
(1991) 01 MAD CK 0084

In the Madras High Court

Case No : O.P. No's. 216 of 1990 and 483 of 1990

M/s. Gautham Constructions and Fisheries Pvt. Ltd.

APPELLANT

Vs

National Bank for Agriculture and Rural Development,
Bombay (NABARD) and Justice M.R.A. Ansari (Retd.) Sole
Arbitrator

RESPONDENT

Date of Decision : 04-01-1991

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 15, 16, 17, 29
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 3, 3(1)(a)

Citation : (1991) 01 MAD CK 0084

Hon'ble Judges : Lakshmanan, J

Bench : Single Bench

Advocate : R. Krishnamurthy, R. Muthukumaraswamy and K. Sundareswaran for O.P. No. 483 of 1990, for the Appellant; Vedantham Srinivasan and J. Krishnamachary for first respondent in O.P. No. 483 of 1990, for the Respondent

Judgement

Lakshmanan, J.—O.P. No. 216 of 1990 was filed by M/s. Gautham Constructions & Fisheries Private limited, under S. 14(2) of the Arbitration Act, to direct the arbitrator to file the Original Award dated 24-5-1990 together with depositions and documents into this Court and to pass a decree in accordance with the Award directing the first respondent therein to pay the petitioner a sum of Rs. 78, 02, 247.15 which includes the amount of award, interest awarded by the arbitrator and for costs. O.P. No. 483 of 1990 was filed under S. 30 of the Arbitration Act to set aside the award of the arbitrator dated 24-5-1990 and for costs.

2. The facts of the petitioner in O.P. No. 483 of 1990 are as follows:

The petitioner is a statutory body created by an Act of Parliament for the purpose of Agriculture and Rural Development. The petitioner had issued an advertisement inviting offers for outright sale of residential flats and office buildings at Madras. The first respondent which is engaged in the business of

constructions, submitted an offer for sale of the office building in Edward Elliots Road with a built up area of 50,000 square feet at Rs. 500/- per square feet of built up area inclusive of the land on which the building is to be put up. After negotiations the offer made by the first respondent was accepted by the petitioner by its communication dated 16-4-1983 to purchase office accommodation measuring about 48,000 sq. ft. of built up area together with the land at the rate of Rs. 400/- per sq. ft. of built up area. Subsequently, the first respondent offered a site in Nungambakkam High Road for putting up the office building instead of the place selected at Edward Elliots Road. The first respondent addressed a letter on 4-7-1983 agreeing to the offer for sale of the land and building for office accommodation of about 48,000 sq. ft. at the same rate of Rs. 400/- per sq. ft. of built up area and subject to the same conditions agreed to earlier with reference to the site at Edward Elliots Road. The petitioner accepted the said offer by letter dated 30-7-1983. As per the said agreements, the first respondent was to construct 48,000 sq. ft. of built up area comprised in the ground floor and 2 upper floors with open parking areas. In continuation of the aforesaid agreement, it was agreed by the first respondent to put up 48,000 sq. ft. of built up area in 3 upper floors apart from the ground floor being put up as a stilt for parking with no additional cost for the same. Pursuant to the aforesaid offer and acceptance, the parties entered into agreements dated 30-8-1983 under which the first respondent agreed to sell the office complex to be constructed on a portion of the extent of land, the portion measuring about 10 grounds, in Nungambakkam High Road with a building of 48,000 sq. ft. built up area. As per the agreement the first respondent was to construct the buildings comprised in three floors besides stilts for parking with a total built up area of about 48,000 sq. ft. at Rs. 250/- per sq. ft. of built up area on the terms and conditions prescribed in the said agreement. On the same day, the petitioner and the first respondent entered into a supplemental agreement under which the first respondent agreed to provide amenities and extra work/fittings in the said building as per the details set out in the annexure to the said agreement for a consideration of Rs. 150/- per sq. ft. of built up area totalling to Rs. 72 lakhs for the 48,000 sq. ft. agreed to be put up by the first respondent. It was further agreed that in case the built up area in the building after the final measurement is less than 48,000 sq. ft. the price payable for the amenities shall be proportionately reduced at the rate of Rs. 150/- per sq. ft. and in case it is more than 48,000 sq. ft. it shall be increased proportionately. Thus, according to the petitioner, the first respondent was to sell the office complex comprising of the land and building at the rate of Rs. 400/- per sq. ft. of built up area which was split under the two agreements, referred to above. According to the petitioner the offer and acceptance and the letter of intent dated 16-4-1983 the contract was to be a firm price contract. The first respondent was required to construct the said 48,000 sq. ft. of office space in three floors on the stilts. The stilts were not to be paid for separately. The first respondent changed the originally agreed plan of construction by lowering the building to sub-soil level and reducing the height of each floor by 6 of about 1.74 grounds which the first respondent ought

to have provided in addition to 10 grounds agreed upon, in order to comply with the Municipal Rules. Instead of putting up 48,000 sq. ft. in three floors with a stilt on the ground level, the first respondent chose to put up a basement for parking and constructed ground plus three upper floors of officer accommodation measuring an extent of about 48,000 sq. ft. The first respondent after having put up such building and receiving full payments as per agreed terms and handing over possession of the building to the petitioner, the first respondent made a claim in relation to the basement constructed by them on the ground that the said space constituted built up area for which they were entitled to be paid at the rate of Rs. 400/- per sq. ft. This claim was made in the final Bill dated 21-12-1987 which was not certified by the Architect. Since the said claim was patently illegal and opposed to the agreement, the petitioner refused to honour the said claim. In view of the refusal relating to the claim of additional cost for basement made by the first respondent the same was construed as a dispute and the matter was referred to the arbitrator for arbitration in terms of clause 44 of the principal agreement which provided for the settlement of disputes between the parties by arbitration. The second respondent, arbitrator entered upon the reference with regard to the said dispute. The first respondent made its claim under seven heads which included the main claim relating to the additional cost of Rs. 48,36,000/- for the basement put up by them which was said to be in excess of 48,000 sq. ft. of built up area. The petitioner filed reply statement dated 13-10-1989. The petitioner repudiated each one of the claim and also made a counter claim for Rs. 85,63,781 plus interest and expenses under various heads.

3. The arbitrator passed the Award dated 24-5-1990. According to the petitioner the award of the arbitrator is vitiated on account of an error apparent on the face of the record besides being liable to be set aside on the ground of legal misconduct. According to the petitioner, the first respondent is not entitled for separate payment and that the builders (the first respondent) brought about the change of the stilts to basement on their own and for their own benefit, only after the approval of the building plan by M.M.D.A. The petitioner was made to believe that the basement was in lieu of the stilts and that no charge would be made as per the original agreement As such the petitioner contended that the builders were not entitled for any extra payment. Thus according to the petitioner, the arbitrator has not applied his mind and awarded a huge sum by way of granting of Rs. 48,36,000/- for the basement admeasuring 12090 sq. ft. at the rate of Rs. 400 per sq. ft. constitutes an error apparent on the face of the record. Like-wise the arbitrator has wholly failed to consider the counter claims made by the petitioner and rejected the same without applying his mind which also constitutes an error apparent on the face of the record. Without prejudice to what is stated above, even assuming without admitting that the basement should be paid for, the learned Arbitrator after having observed that the agreement does not provide for basement, ought to have applied the well accepted principle of quantum meruit while awarding the cost of the basement. Thus the arbitrator

has committed a grievous error and misconducted himself in law in failing to consider the merit of the terms of the contract which governs the rights of the parties. The learned arbitrator failed to note that the claim made by the first respondent towards the cost of basement was in lieu of the cost of stilt. The arbitrator has committed an error in failing to note that as per a material document filed as Ex.R. 72 before him, the respondent/Contractor himself had valued the construction cost of the basement at only Rs. 217.52 per sq. ft. which amounted to Rs. 26.30 lakhs for 12090 sq. ft. of built up area of the basement. The learned arbitrator should not have awarded Rs. 48,36,000/- towards the cost of the basement. The arbitrator has also misconducted himself in awarding interest at 18% per annum from the date of the final bill till date of payment, even though the parties have agreed under the terms of the agreement for payment of interest at the rate of 12% per annum on amounts which are not paid within a period of 15 days from the date of receipt of notice of demand. The arbitrator has no authority to award interest pendente lite. The arbitrator misconducted the proceedings in rejecting the counter claims of the petitioner towards inferior quality of work and reduction in the height of the floors as also the loss sustained by the petitioner due to delay in completion of the project and handing over possession of the premises still refused to grant Rs. 5,30,500/- to the petitioner on the frivolous ground. The reasons adduced by the learned Arbitrator are self-contradictory. Thus according to the petitioner, the arbitrator has wrongly rejected the petitioner's claim to interest on the counter claims without any valid basis. Hence the award on the whole is illegal, null and void and not binding on the petitioner and is liable to be set aside.

4. O.P. No. 483 of 1990 was resisted by the first respondent therein by filing a counter affidavit. According to the first respondent that the petition is misconceived and that the award has become a rule of the Court and ripened into a decree. The arbitrator, who was a former Chief Justice of a High Court was a nominee of the petitioner. The arbitrator on a consideration of all the facts on record, the documentary evidence and submissions made by contending counsel had come to a conclusion honestly on the basis of appreciation of the evidence both oral and documentary. In the absence of pleading that the Award was procured by corruption or fraud, no question or contention of error apparent on the face of the Award can at all be raised. The respondent brought about the change of the stilts to basement with the consent of the petitioner on their own and for their benefit. The petitioner cannot contend that the arbitrator's judgment is a legal misconduct when he had held that the basement is included in the entire building and forms part of the built up area and the respondent is entitled to payment for the basement at the stipulated rate. The arbitrator was right in his finding that the bills presented by the respondent were in accordance with the schedule of payments as per agreement which laid down the percentage of the payment at a different stages of construction and not on the cost of different items of construction but provides for a uniform rate at Rs. 400 per sq. ft. No legal contention at all had been raised before the arbitrator as contended

by the petitioner. Thus, the first respondent prayed this Court to dismiss the O.P. No. 483 of 1990 with costs.

5. I have heard Mr. R. Krishnamurthy, learned counsel for the petitioner in O.P. No. 483 of 1990 on behalf of Messrs. R. Muthukumaraswamy and K. Sundareswaran and Mr. Vedantham Srinivasan learned counsel for the first respondent in O.P. No. 483 of 1990 on behalf of Mr. J. Krishnamachary. I have been taken through the entire pleadings, evidence and all the relevant exhibits filed by both parties at the time of hearing.

6. As per the agreement dated 30-8-1983, the builder has to construct ground floor and two floors with open space for parking. The agreement was amended later, on the same date, by a Minutes of Understanding, under which, instead of open space, stilts were to be provided for parking and one more floor was added. In other words, besides stilts, ground floor and three floors, i.e., in all, four floors were to be constructed. The area to be covered by the building was to be paid at the rate of Rs. 400/- per sq. ft. of built-up area. The cost of the entire project including the value of the land on which the building was to be constructed was also fixed at Rs. 1,92,00,000/-. The building was to be completed and possession given to the Bank within a period of two years from the date of the agreement. But, however, it was not completed within this period, but was completed and possession given to the Bank only 1-9-1987 i.e., after a delay of two years from the stipulated date. Further, instead of stilts for parking as provided in the agreement, the Builder provided a basement and claimed separate payment for the cost of the basement at the rate of Rs. 400/- per sq. ft. The claim was resisted by the Bank. The claim for interest for alleged delayed payment was also refuted by the Bank. The above two disputes and also the other disputes which arose between the Bank and the Builder have been referred for arbitration as provided in the agreement dated 30-8-1983. The Builder in his statement of claim formulated his claims under several heads. The Bank has also made counter claims under various heads. As stated above, the Builder has made seven claims under different heads. The first and the main claim relates to cost of basement. In claim No. 1, the Builder has included three other items, viz., (1) the cost of excess area of 870.30 sq. ft. covered by the building; (2) amount payable for increase in the foundation and (3) cost of conversion of stilts to basement. The claim Nos. 2 and 3 are for cost of the extra area of 870.30 sq. ft. covered by the building. The claim No. 2 is for Rs. 1,55,4567/- towards cost of extra items provided at the instance of the Bank which is also not disputed by the Bank. The claim No. 3 is for Rs. 6,600/- which the Builder has deposited with the Electricity Board which is admitted by the Bank. Under claim No. 4, the Builder has claimed Rs. 21,35,751.42 towards interest on non-payments and delayed payments of its claims Nos. 1, 2 and 3 referred to supra, and delayed payments of its running bills. Claim No. 5 which was disallowed by the arbitrator, is for Rs. 60 lakhs for loss of business as a result of non-payment or delayed payment of its claims. Under claim No. 7, the Builder has claimed costs of the arbitration proceedings as per his memo of cost.

7. Likewise the Bank has made counter claims under various heads. Counter claim No. 1 relates to the Bank's claim for Rs. 13,92,000/- as the value of the land which was less than the land which the Bank was entitled to get under the agreement. Counter claim No. 2 relates to a sum of Rs. 12,24,000/- as compensation for inferior flooring, lesser height of the floors and non-erection of compound wall. Under claim No. 3 the Bank claimed damages in a sum of Rs. 30,77,781/- on account of delay in completion and handing over of possession of the building. Under counter claim No. 4 the Bank had expressed its grievance in regard to non-execution of the sale deed of the land and building in favour of the Bank as required under the agreement dated 30-8-1983, in question. Claim Nos. 5, 6 and 7 are for interest on its counter claim Nos. 1, 2, 3 and 4, which have been disallowed by the arbitrator. Counter claim No. 8 relates to the cost of the arbitration proceedings. In view of the fact that all the claims have been disallowed except claim No. 4 by the arbitrator, the arbitrator held that the Bank is not entitled to any cost of the arbitration proceedings.

8. Before proceeding further, it is useful to refer certain important clauses in the agreement of the sale dated 30- 8-1983 entered into between the Bank and the Builder.

Para 1: The Vendor will construct a building on a portion of the said land more particularly described in the Schedule "G" hereunder constituting the schedule "F" land hereinafter referred to as the "said building" comprised in three floors besides stilts for parking with a total built up area of about 48,000 sq. ft. at Rs. 250/- per sq. ft. of the built up area for the construction of three floors namely, Ground plus two floors, written and shown on the plan thereof and marked in blue colour, in accordance with the building plans pending sanction by the Corporation of Madras. The said building plans have been prepared by the Vendor's Architect, M/s. Kingsway Consulting Engineers at 20/21, Casa Major Road. Egmore, Madras-8.

Para 2: The Purchaser hereby reserves the right to make any alteration in the plan without in any way affecting the outer periphery of the plan submitted to the authorities and such power shall not be unreasonably exercised.

Para 3: The purchaser shall be entitled to appoint an Architect/Engineer/Clerk of Works/any other person to inspect the progress of construction of buildings and the Vendor shall abide by all reasonable directions in respect of the nature of the construction and changes as may be required from time to time that may be given by the Purchaser.

Para 8: The Vendor doth hereby agree to sell to the Purchaser and the Purchaser doth hereby agree to purchase from the Vendor the said property, namely, the building of a total built up area of 48,000 sq. ft. on three floors at Rs. 250/- per sq. ft. of the built up area.

Para 9: The purchaser shall pay to the Vendor the sum of Rs. 1,20,00,000/- (Rupees one crore and twenty lakhs only) as the purchase price in respect of the

said buildings and the said property calculated at the rate of Rs. 250/- per sq. ft. of the built-up area on all the floors. The expression "built up area" for the purpose of this agreement shall include the entire built-up area of the said buildings and shall also include the areas covered by the stair-case with the premises of each floors as also the balconies of each premises.

Para 44: Provided always that in case of any dispute or difference shall arise between the Purchaser or his Architect/Engineer/Clerk of works and the Vendor or his Architect either during the progress or after the completion or abandonment of the works or any portion thereof, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the Architect/Engineer/Clerk of works as the case may be or the withholding by the Architect of any certificate, to which the Vendor may claim to be entitled or the measurements or Valuation mentioned in these presents, then such dispute or difference shall be and is hereby referred to arbitration and final decision of a sole arbitrator to be chosen by the Vendor from a panel of three names to be nominated by the Purchaser. The award of such arbitrator shall be final and binding on the parties and the Arbitration proceedings shall be conducted at Madras only.

Agreement for Amenities dated 30-8-1983

Para 4: The total built up area in the said building would be 48,000 sq. ft. On the above basis the cost of amenities and extra work/fittings to be provided therein as per the particulars set out in Annexure hereto at the rate of Rs. 150/- per sq. ft. comes to Rs. 72,00,000/- (Rupees seventy two lakhs). Out of the said consideration amount of Rs. 72,00,000/- a sum of Rs. 28,80,000/- (Rupees twenty eight lakhs eighty thousand only) shall be paid at the time of execution of this agreement and that the balance of the consideration amount, namely, the sum of Rs. 43,20,000/- (Rupees forty three lakhs twenty thousand only) shall be paid to the Vendor by the Purchaser as hereunder:

PAYMENT SCHEDULE

Provided, in case the built up area in the said buildings in respect of the said three floors after the final measurements is less than 48,000 sq. ft. the final price payable for the amenities and extra work/fittings shall be proportionately reduced. Similarly, in case the built-up area in the said building is more than 48,000 sq. ft. the final price payable for the amenities and extra work/fittings shall be increased proportionately. For this purpose, the total built-up area of the said three floors shall be ascertained in the following manner. The built-up area for the purpose of this Agreement shall include the total internal area (including area occupied by walls and balconies) of each floor and the proportionate area of outside lobbies, staircase and lift wells, appurtenant to the land on which the said building is situated.

PURCHASE OF OFFICE PREMISES AT 3/17, NUN-GAMBAKKAM HIGH ROAD,

MADRAS-34

In continuation of the Main Agreement for sale and subsidiary Agreement for amenities entered into between the below mentioned parties today in regard to the purchase of the above property by NABARD from Messrs. Goutham Construction Company, Madras-17, the following further minutes of understanding have been arrived at:-

(i).....

(ii) The building in the layout enclosed to the Agreement provides a fontage of 94 feet for the Plot and 60 feet for the Building. It has been agreed that subject to the municipal approval and the approval of Head office of NABARD, a larger frontage will be provided within the overall ceiling of 40,000 sq. ft. built-up area.

(iii) The letter of Offer from NABARD provides for construction of the building with ground floor and two additional floors. However, the subsequent Plan approved by NABARD, Bombay, provides for ground floor plan three additional floors. The ground floor will now be a stilt for parking and the three more floors with built-up area of 48,000 sq. ft. will be provided by vendors.

The foundation shall provide for ground plus four more floors, i.e., an eventual further construction of additional floors.

Para (iii)

Madras-18,

30 August ,1983

For NABARD Sd./- Deputy General Manager. For Gautham Construction Company Sd./- Managing Partner.

According to the learned counsel for the Bank, the first respondent/Builder was to sell the office complex comprising of the land and building at the rate of Rs. 400/- per sq. ft. of built up area which was split under the two agreements referred to above, and that as per the offer and acceptance of the letter of intent dated 16-4-1983 the contract was to be a firm price contract. Learned counsel further submits that the first respondent was required to construct 48,000 sq. ft. of office space in three floors on the stilts, which were not to be paid for separately. Further, the only contract which provided for a contingency of a payment of more than the agreed amount was the supplemental agreement which provided for the payment of an increased amount towards amenities if the built-up area, excluding the parking area was more than 48,000 sq. ft. Even as per the said agreement, the first respondent was entitled only at the rate of Rs. 150/- per sq. ft. in respect of the additional extent of built up office area put up by them. In short, learned counsel submits that the principal contracts was a package deal with no payment for profit for stilts in the ground floors. Car parking area not to be put up as it would not constitute built-up area.

9. It is seen from the records that the accepted consideration is Rs. 400/- per sq. ft. of built up area was apportioned at Rs. 250/- in the principal agreement, and Rs. 150/- in the amenities agreement. The amenities agreement also contained payment schedule at page No. 5 and many items therein viz., foundation & plinth, RCC slabs, brick work do not relate to amenities but form part of structures. Thus in my opinion, the apportionment into two agreements has no rationale but it was merely for the benefit of the Bank by way of savings in registration charges and property tax. The proportional adjustment after the final measurements contemplated in the agreement, therefore applies to the contract as a whole viz., the principal agreement and the supplemental agreement. In view of the adjustment for the built up area and other extras provided in the agreement the contract is not a firm price contract. In answer to the contention of Mr. R. Krishnamurthy, that the stilts were not to be paid separately, the learned counsel for the first respondent, Mr. Vedantham Srinivasan, submits that nowhere in the agreement it is stated that the stilts were not to be paid separately and that the agreed rate of Rs. 400/- as per the acceptance and as per the agreement and as per the acceptance is per sq. ft. of built up area.

10. As regards the first claim of the Builder in regard to the cost of the basement, the learned counsel for the Bank, has refuted this claim on the ground that neither the agreement dated 30-8-1983 nor the Minutes of understanding of the same day contemplated the construction of the basement and the basement was constructed by the Builder without the knowledge and approval of the Bank. To negative this claim, the learned counsel for the Builder drew my attention to various documentary and oral evidence produced by them before the arbitrator. They are Annexure C.15 dated 13-1-1984, Annexure 15-A dated 4-2-1984; Annexure C-16 dated 6-2-1984, Annexure C-16-A dated 22-2-1984, Annexure C-19 dated 4-6-1984 and submits that in the face of the above exhibits, the contention of the Bank that the construction of the basement was not within its knowledge nor did it have the Bank's approval cannot be accepted. Annexure C-15 dated 13-1-1984 is the permit of M.M.D.A. for the construction of the building as per the plans submitted by the Builder for the sanction of M.M.D.A. Annexure C.15-A is a letter dated 4-2-1984 by the Builder to Mr. K. Yagvanarayanan, Technical Consultant to the Bank, enclosing photostat copies of the plans sanctioned by M.M.D.A. with the inclusion of the basement in the building plans. It is useful to extract the said letter.

GAUTHAM CONSTRUCTION COMPANY, MADRAS-17

Ref: GCC/NAR/1011/5-84

Date: 4th February, 84.

Mr. K. Yegnanarayana, Tech. Consultant, National Bank for Agriculture & Rural Development, "Pioneer House" (V Floor), No. 6-3-653, Somajiguda, HYDERABAD-500 004.

Sir,

Sub : Sanctioned Plan for Office Complex Nos. 104 to 106, Nungambakkam High Road, Madras-600 034.

We are enclosing herewith the photostat copies of the sanctioned plan for Office Complex for National Bank for Agriculture and Rural Development at Nungambakkam High Road, Madras-600 034 for your information and perusal. In this connection please refer our letter No. GCC/NAR/1011/3-84 dated 19th January, 84 wherein we had already enclosed permit copy.

Thanking you,

Yours faithfully, For GAUTHAM CONSTRUCTION COMPANY Sd/- Managing Partner.

Copy to:

1. The Deputy General Manager, National Bank for Agriculture & Rural Development, No. 499, Anna Salai, Madras-600 018.
2. The Deputy General Manager, National Bank for Agriculture & Rural Development, Poonam Chambers, Shivsagar Estate, Dr. Annie Besant Road, P.B. No. 6552, Worli, Bombay-18.

Encl.: As stated above.

It is also in evidence that the construction started after this. Annexure C.16 is another letter dated 6-2-1984 by the Builder to Mr. K. Yegnanarayana, enclosing photo copies of sanctioned plans for latter's perusal and comment if any. Copies of Annexure C.15 and C.15-A and C-16 were also marked to Deputy General Manager of the Bank at Madras and Bombay, Annexure C.16 is extracted hereunder.

GAUTHAM CONSTRUCTION COMPANY, MADRAS-17

Ref: GC/1011/5-84

Date: 6th February 84.

Sri. K. Yegnanarayana, Technical Consultant, National Bank for Agriculture & Rural Development, "Pioneer House" (V-Floor), No. 6-3-653, Somajiguda, HYDERABAD-500 004.

Dear Sir,

Sub : Office Complex for the National Bank for Agriculture and Rural Development on Nungambakkam High Road, Madras-600 034. Ref : Your letter No. NB/HYD/8455/G25 (Conslt)/83-84 of dated 1-2-84

Photo copies of sanctioned plans for office accommodation at Nungambakkam High Road have been forwarded to you vide our letter No. GCC/NAR/1011/5-84 dated 4th February 84. However we are enclosing another set of drawings for your retention. As desired by you we are enclosing a copy of structural designs/ calculations and soil test Report prepared by M/s. Kingsway Consulting Engineers

and M/s. F.S. Engineering respectively for your perusal and comments if any. A copy of Agreement of Sale and Amenities is also enclosed for your retention. Annexure C.16-A is a letter dated 22-2-1984 by Mr. K. Yegnanarayana, Technical Consultant of the Bank to the Builder in which it is clearly mentioned that the office complex was designed for a basement with five floors and specifications were also given for the construction of the basement. It is useful to extract Annexure C.16-A in this context.

Exhibit C-16-A

K. Yegnanarayana,
Technical Consultant

National Bank for Agriculture and Rural Development CAMP: NABARD: Madras Regional office, 499, Anna Salai, Madras-600 018.

22 February 1984.

M/s. Gautham Construction Company
No, 17, Tirumalaipillai Road, Madras-600 017.

Dear Sirs,

Sub: Proposed office complex at Nungambakkam High Road from M/s. Gautham Construction Company, Madras-Scrutiny of foundation and columns-regarding.
Ref: The design calculations and drawings received through M/s. Gautham Construction Company.

The architects for this complex are S.A. Fernando and M/s. Kingsway Consulting Engineers are the Structural Engineers. The complex had been designed for a basement with five floors. The soil investigation was done by M/s. F.S. Engineers Private Ltd. From their report, the soil is of cohesive expansive soil layers upto a depth of 7.5m, below ground level followed by cohesion- less soils below. The SBC of soil is given as 1 kg./cm. at a depth of 2.5 m. The soil is having swelling character and the report says that care should be taken to see that the bottom of the foundation trenches are not disturbed by over-excavation. Precautions are to be taken to lay the foundation and prior to that at least 6" thick 1:1 powdered quick lime and river sand should be laid.

I. Foundations:

The foundations are designed for basement + five floors.

(a)x.....

(b)

II. RCC Columns:

(a).....

(b).....

(c).....

These have been corrected in the drawings.

Yours faithfully, ds./- K. YEGNANARAYANA (Technical Consultant)

Copy to:

M/s. Kingsway Consulting Engineers,
20/21 Casa Major Road, Madras-600 008.

for information.

It is seen from the above exhibit that the Bank is very well aware of the change made by the Builder. The Technical Consultant of the Bank has also referred to in his letter that the office complex had been designed for a basement with five floors. He has also suggested in that letter to the Builder that the precautions are to be taken to lay the foundation and prior to that at least 6" thick 1:1 powdered quick lime and river sand should be laid. Under the head foundations, the Technical Consultant says that the foundations are designed for basement + five floors. In the concluding paragraph of the said letter technical consultant also says that the suggestion made by him in the said letter have been incorporated and corrected in the drawings. Annexure C.19 is a letter dated 4-6-1984 by the Builder to Mr. Yegnanarayana, Technical Consultant of NABARD, furnishing drawings for the basement. It is seen from the said letter dated 4-6-1984 the building plans etc. mentioned into he said letter including drawing No. G.116/24 for basement plan (Item 1-B) have been sent pursuant to the telegram sent by the Technical Consultant of the Bank dated 2-6-1984.

11. The oral evidence tendered by B.N. Sharma, Ex. Deputy General Manager of the Bank was also referred to by the counsel for the Builder at the time of his argument with reference to the above point. Mr. Sharma in his evidence says as under:

I do not remember whether the drawings annexures C-15- A and C.16 were prepared as per my requirements. But my requirement was communicated to my technical staff including Mr. Yegnanarayana, he was the sole consultant for the Bank for this area.

Exhibits plan Exhibits C-15-A and C-16 contain basement in the place of stilts, I do not remember whether my attention was drawn to these plans. Although I was still in the office at that time.

I do not remember whether there was a discussion between me and the claimant and our consultant, Shri Yegnanarayana with regard to the conversion of stilts into basement as per the above plans but I do remember that some discussions were taking place in this regard but no final decision was taken. Our consultant, Shri Yegnanarayana was suggesting that the conversion of stilts into basement

will enable the bank to carry on air-conditioning and other improvements.

In the face of the above evidence the contention of the Bank that the construction of the basement was not within bank's knowledge cannot at all be accepted. The conversion of stilts into basement was, thus made at the very initial stage of construction of the building and there was no objection by the Bank at any stage for the construction of the basement. The Bank was a silent spectator for the construction being made as per the changes effected.

The next question will be whether the builder is entitled to payment of cost of construction of the basement at Rs. 400/- per sq. ft. According to the learned counsel for the builder, the claim is based upon paragraph 9 of the agreement dated 30-8-1983, in which the expression, "built up area" is defined. As per this definition, the expression "built up area" , for the purpose of this agreement, shall include the entire built up area of the said building and shall also include the areas covered by the stair-case with the premises of each floor as also the balconies of the said premises. Further learned counsel for the first respondent invited my attention to the definition of the words "built up area" as per Central Public Works Department and I.S. Code. Copy of the Memo No. 29/21/58/WI dated NIL, October, 1958, issued by the Central Public Works Department, has been marked as Ex. C.87 . In Ex. C.87 issued by the Central Public Works Department, in order to ensure the adoption of a uniform method of working out plinth areas from plans. Clause I (a) of the above Rules is extracted hereunder:

I. GENERAL:

(a) The total plinth area of a building shall be the sum total of the plinth areas at every floor including the basement if any.

My attention was also drawn to the guide-lines issued by the Indian. Standard in regard to the measurement of plinth, carpet and rentable areas of buildings. The Rule says that this Indian Standard was formulated in the year 1966 to provide a basis for uniform method of measurement of such areas of buildings. Clause 2.1 of the said Rule defines Plinth Area which is extracted hereunder:

2.1. Plinth Area - shall mean the built up covered area measured at the floor level of the basement or of any storey.

3.2. The areas of each of the following categories shall be measured separately:
(a) Basement, (b) Floor without cladding (stilted floor) (c) Floors including top floor which may be partly covered, (d) Mezzanine floor, and (d) Garage.

Prima facie the basement is included in the entire building and forms part of the built up area and hence in my opinion the builder is entitled to payment for the basement at the stipulated rate of Rs. 400/- per sq. ft. Per contra, learned counsel for the Bank refutes this claim on various grounds. Reliance was sought to be placed upon Annexure C.4, C.5 and C.6, acceptance letters of the Bank. By referring to this document the learned counsel submits that these documents referred to stilts and not to basement. My attention was also drawn to letter

dated 12-9-83 written by B.N. Sharma, Ex. Deputy General Manager of the Bank to Mr. Rama Rao, in which Mr. Sharma indicated that no payment will be made for stilts. It is seen from the letter dated 12-9-1983 it is only in the nature of internal correspondence of the Bank and admittedly, the builder was not served on notice, nor did the builder accept this condition. On the other hand, as seen from the above extract of the evidence of Mr. Sharma he had categorically admitted in his evidence when he orally informed Mr. Ramesh about it, the latter did not agree to this condition. The Bank has also not pursued the matter further by issuing a notice to the builder or incorporating in the agreement the condition regarding non-payment for the basement. It is further contended by the learned counsel for the Bank that the contract between the builder and the Bank is in the nature of a lumpsum contract or a package deal and the builder cannot claim payment for separate items and that in any case, the cost of construction cannot exceed the amount of Rs. 1.92 crores. If we refer to the agreement and the supplemental agreement etc. it certainly provides for a payment to the builder at the rate of Rs. 400/- per sq. ft. of the built up area and also that any increase or decrease in the built up area maybe taken into account in the cost of construction after measurement were taken. The amount of Rs. 1.92 crores was fixed for 48,000 sq. ft. The supplemental agreement provides for further payment if the area exceeds 48,000 sq. ft. Hence the payment cannot be restricted to 1.92 crores as contended by the learned counsel for the Bank, and the Bank is liable to pay at the rate of Rs. 400/- per sq. ft. of the built up area if the built up area exceeds 48,000 sq. ft. as admittedly it did.

13. Learned counsel for the bank next contended that in any event the builder is not entitled to claim payment for the basement at Rs. 400/- per sq. ft. as the actual cost of construction of the basement is much less than the cost of construction of the office floors. A reference to the principal agreement dated 30-8-1983 which only provides for a uniform rate of Rs. 400/- per sq. ft. for the entire built-up area. Thus, the builder, in my opinion, is entitled to payment of the cost of basement at Rs. 400/- per sq. ft. for area covered by the basement. It is also seen from the records that the measurement of the building was taken jointly by both parties and the area covered by the basement was arrived at 12,090 sq. ft. Hence the Builder shall be entitled to received payment for this area at Rs. 400/- per sq. ft. i.e. Rs. 48,36,000/-. The payment of interest on this amount will be considered later. As stated supra the Builder has included three other items in Claim No. 1. The arbitrator has considered item No. 1 along with major claim Nos. 2 and 3 separately. In so far as items 2 and 3 of Claim No. 1 are concerned the arbitrator has rightly disallowed for the reasons stated in the award. In so far as Claim Nos. 2 and 3 are concerned which the Bank has however pleaded as set off against the counter claims of the Bank. The arbitrator on a consideration of entire materials placed before him, allowed the claims in full to an extent of Rs. 5,10,009/- and awarded interest at 18% per annum on Rs. 5,03,469/- from the date of the final bill dated 21-12-1987 till the date of payment and rejected the claim of interest on the third claim of Rs. 6,600/-.

According to the learned counsel there is no justification for awarding interest on the said sum. As stated supra the award of interest at 18% per annum from the date of the final bill till the date of payment or decree of the Court and the correctness of the same will be considered later. Likewise the arbitrator has totally rejected claim Nos. 4 and 5 under which the Builder has claimed Rs. 21,35,751-42 towards interest on non-payment and delayed payments of its claims Nos. 1, 2 and 3, Rs. 60 lakhs for loss of business as a result of non-payment or delayed payment of its claims respectively. As regards to claim No. 7 the arbitrator has awarded a sum of Rs. 60,000/- towards cost. According to the arbitrator, the builder has succeeded only in respect of his claim Nos. 1 and 2. It is settled principle of law that granting of cost is an absolute discretion of the arbitrator. Hence I am not interfering with the award of the arbitrator on Claim No. 7. Accordingly, the award passed by the arbitrator as regards to the claim No. 7, is confirmed.

14. Mr. R. Krishnamurthy, learned counsel for the Bank invites my attention to a decision reported in *K.P. Poulose Vs. State of Kerala and Another*, and submits that the award is vitiated by an error of law and that the arbitrator has ignored very material documents which throw abundant light on the controversy. In this sense the arbitrator has misconducted the proceedings which would also amounts to legal misconduct. According to Mr. R. Krishnamurthy, learned counsel for the Bank, the entire contract would go to show that only the office accommodation would constitute built-up area for which the Bank has agreed to pay Rs. 400/- per sq. ft. for 48,000 sq. ft. and that the agreement itself would show that stilts for parking would not constitute built-up area for which payment cannot be claimed. According to the learned counsel for the Bank, that the finding of the arbitrator that the parking area constitute built up area amounts to an error apparent on the face of the record and amounts to legal misconduct. The arbitrator in reaching the conclusion has not referred to the terms of the contract in its proper perspective and the conclusion of the arbitrator without taking into account the vital provision of the contract amounts to legal mis-conduct and hence the award of the arbitrator is liable to be set aside.

15. Learned counsel further submits that the terms of the contract would show that a contract is a turn key or a firm price contract and the Bank is liable to pay Rs. 1.92 crores for 48,000 sq. ft. office accommodation together with the land including parking area. Parking area which was originally agreed to provide in the open space was modified to stilts later on. Hence the same has not been taken into account for the purpose of payment. Therefore, learned counsel submits that the basement which was put up by the first respondent in lieu of stilts for their own, cannot be paid for and whatever applies to stilts would equally apply to basement as the same was provided only for parking and such a parking area in basement could not form part of office accommodation which alone is to be paid for. Thus, according to the learned counsel for the Bank, that the conclusion of the arbitrator that the basement is a built-up area and it is to be paid for, amounts to misconduct. Learned counsel has also taken me through the relevant

provisions of the agreement and particularly the definition of the words built up area.

16. I am unable to countenance the said contentions raised by the learned counsel for the petitioner. In my opinion the arbitrator has rightly applied his mind and considered the agreements and other vital documents which are relevant for the purpose of arriving at a conclusion whether the area covered by the basement is a built up area or not and has reached a right and just conclusion. In my opinion the decision cited supra by the learned counsel for the Bank, is not applicable to the facts of this case and is distinguishable because in this case the arbitrator has not ignored any of the material document to arrive at a decision to resolve the controversy between both the parties. *K.P. Poullose Vs. State of Kerala and Another*, is a case of the arbitrator arriving at an inconsistent conclusion even on his own finding. Hence the Supreme Court held that the award suffered from a manifest error apparent ex facie. That is not the case here. The arbitrator has considered all the documents and the materials placed before him and arrived at a conclusion. Whether the arbitrator in interpreting a particular document in a particular manner or not is not within the province of this Court to consider, which in my opinion, will not amount to legal misconduct or misconduct of the proceedings as contended by the learned counsel for the Bank. Thus, I reject the arguments of the learned counsel for the petitioner on the above points and confirm the award of the arbitrator; but however, subject to my decision on the question of award of interest which I will consider at the later part of the order.

17. Learned counsel for the Bank submits that the award of the arbitrator in granting interest at 18% per annum from the date of the final bill till date of payment or decree of the Court is wholly without jurisdiction. According to the learned counsel, the arbitrator has no power or authority to award interest at 18% per annum when the parties to the agreement have agreed to charge interest in case of default at the rate of 12% per annum. It is also contended that the arbitrator has no authority or jurisdiction to award interest from the date of final bill dated 21-12-1987 till date of payment, which includes the period during which matter was pending before the arbitrator (*pendente lite*). In support of his contention Mr. R. Krishnamurthy cited a decision reported in *Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another*, wherein a Division Bench of the Supreme Court held as under:

Paragraph No. 13:

The interest awarded, in the instant case, covers three periods; (i) 6th August, 1981 to 21st August, 1984, prior to the commencement of the arbitration proceedings; (ii) 22nd August, 1984 to 19th July, 1985 *pendente lite*; and (iii) 19th July, 1985 to 17th June, 1986 (date of award to date of decree).

14. Having regard to the position in law emerging from the decision of this Court in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and*

Others, and S.29 of the Arbitration Act, 1940 and S.34 of the Code of Civil Procedure, we would modify the grant of interest in this case. The arbitrator has directed interest to be paid at 17% per annum from 6-8-1981 up to the date of decree viz., 17-6-1986 since in this case the reference to arbitration was made after the commencement of the (Interest Act, 1978, the arbitrator under S. 3(1) (a) of the said Act was entitled to award interest from 6-8-1981 till 21-8-1984 in view of this Court's decision in Executive Engineer (Irrigation), Balimela and Others Vs. Abhadutta Jena and Others, In the light of the same decision, he could not have awarded interest for the period from 22-8-1984 till the date of the publication of the award viz., 19-7-1985. So far as interest for the period from the date of the award (19-7-1985) till the date of the decree is concerned, the question was not specifically considered in Abhadutta Jena's case (supra) but special leave had been refused against the order in so far as it allowed interest for this period. We think interest should be allowed for this period, on the principle that this Court can, once proceedings under Ss. 15 to 17 are initiated, grant interest pending the litigation before it, i.e. from the date of the award to the date of the decree. It may be doubtful whether this can be done in cases arising before the Interest Act, 1978 in view of the restricted scope of S. 29 of the Arbitration Act. But there can be no doubt about the court's power to grant this interest in cases governed by the Interest Act, 1978 as S. 3(1)(a) which was applied by Abhudatta Jena to arbitrators will equally apply to enable this Court to do this in these proceedings.

In Executive Engineer (Irrigation), Balimela and Others Vs. Abhadutta Jena and Others, the Supreme Court held as follows: (Head note para 22)

In the cases to which the 1978 Interest Act applies the award of interest prior to the proceedings is not open to question. In regard to pendente lite interest, that is, interest from the date of reference to the date of the award, the claimants would not be entitled to the same for the simple reason that the arbitrator is not a Court within the meaning of S. 34 of the C.P.C., nor were the references to arbitration made in the course of suits. In the cases which arose before the commencement of the Interest Act, 1978, the claimants are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1939 does not apply to their cases and there is no agreement to pay interest or any usage of trade having the force of law or any other provision of law under which the claimants were entitled to recover interest. They are not entitled to claim pendente lite interest as the arbitrator is not a Court nor were the reference to arbitration made in suits.

In State of Orissa Vs. Dandasi Sahu, the Supreme Court held as follows: (para 13 at page 1796).

It is now well-settled that the interest pendente lite is not a matter within the jurisdiction of the arbitrator. In this connection reference may be made to the

observations of this court in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, where this Court held that the arbitrator could not grant interest pendente lite. In the aforesaid view of the matter this direction in the award for the payment of such interest must be deleted from the award. So, we delete the following portion from the award. "The award amount shall bear interest at 10% per annum from 9-9-1975 till the date of decree or payment, whichever is earlier." The order of the High Court is modified to the extent that the award is confirmed subject to deletion of the interest as aforesaid. We make it clear that in the facts of this case interest for the period from 26-9-81 to 18-3-83, the date of the award be deleted. The High Court has, however, granted interest from the date of the decree. That is sustained.

In State of J & K. v. Haji Ghulam Rasool Rather & Sons AIR 1989 S.C. 1021, the Supreme Court held as follows:

Para 4. The other question agitated on behalf of the appellant relates to grant of interest in favour of the respondent. The award Annexure A which is included at pages 18 and 19 of the paper book indicates that a sum of Rs. 70,981/- was allowed by way of interest as against a larger amount claimed. This part of the award has to be deleted in view of the decision in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, holding that in cases where the reference or arbitration was made prior to the commencement of the Interest Act, 1978, that is, August 19, 1981, interest was not payable pendente lite and for the earlier period. The reference in the present case had been made before the coming in force of the Interest Act. The award is, in the circumstances, modified to that extent. The appeal is accordingly allowed in part, but there will be no order as to costs.

The arbitrator in this case awarded payment of interest subject to the decision reported in Secretary to the Government of Orissa and Another Vs. Sarbeswar Rout, . It is seen from the said judgment the three learned Judges of the Supreme Court have distinguished the judgments reported in Executive Engineer (Irrigation) Balimela's case and Gujarat W.S. & S.B. case (supra) on facts, and set aside the order awarding interest in so far it allowed interest for the period after 20-4-1982 and allowed the appeal. The learned Judge says that the aspect of the case which arose for consideration in Secretary, Govt. of Orissa's case (supra) did not arise for decision in cases reported in Executive Engineer (Irrigation) Balimela and Gujarat W.S. & S.B. (supra) cases. Hence in my view, no assistance from them can be taken in the present case. In the instant case reference to the arbitrator was made after the commencement of the Interest Act, 1978. Interest is a specific dispute under reference between parties. However in view of the Supreme Court decisions in Executive Engineer (Irrigation) Balimela's case and Gujarat W.S. & S.B.'s case (supra) interest is not payable pendente lite as the said rulings are not overruled. In the instant case as stated above, the agreement provides for payment of interest only at 12% per annum, as contemplated under Clause 14 of the Principal Agreement.

But both parties have claimed interest at 18% per annum before the arbitrator. The claim for interest on the constituted claims is within the purview of the arbitrator. The claim for interest at 18% per annum which is the normal banking rate of interest is not disputed by both parties. Even in the counter claim, the Bank has claimed interest only at the rate of 18% per annum. The award of interest at 18% per annum from the date of the final bill cannot be characterised as an error apparent on the face of the record. On the contrary, the arbitrator has strictly accepted the claim made by both parties at 18% per annum in the matter of grant of interest. I am unable to accept the contention of Mr. R. Krishnamurthy, that the rate of interest granted by the arbitrator at 18% per annum is excessive and on the high side. Therefore the same does not require reduction in my hands to 12% per annum as agreed to between the parties as per the principal agreement. Having regard to the limited scope of interference in proceedings under S. 30 of the Arbitration Act, it is not possible for me to hold that the arbitrator has committed an error apparent in granting interest at 18% per annum. Therefore I am not able to interfere with the award of the arbitrator on this aspect of the matter. Unless a case has been made out to interfere with the award of the arbitrator on the question of the Award of interest at 18% per annum, it will not be open to this court to grant interest at 12% even though it is provided in the agreement between the two parties. However the interest is payable to the builder from the date of final bill till the arbitrator entering upon the reference and from the date of the award till payment. Having regard to the position in law emerging from the decision of the Supreme Court in Executive Engineer (irrigation, Balimela) (supra) Gujarat W.S. & S.B. (supra) cases, and Section 29 of the Arbitration Act, and S. 34 of the Code of Civil Procedure, I would modify the grant of interest in this case. The arbitrator has directed interest to be paid at 18% per annum from the date of the final bill, viz., 21.12.1987, till the date of decree whichever is earlier. Since in this case the reference to arbitration was made after the commencement of the Interest Act, 1978, the arbitrator under S. 3(1)(a) of the said Act was entitled to award interest prior to the commencement of the arbitration proceedings in view of the decision reported in Executive Engineer (Irrigation) case (supra). In the light of the same decision the arbitrator could not have awarded interest for the period pendente lite till date of passing the award viz. 24.5.1990. In so far as interest for the period from the date of the award till date of the decree is concerned, the interest at 18% per annum should be allowed for this period on the principal, that this Court can, once proceedings under Ss. 15 to 17 of the Arbitration Act are initiated, grant interest pending the litigation thereafter, i.e., from the date of the award to the date of the decree. There can be also no doubt about the court's power to grant interest in case governed by Interest Act, 1978 as Section 3(1)(a) which was applied in Executive Engineer(Irrigation) Balimela case(supra) to arbitrators, will equally apply to enable me to do this in these proceedings. Under these circumstances I would further delete interest awarded by the arbitrator pendente lite, i.e., from the date of entering upon the reference till 24.5.1990, date of passing of the award and confine interest on the principal

sum of Rs. 48,36,000/- on Claim No. 1 and Rs. 5,10,009/- representing Claim Nos. 2 and 3. However, in exercise of my powers u/s 3 of the Interest Act, 1978 and Section 29 of the Arbitration Act, I direct that the above principal sums should carry interest at the same rate (18% per annum) from the date of my order till date of actual payment.

18. Let me now deal with the counter claims made by the Bank. The bank has claimed under eight heads. The arbitrator has disallowed counter claim No. 1 on the ground that it was admitted by the Bank that the extent of the land 9 grounds and 1100 sq. ft. which is demarcated in the Schedule-G to the agreement has been provided by the Builder. On the counter Claim No. 2, the Bank has claimed compensation for inferior flooring, lesser height for the floors and non-execution of compound wall. With regard to the flooring, according to the Bank, the builder has to provide marble flooring in the entire building. But the Builder has actually provided marble-flooring in some portions like stair case and entrance hall, but has provided only mosaic tile flooring in the rest of the building. The Builder states that the flooring was done in accordance with the specifications attached to the agreement and under the supervision of the Engineers of the Bank. Learned counsel for the Builder drew my attention to Annexures C.44, C.46, C.63, C.64 filed along with the claim petition. It is common case that the work of construction shall be carried on in accordance with the directions of the Bank's officials and as provided under the agreement. Annexures referred to above clearly indicate that the flooring work was done in accordance with the directions of the Bank's officials. The materials used for the flooring were made within the knowledge of the bank's officials. The Bank has not raised a little finger against the use of mosaic instead of marble tiles for the flooring. Hence in my view, the claim of the Bank on this scope does not appear to be bonafide. The second objection is about the height of the floors. According to the Bank, Height of the floor should be 11'6" as required under the agreement. But the height of meet has alone been provided. A perusal of the plans sanctioned by M.M.D.A. will show that the height of 11 ft. is in accordance with the plans sanctioned by M.M.D.A. As pointed out earlier, the Bank had full knowledge of these plans. The height was also within the knowledge of the the Bank's Official and there was no objection at any point of time. The Bank in my opinion, cannot claim any damages for the lower ceiling provided by the builder. The next claim under this head is with regard to compound wall. At the time of argument it was represented by the learned counsel for the Bank that the compound wall have been now put up by the builder and hence there is no need for me to consider this counter claim. Counter claim No. 3 is with regard to delay in completion and handing over of possession of the building. I will deal with this point a little later. Under counter claim No. 4 the Bank had ex-pressed its grievance that the Builder has not executed the sale deed of the land and building. This-claim of the Bank has been allowed by the arbitrator and the Builder was directed to execute a sale deed in favour of the Bank without any further delay. The said direction is confirmed, and the builder is directed to

execute a sale deed without further loss of time. Counter claim Nos. 5, 6, and 8 representing the interest claimed by the bank on counter claim Nos. 1 to 4. The arbitrator disallowed these claims in view of the fact that the counter claims Nos. 1 to 3 have been disallowed. In counter claim No. 8, the arbitrator has held that the Bank is not entitled to any cost of the arbitration proceedings in view of the fact that all the counter claims have been disallowed except Claim No. 4. Let me now come to counter claim No. 3. The Bank claims damages in a sum of Rs. 30,67,781/- on account of delay in completion and handing over of possession of the building. As per the agreement dated 30.8.1983, the Building has to be completed and possession handed over to the bank within a period of two years i.e. on or before 30.8.1985. As a matter of fact, possession of the building was handed over to the Bank on 1st September, 1987. The arbitrator has divided this claim into two parts: (1) Rent paid by the bank for its office from 1st September, 1985 to 31st August 1987 and (2) the salaries paid to its staff during the delayed period. The second part of the claim was rightly disposed of by the arbitrator since the staff of the Bank who are permanent employees of the Bank and are appointed specifically for supervising the work of construction. Hence this discountenance the claim for the salaries paid to its staff during the delay made by the Bank. In regard with the first of the claim in counter claim No. 3 the arbitrator as a matter of fact held that the builder has admitted that there was a delay of two years in completing the construction. The arbitrator has also held that since the Bank has been extending the period from time to time for completing the construction, and time was not the essence of this contract for completing the construction and that the delay by itself does not entitle the Bank to claim damages for the delay. Learned arbitrator has forgotten one important fact that the Bank has been complaining against the slow progress of the work and pressing for more speedy work. However the Bank has granted final extension till 31st March, 1987 and claimed damages under Ex. R.20. Therefore the arbitrator ought to have considered the Bank's claim for the rent it paid for its office for the period between 1st April, 1987 and 1st September, 1987 i.e. for a period of five months. Though the arbitrator says in his judgement that this claim has to be considered it does not appear from the award that this claim was ever considered. The arbitrator arrived at the figure of Rs. 5,30,500/-. In refuting this claim, the Builder pleads that the Bank was withholding payment of its Bill and the delay in payment of the bill had been considered and that the arbitrator having held that the withholding part of the bills was not unreasonable and rejected the claim of the builder for interest for delayed payment. The arbitrator in my opinion, ought to have awarded a sum of Rs. 5,30,500/- to the Bank. In my opinion, the arbitrator has committed an error in not awarding this sum of Rs. 5,30,500/- in favour of the Bank, which I am emboldened to interfere and correct the same on the strength of the two decisions of the Supreme Court reported in: (1) Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another, , in which the Supreme Court held as under:

It was further contended for the appellants that an award is one and indivisible

and to direct that effect be given to a part of the award and not to the whole of the award would amount to modifying the award and that was impermissible. We do not think that there is any substance in this contention also. Where a severable part of an award cannot be given effect to for a lawful reason, there is no bar to enforce the part of which effect could be justly given. See *Mt. Amir Begam v. Badr-ud-din Hussain* AIR 1914 PC 105 where as a general principle it is laid down that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. By giving effect to a part of the award in this case no prejudice is caused to the appellants. In fact they stand to benefit. As the award stands, the appellants would have been responsible not only to pay the amounts personally, but also from the property which was charged. Since the charge part is eliminated for want of registration, they are freed from the additional liability. It is true that judgement should be pronounced according to the award, but that does not bar giving effect to the severable part of the award if it could be justly done. Departure from the award or a part of the award is barred only in those cases where the award or a severable part of it is lawful and capable of being given effect to

(2) and in *The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board*, the Supreme Court held as follows:

We are not disposed to hold as contended by the respondent, that if a part of the award be found to be invalid, the entire award should be set aside and remitted back for a fresh decision. The error which has occurred in the award of the Umpire relates to a matter which is distinct and separate from the rest of the award. The part which is invalid being severable from that which is valid, there is no justification for setting aside the entire award

Respectfully following the above two rulings, I direct that the award for the arbitrator will stand amended to the extent of Rs. 5,30,500/- representing the Bank's claim for the rent it paid for its office for the period between 1st April, 1987 to 1st September 1987, on counter claim No. 3. As held by the Supreme Court in the above judgements that if a part of the award be found to be invalid, or incorrect the entire award should not be set aside and remitted back for a fresh decision. The error which has occurred in the award of the arbitrator relates to the matter (counter claim) which is distinct and separate from the rest of the award representing the claims made by the builder. Further the award of the arbitrator given in favour of the builder on his various claims is not touched by me except with regard to the award of interest for the period pendente lite, that too on the strength of the Supreme Court judgements referred to supra. It is open to me to amend the award without touching the award passed by the arbitrator in regard to the main claims. The counter claim is a distinct and separate, claim from the rest of the award. The counter claim is severable from the main claim and hence there is justification for me to interfere with the award in regard to that portion alone without setting aside the entire award. Normally, I would have remitted the award for a decision on the counter claim in the light of

my judgment but that is likely to involve undue delay and expense in a dispute which is pending since 1987. It may be contended for the Builder that an award is one and indivisible and to direct that effect be given to a part of the award and not to the whole of the award would amount to modifying the award and that was impermissible. I do not think that there is any substance in this contention. Where a severable part of the award cannot be given effect to for a reason, there is no bar to enforce award which effect could be justly given. In *Mt. Amir Begam v. Badr-ud-Din Hussain* AIR 1914 P.C. 105 wherein it was held that that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. By giving effect to a part of the award in this case no prejudice is caused to the Builder. In fact they stand to benefit to a greater extent on their main claims. Thus the award of the arbitrator is modified to the extent in so far as the counter claim No. 3 is concerned for a sum of Rs. 5,30,500/- together with interest at 18% per annum. The Bank also will be entitled to interest at 18% per annum on this amount except the period pendente lite, till the date of realisation.

It was argued by Mr. Vedantham Srinivasan, that the Bank has released retention money of Rs. 10 lakhs furnished by the builder in terms of Clause 13 of the agreement for sale fully satisfying that there are no defects during the defects liability period, that there was no counter claim even at the time of reference to arbitration and there was no question of existence of any dispute as there was no notice to the respondent from the Bank to the Builder as regards their claim or intention to claim, till the preliminary hearing by the arbitrator. I am unable to agree. The arbitration clause provides for referring any dispute or reference that may arise between the parties either during the progress or after the completion of the work or any portion thereof. Hence it is open to both parties to raise any dispute even after the completion of the work. Whatever may be the case the arbitrator has entertained the counter claim made by the Bank.

Lastly it was contended by Mr. Vedantham Srinivasan, that the petitioner/Bank has not made out any case for setting aside the award and did not make out any error which is apparent on the face of the award or made out any ground of misconduct. In support of his contention learned counsel invited my attention to the following decisions:

(1) *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, in which the Supreme Court held as follows:

When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.

(2) In *Sudarsan Trading Co. Vs. Government of Kerala and Another*, the Supreme Court held as follows :-

It is not open to the court to probe the mental process of the arbitrator and

speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In absence of any reasons for making the award, it is not open to the court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisal of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

(3) In *State of Orissa Vs. Dandasi Sahu*, , the Supreme Court held as follows:

It is well-settled that when the parties choose their own arbitrator to be the judge in dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon law or on facts. Therefore, when arbitrator commits a mistake either in law or in fact in determining the matters referred to him, where such mistake does not appear on the face of the award and the documents appended to or incorporated so as to form part of it, the award will neither be remitted nor set aside.

The contention of Mr. Vedantham Srinivasan, shall merit consideration. As already mentioned the award of the arbitrator is not only a reasoned one; but also is elaborate and detailed. It is well settled that in the absence of mistake of law or of fact apparent on the face of the record, the award of the arbitrator is not open for challenge by any party. I do not find any error apparent on the face of the record except on the question of award of interest pendente lite and failure to consider the counter claim No. 3, warranting interference with the award in question. In *P.K. Chinnasamy Vs. The Superintending Engineer, Execution Circle, TWAD Board* (now redesignated as *Superintending Engineer, TWAD Board* and *Another*, , *Nainar Sundaram and Bellie, JJ.* have held that it is not the function of the court to scrutinise the award on merits as if it is sitting in appeal on the verdict of the arbitrator. Applying the above ruling and the rulings in plethora of decisions of the highest court of the land and highest court of the State it is not possible for me to interfere with the award of the arbitrator except to the extent indicated above. There is also merit in the contention of the learned counsel for the Builder that since the basement constituted the built up area and the rate is available in the agreement itself, there is no question of applying principle of "Quantum meruit". As an alternative argument the learned counsel for the Bank submits that the Builder himself by his letter dated 17-2-1989 (Ex. R.66) has agreed to receive 50% of covered built up area rate i.e. Rs. 200/- per sq. ft. i.e. Rs. 24,00,000/- plus Rs. 5.36 lakhs for additional works cost as worked out by Bank. This submission was made by the learned counsel for the Bank without

prejudice to his other contentions in regard to the validity of the award. It is true that the Builder has agreed to accept Rs. 24,00,000/- plus Rs. 5.36 lakhs for the reasons mentioned in Ex. R.66. Since the Bank had expressed a desire to consult their Consultant, Managing Director and Chairman on the subject and the Bank needed time till 28-2-1989 and as such time was also extended till 28-2-1989 for arriving at a decision the Builder had agreed to extend its notice for arbitration till the end of February, 1989. The builder had specifically requested the Bank to consider the request and finalise the payment without further delay and in case the Bank do not agree with this request of the Builder they may take necessary action to refer the matter to the arbitration. It is seen from the said exhibit that the rate of Rs. 217.52, was worked out by the Builder at the instance and desire of the Bank for the negotiation purpose. Though the Builder did submit certain details on 14-3-1990, the negotiations were made without prejudice to the rights of the both parties and ultimately negotiations failed. Under these circumstances there is no purpose in referring to this correspondence which have been made without prejudice to the rights of the Builders. This Court has now been called upon to decide whether the award passed by the arbitrator is valid and well within the jurisdiction of the arbitrator. In view of my findings on the main claims made by the Builder, the argument of the learned counsel for the Bank do not merit and deserve any consideration at this stage. In view of the proceedings and to maintain cordial relationship between the Builder and, the Bank, the Builder himself had agreed to accept 50% of covered built up area rate. According to the Learned Counsel for this Bank, the Builder having offered to accept 50% of the covered built up area rate i.e. Rs. 200/- per sq. ft. amounting to Rs. 24,00,000/- the Builder is not entitled claim Rs. 400/- per sq. ft. of built up area for the basement. It is also seen from Ex. R.72 the Builder has submitted additional cost of basement floor worked out as per CPWB Schedule/Plinth area rates, to the Bank. But it is to be seen that the said proposals were made by the Builder to the Bank only for the purpose of negotiations and peaceful settlement and without prejudice to its claim. In the last paragraph of Ex. R.66, the Builder has specifically stated that the Builder had agreed to extend notice for arbitration till the end of February, 1989 and requested the Bank to consider their request and finalise payment without further delay. It is also stated that in case the Bank do not agree with this request of the Builder the Bank may take necessary action to refer the matter to the arbitration and in any event the claims submitted by the Builder in their letter No. GCF/NBRD/NHR/88 dated 30-12-1988 will remain as it is. But it is seen from the correspondences between the parties the negotiations between the parties having not fructified the matter was referred to arbitration. Once the matter is referred to arbitration, the arbitrator is expected to decide the matters on the controversy raised before him and to resolve the dispute between the parties on merits. It is also a matter of fact that the negotiations between the parties have failed and in that even the Builder has no other option except to pursue their claim made already. Accordingly, the arbitrator has also decided the issues raised before him by both parties and passed the impugned award. The Bank could have considered the claim made by

the Builder under Ex. R.66 and R.72, and arrived at just and reasonable decision. In my opinion the Bank has failed to avail the opportunity and reach a settlement. Hence it is not open to the Bank now to rely on Ex. R.66 and R.72 and to say that the rate claimed is only Rs. 200/- per sq. ft. and hence the Builder is not entitled to claim Rs. 400/- per sq. ft. The arbitrator has passed a reasoned award as stated above. This Court has only to decide whether the arbitrator has passed an award in accordance with law or misconducted himself or committed any legal misconduct. Hence this claim now made as an alternative plea deserves no consideration.

The appointment of an Arbitrator is also entirely at the discretion of the Bank, The agreement for sale dated 30-8-1983 provides for a dispute being referred to arbitration under Clause 44 of the agreement, which is couched in very wide language. It provides for reference to arbitration to an arbitrator to be chosen by the Vendor/Builder from a panel of three names to be nominated by the Purchaser/Bank. It also further provides that the award of such arbitrator shall be final and binding on the parties. It is seen from the above clause 44 of the agreement for sale, the Builder has no option of his own except to choose a person from a panel of three names to be nominated by the Bank. In the instant case as stated above Mr. M.R.A. Ansari, Retired Chief Justice of a High Court, has been appointed as a sole arbitrator. The said arbitrator, in my opinion, has considered the rival claims of both parties, considered the merits and demerits of both claims, and ultimately passed the impugned Award by giving cogent and acceptable reasons. The Award in my opinion, is not liable to be set aside, it being a reasoned one except to the extent indicated above in so far as the interest awarded pendente lite and in regard to one counter claim. The Bank has not made out any case for illegality or nullity of the award. Merely because the award is against the Bank and not to its liking the Award is not liable to be interfered with. It is also not alleged or argued by the Bank that the Award was procured by any illegal methods.

In the result, O.P. No. 216 of 1990 is allowed and there will be a decree in accordance with the award subject to my observations made above with regard to the award of interest awarded by the Arbitrator and in regard to counter claim No. 3. O.P. No. 483 of 1990 filed by the Bank is allowed in part as stated above. There will be no order as to costs.