

(1998) 08 BOM CK 0071

In the Bombay High Court

Case No : Arbitration Petition No. 177 of 1994

M/s. Mukund Limited

APPELLANT

Vs

M/s. Hindustan Petroleum Corporation Limited

RESPONDENT

Date of Decision : 18-08-1998

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 35
Contract Act, 1872 — Section 7

Citation : (1999) 1 BomCR 494 : (1998) 3 BOMLR 636

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Verendra V. Tulzapurkar, K.D. Parikh and P.D. Shah, instructed by M/s. Shah, Desai Doijode and Phatarphekar, for the Appellant; N.G. Thakkar, M.O. Siodia and M/s. D.S. Retiwala, instructed by y M/s. Rustomji and Ginwala, for the Respondent

Judgement

F.I. Rebello, J.—This petition is directed against the Award dated 27th June, 1994 passed by the learned Arbitrator in proceedings between the petitioners and the respondent. The arbitral proceedings commenced with the respondent herein invoking the provisions of the arbitration clause in the agreement by letter dated 6th January, 1993 to the Sole Arbitrator Mr. Bhatkal. The respondent referred disputes as raised by them and also the dispute raised by the petitioner as to the existence of the arbitration agreement itself. Parties thereafter appeared before the Arbitrator. The petitioner appeared under protest and without prejudice in terms of the letter dated 11th May, 1993.

2. The respondent herein on 7th November, 1989 forwarded tender enquiries to nine companies for design, supply, fabrication, erection and commissioning of Propane De Asphalting (P.D.A) heater at Mahu, Bombay. One of the offers received was from the petitioner and Engineering India Limited (E.I.L.). Subsequent to that various discussion took place between the parties. On 12th December, 1990 the petitioner wrote a letter extending the validity of the offer. On 11th January, 1991 discussions were held between the parties and

Memorandum of Discussions was recorded. Amongst the relevant points discussed were as under:-

The delivery period of 16th months should be reckoned from date of T.O.I. and not technically and commercially clear order; Mukund Limited i.e. the petitioners are amenable to placement of orders for supply and erection part; however, no additional benefit from such an exercise for petitioners. This was done as the contract was to be split up into two. On the same day, the respondent sent to the petitioners a telex, which will be described hereinafter as Telex of Intent (T.O.I.). The said telex referred to the Memorandum of Discussions dated 11th January, 1991 and all other correspondence exchanged earlier. It was intimated that the offer is accepted and a P.O. for turnkey job for design, fabrication and erection of a heater for a total basic cost of Rs. 2.17 crores will be issued shortly. Delivery was to be within six months of T.O.I. It was also mentioned therein that price escalation for change in exchange rate and custom duty on value of imported components will be applicable. Other clause was that other terms of L.D. arbitration clause as per the tender will be applicable. The petitioners were informed to treat the same as a firm commitment and that detailed order would follow. Subsequent to that two purchase orders one dated 8th February, 1991 and the other dated 8th March, 1991 were delivered to the petitioners on 21st March, 1991. One of the important clause of the said purchase order is clause 6 which reads as under:-

"The prices are inclusive of all taxes, duties as applicable to material supply and no extra charges will be payable by HPCL towards these."

The contract was split up into two. One for design and engineering and the other for supply and fabrication. Clause 17 is the clause pertaining to arbitration. On 23rd March, 1991 a mobilisation advance of Rs. 19, 99, 493/- was paid by the respondents to the petitioners. There is a letter dated 23rd March, 1991 from the petitioners to the respondents. In the said letter, the petitioners pointed out to the respondents Point No. 6 of the purchase order which according to them was not in line with the clarification submitted by them. The petitioner also pointed out that the job would be at site as work contract and the prices would not include various taxes and excise duties and other statutory levies applicable to work contract and in the event any tax or dues are payable by them they should be reimbursed on proof of payment. It was further informed that the contract is finalised for supply and fabrication as a separate contract and it can attract excise duty and Maharashtra Sales Tax. Respondents were therefore requested to release single contract on works contract basis. Thereafter correspondence has been exchanged between the parties wherein the petitioners have submitted designs and data sheets. The respondents have sought approval of data sheets, forwarded progress report and sought for revision of the purchase order as per letter dated 26th March, 1991. The petitioners also complained that if the data sheets were not approved, the delay would effect the delivery schedule. The design and data sheets were approved. The revised PERT chart was submitted

indicating completion of work by November, 1992. The respondents informed the petitioners that the PERT chart was not acceptable. There was a letter of 9th November, 1991 by the petitioners to the respondents about variation of purchase order and for increase in price on account of unexpected devaluation of rupee, revised import policy etc. Respondents by letter of 21st November, 1991 rejected the request made by letter of 9th November, 1991. By letter dated 26th November, 1991 petitioners sought an increase of Rs. 80 lakhs on account of reasons set out therein. On 3rd January, 1992 respondents informed the petitioners that they would cancel the contract for non-compliance. On 6th January, 1992 the respondents reminded the petitioners about the Bank Guarantee for security. On 7th January, 1992 the respondent claimed increase in price, setting out therein that it would not be possible to execute the work unless the price is increased. This was reiterated by letter of 30th January, 1992. On 7th February, 1992 the respondents informed the petitioners that they would not accept the period of delivery or increase the price. On 30th April, 1992 the petitioner once again demanded Rs. 110 lakhs including Rs. 22 lakhs by way of exchange rate and custom duty variation. On 30th October, 1992 the Bank Guarantee furnished by the petitioners was invoked by respondents and a sum of Rs. 21.70 lakhs was received thereof. On 16th November, 1992 the respondents by letter terminated the contract and also invoked the arbitration clause.

On 27th November, 1992 a penal of three nominees were forwarded to the petitioners for naming an arbitrator. By letter of 23rd December, 1992 the petitioners informed the respondents that there was no concluded contract and hence there was no valid arbitration clause. The petitioners, however, agreed to refer to Mr. Bhatkal as Sole Arbitrator outside the alleged contract the issue as to whether there was a valid contract between the parties or not and whether the respondents could invoke the arbitration clause under the alleged contract. On 6th January, 1993 the respondents referred to Mr. Bhatkal all disputes between the parties. The Award was published on 27th June, 1994.

3. At the hearing of this petition on behalf of the petitioners the principal contentions as raised are:-

(a) There was no concluded contract between the parties and hence there was no question of referring the disputes to arbitration.

(b) Even if it was assumed that there was a concluded contract in the T.O.I. there was no arbitration clause and in so far as the purchase order is concerned as the contract itself was not concluded the purported arbitration clause could not be given effect to.

(c) After the Arbitrator had given a finding that both the parties are guilty of delay, there was no question of awarding damages in favour of the respondents.

(d) There was no evidence led by the respondents quantifying the damages and the reliance by the Arbitrator on the offer of the petitioners seeking additional money for completing the job with- out considering the order contents of the

letters whereby they claimed deduction in an amount of Rs. 49.60 lakhs which the respondents even otherwise had to pay discloses non application of mind by the Arbitrator amounting to legal misconduct.

Even otherwise in awarding damages the Arbitrator ought to have considered the mitigating circumstances namely the offer of the petitioners to carry on the work for additional amount.

(e) In fact the petitioners repudiated the contract in November, 1991 and the respondents had floated a new tender on 9th January, 1992. In these circumstances the Arbitrator after coming to the conclusion that there was no delay upto November, 1991, ought not to have awarded damages.

(f) The Arbitrator awarded costs exceeding the claim of the respondents themselves in as much as a larger amount was awarded then claimed by the respondents.

(g) Lastly, the grant of interest on mobilisation advance for the period from 2nd June, 1993 to 27th June, 1994 and future interest is perverse as amount of mobilisation advance was received by the respondents by invoking Bank Guarantee October, 1992. Therefore, no interest could have been awarded.

4. On behalf of the respondents it is contended as under: -

(h) The documents on record would show that there was a concluded contract. It is further contended that signatures of both the parties are not required for a contract to be concluded and even if it is assumed that the parties have not signed the contract, the conduct would show that in fact there was a concluded contract.

(i) Even admitting that there was no arbitration clause in T.O.I. except reference to arbitration the T.O.I. referred to detailed order that would follow. The detailed order is the purchase order in which there is a clause for arbitration.

(j) Though the Arbitrator had given a finding that neither parties are guilty of delay upto November, 1991 that by itself does not mean that damages could not be awarded for breach of contract. At the highest for the period of delay no damages could be awarded.

(k) No evidence admittedly had been led on behalf of the respondents quantifying damages however, the petitioners themselves had offered to do the work as an additional work for an amount of Rs. 110 lakhs which by itself would be an answer to the claim for damages by the respondents.

(l) A perusal of the Award of the Arbitrator would show that it cannot be said to be an award which could not be passed on the material available and merely because another view is possible is not a ground for the Court to intervene with the Award of the Arbitrator.

(m) Even otherwise, it is contended that there is nothing on record to show that

the Arbitrator has misconducted himself and/or strayed out of the terms referred to. In that light it is contended that this Court should not interfere with the Award.

(n) The Award is severable and after severing that part of the Award which cannot be sustained the rest of the Award can be sustained.

5. In the light of these contentions, the following issues will arise for determination :-

(a) Whether the findings of the Arbitrator that there is a concluded contract can be said to be without jurisdiction or disclose an error of law apparent on the face of the record warranting interference by this Court.

(b) Whether the amount of damages as awarded need to be interfered with considering the material and documents on record and whether the Award suffers from legal misconduct in as much as the Arbitrator has not considered the findings given by himself that both parties were not liable for delay upto the period of November, 1991 and further by not fully considering the contents of letter dated 30th April, 1992 which disclosed mitigating circumstances.

(c) Whether the Arbitrator was right in awarding costs more than what had been prayed for by the respondents.

(d) Whether interest could have been awarded on the mobilisation advance for the period 2nd June, 1993 to 27th June, 1994 when the Bank Guarantee had been invoked by the respondents on 30th October, 1992 and amount received.

6. In support of their contention that there is no concluded contract it is sought to be pointed out that the T.O.I. was by itself not a contract. Even otherwise there was no term of arbitration in the T.O.I. and by rewriting the clause in the matter of arbitration the Arbitrator had misconducted himself. It is then pointed out that even if the purchase orders are taken they have to be considered in the context of the correspondence exchanged between the parties which clearly indicate that there was no concluded contract. Attention is invited to section 7 of the Indian Contract Act. From a reading of section 7 it is pointed out, to convert proposal into a promise the acceptance must be absolute and unqualified and has to be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. Attention is invited to the correspondence on record wherein the petitioners had invited attention of the respondents to certain deviations in the matter of what was agreed and what the respondents had in formed the petitioners whilst awarding the contract. Reference is invited to the letter dated 10th September, 1990 which was before the contract was awarded and to letters dated 26th March, 1991, 19th June, 1991, 9th November, 1991, 7th February, 1991 and other correspondence. It is submitted that there is no unequivocal acceptance and further if the term in an agreement is vague then also it cannot be said that there is a concluded contract. It is further stated that the learned Arbitrator has proceeded on the

footing that the T.O.I. was an offer made by the respondents which was accepted by the petitioners. This it is pointed out is contrary to the stand taken by the respondents who have invoked the arbitration clause as contained in the purchase order and not T.O.I. The said finding it is pointed out therefore is contrary to the case made out by the respondents themselves.

In support of this contention that the T.O.I. is not a concluded contract reliance was placed on the Judgment of the Apex Court in the case of *Badri Prasad v. State of Madhya Pradesh & another* AIR 1970 S.C. 706 for the proposition that for a contract to come into force there has to be unconditional acceptance and that mere intimation is not sufficient. Next reliance is placed on the Judgment of a Single Judge of the Delhi High Court in the case of *Union of India Vs. Uttam Singh Dugal and Co. (Pvt.) Ltd.*, for the proposition that when there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract. It is also pointed out that in the absence of any absolute and unqualified acceptance in conformity with law no legal and binding contract could be formed. Reliance is also placed in the case of *Union of India v. Mohan Meakin Breweries Ltd* AIR 1988 N.O.C. 33. to contend that the acceptance of tender therein amounted to a counter offer which was not accepted by the Company as it was not signed. In these circumstances the mere fact that the Company had paid security amount as provided in the acceptance of tender would not amount to implied acceptance of terms and conditions of Acceptance of Tender. On the other hand, the implication of not signing the acknowledgment attached to the Acceptance of Tender was that the Company refused to accept all the terms contained therein. It is further contended that the findings of the learned Arbitrator that T.O.I. contained an additional terms of arbitration in the nature of offer is erroneous on the face of the award. It is contended that T.O.I. referred acceptance subject to various conditions including condition regarding arbitration. It is further contended that the Arbitrator himself has given a finding that there is no acceptance of T.O.I. by word of mouth or in writing and that the petitioners never accepted the term regarding arbitration in the T.O.I. and that there is also no question of the petitioners having accepted the offer by conduct. It is then contended that the arbitrator clause in T.O.I. is vague and if a clause is vague, courts have held that there is no arbitration agreement. Reliance for this purpose is placed on the judgment of a Division Bench of the Calcutta High Court in the case of *Teamco Private Ltd. Vs. T.M.S. Mani*, . A Division Bench of the Calcutta High Court has observed that every agreement must be construed with reference to language used therein and if the parties have failed to express their intention of having their disputes settled by arbitration by using clear, meaningful and unambiguous language and have failed to enter into a valid arbitration agreement, the Court has no choice but to say that there is no contract and it is not open to the Court to create a contract for the parties. The action of the Arbitrator it is contended in trying to explain the clause of T.O.I. is rewriting the contract.

In so far as the purchase orders are concerned, it is contended that the same have not been signed by the petitioners nor have been accepted by the petitioners and that the purchase orders contained terms different from the terms offered by the petitioners. It is contended that the price offered by the petitioners is different from the price mentioned in the purchase orders. It is pointed out that if the contract stood frustrated after the fabrication was done by the petitioners at site but before erection and commission in that event under the purchase order the respondents would pay nothing to the petitioners. The next difference pointed out is that the price quoted by the petitioner is exclusive of Sales Tax, duties, etc. The purchase order in clause 6 states that the prices are inclusive of all taxes, duties as applicable to materials supplied and no extra charge will be payable by the respondents. Further it is contended that the offer of the petitioner and the correspondence prior to 11th January, 1991 as also the minutes of the meeting dated 11th January 1991 did not contain any arbitration clause and the arbitration clause in the purchase order has not been accepted by the petitioner. Lastly it is contended that clause 14 is a new term and not part of the offer or clarification of the meeting held on 9th June, 1997. For all these reasons, it is contended that there is no valid contract.

7. The respondents on the other hand have invited the courts attention to the correspondence on record to show that the contract in fact is concluded. It is explained that in so far as T.O.I. is concerned it merely referred to the formal acceptance of the tender offered by the petitioners and the T.O.I. itself indicated that the detailed order would follow. The detailed order it is contended is the purchase order in which there is a provision for arbitration. It is pointed out that T.O.I. merely referred to the fact that disputes between the parties would be referable to arbitration and this is reflected by the subsequent purchase orders. It is contended that there need not be actual signing of a contract between the parties for a concluded contract. Reliance is placed in the case of AIR 1949 199 (P & H.) . A Division Bench of the East Punjab High Court considering the Arbitration Act, 1940 and expression written agreement held that actual signature of both the parties are not necessary, it is sufficient if one party signs the submission and the other accepts it orally or by conduct. Next attention is invited to a Judgment of this Court in the case of Lewis W. Fernandez Vs. Jivatlal Partapshi and Others, for the purpose of interpretation of section 2(a) of the Act. A Single Judge of this Court held that the party claiming arbitration must show existence of dispute arising out of or in relation to contract and arbitration agreement within Arbitration Act and that the contract notes sent by one party and accepted by another by signing confirmation notes or by conduct is sufficient arbitration agreement. Learned Counsel also placed reliance on the commentary by Chitty on the Law of Contract at paragraph 82 of the 25th Edition. Chapter II in which the learned author has observed as under :-

"The general rule that there can be no acceptance by silence does not mean that an acceptance always has to be given in so many words. Obviously, an offer can be accepted by conduct; and this is never thought to give rise to any difficulty

where the conduct takes the form of a positive act. In principle, conduct can also take the form of a forbearance."

8. Can therefore on the material on record it be said that there is a concluded contract as held by the Arbitrator. The first important document is the T.O.I. itself which refers to the M.O.D. or the Memorandum of Discussions between the parties held on 11th January, 1991 and the T.O.I. which informs the petitioners that the offer is accepted and other terms which would follow in terms of the detailed order. Much is sought to be made out of the expression other terms of L.A.D., arbitration clause as per own tender would be applicable. It is true, that there was no arbitration clause in the tender. That does not mean that if there is a surplusage of language in the communication that by itself can be constructed to mean that there was absence of any arbitration clause in the T.O.I. A correct and fair reading of the said communication would be that the respondents would like to have disputes settled by arbitration and that would be in terms of the detailed order which would follow. The detailed order is the purchase order. In the purchase order there is an unequivocal terms as to arbitration. At no point of time till the dispute arose did the petitioner inform the respondents that they were not willing to go by the arbitration clause and/or that it was not the understanding between the parties. The entire contention is that T.O.I. did not have an arbitration clause and that there is no concluded contract. This argument has to be rejected considering the document on record. Pursuant to the T.O.I. the purchase orders were issued. In terms of the purchase order mobilisation advance was paid to the petitioners. The petitioners secured the mobilisation advance by a Bank Guarantee. Thereafter in terms of the order to comply with the time frame the petitioners from time to time have been sending the plans to the respondents for approval. The grievance by the petitioners throughout is that the respondents are not acting within time so as to enable the petitioners to carry out and complete the contract and that if the time schedule was not adhered to it would result in delay. That has been substantially the entire tenor of the correspondence exchanged and the other to the extent what would be paid or not payable. These may constitute disputes therein but these disputes if and at all would be covered by the clause of arbitration itself. It cannot be said from the correspondence exchanged that the petitioners never accepted the contract. The Arbitrator based on the same has held that this is a concluded contract.

9. Let us now apply the tests laid down by the Apex Court in interfering with an Award.

In Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. Vs. Union of India (UOI) and Others, the Apex Court held that where an arbitrator is called upon to decide the effect of the agreement, he has really to decide a question of law, i.e. of interpreting the agreement, and hence, his decision is not open to challenge. In Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, the Apex Court has observed as under :-

"Mr. Pai on the other hand urged that the jurisdiction of the arbitrator could not

be determined by him nor can he arrogate jurisdiction to himself by misconstruction of the contract and thereby clutch at jurisdiction and in such a situation, the Court always retains to itself to set aside the award on the ground of an error of law apparent on the face of the award. In terms, he stated that the issue about the jurisdiction of the arbitrator has never been parted with by the Court. Generally speaking, common law courts were very reluctant to part with this jurisdiction to set aside an award on the ground that the arbitrator had no jurisdiction to entertain and decide the dispute. The Court went so far as to say that the arbitrator cannot confer jurisdiction upon himself by deciding in its own favour some preliminary points upon which its jurisdiction rests. In fact, that is a non-issue. It cannot be disputed that even the question of jurisdiction of an arbitrator can be the subject-matter of a specific reference. If the parties agree to refer the specific question whether the dispute raised is covered by the arbitration agreement, it becomes a specific question of law even if it involves the jurisdiction of the arbitrator and if it is so, a decision of the arbitrator on a specific question referred to him for decision even if it appears to be erroneous to the Court is binding on the parties."

In *Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others*, . The Apex Court in para 20 has observed as under :-

"We would now proceed to deal with the question as to whether the High Court was right in setting aside the award made by an arbitrator. As regards an award made by an arbitrator under the Act the law is well settled that the arbitrator's award is generally considered binding between the parties since he is the tribunal selected by the parties. The power of the Court to set aside an award is restricted to the grounds set out in section 30 of the Act, namely, (a) where the arbitrator has misconducted himself or the proceedings; (b) where the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35; and (c) where the award has been improperly procured or is otherwise invalid. The Court can set aside the award under Clause (c) of section 30 if it suffers from an error on the face of the award. An award might be set aside on the ground of an error on the face of it when the reasons given by the decision, either in the award or in any document incorporated with it, are based upon a legal proposition which is erroneous. In the absence of any reasons for making the award, it is not open to the Court to interfere with the award. The Court cannot 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. An award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed grave mistake in arriving at his conclusion. The arbitrator is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or deed of settlement he is required to give such reasons. If the arbitrator or umpire chooses to give reasons in support of his decision it would be open to the Court to set aside the award if it finds that an error of law has been committed by the arbitrator or

umpire on the basis of the recording of such reasons. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. The arbitrator is the sole judge of the quality as well as the quantity of the evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the arbitrator. The Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal."

In *State of Rajasthan Vs. Puri Construction Co. Ltd. and Another*, the Apex Court pointed out that erroneous application of law constituting the very basis of the award and improper or incorrect finding of fact which without closer and intrinsic scrutiny, demonstrable on the face of the material on record amounts to legal misconduct, but an award cannot be set aside merely on ground of misreading, misconstruction or misappreciation of material on record. Nor can it be set aside merely because on Court's own assessment an alternative view is possible.

Therefore considering the Judgments cited at the Bar and the various arguments advanced, I am of the considered opinion that the Arbitrator was right in arriving at the conclusion that there was a concluded contract. Even if, it can be held that another view is possible that by itself is no answer. As has been held by the Apex Court in the case of *State of Rajasthan (supra)* merely because another view is possible that by itself is no ground for setting aside the award. Learned Arbitrator has gone through the various correspondence and has arrived at the finding that there was a concluded contract. In my opinion considering the documents I find no reason to interfere with the said findings that there is a concluded contract. Once there is a concluded contract the argument that there is no arbitration clause has to be rejected as the purchase order contained clauses pertaining to arbitration. These findings therefore would not amount to legal misconduct on the part of the Arbitrator or disclose an error of law apparent on the face of the record.

10. Having answered the first contention, the question now is whether the Arbitrator was right in awarding damages as awarded. The Arbitrator has quantified the damages in an amount of Rs. 110 lakhs. It is a normal rule that it is on the person claiming damages who has to prove the damages. This also applies to award of Arbitrator. An Arbitrator cannot pass an award in conscious disregard of law. See *Associated Engineering Co. Vs. Government of Andhra Pradesh and another*, . In the instant case, respondents have not led any evidence independently to show the damages which they would be entitled to on account of breach of contract. The only material on record which the Arbitrator has relied upon is the communication of the petitioners to the respondents dated 30th April, 1992. The Arbitrator has arrived at a figure of Rs. 110 lakhs based on the amount claimed by the petitioners for fulfilling the terms of the contract. Learned Counsel on behalf of the petitioner has invited my attention to the judgment in the case of *Payz, Limited v. Saunders* 1918(2) K.B. 581 to contend that the Court while awarding damages must take into consideration the

mitigation circumstances whereby loss could be minimised or diminished. My attention is invited to the following observation in the said judgment :-

"The question is one of juristic importance. What is the rule of law as to the duty to mitigate damages? I will first refer to the Judgment of Cockburn, C. J., in *Frost v. Knight*, (1) where he said. "In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been diminished."

Can therefore it be said that the Arbitrator was right in awarding the damages as quantified by him. The letter itself would be of relevance and more so clause 8 of the said letter, which reads as under :--

"In the interest of maintaining good commercial relations with H.P.C.L., we have reviewed the situation critically and offer to absorb 15% increase in labour and consumable cost. 10% procurement charges kept on Rs. 92.45 lakhs and also bear part of losses. Now we request a net increase in cost of Rs. 80 lakhs. This compensation includes an amount of Rs. 16.18 lakhs which is reimbursable by H.P.C.L. on account of variation in foreign exchange component and custom duty and also Rs. 17.88 lakhs due to variation in detailed designing by E.I.L."

What therefore emerges is that the petitioners have first quantified the additional amount which according to them is required by them to complete the contract as Rs. 129.27 lakhs. Thereafter they have pointed out that they are willing to absorb part of the increase in labour, as also procurement charges and bear part of the losses. After doing that they have brought down the cost to Rs. 110.00 lakhs. Admittedly the amount of Rs. 22.10 lakhs in terms of the contract itself was the amount which the respondents had to bear and this could not have been awarded while computing the damages at Rs. 110 lakhs. Thus from the figure of Rs. 110 lakhs if Rs. 22.10 lakhs is deducted that will work to Rs. 87.90 lakhs. The Arbitrator clearly misconducted himself in law in considering the said amount of Rs. 22.10 lakhs while quantifying the damages as awarded.

The next item to which reference is made is to the amount of Rs.22.67 lakhs due to variation in design to be paid to E.I.L. by the petitioner. Herein also we must consider that material has come on record that there were differences and disputes between the petitioners on the one hand and E.I.L. on the other. The correspondence exchanged also shows that the respondents wanted E.I.L. to be a party for completing the work awarded. It has come on record that the petitioners were willing to have a tie with some other parties for doing the work to be done by E.I.L. The additional costs of Rs. 27.60 lakhs is the costs on account of variation in designing which were to be paid to E.I.L. by the petitioner. In this context can it be said that this amount can sound in damages which the respondents were entitled to. This was the amount the petitioner had to pay E.I.L. on account of changes in design. If this be the case, this amount could not have figured in so far as awarding damages are concerned as it would be dispute

between petitioner and E.I.L. and respondents could not have quantified them as damages on that count as they were not bound to pay E.I.L. the said amount. The learned Arbitrator therefore misconducted himself in law in considering the said amount of Rs. 27.60 lakhs while quantifying the damages. If the said amount is excluded what remained from the offer by the petitioners is an amount of Rs. 60.30 lakhs. It is true that the petitioners had sought to bring on record that the additional costs that would be incurred by them in re-tendering the contract exceeds Rs. 110 lakhs. The learned Arbitrator himself has chosen not to accept the said evidence. In the light of that even if the letter of the petitioner had to be accepted at the highest the material on record would show that the respondent had proved that they were entitled to Rs. 60.30 lakhs. The observations of the Apex Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , will have to be borne in mind. The Apex Court observed as under :--

"A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award."

In that context the Award of the Arbitrator to that extent will have to be interfered with and instead of a sum of Rs. 110 lakhs, the amount of damages would have to be quantified at Rs. 60.30 lakhs.

11. The other contention is regarding costs. From the reference itself it can be said that the respondents had not quantified the costs to Rs. 50,000/- but actual costs to be incurred. Therefore there is no error in the said amount awarded by the learned Arbitrator and no interference is called for.

12. The last item is of granting interest on the mobilisation advance between the period 2nd June 1993 to 27th June. 1994. The learned Arbitrator has given a finding that the delay upto November, 1991 could not be attributed to both the parties. The respondents invoked the Bank Guarantee on 7th January, 1992. The interest awarded by the learned Arbitrator is for the period 2nd June, 1993 to 27th June, 1994. This is clearly an error apparent in as much as even on the date of the reference the respondents had already received the money which they had given as mobilisation advance and consequently no interest could have been awarded on the said amount for the period 2nd June, 1993 to 27th June, 1994.

13. In the light of that the award is modified as under :--

Claim Amount Awarded Total

Rs. Rs.

(A) (i) Rs. 1,65,93,000/- 60,30,000.00

(ii) Interest 07.10.549.00 67,40,549.00

(B) Rs. 30% of

Rs. 16,75,000/-paid

E.I.L. i.e

Rs. 5.02.500/- 05,02,500.00

(C) Interest 59,212.40 05,61,712.40

(E) Liquidated damages 00000.00 0.00

(F) Mobilisation Advance 19,99,693,00 19,99,693.00

(H) 10% as Security

Deposit. 00000.00 0,00

Less : Bank Guarantee

Amount encashed 21,70,000.00 21,70,000.00

Grand Total 71,31,954.00

(D) Costs of Arbitration 75,600.00 75,600-00

14. In the light of that the following order is passed :--

ORDER

Decree in terms of paragraph 13 of the modified Award as aforesaid with further interest at the same rate from the date of the decree till final payment and/or realisation.

In the circumstances of the case, each party to bear their own costs. Certified copy expedited.

15. Award modified.