that said award was liable to be dismissed, save and except in respect of award of interest. Mr. Bookwala also contended that questions of law were specifically referred to the learned arbitrators under the order of Pratap, J., dated 9th March, 1984 and the petition was, therefore, also not maintainable on the ground of

alleged error of law. I shall deal with the relevant submissions of the Counsel on either side at their appropriate place in the later part of this judgment. I shall deal with contentions Nos. 3 to 6 together for the sake of convenience, as the discussion was overlapping and there is no merit at all in any of those contentions. I shall deal with contentions Nos. 1 and 2 in greater detail.

Findings, reasons and conclusions

5. Clause 2 of the Supplemental Agreement constitutes the Arbitration Agreement between the parties. The said clause is very wide and takes within its sweep all disputed claims arising out of or in connection with the Development Agreement dated 30th May, 1978. Claim for payment of municipal taxes in respect of buildings "B" and "E" is clearly referable to the provision contained in the said Development Agreement and is covered by the Arbitration Agreement/arbitration clause. Claim for payment of pro rata taxes paid in respect of garden plots forming part of the entire layout is also referable to Clause 32(a) of the Development Agreement. Garden plots are required to be reserved and kept unbuilt as an integral part of the entire development scheme and have direct nexus with the construction of buildings "B" and "E" on the said plot. It is not possible to accept the submission urged on behalf of the petitioners that Clause 32(a) of the Development Agreement should be construed so as to limit the same in its application to the lands directly concerning buildings "B" and "E" only. The expression "in respect of" used in the said clause is wide enough. The Court must take a common sense view of the matter and promote reasonableness and honesty and ensure business efficacy while interpreting the commercial documents and contracts. Claim for pro rata contribution in respect of development cost for the entire plot is clearly covered under Clause 6 of the Development Agreement dated 30th May, 1978. In my judgment, the relevant claims, i.e. claims at Serial Nos. 1 and 4 in the Statement of claim dated 16th July, 1984 are covered by the above-referred Arbitration Agreement/Arbitration clause.

6. It was argued by the learned Counsel for the petitioners that the reference made to the arbitrators was only in respect of claims set out in letters dated 2nd April, 1983 and 5th October, 1983 addressed by or on behalf of the respondents to the petitioners. It was argued that no reference was made to the arbitrators in respect of development cost and the arbitrators acted beyond their authority and jurisdiction by entertaining the said claim. It was clearly stated in paragraphs 3 and 4 of letter dated 2nd April, 1983 that the respondents reserved their right to make further claims arising out of the Development Agreement dated 30th May, 1978. The respondents notified their claim relating to alleged pro rata liability of the petitioners to pay development cost in sum exceeding Rs. 3,00,000/- in the draft to the Agreement of Reference forwarded to the petitioners with their Advocates' letter dated 21st November, 1983 particularising all the claims. Claims of the respondents sought to be referred to arbitration are particularised

in the said draft agreement. Sub-clause (e) of Clause 1 of the said draft reference makes reference to the claim for cost of development in the following words:-

"For Rs. 3,08,604/- being the amount payable by the Developers to the owners on account of the cost of development and layout in terms of Clause 6 of the Development Agreement in view of the change of contractors and/or discontinuing the contractors M/s. Makwana & Sons as per the said Clause 6 of the Development Agreement dated 30th May, 1978."

In my judgment, the subject-matter of the reference actually made to the arbitrators cannot be restricted in the manner attempted by the petitioners, particularly when the cost of development referable to Clause 6 of the Agreement of Development is covered by the arbitration clause. I am not prepared to take a hyper-technical view of the matter and hold that the reference made was restricted only on respect of claims set out in the said letters and 2nd April, 1983 and 5th October, 1983. It is not one of these cases where the scope and ambit of the reference is subsequently enlarged and the arbitrators entertained claim at a late stage not covered by the arbitration clause or terms of reference. The arbitration clause covers all the claims. Reference made must be correlated to the arbitration clause. Disputes raised by the petitioners cannot be examined by ignoring Exhibit "O" to the plaint in Arbitration Suit No. 2494 of 1983. The very same exhibit was forwarded by the Advocates for the respondents to the petitioners with covering letter dated 21st November, 1983.

7. Mr. Samdani, learned Counsel for the petitioners, has invited my attention to the averments made in the plaint in the Arbitration Suit No. 2494 of 1983 filed by the respondents u/s 20 of the Arbitration Act, 1940. The said Arbitration Suit was filed on 2nd December, 1983. By prayer (a) of the plaint of the said suit, the respondents sought a direction against the petitioners to approve and execute the draft agreement of reference, Ex. "O" thereto. Mr. Samdani has invited my attention to paragraphs 17, 23 and 25 of the plaint of the said suit. It is true that in the said paragraphs of the plaint no reference is to be found to the claim for development cost. The plaint in the said arbitration suit cannot be divorced from prayer (a) of the plaint and Exhibit "O" thereto. Annexures to the plaint or part of the plaint. If the said three paragraphs of the plaint are read together along with prayer (a) of the plaint and Exhibit "O" thereto, it becomes clear that the respondents sought order of reference from the Court inter alia in respect of claims for municipal taxes pertaining to buildings "B" and "E" garden plots and also in respect of alleged liability of the petitioners to pay pro rata cost of development in sum exceeding Rs. 3,00,000/-. Mr. Samdani has argued before me that the order of the Hon'ble Mr. Justice Pratap dated 9th March, 1984 should be viewed as an order of reference u/s 20 of the Arbitration Act, 1940 and the said order should be interpreted so as to restrict its scope to claims enumerated in paragraphs 17, 23 and 25 of the petition only without any reference whatsoever to the above-referred exhibit "O" to the plaint. In my judgment

order dated 9th March, 1984 does not amount to an order of reference passed by the Court u/s 20 of the Arbitration Act, 1940. This Court did not direct the parties to file the arbitration Agreement in Court. Parties had already proceeded with the arbitration under Chapter all of the Arbitration Act, 1940. Parties had a choice to proceed with the arbitration under Chapter II or under Chapter III. In view of this clear position in law, I decline to hold that the said order dated 9th March, 1984 passed by Pratap. J., was an order of reference under Chapter III of the Arbitration Act, 1940. I decline to hold that the said order dated 9th March, 1984 amounts to an order for filing of the arbitration agreement in Court or for an order of reference directed by the Court, and that too after excluding the claim for development cost. With respect, the order dated 9th March, 1984 opens with the keyword already underlined by me for the sake of emphasis, i.e. "As the parties have already made a reference and as the arbitrators are also seized thereof". In this view of the matter, I hold that the learned arbitrators had the necessary authority and jurisdiction to decide claims at Serial Nos. 1 and 4 set out in the Statement of claim dated 16th July, 1984 by virtue of Clause 2 of the Supplemental Agreement dated 26th July, 1978 and the arbitrators did not exceed their authority by entertaining the claims for property taxes in respect of buildings "B" and "E" or garden or the claim for pro rata contribution in respect of cost of development covered under Clause 6 of the said Development agreement. I have no hesitation in rejecting the submission of the learned Counsel for the petitioners to the effect that the impugned award, wholly or partly is beyond the jurisdiction of the learned arbitrators. It must also be stated in passing that the petitioners have take full part in the arbitration proceedings on the merits of the claim and the petitioners should not have raised such contentions merely because the impugned award happens to be against the petitioners. The petitioners had invited the learned arbitrators to reject the claim of the respondents on merits on the footing that the arbitrators had jurisdiction to decide the claims and the reference made or entertained was not beyond their authority.

8. Shri Samdani, learned Counsel for the petitioners, then argued that the learned arbitrators had violated principles of natural justice, exhibited bias and denied reasonable opportunity of hearing to the petitioners by refusing to take written arguments on record and by returning the same when sent by post as recorded by the learned arbitrators in the minutes of the meeting held on 5th August, 1988. In my opinion, it would have been much better if the learned arbitrators would have kept the written arguments of the petitioners on record instead of returning the same to the petitioners. It is not sufficient that justice is done. It is also necessary that justice must appear to have been done. I am, however, satisfied that having regard to the totality of facts in this case and the ample opportunity granted by the learned arbitrators to the parties, the impugned Award is not liable to be set aside merely on the ground that the learned arbitrators refused to take written arguments of the petitioners on record. It is obvious from the record forwarded by the learned arbitrators and the

number of meetings held by then and the notes of arguments maintained by them that the learned arbitrators fully applied their mind to all the contentions urged before them, considered all the documents and substantially complied with all the principles of natural justice. The petitioners have not suffered any prejudice merely by reason of the said written arguments having not been kept on record. The arbitrators can follow such procedure as they deem fit and if on an overall view the courts come to the conclusion that the procedure followed is just and fair, an award cannot be set aside merely because it would have been better if some other procedure was followed by the Arbitrators. It is impossible to hold that the learned Arbitrators misconducted the proceedings or exhibited bias or committed breach of principles of natural justice or did not apply their mind or that their Award is perverse. In my judgment, the learned Arbitrators were final judges to determine questions of fact and questions of law urged before them. There is no error of law apparent on the face of the Award. It is too well settled that an award can be assailed on limited grounds and not generally. In my opinion, none of such grounds exist in this case. It was *International Airports Authority of India Vs. K.D. Bali and Anr*, that the arbitrators have acted with bias and were at fault by not recording in the minutes of meeting what was argued before them. The said argument was rejected by the Hon'ble Supreme Court. Relevant paragraph 7 of the above-reference judgment reads as under :-

"7. The learned judge (of the High Court of Bombay) had examined the five circumstances advanced before him. The first was that the arbitrator did not record the minutes of the meetings after September 29, 1987. The learned Judge found that there was no merit in this complaint. After 29th September, 1987 the petitioners' advocate orally made submissions that the arbitrator had no jurisdiction to entertain the dispute. The Advocate for the petitioner also desired to file written arguments and the arbitrator did not object to the same. In spite of it the petitioner insisted that the arbitrator should record the minutes setting out the entire oral arguments advanced on behalf of the petitioner. This in our opinion was not a reasonable request to make and the arbitrator had rightly declined to do so. This is no basis of any reasonable apprehension of bias."

(Bracketed portion supplied.)

I respectfully follow the said judgment and hold that the petitioners have failed to prove their allegations of bias against the learned arbitrators. I have no hesitation in holding that the allegations of "bias" made against the learned arbitrators are not bona fide. It was held in the above case that the apprehension of bias must be judged from a healthy and reasonable point of view and not as mere apprehension of any whimsical person.

9. It was argued by Mr. Samdani that part of the claim which was made subject matter of the second reference by the respondents was already covered by the first reference and the Award made in the first reference. It was argued by the learned Counsel for the petitioners that such claim was, therefore barred by principles analogous to *res judicata*. Only part of municipal taxes in respect of

buildings "B" and "E" in the sum of about Rs. 25000/- and odd was subject-matter of the first reference as well as the subject-matter of the second reference. Claim for municipal taxes in respect of garden plots was not subject-matter of the first reference. Claims for pro rata contribution in respect of development cost in the first reference for a sum of Rs. 83,000/- and odd was a totally different claim and at that stage the claim was made by the respondents against the petitioners merely on the basis of estimate received by the respondents from M/s. Makwana & Sons. The claim made by the respondents seeking contribution from the petitioners in respect of development cost, which is the subject-matter of the second reference, is not the same claim which was made the subject matter of the first reference. There is some substance in the plea of the learned Counsel for the petitioners when he contends, that part of the claim in respect of municipal taxes for buildings "B" and "E" amounting to Rs. 25,000/- or near about could not have been made the subject-matter of the second reference, as it already the subject-matter of the first reference and the first Award. However, the said plea loses its significance when it is viewed in the context of the Award being lump sum award in respect of claims 1 and 4. The learned arbitrators have made a composite award in respect of claims particularised at items 1 and 4 and have awarded a total sum of Rs. 1,66,000/- only against the total claim of Rs. 3,38,706/-. It is not possible to speculate and hold that the learned arbitrators awarded the above referred claim for municipal taxes in respect of buildings "B" and "E" which was already the subject-matter of the first reference. It is neither possible nor permissible to speculate on these aspect and the award cannot be assailed in the manner attempted to be done by the petitioners. Perhaps the claim made by the petitioners, which was already the subject-matter of both reference, was not awarded.

10. It was then argued by the learned Counsel Mr. Samdani that part of the claim which was made the subject-matter of the second reference was barred by law of limitation and the learned arbitrators ignored the law of limitation while making the Award/It is not possible to accept this submission. It was for the learned Arbitrators to make their decision on the plea of limitation. In a non-speaking award, it is not permission to into the mental process of the learned Arbitrators and to speculate as to what have been done by the arbitrators, particularly when the award is a non-speaking composite award in respect of items 1 and 4 in the Statement of Claim. Mr. Samdani advanced elaborate arguments on merits by referring to Compilations filed and attempted to demonstrate that no reasonable person could have made such an award and it is perverse. I am afraid, the exercise attempted by Mr. Samdani is an exercise in futility and the Court is not expected to evaluate evidence. Even otherwise, there is no merit in the submission made. I do not think it necessary to deal with contentions 3 to 7 in detail. Each of these contentions is without any merit and deserves to be rejected without any more discussion.

11. Now it is time to refer to some of the authorities cited at the Bar. Mr. Bookwala, learned Counsel for the respondents, relied on the ratio of the Division

Bench judgment of our High Court in the case of Rashtriya Chemicals and Fertilizers Limited Vs. Mohindersingh and Co. and Another, . The Hon" ble Division Bench of our High court has observed and held in this case that the learned arbitrator was entitled to make a lump sum award and was not bound to make a separate award in each item. It was held by our High Court that the learned arbitrator was not bound to give reasons or lay down any principles on which he based his decision. It is a well settled proposition of law that it is not permissible to probe into the mental process of the learned arbitrators or to speculate as to what impelled them to make the award or to indulge in conjecture about the calculation which must have been made by the arbitrators before arriving at a particular figure. In that case also, the award was challenged on the ground that the same was perverse. In this context, the Hon"ble Division Bench observed as under:-

"Mr. Thakker (i.e. Mr. G.A. Thakkar, learned Counsel for the appellant) attempted to take us through certain records before the arbitrator. The fallacy of such an exercise is apparent from the fact that we are not sitting in appeal over the award. Our jurisdiction is circumscribed by the restraints placed by section 30 the Arbitration Act, (1940)."

I respectfully follow the said judgment Mr. Bookwala also referred to the judgment of the Hon" ble Supreme Court in the case of Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, . It is well settled that an award can be impugned on the ground of error of law apparent on the face of it only if the award itself contains the proposition of law which can be demonstrated to be erroneous on its face. The arbitrators are sole judges not merely of factual matters but also of legal matters which they are called upon to decide under the terms of reference in the case of M/s. Tarapur and Co. (supra) it was observed that the award could not be challenged on the ground of error of law apparent on the face of the award where a question of law was specifically referred to the arbitrators. Relying on the order of Pratap, J. Dated 9th March, 1984, it was argued by Mr. Bookwala that several questions of law are specifically referred to the learned arbitrators and thus it was not open to the petitioners. In any view of the matter, to assail the Award on the ground of alleged error of law apparent on the face of the order. In my judgment, the order of Pratap. J., cannot be interpreted to mean that questions of law were specifically referred to the learned arbitrators in the sense in which that expression is used in decided cases As a matter of fact, reference proceeded with under Chapter II of the Arbitration Act, 1940, and the order of Pratap, J., dated 9th March, 1984 recognises the said fact. as is obvious from the opening words of the order. Since I am of the View that the impugned Award does not disclose any error of fact or any error of law whatsoever, it is obvious to me that the above-cited authority has no applicability to the facts of this case. Reference was made by Mr. Bookwala to several other judgments. I do not consider it to be necessary to refer to all the judgments cited at the Bar.

12. Mr. Samdani, learned Counsel for the petitioners, relied on the judgment of the Hon"ble Supreme Court in the case of Orissa Mining Corporation Ltd. Vs. Prannath Vishwanath Rawley, . It was held in that case by the Hon"ble Supreme Court that arbitrators could not enlarge the scope of the reference. I have already held in the earlier part of my judgment that the entire claim was within the scope of the arbitration clause and also within the scope of reference made by the parties in pursuance thereof. This judgment has accordingly no application to our case. In view of the above discussion, it is not necessary to refer in the judgment of the High Court of Delhi cited by Mr. Samdani in the case of Natwar Lal Shamal Das and Co. Vs. Minerals and Metals Trading Corporation of India, .

13. Mr. Samdani then relied on the judgment of the High Court of Madras in the case of M/s. N.K. Ahammed. v. The Madras State Housing Board and Another, reported in (1979)1 Mad LJ 185 in support of this proposition that the learned arbitrators were bound to observe principles of natural justice which according to him the learned Arbitrators has failed to observe in this case. There can be no quarrel with the proposition of law formulated by Mr. Samdani in this behalf. Having regard to the large number of meeting held by the leaned Arbitrators and the agreed extensions of time right up to the end (last extension agreed upon being on 19th August, 1988). I am satisfied that principles of natural justice were substantially complied with in this case. It is not necessary to discuss this authority in any further detail.

14. Mr. Samdani relied upon the judgments of the High Court of Calcutta in the case of Messrs. Khusiram Benarshilal v. Messrs.Mathuradss Goverdhandass., reported in 52 C.W.N.826 and in the case of Chhogmal Rawatmal v. Sankalchand G. Shah and ors, reported in 53 C.W.N. 828. Mr. Samdani relied on the decisions in support of his submission that in a given case the Court must look into the facts and if the Court comes to the conclusion that having regard to the materials on record the arbitrators could never have made the impugned award, the award would have to be set aside as perverse. In our case, it is impossible to hold that the award is perverse. An award cannot be challenged merely on the ground that the same is an unreasonably one. If an award, on the face of it, is preposterous or absurd, it would be a different matter. In my judgment, the impugned Award is just and reasonable and at any rate it is based on one of the reasonable possible views. The above cited authorities, therefore, have no application of the facts of this case.

15. A reference was also made by Counsel to the judgment of the Hon "ble Supreme Court in the case of N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, . In this case the Hon "ble Mr. Justice Mathew, speaking on behalf of the Bench, observed that an award could not be challenged either on the ground of error of fact or on the ground of error of law. In this case the Hon "ble Supreme Court approved the statement of law formulated in the standard work "Russell on Arbitration" and the relevant passage reads as under:-

"The general rule is that, as the parties choose their own arbitrator to be the

judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, wither upon the law or the facts. (See "Russell on Arbitration". 17th ed. p. 322)."

16. It has been held in the recent decision of the Hon "ble Supreme Court in the case of AIR 1990 1426 (SC) that an award is not assailable merely on the ground that the arbitrators have not given reasons for the award.

17. In view of the above discussion, I have no hesitation whatever In coming to the conclusion that the petition deserves to be dismissed, save and except in respect of claim for interest.

Plea for urgent law reform

18. Parties resorting to alternative forum of arbitration must not be at any disadvantages as compared to the parties litigating. It is shocking to observe that the arbitrators have no jurisdiction to award interest pendente lite and the lacuna in the relevant provision still continues to subsist Parties resorting to arbitration must be at least on par with parties litigating. Serious anomalies have been pointed out by the Hon"ble Supreme Court in paragraph 17 of its judgment in the case of M/s. Hind Builders Vs. Union of India,

"However, though pendente lite interest has been made available in Court proceedings, its extension to arbitration law appears to have acquired some technical limitations resulting in denial of pendente lite interest in most cases of arbitration..... These anomalies have arisen because formerly an arbitrator could not be treated as a Court to which the CPC applied and because now the Interest Act, 1978, while Including arbitration proceedings within its ambit, has, apart from a reference to section 34, omitted to provide specifically for pendente lite interest. This has clearly brought out by Chinnappa Reddy, J."

In a country governed by rule of law, Legislature is expected to respond to the urgent need of law reform so that the injustice is not continued. I have, there for, drafted a proposal recommending that a new section be incorporated in the Arbitration Act, 1940, reading as under:---

"Notwithstanding anything contained in any other law, and notwithstanding anything contained in any judgment, decree or order of the Court, the arbitrators shall have the same powers to award interest, including interest pendente lite and interest from the date of the award till the passing of the decree as a Civil Court has in a civil suit."

I request the Maharashtra Bar Council, the Bombay Bar Association and the Advocates" Association of Western India to pursue this matter with the Government of India on war footing. A copy of my judgment will be forwarded to the Government of India, Ministry of Law and Judiciary, the Bar Council and the Bar Association.

ORDER

19. The Petition is partly allowed. The provision made in the impugned Award for interest payable on the sum of Rs. 1,66,000/- is deleted. Rest of the Petition is rejected and the impugned Award directing the petitioners to pay a sum of Rs. 1,66,000/- to the respondents is confirmed. Having regard to the partial success of the parties, there shall be no order as to costs.