

(2009) 12 DEL CK 0070

In the Delhi High Court

Case No : CS (OS) 2684A of 1998 and I.As. 7748 and 8707 of 1999

Manohar Singh and Sons

APPELLANT

Vs

Raksha Karamchari Coop. Gr. H. Soc. and Another

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33, 37(4), 4

Contract Act, 1872 — Section 28

Limitation Act, 1963 — Article 137, 181

Citation : (2009) ILR Delhi 419 Supp

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Anusuya Salwan and Renuka Arora, for the Appellant; Shobhna Takiar and Arya Girdhari, for the Respondent

Judgement

Manmohan, J.—Both the petitioner-contractor and respondent-cooperative society have filed applications under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to "Act, 1940") impugning the sole Arbitrator, Ms. Justice (Retd.) Leila Seth's Award dated 1st December, 1998.

2. While I.A. 8707/1999 has been filed by respondent-cooperative society impugning the Award on merits, I.A. 7748/1999 has been filed by petitioner-contractor challenging the Award on the preliminary issue whereby the sole Arbitrator after relying upon Clause 6 of the Agreement dated 8th February, 1984 has held that petitioner- contractor's right to seek arbitration stood extinguished on the ground that petitioner-contractor had not given notice to arbitrate within 28 days of receipt of the Architect's decision.

3. Briefly stated the facts relevant for the present case are that on 20th September, 1983 respondent-cooperative society floated a tender for construction of 150 flats at Paschim Vihar, New Delhi and the work was awarded to petitioner-contractor vide Agreement dated 8th February, 1984.

4. On 14th December, 1987 the Architect certified the petitioner- contractor's

final bill for an amount of Rs. 9,47,043 along with a sum of Rs. 13,50,600/-. But respondent-cooperative society withheld the other certified amount of Rs. 13,50,600/- on account of alleged defects.

5. On 24th December, 1987, petitioner-contractor raised certain grievances against the said act of respondent-cooperative society and requested for an amicable resolution of the same.

6. Though on 1st January, 1988 flats were handed over to members of the respondent-cooperative society, only a cheque for Rs. 9,00,000/- was released on 30th January, 1988 to petitioner-contractor who accepted the same as a part payment.

7. On 16th January, 1989 the Architects' firm issued another certificate stating therein that defects had been rectified and directed release of payment of Rs. 13,50,600/-. However, the Architect stated that a sum of Rs. 50,000/- be retained for a period of three months for maintenance of the building.

8. On 12th May, 1989 petitioner-contractor sent a legal notice giving last opportunity to respondent-cooperative society to settle the accounts, within a period of thirty days. Since petitioner-contractor was not satisfied with the reply received from the respondent-cooperative society, petitioner-contractor invoked the arbitration clause and vide its letter dated 1st August, 1989 sought appointment of an arbitrator. On 21st September, 1994 a learned Single Judge of this Court referred the disputes between the parties in accordance with arbitration clause for adjudication.

9. Upon an appeal being filed by the respondent-cooperative society being FAO(OS) 286/1994, a Division Bench of this Court at the instance of both the parties referred the disputes for adjudication to Ms. Justice Leila Seth, former Chief Justice of Himachal Pradesh High Court. The said order dated 9th December, 1994 is reproduced hereinbelow for ready reference:

FAO(OS) No. 286/94

The parties before us are agreed that the subject matter of the dispute may be referred to arbitration. Learned Counsel for the parties have left it to the Court to suggest the name of the Arbitrator. We accordingly appoint Justice Leila Seth, Former Chief Justice Himachal Pradesh High Court as the Arbitrator in this case. The Registry will send the copy of the papers to the learned Arbitrator along with addresses of the parties as well as the counsel. This appeal is accordingly disposed of.

Appellant's counsel agrees that after the award is made the appellants will bear one half of the fee stipulated by the Arbitrator. The appellants will reimburse the respondents for one half of the fee paid by the respondents to the Arbitrator within 4 months from the date of such payment. Initially, the respondents shall pay the fee to the Arbitrator as may be fixed by her.

10. As stated hereinabove, the sole Arbitrator after holding that the arbitration clause had not been invoked within the stipulated time as prescribed in Clause 6, proceeded to decide the matter claim-wise assuming that her decision was wrong on the preliminary issue. The sole Arbitrator's finding with regard to the preliminary issue is reproduced hereinbelow:

The arbitration clause also provides that if the employer or the contractor is dissatisfied with the decision of the Architects, either of them may within 28 days of receiving the decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. This written notice must specify the matters in dispute and only such disputes or differences of which written notice has been given will be referred to arbitration.

It is clear from the above that there are three stages: the first, the decision of the Architects in writing regarding any matter, two, the dissatisfaction with the decision of the Architects on any matter (except the accepted matters); three, written notice within 28 days to the other party through the Architects specifying the matters in dispute requiring the disputes be arbitrated upon. It is only then that an Arbitrator is to be appointed and the matter referred to him.

Though the legal notice dated 12th May 1989 does briefly refer to the claim for an amount of Rs. 50,54,568.20 (Rs. 35,16,594.20 + Rs. 13,37,974/-) as on 30th April 1989 and asks for future interests at 18% per annum till the date of final payment, there is no mention made regarding referring the dispute to arbitration. In fact it is stated in the said letter that the money lying with the society collected from the members for construction costs is being returned to the members with the ulterior motive of delaying/avoiding payment and creating further complications. So a last opportunity to settle the account is given. This is a request for settlement, not a request or reference to arbitration.

The respondent in reply to the said notice on 15.6.1989 has referred to the fact that the claimant has failed to rectify the defects pointed out till date and denied any verbal instructions regarding additional work. Further, since the defects had not been rectified, the payment of Rs. 13,50,600/- had not been made and the sum of Rs. 9 lakhs had been given in full and final settlement. It was also asserted that the decisions regarding disbursement of surplus money lying with the Society had been taken by the General Body and not merely by the Managing Committee and as such is not mala fide. Consequently, they were advised not to initiate any legal action.

It was only thereafter when the last opportunity to settle the account was not taken that on 1st August 1989, the claimant wrote to the respondent giving a notice u/s 4 read with Section 8 of the Act for appointment of an Arbitrator and sent a copy to the Architects. Even this was a month-and-a-half after receipt of the respondents' letter.

Whichever way I look at it, whether at the Architects' certificate of 14.12.1987 or their certificate of 16.1.1989, it would appear to me that the notice for

arbitration required under Clause 6 has not been given within 28 days. Therefore, action not having been initiated within the specified time, the right has been waived/extinguished. However, assuming I am wrong in my decision on this preliminary point, I proceed to decide the claims.

11. Ms. Anusuya Salwan, learned Counsel for petitioner-contractor submitted that Clause 6 of the Agreement dated 8th February, 1984 limited the time period to 28 days within which a party could invoke the arbitration clause, instead of three years as prescribed under Article 137 of the Limitation Act, 1963. She submitted that Clause 6 of the Agreement dated 8th February, 1984 was void and violative of Section 28 of the Contract Act, 1872 (hereinafter referred to as "Contract Act") inasmuch as it provided a shorter period of limitation. In this connection, she placed reliance upon Section 28 of Contract Act which reads as under:

28. Agreements in restraint of legal proceedings void.- [Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict party from enforcing his rights, is void to that extent.

12. In support of her submission that the 28 days limitation period within which petitioner-contractor had to enforce its rights was void, Ms. Salwan relied upon a judgment of this Court in the case of Explore Computers Pvt. Ltd. Vs. Cals Ltd. and Another, wherein the Court has held as under:

46. Learned Counsel for the plaintiff in addition submitted there could not be any restriction on the time period for filing a suit or claim as that would be hit by the provisions of Section 28 of the Indian Contract Act, 1872 (hereinafter referred to as the Contract Act). In this behalf learned Counsel submitted that the provisions of Section 28 were amended by the Indian Contract (Amendment) Act, 1996 which received the assent of the President on 8.1.1997. The said Section prior to amendment read as under:

Section 28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

47. After amendment was brought into force, the section read as under:

Section 28. Every agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the

ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his right, is void to that extent.

48. The effect of the amendment of Section 28 thus made it clear that any Clause extinguishing the right of a party or discharging any party from the liability in respect of any contract on expiry of specific period so as to restrict the time period would be void.

49. Learned Counsel referred to the judgment of the learned Single Judge of this Court in Union of India (UOI) Vs. Simplex Concrete Piles India (P) Ltd., where one of the questions raised was in respect of the arbitration clause in an agreement requiring the claim to be filed within 90 days from the date the final bill was raised for payment. It was held that the said clause in the arbitration agreement limiting the time during which a claim can be made by a party would be clearly against public policy and would be void u/s 28 of the Contract Act. Learned Counsel for defendant No. 2 on the other hand contended that the bank was within its right to curtail the period within which a claim could be filed through suit or a legal proceeding against a bank within one month of the Expiry of the bank guarantee. Learned Counsel in this behalf referred to the judgment of the Supreme Court in National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, . It was held that an agreement which curtails the period of limitation and prescribes a shorter period than prescribed by law would be void as offending Section 28 of the Contract Act. This was so because such an agreement would seek to restrict a party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for enforcement of his relief has yet not expired.

50. However, there was possibility of agreements which do not seek to curtail the time for enforcement of the right but which provide for forfeiture or waiver of a right itself if no action is commenced within the period stipulated by the agreement and such a clause would not fall within the mischief of Section 28 of the Act.

51. After discussing the effect of the various judgments, it was observed in Para 17 as under:

From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreement which do not seek

to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act to put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a Clause would fall outside the scope of Section 28 of the Contract Act. This in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

52. Learned Counsel also relied upon the observations made by the Supreme Court in *State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another*, where it was held that a guarantee is enforceable or not depends upon the terms under which the guarantor binds himself. The exception to this is in case of ambiguity when all other rules of construction fail the Courts interpret the guarantee *contra proferentem* against the guarantor or use the recitals to control the meaning of the operative part where this is possible. However the cardinal rule remained that a guarantor must not be made liable beyond the terms of his engagement. In the facts of the case the guarantee was to remain in force for one calendar month after the pronouncement of the judgment and/or a period of 12 months from the date of execution of the guarantee whichever be later and/or the drawing and sealing of the order of the Supreme Court finally disposing of the petition. It was held that the time-limit fixed was an integral part of the guarantee and the contention of the bank that the guarantee was no longer enforceable was held to be right.

53. On a conspectus of the aforesaid judgments, two aspects have to be noted. The first is that it is the terms of the bank guarantee which have to be given due weight and the second is the distinction which is sought to be carved out in *National Insurance Company case (supra)* between a clause curtailing the period of limitation being void u/s 28 of the Contract Act and a clause which provides for forfeiture or waiver of a right if no action is commenced within the period stipulated by the agreement. Insofar as the second aspect is concerned, it cannot be lost sight of that the judgment in *National Insurance Company case (supra)* was delivered on 23.3.1997 and thus related to the provisions of Section 28 as it stood prior to the amendment because that was the substantive law in force at the time when the cause of action had arisen. The amendment to Section 28 was made with effect from 8.1.1997 and it is not disputed that the cause of action in respect of the subject matter in the present suit arose after the amendment. Sub-clause (b) of the amended Section 28 deals with the clauses which extinguish the rights of any party thereto or discharge any party from any liability being void under the said section. Thus the scope of Section 28 has been widened whereby Clause (a) deals with the position prior to the amendment

alone and Clause (b) is in addition.

54. In view of the amended section coming into force, the distinction sought to be carved out earlier by the legal pronouncements would not hold good.

13. On the other hand, Ms. Shobhna Takiar, learned Counsel for respondent-cooperative society submitted that arbitration clause was a condition precedent for invoking the alternative disputes resolution mechanism and thus the disputes could only be referred for adjudication in accordance with the said clause. According to her, Clause 6 of the Agreement dated 8th February, 1984 was not void or violative of Section 28 of Contract Act. She submitted that petitioner-contractor had lost its right to seek arbitration as it did not invoke the arbitration clause within 28 days of certification of the final bill by the Architect. In this connection, Ms. Takiar placed great emphasis on the following words in Clause 6 "...and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration...."

14. In this connection, Ms. Takiar relied upon following judgments:

A) National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, wherein it has been held as under:

6. The appellants contested the suit inter alia on the ground that the suit was barred by limitation as well as by Condition No. 19 of the policy and on the ground that the claim made by the Respondent No. 1 was not covered by the policy. Condition 19 of the policy which was set up by way of defence runs as under:

Condition No. 19.-In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration.

xxxx xxxx xxxx xxxx 17. From the case-law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provide for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand

extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

B) P. Manohar Reddy and Bros. Vs. Maharashtra Krishna Valley Dev. Corp. and Others, wherein it has been held as under:

3. The parties hereto thereafter entered into a contract on 9-2-1988, Clauses 37, 54 and 55 whereof read as under:

37. After completion of work and prior to that payment, the contractor shall furnish to the Executive Engineer, a release of claims against the Government arising out of the contract, other than claims specifically identified, evaluated and expected from the operation of the release by the contractor.

* * *

54. Settlement of dispute (for works costing less than Rs. 50 lakhs).-If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any drawings, record or ruling of the Executive Engineer, KIP, Division No. VII, Shrigonda on any matter in connection with or arising out of the contract or the carrying out of work to be outside the terms of contract and hence unacceptable, he shall promptly ask the Executive Engineer, in writing, for written instructions or decision. Thereupon the Executive Engineer, shall give his written instructions or decision within a period of 30 days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

being requested, or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision, appeal to the upward authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of thirty days from receipt of the decision shall indicate his intention to refer the dispute to arbitration as per Clause 55 failing which the said decision shall be final and conclusive.

55. Arbitration (for works costing less than Rs 50 lakhs).-All the disputes or differences in respect of which the decision has not been final and conclusive as per Clause 54 above shall be referred for arbitration to a sole arbitrator appointed as follows:

Within 30 days of receipt of notice from the contractor or his intention to refer the dispute to arbitration the Chief Engineer (SP, Irrigation Department), Pune shall send to the contractor a list of three officers of the rank of Superintending

Engineers or higher, who have not been connected with the work under this contract. The contractor shall within 15 days of receipt of this list select and communicate to the Chief Engineer, the name of one officer from the list who shall then be appointed as the sole arbitrator. In case the contractor fails to communicate this selection of name within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within 30 days as stipulated, the contractor shall send a similar list to the Chief Engineer within 15 days. The Chief Engineer shall then select one officer from the list and appoint him as the sole arbitrator within 15 days. If the Chief Engineer fails to do so, the contractor shall communicate to the Chief Engineer the name of one officer from the list who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Arbitration Act, 1940 or any statutory modification thereof. The arbitrator shall determine the amount of costs to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor shall not be withheld unless they are subject-matter of the arbitration proceedings.

All awards shall be in writing and in case of award amounting to rupees one lakh and above, such awards shall state the reasons for the amount awarded. Neither party is entitled to bring a claim to the arbitrator if the arbitrator has not been appointed before the expiration of 30 days after defects liability period.

A work order was issued on the same day. The said contract was to be completed by 8-1-1989 i.e. within a period of about 11 months. The appellant failed to complete the work within the stipulated time. He applied for extension which was granted first up to 9-7-1989 and thereafter up to 30-9-1990. Within the said period the work was completed. The measurements of the work undertaken by the appellant were recorded on 26-11- 1990. Final bill prepared and paid by the respondent was accepted by the appellant without any demur.

xxxx xxxx xxxx xxxx 11. Mr Sundaravardan, learned Senior Counsel appearing on behalf of the appellant raised the following contentions in support of the appeal:

(i) The High Court committed a serious error of law in passing the impugned judgment insofar as it failed to take into consideration that limitation for raising a claim as envisaged under Clause 54 is not applicable in the instant case.

(ii) In view of the fact that the claim was rejected only on 26-2-1992 by the appellate authority, the period of 30 days should be counted therefrom.

(iii) While exercising its jurisdiction u/s 8 of the Act, the Court was concerned only with the question as to whether there was a triable issue.

(iv) Once a triable issue is found to have been raised, which was required to be

referred to the arbitration, the merit of the claim cannot be gone into.

12. Ms Aprajita Singh, learned Counsel appearing on behalf of the respondent, on the other hand, would urge:

(i) Clause 54 of the general conditions of the contract must be invoked by the contractor during the tenure thereof and not after completion of the contract and acceptance of the final bill.

(ii) The final bill having been accepted without any demur, the contract came to an end, wherewith the arbitration agreement which was a part thereof also perished.

(iii) The appellant having not sought for extension of time in terms of Sub-section (4) of Section 37 of the Act and in any event no sufficient cause having been made out therefore, even no extension of time could be granted.

xxxx xxxx xxxx xxxx 19. A plain reading of the aforementioned provisions clearly shows that Clause 54 does not envisage raising of a claim in respect of extra or additional work after the completion of contract. The jurisdiction of the civil court u/s 8 of the Act or u/s 20 thereof can be invoked if the disputes and differences arising between the parties was the one to which the arbitration agreement applied.

20. The contractual clause provides for a limitation for the purpose of raising a claim having regard to the provisions of Section 28 of the Contract Act. It is no doubt true that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a clause providing for limitation so as to enable a party to lodge his claim with the other side is not invalid.

xxxx xxxx xxxx xxxx 22. Referring to the well-known decision of Scott v. Avery, and noticing different views expressed by different courts, it was held: (Maharaj Singh case, SCC p.952, para 22)

22. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in Scott v. Avery bars any action or suit if commenced for determination of a dispute covered by the arbitration clause. But if on the other hand a dispute cropped up at the very outset which cannot be referred to arbitration as being not covered by the clause, then the Scott v. Avery clause is rendered inoperative and cannot be pleaded as a bar to the maintainability of the legal action or suit for determination of the dispute which was outside the arbitration clause.

Whether such a clause comes within the purview of the arbitration clause vis-a-vis Article 137 of the Limitation Act, it was held: (Maharaj Singh case, SCC pp. 952-53, para 23)

23. ...It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act and is valid; vide Baroda Spg. and Wvg. Co. Ltd. v.

Satyanarayan Marine and Fire Insurance Co. Ltd, Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd. and Ruby General Insurance Co. Ltd. v. Bharat Bank Ltd. Clause 19 has not prescribed a period of 12 months for the filing of an application u/s 20 of the Act. There was no limitation prescribed for the filing of such an application under the Limitation Act, 1908 or the Limitation Act, 1963. Article 181 of the former did not govern such an application. The period of three years prescribed in Article 137 of the Act of 1963 may be applicable to an application u/s 20.

xxxx xxxx xxxx xxxx 31. We, however, as noticed hereinbefore, are concerned with a different fact situation. As arbitration clause could not be invoked having regard to the limited application of Clauses 37, 54 and 55 of the general conditions of the contract, we are of the opinion that the trial court was not correct in directing appointment of an arbitrator.

15. Ms. Takiar further submitted that petitioner-contractor could not rely upon Section 28(b) of the Contract Act as the said Sub-section had been introduced in the year 1997 - which was much after the arbitration clause had been invoked by the petitioner-contractor.

16. On merits, Ms. Takiar submitted that the sole Arbitrator had erroneously awarded Claim No. 1 as there was nothing on record to show that petitioner-contractor had removed the defects initially pointed out by the Architect. She further submitted that petitioner-contractor's claims were otherwise barred by limitation and if petitioner-contractor had any grievance with regard to the decision taken by the Architect during the execution of the contract, petitioner-contractor should have raised the disputes at that stage rather than waiting for the final bill.

17. Having heard the parties at length and having perused the impugned Award, I am of the view that before I deal with the rival contentions, it would be appropriate to first outline the scope of interference by this Court with an arbitral award rendered under Act, 1940. The Supreme Court in M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, has clearly outlined the scope of interference by this Court in petitions filed under Sections 30 and 33 of the Act, 1940. The relevant observations of the Supreme in the said judgment Court are reproduced hereinbelow:

36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings u/s 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the

court would not be justified in interfering with the award.

37. The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined....

18. As far as the Arbitrator's finding on the preliminary issue is concerned, I am of the view that it is based on a wrong proposition of law. Clause 6 of the Agreement dated 8th February, 1984 reads as under:

SETTLEMENT OF DISPUTES, ARBITRATION

All disputes and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the works (whether during the progress of the works or after their completion, and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the Architects who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the accepted matters shall be final and without appeal as stated in clause No. 35. But if either the Employer or the Contractor be dissatisfied with the decision of the Architect on any matter question or the dispute of any kind (except any of the accepted matters) or as to the withholding by the Architect of any certificate of which the Contractors may within 28 days after receiving notice to such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the Arbitration and final decision of a single arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement to the appointment of a single arbitrator, to the arbitration of two Arbitrators being both Fellow of the Indian Institute of Architects or Fellow of Institute of Engineers or Equivalent one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of Reference appoint an Umpire....

19. Upon perusal of the aforesaid Clause, I am of the view that the expression "but if either the Employer or the Contractor be dissatisfied with the decision...the Contractors may within 28 days after receiving notice to such decision give a written notice...requiring that such matters in dispute be arbitrated upon", limits the time within which petitioner-contractor has to approach for arbitration.

20. In National Insurance Co. Ltd. (supra) the condition in Clause 19 specifically provided for extinction of the right against the insurance company by stating that the insurance company would not be liable beyond the expiry of twelve months

from the happening of loss or damage unless the claim was the subject matter of pending action or arbitration. But, in the present case, Clause 6 does not state that the respondent-cooperative society would not be liable for any claim after expiry of 28 days from the happening of loss or damage unless the claim was the subject matter of any pending action or arbitration. In fact, Clause 6 does not state that respondent-cooperative society's liability shall cease after 28 days of a certificate being issued by the Architect.

21. As far as the judgment of Supreme Court in *P. Manohar Reddy & Bros.* (supra) is concerned, I am of the view that the Clause 6 does not have the effect of extinguishing the petitioner-contractor's right to raise claims and seek remedies against the respondent-cooperative society. I also find that recently a learned Single Judge of this Court in case of *Punj Llyod v. National Highway Authority of India* reported in 2009(3) Arb.L.R. 506 has observed as under:

29. I may also notice the recent judgment of the Apex Court in *P. Manohar Reddy and Bros. Vs. Maharashtra Krishna Valley Dev. Corp. and Others*, relied upon by the counsel for the respondent. In the said judgment, the Apex Court upheld a contractual clause providing for limitation for the purposes of raising a claim and further held the said clause to be not invalid. Reliance was placed on *Wild Life Institute of India* which judgment as aforesaid has been considered by this Court in *Pandit Construction Company* and held to be not considering the amendment to Section 28 of the Act.

22. The words relied upon by Ms. Takiar in the said Clause 6, namely, "such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration", only prescribes the contents of the arbitration notice.

23. Consequently, in my view, Clause 6 of the Agreement dated 8th February, 1984 does not extinguish the right of any party or discharge any party from liability after expiry of 28 days. In fact, Clause 6 of the Agreement executed between the parties limits the time within which an aggrieved party can invoke the arbitration and enforce its right. The un-amended Section 28 of the Contract Act reads as under:

28. Agreements in restraint of legal proceedings void.-- Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Accordingly, Clause 6 to the extent it limits the time period to 28 days is void.

24. As far as the respondent-cooperative society's objections to the impugned Award on merits is concerned, I find that the learned Arbitrator has awarded only those claims which had been duly certified either by the Architect or by a local commissioner whose name had been suggested by respondent-cooperative

society or the claims which had been agreed to be paid by respondent-cooperative society in the Minutes of Meeting held on 22nd October, 1986. I also find that learned Arbitrator has given cogent reasons for refund of security deposit and for payment of interest. In any event, refund of security deposit and award of interest were strictly in accordance with the contractual terms.

25. As far as the respondent-cooperative society's argument that there was nothing on record to show that petitioner-contractor had removed the defects initially pointed out by the Architect is concerned, I find that the Architects' firm had itself subsequently on 16th January, 1989 issued a certificate stating that the petitioner-contractor had removed/rectified the defects. The said letter dated 16th January, 1989 reads as under:

Dear Sir,

Sub: Constn. of 150 flats for your Society at Rohtak Road.

Since the defects as listed in our letter No. 156/3782/RKA/87 dated December 14, 1987 have been rectified/removed and defect liability period is also over. It is recommended that the payment withheld on these counts may please be released to the Contractor with immediate effect. Further a sum of Rs. 50,000/- (Rs. Fifty thousand only) may please be retained for further period of three months for the maintenance of the buildings for any kind of defects.

26. I am further of the view that the claims raised by petitioner- contractor were not barred by limitation as the petitioner-contractor had raised the disputes within a period of three years after the final bill had been certified by the Architect for payment, namely, 14th December, 1987. I am fortified in my view by Clause 33 of the Agreement executed between the parties, which reads as under:

33. Payment on Interim Certificate to Contractor:

All such payments made on Interim Certificate shall be regarded as payments by way of advance against the final payment only and not as payment for work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed, on reerected or be considered as an admission of the due performance of the contract or any part thereof in any respect of the accruing of any claim nor shall it conclude, determine to the final settlement and adjustment of the accounts or otherwise, or in any other way vary or affect the contract....

27. The aforesaid clause clearly shows that the bills and payments made during the midst of execution of the contract were interim in nature and were not conclusive of the work done. Therefore, any arbitration claim at the stage of interim bill would be premature and not liable to be referred to arbitration.

28. Moreover, if the respondent-cooperative society's arguments were to be accepted, it would mean that during the course of execution of contract itself,

petitioner-contractor would have had to raise claims as soon as petitioner-contractor's interim bills were certified for payment. Accepting this interpretation would result in a number of arbitrations between the same parties with regard to the same contract and this in turn could lead to different arbitral tribunals reaching different conclusions.

29. In view of aforesaid finding, I.A. 7748/1999 filed by petitioner-contractor is allowed and I.A. 8707/1999 filed by respondent-cooperative society is dismissed. Consequently, Award is made rule of the Court and Registry is directed to prepare a decree sheet in accordance with the arbitral Award passed on merits after excluding the conclusion arrived at by learned Arbitrator on the preliminary issue. Accordingly, present applications and petition stand disposed of.