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(1986) 09 P&H CK 0081

In the Punjab And Haryana At Chandigarh

Case No : First Appeal from Order No. 154 of 1983

M/s Goyal Electric Stores — APPELLANT

Vs

Punjab State Electricity Board, Patiala and others — RESPONDENT

Date of Decision : 10-09-1986

Acts Referred:
Arbitration Act, 1940 — Section 33

Citation : (1986) 09 P&H CK 0081

Hon'ble Judges : Rajendra Nath Mittal, J

Bench : Single Bench

Advocate : H.L. Sibal, Mr. S.C. Sibal and R.K. Honda, for the Appellant; R.L. Sharma for Respondent No. 1 and Mr. S.K. Aggarwal, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Nath Mittal, J.—This appeal has been filed against the order of the Senior Sub Judge. Patiala dated 4th February, 1983.

2. Briefly the facts are that tender enquiry Q 10 (dis) dated 17th July, 1972 was floated by the Punjab State Electricity Board (hereinafter referred to as the Board) for sale of 500 MT of copper scrap The tenders were required to be accompanied with the earnest money at the rate of 2% of the tendered price as security. The conditions of sale were that the officer inviting tenders had the right to change the quantities of material offered for sale at any time to accept or reject any or all of the tenders received without assigning any reason. M/s Goyal Elecrtic Stores, Chandigarh (hereinafter referred to as the Goyals) sent a tender dated 15th July, 1972 offering to purchase whole of the quantity at graded rates, i. e., for 20 MT at the rate of Rs. 14.71, 30 MT at the rate of Rs. 14.61, 100 MT at the rate of Rs. 14.53, 100 MT at the rate of Rs. 14 31, 100 MT at the rate of Rs. 14.21 and 150 MT at the rate of Rs. 14.11 per Kg along with security of Rs. 1 lac. It was stated in the tender that a sum of Rs. 57,000/- was already lying with the Board and that amount be treated as further security. It is alleged that the Board accepted the offer of the Goyals for first 347 MT at their quoted rates.

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They lifted the above quantity from 1st March, 1973 to 16 July, 1974.

3. The Goyals then wrote to the Board that the latter should allow them to lift further 153 MT of copper scrap. The Board did not agree to that. The Goyals thereafter referred the matter to the Chairman of the Board stating that the above said quantity be given to them and in case it was not possible, the matter be referred to the arbitration in pursuance of Clause 12 of the tender. They also appointed Shri Madan Mohan Gupta, Advocate, Respondent No. 2 as their arbitrator and requested the Chairman to appoint the Board''s arbitrator. The Board appointed Shri O. P. Sharma, Respondent No. 3 as its arbitrator. Both the arbitrators entered upon the reference and unanimously passed an award that the Board should supply 153 MT of copper scrap to the Goyals against payment as per tender rates. The Goyals would further be liable to pay sales tax, etc. as mentioned in the tender enquiry. Their claim for damages to the tune of Rs. 25,000/- was, however, rejected by the arbitrators. The award was filed in the Court of the Senior Sub Judge for making that a rule of the Court.

4. The Board filed objections against the award. It was inter alia stated by it that there was no agreement between the parties to supply 153 MT and that the arbitration clause to refer the matter to the arbitrators, therefore, did not apply. The arbitrators consequently had no jurisdiction to decide the matter. It was further alleged that the arbitrators acted with haste for not serving a notice on the Board and that they also misconducted themselves and the proceedings.

5. On the pleadings of the parties the following issues were framed:

1. Whether the arbitration agreement arising out of tender enquiry Q-10 was with respect to 347 MT of copper scrap only ? OPP

2. If issue No. 1 is proved, whether the reference to arbitration was legal and valid ?

3. Whether the proceedings before the Arbitrators are vitiated for lack of notice to the Petitioner and for other irregularities as alleged in para 2 clause L of the objections petition ? OPP

4. Whether the award made by the Arbitrators is bad for their misconduct and for the misconduct of the proceedings and on the grounds stated by the objection-Petitioner ?

4A. Whether the objector Board is estopped from challenging the acceptance of the agreement as well as of the award.

6. The Court held that the agreement between the parties was with regard to 357 MT only and not with respect to 153 MT, that the reference to arbitration with regard to the claim of 153 MT by the Goyals was not valid, that the proceedings before the arbitrators were not vitiated for lack of notice to the Board and that the parties were afforded due opportunity to lead evidence and they were properly heard by the arbitrators but they did not discuss the evidence

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and record specific finding of fact. It was further held that the findings of the arbitrators were not based on any evidence and, therefore, the award was bad on the face of it. On issue No 4-A the Court held that the Board was not estopped from challenging the agreement and the award. Consequently it accepted the objections of the Board and set aside the award. The Goyals have come up in appeal to this Court. Issues Nos. 1 and 2.

7. Mr. Sibal has argued that both the parties referred the dispute to the arbitration of Mr. Madan Mohan Gupta and Shri O. P. Sharma who decided the same after giving opportunity to the parties to lead the evidence. No petition u/s 33 of the Arbitration Act, (hereinafter referred to as the Act) was filed by the Board challenging the jurisdiction of the Arbitrators and that that question was not even raised before the Arbitrators. Therefore, they cannot raise the question of jurisdiction after the award has been given by them.

8. I have heard the learned Counsel for the parties at a considerable length. In order to determine the question I shall first deal with the legal aspect. In case a party wants to raise a dispute regarding reference to arbitration, it can do so u/s 33 of the Act which provides that a party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement shall apply to the Court and the Court shall decide the question of facts. It is well settled that the question can be raised before the matter has been referred to the Arbitrators and not after the award has been given by them. In the above view, I am fortified by the observations of the Supreme Court in M/s Tarapore and Company v. Cochin Shipyard Ltd. Cochin A.I. R. 1986 S. C. 1072. In that case, there was an arbitration agreement between the Contractor-Appellant and the Shipyard Company Respondent. The matter was referred by the Respondent to arbitration stating that the reference was without prejudice to its rights. It thereafter participated in the arbitration proceedings and the Arbitrator gave the award. The question arose as to wethher the Respondent Company could challenge the award on the ground that there was no valid reference to the Arbitrator. D. A. Desai J. speaking for the Court observed thus:

If the Respondent wanted to assert that it had reserved to itself the right to contend that no specific question of law was referred to the arbitrator, in the first instance, it should not have made the reference in the terms in which it is made but should have agreed to the proposal of the Appellant to make a general reference. If the Appellant insisted on the reference of a specific question which error High Court appears to have committed, it could have declined to make the reference of a specific question of law touching his jurisdiction and should have taken recourse to the court by making an application u/s 33 of the Arbitration Act to have the effect of the arbitration agreement determined by the court. Not only the Respondent did not have recourse to an application u/s 33 of the Arbitration Act, but of its own it referred a specific question of Jaw to the arbitrator for his decision, participated in the arbitrtion proceeding invited the arbitrator to decide the specific question and took a chance of a decision. It cannot therefore, now be

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permitted to turn round and contend to the contrary on the nebulous plea that it had referred the claim/dispute to the sole arbitrator without prejudice to its right to contend to the contrary.

9. It is also evident from the above observations that if some disputes have arisen between the parties and they agree to refer the same to an arbitrator and participate in the proceedings without any demur they subsequently cannot challenge the award on the ground that the arbitrator had no jurisdiction to decide the matter. This view further finds support from N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, . In that case, the arbitrators failed to make the award within time. By a consent order the Umpire was directed to act as the sole arbitrator. Both the parties acquiesced in the proceedings before the Umpire. The question arose whether the award was liable to be set aside on the ground that the Umpire had no jurisdiction. It was held therein as follows:

As we already said, paragraph 5 of the Order in O. P. 11 of 1972 leaves no room for doubt that it was a consent order. The Board made no endeavour to have that order vacated by filing a review, if the statement in that order that it was passed on the basis of consent procceded from a mistake of the court On the other hand, we find that the Board participated in the proceedings before the Umpire without any demur to his jurisdiction. The only inference from this conduct on the part of the Board is that it had no objection to the order revoking the authority of the arbitrators. Therefore, by acquiescence, the Board was precluded from challenging the jurisdiction of the Umpire.

If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence'' (See ''Russell on Arbitration'', 17th Ed., p. 215).'' In Chowdhri Murtza Hossein v. Mt Bibi Bechannissa, (1876) 3 I A 209 (PC) at p. 220 the Privy Council said:

On the whole, therefore, their Lordships think that the Appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself and that it is too late for him, after the award has been made, and on the application to file the award, to nsist on this objection to the filing of the award.

The High Court said that acquiescence of the Board by participating in the proceedings before the Umpire as sole arbitrator would not confer jurisdiction as there was inherent lack of jurisdiction in that the order in O. P. II of 1972 was bad in law and that it did not clothe the Umpire with any jurisdiction. We are of

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the view that even assuming that the order in O. P. II of 1972 was not passed on consent, the Umpire had power to pass the award.

10. A similar question come up before the Bombay High Court in State of Maharashtra and Others Vs. Ranjeet Construction, . In that case there was Clause 30 in the agreement to the effect that the decision of the Superintending Engineer of the Circle for the time being would be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs drawing and instructions, hereinbefore mentioned and as to the quality on workmanship, or materials used on the word or as to any other question, claim, right, matter, or thing whatsoever, in any way arising, out of, or relating to the contract, designs drawings, specification, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof. Some disputes arose between the parties and the Respondent contractor referred the matter to the Superintending Engineer to arbitrate. The Superintending Engineer entered upon the reference. However, the Government, in view of the decision of the Supreme Court that the abovesaid clause did not amount to arbitration agreement, asked the Superintending Engineer not to proceed with the arbitration proceedings. He closed the proceedings after the receipt of the letter. The contractor moved an application u/s 8 for appointment of an arbitrator. The Court appointed the arbitrator. The State went up in revision against the order of the Subordinate Judge. The learned Chief Justice observed that whatever might be the interpretation of Clause 30 and whatever might be the impact of the judgment of the Supreme Court on the interpretation of the clause it was clear from the correspondence that both the contractors and the Government always understood Clause 30 as an arbitration clause and referred their disputes to the arbitration of the Superintending Engineer of the Circle. Even if it does not constitue an arbitration clause, it was abundantly clear from the correspondence that the dispute between the parties arising in respect of the contract the Government and the contractor did appoint the Superintending Engineer of the Circle as an arbitrator. Even assuming that the original contract did not provide for arbitration the parties were free to refer their dispute to the arbitrator. Whether that reference was made under misapprehension of law or otherwise, when in fact they had referred the dispute to arbitration and the arbitrator had entered upon the reference and the parties had filed their claims, the arbitration proceeding must proceed until it was concluded by an award. If the arbitrator did not proceed to make an award, the parties had a right to invoke the jurisdiction of the Court to appoint another arbitrator. Merely because one of the parties to the arbitration proceedings came to the conclusion that Clause 30 did not constitute an arbitration clause, it could not terminate the arbitration proceedings unilaterally. Having once referred the dispute to an arbitrator, they were percluded from terminating the arbitration proceedings. The Superintending Engineer who had entered upon the reference, was bound to complete the

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arbitration proceedings and if he was unable to discharge his function because of the order of the Government, it was open to the other party to the dispute to seek the appointment of other arbitrator. It was further observed that the Government was not competent to direct the Superintending Engineer not to act as such and terminate the proceedings. Inasmuch as the Superintending Engineer had refused to act, the contractor was entitled under the Act to have another arbitrator appointed by Court.

11. Similar observations were made in The The Union of India (UOI) Vs. D.N. Revri and Co. and Others, . The facts of that case were that the Respondent firm entered into a contract with the Union of India for supply of sugar. The Ministry of Food & Agriculture was the concerned Ministry with the subject of the contract. The arbitration clause provided that in case of disputes reference shall be made to a single arbitrator to be nominated by the Seretary in the said Ministry. Dispute arose between the parties. At the time of dispute, the Ministry was bifurcated into two separate Ministries, one of Food and the other of Agriculture. The subject of the contract came to be allotted to the Ministry of Food. Subsequently the Ministry of Food and Ministry of Agriculture were integrated into one single Ministry of Food & Agriculture. The new Ministry had two Departments, one of Food and the other of Agriculture and each Department was under a different Secretary. The Secretary of Department of Food nominated one Advocate as the sole arbitrator of the dispute. The firm participated in the arbitration proceedings without objection or protest against the jurisdiction of the arbitrator. The arbitrator ultimately gave an award against the firm. The Government made an application before the Subordinate Judge to make the award rule of the Court which was resisted by the firm. The main question was whether the appointment of the arbitrator was valid. The trial Court made the award rule of the Court. On appeal the High Court set aside the award. The Government went to the Supreme Court with special leave. The appeal was allowed. It was observed by P. N. Bhagwati, J. (as he then was) that the Secretary in the Ministry of Food & Agriculture authorised to nominate an arbitrator was the Secretary incharge of the Department of Food, that the firm did not raise any objection to the appointment of the arbitrator and participated in the arbitration proceedings without any protest. The firm knew at that time that there were two Secretaries in the Ministry of Food & Agriculture. The circumstance was clearly indicative of the intendment of the parties that the Secretary in-the Ministry of Food & Agriculture concerned with the subject-matter of the contract should be the person entitled to nominate the arbitrator. Therefore, the appointment of the arbitrator was valid.

12. Arbitration agreement has been defined in Clause (a) of Section 2 of the Act and it means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. It is clear from the definition that the arbitration agreement should be in writing but it need not be signed by the parties. I get support in the above view from the observations of the Supeme Court in Jugal Kishore Rameshwardas Vs. Mrs. Goolbai Hormusji, .

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Therein it was held to constitute arbitration agreement in writing it is not necessary that it should be signed by the parties and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. The arbitration agreement may not be found in one document but it may be inferred from several documents I took the same view in Bassi Cold Storage through Ved Bassi, Prop. v. The Punjab State Electricity Board F. A. O. No. 890 of 1984 (decided on 14th January, 1986), First Appeal From Order No. 890 of 1984, decided on 14th January, 1986. The relevant observations are as follows:

It is well settled that an arbitration agrement need not be in a particular form or contained in one document. The terms of such an agreement may be collected from a series of documents. It is also not necessary that it should be signed by the parties. If the existence of an arbitration agreement in writing is established, a reference can be made to the arbitration.

With the above observations in view it is to be seen whether there was any agreement between the parties to refer the dispute regarding 153 MT of copper scrap to the arbitrators. Mr. Sibal has not relied on the arbitration clause contained in the tender submitted by the Goyals for purchase of the scrap in response to tender enquiry, Q-10. Issue No. 1 thus becomes irrelevant. He has relied on correspondence between the parties to prove arbitration agreement.

13. It is not disputed that many letters were written by the Goyals to the Board to allot 153 MT of copper scrap. Ultimately they wrote a letter dated 16th July, 1974. Exhibit P-8, to the Chairman of the Board requesting him to give a personal hearing and allot 153 MT of copper scrap to them. A further request was made by them that if that was not possible, the matter be referred to the arbitration forthwith so that their grievance be edressed. After a few days they also appointed Shri M. M. Gupta as their arbitrator. The Board, thereafter, instituted a suit for injunction against the Goyals and the arbitrators in the Court of Subordinate Judge 1st Class, Patiala that they should not proceed with the arbitration proceedings. It also prayed for ad-interim injunction which was declined by the Court vide order dated 5th March, 1975. Appeal against that order was dismissed by the Senior Subordinate Judge, Patiala. The Board came up in revision to this Court which was also dismissed by a Division Bench on 25th September, 1975, holding that the remedy by the Board was u/s 33 of the Act and not by way of suit.

14. On 3rd October, 1975, the Secretary of the Board wrote Memo. No. 69/PA/LA to the Goyals (see page 144 of the Court file) that it had been decided to nominate the Board''s arbitrator. On the same day the Goyals communicated their acceptance of the Board''s offer to appoint their arbitrator (see letter dated 3rd October, 1975 at page 143). Thereafter the Board, vide letter dated 8th October, 1975, appointed Mr. O. P. Sharma, Advocate as their arbitrator (letter No. 1418/LB2(2600)-page 140). It was further stated therein that the Goyals had appointed Mr. M. M. Gupta arbitrator as their arbitrator and he had

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adjourned the case to 11th October, 1978 so that the Board''s arbitrator could be appointed. The arbitrator was, therefore, requested to enter upon the reference in consultation with Mr. Gupta. Both the arbitrators thereupon entered on the reference and they appointed Shri Kartar Singh, Advocate as Umpire. Shri Kartar Singh accepted the offer to act as an Umpire in the dispute between the parties vide letter dated 16th October, 1975 (see page 12 of arbitrator''s file). The Goyals filed the claim before the arbitrators which was contested by the Board. The parties thereafter duly participated in the proceedings before the arbitrators, led evidence and submitted written arguments before them.

15. From the aforesaid correspondence between the parties, it is clear that the parties agreed to the appointment of the arbitrators and both the parties appointed their separate arbitrators. The arbitrators then appointed the Umpire. Subsequently the parties fully participated in the proceedings. In the circumstances it cannot be said that the appointment of arbitrators is illegal and they had no jurisdiction to decide the matter between the parties. I am therefore, of the opinion that the reference to arbitration was legal and valid.

Issue No, 3.

The issue was decided in favour of Goyals. Mr. Sharma has not contested the finding of the Court on this issue.

Issue No. 4.

Mr. Sibal has argued that the Court should not have decided whether the Board was liable to supply 153 MT of scrap to the Goyals as it was to be determined by the arbitrators. He further argues that the Court has criticised the award as if it was deciding the matter in appeal. It was deciding an application u/s 30 of the Arbitration Act in which it had a limited jurisdiction It was not necessary for the arbitrators to discuss the evidence in the award or to give the reasons for arriving at the decision given by them. Therefore, the award could not be set aside on the ground that it was not a speaking award or that the conclusions arrived at by the arbitrators were incorrect.

18. I find force in the argument of the learned Counsel. The grounds which cannot be taken into consideration for setting aside an award u/s 30 have been dealt with by me in Bassi Cold Storage''s case (supra). The relevant observations are as follows:

It is well settled that the Court in dealing with an application to set aside the award has not to consider whether the view of the Arbitrator is justified on the basis of the evidence or not. The decision of the Arbitrator is considered binding between the parties as he is the Tribunal selected by them. It is not open for a Court to speculate the reasons for making the award, if no reasons are given by the Arbitrator therein. The Court cannot proceed to determine whether the conclusion is right or wrong on an assumption that the Arbitrator arrived at the conclusion on. certain process of reason. The award can only be set aside if there

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is an error on the face of it. (See Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, . The Arbitrator is also not bound to give a reasoned award and if in passing an award he makes a mistake of law or a fact, that is no ground for challenging its validity. It is only when an erroneous proposition of law is stated in the award and which is the basis of the award, it can be set aside or remitted on the ground of error of law apparent on the face of the record. An error of law on the face of the award means that one can find in the award or a document actually incorporated thereto as for in stance a note appended by the Arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which one can then say is erroneous. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out whether or not the Arbitrator has committed an error of law. (See Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, It is also well settled that in proceedings to set aside an award the appellate Court cannot sit in appeal over the conclusion of the Arbitrator by re-examining or reappraising the evidence and hold that the conclusions arrived at by the Arbitrator are wrong (Se State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., .

It is evident from the above observations that if no reasons have been given by the arbitrators or if the conclusions are wrong, the award cannot be set aside. The award can, however, be set aside when some proposition of law stated therein is erroneous on the face of it. The Court, however, deviated from the above principle and went into the merits of the case as if it was deciding the matter in appeal. The Court, it is relevant to point out, rightly held that the parties were afforded reasonable opportunity to lead evidence and were given a proper hearing. But still it came to the conclusion that the award was liable to be set aside as the arbitrators did not discuss the evidence therein. The approach of the Court, in my view, is not correct. The award cannot be set aside on this ground. The Court also had no jurisdiction to decide as to whether the Board agreed to supply 153 MT of of scrap or not because this was the specific dispute which was referred to the arbitrators and thus it was within their purview to decide.

19. Mr. Sibal has next contended that the Court, while setting aside the award, has also taken into consideration the fact that the arbitrators recorded separate findings which they did not annex with the award. However, the conclusions arrived at by the arbitrators were unanimous and, therefore, it does not make any difference if the findings recorded by them were not annexed with the award. He submits that this question was raised in application for summoning the award filed by the Board (case No. 701 of December, 1976) and was decided in favour of the Goyals. A revision petition against that order was dismissed in limine by this Court in Punjab State Electricity Board v. Goyal Electric Stores and others C. R. No. 2152 of 1979 (Decided on 20th November, 1979), Civil Revision No. 2152 of 1979, decided on 20th November, 1979. Therefore, this question

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could not be raised by the Board in these proceedings. I find substance in this submission as well. The arbitrators gave a ananimous award dated 15th December, 1975. The issues which were framed by the arbitrators were as follows:

1. Whether the claimant-firm M/s. Goyal Electric Stores, Chandigarh are entitled to recover 153 MT copper scrap from P. S. E. B. according to tender specification No. Q-10 as alleged in the claim petition?

2. Relief.

Both the arbitrators unanimously held that the Board was liable to supply 153 MT of copper scrap to the claimant-firm, M/s. Goyal Electric Stores, Chandigarh against payment as per their tender rates, i. e. Rs. 14.21 per Kg. in respect of 3 MT and Rs. 14.11 per Kg. in respect of 150 MT of copper scrap. Consequently issue No. 1 was decided in favour of the Goyals. It is true that it is mentioned in the award that the arbitrators had recorded their respective findings separately. However, they passed a unanimous award as given above. The award was fjed in the Court on 9th January, 1976. The Board filed objections to the award on 13th February. 1976 but no objection was taken that it was an incomplete award as separate findings recorded by the arbitrators did not accompany the same. Later the Board filed a petition that the award was incomplete and the arbitrators be directed to file the findings recorded by them separately. That application was dismissed by the Senior Sub Judge vide order dated 9th May, 1979. A revision was filed by the Board to this Court which was dismissed in limine by Tandon, J. It is. therefore, evident that the Court did not consider it necessary to direct the arbitrators to submit the findings recorded by them It is true that the arbitrators have recorded separate reasons but the conclusion, recorded regarding issue No. 1 framed by them is unanimous. Even if different reasons were given or no reasons were given by them in arriving at the same conclusion, that will not make the award illegal. Therefore, in the facts and circumstadces of the case it cannot be held that the arbitrators misconducted themselves or the proceedings. Consequently I reverse the findings of the Court on issue No. 4. Issue No. 4-A

The findings on this issue have not been challenged by Mr. Sibal.

21. For the aforesaid reasons I accept the appeal, set aside the order of the trial Court and make the award rule of the Court. No order as to costs.

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