
(2014) 01 DEL CK 0120
In the Delhi High Court
Case No : CS (OS) 1202 of 2009

National Research Development Corporation	APPELLANT
Vs	
M/s. Industrial Carbon and Others	RESPONDENT

Date of Decision : 29-01-2014

Acts Referred:

Arbitration Act, 1940 — Section 16 16(1) 28 30 33
Evidence Act, 1872 — Section 114(g)

Citation : (2014) 01 DEL CK 0120

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : P.N. Bharadwaj, for the Appellant; Sudhir Kumar Sharma, Advocate for defendant no. -3, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Shakdher, J.

CS(OS) 1202/2009, I.A. No. No. 12111/2009 (objections filed by the plaintiff) and I.A. No. 13663/2010 (objections filed by defendant no. 3-Mr. S.R. Mohta) and I.A. No. 13664/2010 (application for condonation of delay of 120 days in filing objections filed by defendant no. 3-Mr. S.R. Mohta) and IA No. 13665/2010 (for taking on record additional documents filed by defendant no. 3-Mr. S.R. Mohta).

BACKGROUND

1. This is an action which pertains to the Arbitration Act 1940 (in short the 1940 Act). Both the plaintiff i.e., the National Research Development Corporation (in short NRDC) as well as defendant no. 3 i.e., Mr. Shiv Ratan Mohta (who is the erstwhile partner of defendant no. 1) have filed objections to the award dated 28.05.2009. The objections filed by the NRDC, are numbered as IA No. 12111/2009, while the objections filed by defendant no. 3, are numbered as IA No. 13663/2010. The objections of defendant no. 3 are accompanied by an

application for condonation of delay, which is numbered as: IA No. 13664/2010, and an application for taking on record the additional documents filed by defendant no. 3, which is numbered as: IA No. 13665/2010.

1.1 It may also be pertinent to note that defendant nos. 1, 2 & 4 were proceeded ex-parte vide order dated 04.03.2010. It is thus apparent that on receipt of the impugned award dated 28.05.2009, the same was registered as a suit, i.e., CS(OS) No. 1202/2009.

1.2 It may also be relevant to note that the dispute between the parties has travelled to the court on an earlier occasion when, this court vide judgment dated 10.04.2008 partially set aside the award dated 19.03.2001 passed by the then sole arbitrator, Mr. S.R. Goel. This court vide its judgment dated 10.04.2008 had remitted the matter to Mr. S.R. Goel to consider the material on record and, thereafter, render specific findings qua claim no. 1. It is pertinent to note at this stage that a perusal of the judgment of this court dated 10.04.2008 would show (in particular paragraph 17 read with paragraph 25) that claim no. 1 refers to the "first claim" [which comprises of claims (a) and (b)], adverted to in the statement of claims filed by the NRDC before the then arbitrator appointed in the matter i.e., Mr. S.R. Goel. Claim (b) has two parts. One relates to prayer for royalty for the period commencing with the start of commercial production till the date of termination of the agreement with the minimum royalty quantified at Rs. 6 lacs; the second part of claim, (b) seeks award of damages quantified at Rs. 55,000/- per month for illegal use of Silver Impregnated Graphite (SIG) contacts, purportedly manufactured by the defendants.

1.3 However, the matter on remand could not proceed further due to the unfortunate demise of Mr. S.R. Goel. Consequently, an application was moved by NRDC u/s 8 of the 1940 Act for appointment of a new arbitrator. Pursuant to the order of this court, the said application was treated as a separate suit and hence numbered as: CS(OS) No. 982A/2008.

1.4 Upon appointment of Mr. Dinesh Dayal, ADJ (Retd.) as the new arbitrator, the said suit, i.e., CS(OS) No. 982A/2008, was disposed of vide order dated 13.08.2008. It may be relevant to note at this stage that NRDC had filed an application under Sections 16 and 28 of the 1940 Act for enlargement of time for making the award. This court vide order dated 09.02.2009 had enlarged the time for passing the award within a period of four (4) months from the date of resumption of proceedings before Mr. Dinesh Dayal. Since, the award was passed on 28.05.2009, it has, decidedly been passed, within the time frame stipulated by this court.

In so far as the merits of the disputes are concerned, the same have arisen in the background of the following facts and circumstances.

1.5 NRDC, which is a public sector enterprise, stands incorporated under the Companies Act, 1956. The main object of its incorporation is development, promotion, licensing and exploitation of technology and information, which

includes technical and industrial know-how. It appears that Council for Scientific and Industrial Research (CSIR), which is engaged in the information and development of technological know-how through its various constituent research institutions, one of which is the National Physical Laboratory, developed the know-how, used for the manufacture of SIG contacts. SIG contacts are used in signalling equipment installed by the Indian Railways. Evidently, CSIR, assigned the know-how for impregnating silver into graphite, to NRDC.

1.6 NRDC, in turn, executed a license on 30.03.1989 with the defendants herein, which vested a right in them to manufacture SIG contacts for a period of ten (10) years from the date when, they commenced commercial production.

1.7 In terms of sub-clauses 5(i) and (ii) of the license, the defendants were required to pay a consolidated premium of Rs. 55,000/- alongwith royalty at the rate of 5% calculated on the "ex-factory sale price". The said royalty was to be paid on the first day of April and first day of October every year, though not later than first day of May and first day of November, immediately following, in every such year.

1.8 As indicated above the obligation to pay royalty was to commence upon commencement of commercial production at the plant, which included any usage of the article by the defendants. This obligation was to continue for a minimum period of ten (10) years.

1.9 For the purposes of due enforcement of this obligation, sub-clauses 6B(iv) and (v) provided that the defendants shall at all reasonable times produce books of accounts so maintained or all other relevant books of accounts, vouchers, documents, receipts and connected papers to NRDC, its attorneys or authorized agents. NRDC was also given the right to inspect and take copies of extracts. Furthermore, the defendants were required to submit prior to the first day of April and first day of October, every year, complete statement of SIG contacts manufactured, stored and marketed or used for their own purposes by the defendants.

1.10 The defendants were also required to disclose the ex-factory sale price of SIG contacts prevailing during the period for which royalty was payable to NRDC as well as statements of calculations of estimated royalty. These statements were required to be certified by the auditor of the defendants, though NRDC was given the right to examine the validity of such statements.

1.11 The record shows that the defendants commenced production in November, 1991. Evidently, no statements pertaining to estimated royalty were submitted by the defendants, which led to the eruption of disputes between the parties. Consequently, the NRDC terminated the license on 07.04.1994. Late Mr. S.R. Goel, retired ADJ, who was appointed as an arbitrator, entered upon reference and delivered his award on 19.03.2001.

1.12 Notably, the defence of the defendants on merits was that the technology/

know-how furnished to them under the license was both unviable and defective.

1.13 Late Mr. S.R. Goel, however, vide his award dated 19.03.2001, broadly, returned the following findings in favour of NRDC: that the defendants had failed to furnish accounts to NRDC; the defendants had also failed to pay royalty to NRDC; and lastly, that the defendants had been unable to prove that the technology/know-how furnished to them by NRDC was unviable or defective.

2. However, unfortunately for NRDC, late Mr. S.R. Goel, having come this far, did not agree with the defendants that, royalty or damages could be awarded, as according to him, the onus for proving the same lay on them, which they had failed to discharge. Thus, in effect, the monetary claims of NRDC were rejected on the ground that it had failed to prove its claim for royalty and damages. Significantly, late Mr. S.R. Goel, while dealing with the counter claim preferred by the defendants, rejected the same on the ground that they were in breach of their obligations under the license to pay royalty and, to disclose information, contained in their accounts.

3. It is in the background of these findings contained in the award of 19.03.2001, that when, the matter got carried to this court, vide judgment dated 10.04.2008 the matter was remitted to the learned arbitrator on a limited aspect pertaining to claim no. 1. Claim no. 1, as extracted in the judgment of this court dated 10.04.2008, reads as follows:

....(a) That the respondent-firm be directed to furnish the true and correct statement of accounts and the statement of its manufacturing activity from the time of start of its production under the licenced agreement till the respondents continuing, utilizing and exploiting the know-how;

(b) An award for a minimum amount of Rs. 6 lakhs on account of royalty allegedly due to the respondent for the period when latter started commercial production of the licensed product till termination of agreement and further award of damages quantified at Rs. 55,000/- per month for the illegal use of manufactured products "SIG Contacts"...

3.1 This court was of the view that since the learned arbitrator in the award of 19.03.2001 had returned a finding that the defendants were in breach of their obligations under the license and had failed to disclose the necessary information which they were obliged to do-the learned arbitrator ought to have considered the material on record and returned a specific finding vis-?-vis claim no. 1. The operative directions of this court are contained in paragraphs 22 to 25, which are extracted hereinbelow, both for reasons of convenience and efficacy; as much argument has been advanced by the counsel for NRDC, with regard to the scope of the remand, ordered by this court:

22. It is a trite law that a party or plaintiff who approaches the Court is under a duty to prove damages and the extent suffered. In the absence of positive evidence, the claimant could not, on the issues of damages, rely on the

withholding of books of accounts. Therefore, the finding of damages and royalty cannot be interfered with. In this context, it would be well remind one self that Court's jurisdiction u/s 30/33 is supervisory and not appellate. It can interfere with the award, if satisfied upon the materials on record that the inferences drawn on the findings rendered as such can be characterised as manifest errors of law or those which could have been rendered in the circumstances of the case. There is no material available on the record. All the relevant discussions in this regard concerning damages, in the opinion of the Court, cannot be interfered with. It is certainly not a manifest error of law.

23. The Court is of the opinion that even while the finding on damages or the adequacy of proof in that regard cannot be interfered with, the award has rendered inconsistent findings and also not addressed the issue of claim No. 1. After having rendered clear findings concerning the respondent's breach of the contract failure to pay royalty, and failure to disclose accounts, the Arbitrator could not have completely overlooked claim No. 1. In the circumstances, even while sustaining the other findings, this Court is of the opinion that the award requires to be interfered with on that limited aspect.

24. In the light of the above discussions, the award should be partly set aside. The Arbitrator has to render fresh findings on claim (a) and consequent directions in claim (b) concerning royalty, and interest.

25. In view of the above discussion, the claim in the suit has partly succeed. Accordingly the award is partly set aside. The Arbitrator is hereby directed to consider the materials on record and render specific findings on claim No. 1 and based on the same after the hearing of the learned counsel for the parties, render specific findings on the other claims. Subject to these directions, findings on Issue No. 8 and 9 are left undisturbed....

(emphasis is mine)

4. At this stage it may be relevant to note that late Mr. S.R. Goel, had struck thirteen (13) issues in the matter, the last, which is the thirteenth (13th) issue pertained to relief to be accorded in the matter.

4.1 To enable clearer perspective of the matter in the context of the remand ordered by this court; it would be useful to extract the issues struck between the parties:

1. Whether the process know how for indigenous manufacture of "SILVER IMPREGNATED GRAPHITE CONTACTS" was licensed to M/s. Industrial Carbon as per terms and conditions contained in the licence Agreement dated 30.03.1989? OPC

2. Whether any patented process know how has licensed to the Respondent under Licence Agreement dated 30.03.1989? If so, to what effect? OPR

3. Whether the Licence Agreement dated 30.03.1989 stood validly terminated? If

so, to what effect? OPC

4. Whether the claimant failed to abide by the terms and conditions of licence agreement dated 30.3.1989? If so, to what effect? OPR

5. Whether the information given in the know how and process documents was unviable, uneconomical, imperfect and incomplete? If so, to what effect? OPR

6. Whether Dr. J.K.N. Sharma either misguided or misdirected the respondent? If so, to what effect? OPR

7. Whether the claimant had no right to enter into the license agreement dated 30.3.1989 regarding the know how process as pleaded in para 15 of the objection?

8. Whether the claimant is entitled to royalty from the respondent? If so, how much? OPC

9. Whether the claimant is entitled to damages? If so, at what rate and for what period? OPC

10. Whether the claimant is entitled for interest? If so, at what rate and for what period? OPC

11. Whether the goods manufactured by the respondent were not of required standard because of defective technical know how process supplied under the Licence Agreement dated 30.3.1989 and were so rejected by the buyers? If so, to what effect? OPR

12. Whether the respondents are entitled to the refund of Rs. 55,000/- paid as premium at the time of execution of licence agreement dated 30.3.1989? OPR

13. Relief.

5. Late Mr. S.R. Goel, decided issue nos. 1 to 7, 11 and 12 in favour of NRDC. However, issue nos. 8, 9 and 10 were decided against NRDC and in favour of the defendants, on the ground that the NRDC had failed to prove the quantum of SIG contacts sold by the defendants. The learned arbitrator had also concluded that there was a failure on the part of the NRDC to prove the rate at which SIG contacts were sold, and the price which the defendants had received from their customers. According to the learned arbitrator, there was absence of primary and secondary evidence. The evidence available on record was hearsay and, therefore, the claim for royalty as well as damages, according to him, could not be allowed based on guess work and conjecture.

6. Upon remand of the matter to Mr. Dinesh Dayal, he was required to construe the scope of the directions issued by this court, in its judgment dated 10.04.2008. This became a critical exercise in view of the fact that this court vide its judgment dated 10.04.2008 had upheld the findings returned in the award qua damages. Mr. Dinesh Dayal, the learned arbitrator, after hearing the counsels for parties came to the conclusion that NRDC's claim for royalty for the period

beyond the termination of the license could not be considered.

6.1 As noted above, there is a finding of fact that commercial production began in November, 1991, and that, the license was terminated on 07.04.1994. It was the contention of NRDC before the learned arbitrator that, since the license ran for a minimum period of ten years, any use of its technology/know-how beyond 07.04.1994, would also make the defendants, liable for payment of royalty, if not for damages. Mr. Dinesh Dayal, though, vide the impugned award dated 28.05.2009, rejected the contentions of the defendants on the ground that this court had upheld the findings returned in the award dated 19.03.2001, with regard to damages; and therefore, NRDC's claim for royalty for the period for which damages were disallowed, could not be considered in the absence of necessary pleadings made in that behalf, notwithstanding the fact that there may be evidence on record pertaining to the said aspect. The relevant observations of the learned arbitrator are contained in paragraph 31 of the impugned award, which reads as follows:

....31. The evidence shows that the respondents entered into commercial production in November 1991. The license of the respondents was terminated by notice Ex C/31 dated 7.4.1994 forthwith. The claim of the petitioner is thus a clear case for claim of royalty from November 1991 to 7.4.1994 and damages at the rate of Rs. 50,000/- p.m. till the respondents continued to use the process knowhow for manufacture of SIG contacts. The Court has upheld the findings in the Award of Shri S.R. Goel with regard to damages. The petitioner now cannot be allowed to claim royalty for the period for which their claim for damages has been disallowed. The forceful arguments of the learned counsel for the petitioner pointing out the evidence to support his claim for royalty for the period November 1991 to 2001 cannot be accepted. Any amount of evidence pointed out by the learned counsel cannot be looked into in the absence pleadings. The learned counsel for the claimant also tried to take advantage of the prayer in claim E. I do not think that the claimant can be allowed to take benefit this prayer when their claim for royalty and damages is clearly spelt out and the claim for damages has already been disallowed...

(emphasis is mine)

6.2 As regards royalty for the period November, 1991 to 07.04.1994 is concerned, the learned arbitrator, Mr. Dinesh Dayal, examined two aspects. First, that royalty was to be paid at the rate of 5%, calculated on the ex-factory sale price, in terms of clause 5(ii) of the license; and that, the expression ex-factory sale price was defined in explanation (ii) of clause 5. Second, the presence of evidentiary material, if any, to demonstrate the quantum of SIG contacts manufactured, and the rate prevailing in respect of the same, during the period in issue.

6.3 The learned arbitrator, Mr. Dinesh Dayal, came to the conclusion that the evidentiary material on record did not establish either the ex-factory price

prevailing or, the quantum of SIG contacts manufactured during the period in issue, i.e., between November, 1991 and 07.04.1994.

6.4 Thus, based on these broad findings, claim no. "A" [sic claim (a)], was allowed by the learned arbitrator in line with his interim order dated 17.12.2008, while "nil" amount, was awarded in respect of claim "B" [sic claim (b)].

SUBMISSIONS OF COUNSELS

7. In the background of the aforesaid facts, arguments on behalf of NRDC were advanced by Mr. P.N. Bharadwaj, while on behalf of defendant no. 3 the arguments were advanced by Mr. Sudhir Kumar Sharma. As indicated above, defendant nos. 1, 2 and 4 were proceeded ex-parte on 04.03.2010. The said defendants have remained unrepresented for most part before the learned arbitrator and throughout before this court. Pertinently, defendant nos. 2 and 4 herein, initially, were represented through a counsel before the learned arbitrator; since there was no representation on their behalf as the proceedings progressed, they were proceeded ex-parte by the learned arbitrator.

8. The submissions of Mr. Bharadwaj were as follows:

8.1 The learned arbitrator, Mr. Dinesh Dayal, on remand, vide order dated 17.12.2008 had directed the defendants to produce the true and complete statement of SIG contacts manufactured/marketed and used for their own purpose, and also a correct statement of accounts for the period defendants continued to use, utilize and exploit the process/know-how which was assigned to them.

8.2 It was submitted that defendant no. 3 had moved two applications before the learned arbitrator dated 20.12.2008 and 21.02.2009, both of which were directed against the order dated 17.12.2008. The first application sought directions. While the second application explicitly sought modification of the order dated 17.12.2008.

8.3 The learned counsel submitted that the burden of these applications was that it was not possible for defendant no. 3 to produce the books of accounts, vouchers and documents, etc. of defendant no. 1 for the following reasons. First, defendant no. 3 had resigned from partnership on 12.08.2002 and his power of attorney had been revoked by the other defendants, who were partners of defendant no. 1 on 10.09.2003. Second, a large span of time had elapsed between the period when, allegedly the SIG contacts had been manufactured by the defendants and the date of the order which required production of books of accounts, statements, etc. In other words, books of accounts, statements, etc. pertaining to defendant no. 1 were not available with defendant no. 3 and therefore, it was not possible for him to produce the records whose, production was sought.

8.4 It was contended that in support of this averment, provisions of the Income Tax Act, 1961 and the Rules framed thereunder were brought to aid.

8.5 It was also brought to my notice that before the learned arbitrator, defendant no. 3 had sought to contend that NRDC had not sought information with regard to production of SIG contacts during the relevant period i.e., 1991 to 1994.

8.6 It was submitted that the aforementioned applications were, however, dismissed by the learned arbitrator vide order dated 01.04.2009, whereby the grounds adverted to above for seeking review of order dated 17.12.2008 were rejected.

8.7 It was thus, contended that the learned arbitrator, however, in the impugned award, despite noticing the fact that directions contained in order dated 17.12.2008 had not been complied with, failed to draw adverse inference. To demonstrate that books of accounts were available with defendant no. 3, reliance was placed on the deposition of defendant no. 3 made during his cross-examination.

8.8 Based on the extracts of the deposition of defendant no. 3, it was asserted that the books of accounts although available with defendant no. 3 were not produced; a fact, which the learned arbitrator erroneously chose to ignore and, thus, fell into an error in not drawing an adverse inference against the defendants.

8.9 Apart from the above, it was contended that there was material available on record which would show that the defendants had manufactured SIG contacts during the period November, 1991 till February, 2001. In this behalf, reliance was placed on Ex. C/33-A, C/34, C/35, C/36, C/37, C/39 and Annexure CC-1.

9. Mr. Bharadwaj contended that the accumulative appreciation of the aforementioned exhibits would clearly demonstrate that defendant no. 1 had been approved as a manufacturer of SIG contacts by the Research Designs & Standards Organisation (in short RDSO), Lucknow, Calcutta (now known as Kolkata) as far back as in November, 1991, and that, between November, 1991 and September, 1998, the defendants had manufactured 20,42,297 SIG contacts used in plug-in-type relays, and 24,200 SIG contacts used in shelf-type relays.

9.1 It was also contended that Annexure CC-1 in no uncertain terms demonstrates that between January, 1998 to February, 2001, the production figures for SIG contacts used in plug-in-type relays was 14,51,362, and those, used in shelf-type relays was 35,961.

9.2 It was submitted that the learned arbitrator mis-directed himself in coming to the conclusion that there was no evidence available on record with regard to the quantity of SIG contacts manufactured as, he incorrectly, only concentrated on the report of RDSO, Lucknow, (Ex. C/33), which indicated that 2,46,762 SIG contacts had been inspected during the period January, 1996 to December, 1996.

9.3 It was contended that other exhibits which demonstrated that production had been carried out by the defendants right from the date of its approval, were ignored. In this behalf, specific reference was made to Ex. C/33A and C/39. It

was also contended that the learned arbitrator ignored the fact that as per the deposition of defendant no. 3 (RW-1), the price of SIG contacts used in plug-in-type relays as well as shelf-type relays stood disclosed. The learned counsel relied upon the deposition of defendant no. 3 (RW-1) to demonstrate that the price for a SIG contact used in plug-in-type relays was Rs. 35/- between February, 1999 to December, 2000.

9.4 It was contended that the learned arbitrator could have quantified the royalty, which was claimed by NRDC for the period November 1991 to November, 2001.

9.5 It was submitted that the rejection of NRDC's claim post 07.04.1994 was erroneous for the reason that it was claiming a royalty beyond the date of termination of the license and, not damages, as was concluded by the learned arbitrator.

9.6 In so far as the objections of defendant no. 3 were concerned, it was submitted that they were not maintainable. The arguments addressed in support of NRDC's objections were pressed to repel the objections raised on behalf of defendant no. 3. It was further submitted that the objections being beyond time and the reasons given for seeking condonation of delay being not sufficient, both the application for condonation of delay and the objections ought to be dismissed on this short ground alone.

10. As against this, the learned counsel for defendant no. 3 relied upon the findings returned by late Mr. S.R. Goel, in his award dated 19.03.2001 to the extent that they were sustained by this court vide order dated 10.04.2008. In support of this stress was laid on the findings recorded by late Mr. S.R. Goel in the award dated 19.03.2001 with regard to issue no. 13.

10.1 Reliance was also placed on the observations made in the impugned award dated 28.05.2009, to contend that, there was no evidence produced with regard to either the quantity manufactured by the defendants between November, 1991 and 07.04.1994 or as regards the ex-factory price prevalent during the said period. The learned counsel contended that the onus to establish its claim lay on NRDC. Defendant no. 3 was unable to produce the record as more than 15 years had passed since the passing of order dated 17.12.2008 by the learned arbitrator, for production of the record. It was thus, contended that, the impugned award ought to be sustained to the extent it rejected NRDC's claim for royalty and damages.

10.2 In order to buttress his submission, Mr. Sharma relied upon the findings returned in the award dated 19.03.2001 by Mr. S.R. Goel with regard to issue nos. 8 & 9 as also one singular observation made while rendering decision in respect of issue nos. 4 & 5; as otherwise findings returned vis-à-vis issue nos. 4 & 5 were substantially in favour of NRDC. It may be pertinent to note here that issue nos. 8 & 9 were decided in favour of the defendants, which essentially related to: whether NRDC was entitled to royalty and damages? If so, the

amounts payable with respect to the same. Issue no. 4 related to: whether NRDC had failed to abide by the license conditions? If so to what effect? While issue no. 5 pertained to: whether the information given in the know-how and the process documents by the NRDC to the defendants was unviable, uneconomical, imperfect and incomplete? If so, to what effect? As indicated above, though issue nos. 4 & 5 were substantially decided in favour of NRDC, an observation was made that it had committed breaches "of 1 or 2 terms of the license agreement." There was also an observation made to the effect that NRDC did not give demonstration of the technical process and there was "some imperfection" in the technical process. It is this observation on which reliance was placed by Mr. Sharma.

10.3 Mr. Sharma also contended that the NRDC had no right to execute a license in favour of the defendants as the know-how ceased to be its exclusive patented property w.e.f. 17.06.1981. In this regard Mr. Sharma drew my attention to the answer given by Dr. J.K.N. Sharma (CW1) in reply to the query as to whether the process developed by him had ever been patented. From Dr. J.K.N. Sharma's (CW1) testimony, Mr. Sharma tried to demonstrate that the answer given by Dr. J.K.N. Sharma to the effect that the process was never patented, was demonstrable of the fact that NRDC had no right to execute a license per se much less in favour of the defendants.

10.4 The sum and substance of Mr. Sharma's submission was that by virtue of the impugned award claim (a) was erroneously allowed, while the remaining claims, i.e., (b), (c) & (d) were rightly rejected.

REASONS

11. Having heard the learned counsels for the said parties and perused the record, what has to be determined in the first instance is the scope of the objections filed by NRDC vis-?-vis the impugned award dated 28.05.2009, in the context of the fact that the said award has been passed pursuant to a remand ordered by this court vide judgment dated 10.04.2008. Therefore, reference to the operative part of the judgment dated 10.04.2008 would be necessary. The relevant extracts in that behalf have already been culled out above.

11.1 A perusal of paragraphs 22 to 25 of the judgment would demonstrate that this court had categorically sustained the findings returned in late Mr. S.R. Goel's award dated 19.03.2001, which pertained to issue nos. 8 & 9 as noted above relatable to damages.

11.2 In other words, the findings returned in the said award that there was no evidentiary material placed on record with regard to damages, could not be interfered with. However, in view of the fact that the learned arbitrator had come to the conclusion that the defendants were also in breach of their obligations, undertaken under the license, to furnish information and relevant statements/documents with regard to production; this court set partially aside the award dated 19.03.2001. A direction was issued to reconsider the material on record

and render specific findings qua claim no. 1.

11.3 Therefore, one would have to first examine as to what "claim no. 1," comprised of.

11.4 A lead in respect of this is available in the observations made in paragraph 17 of the judgment dated 10.04.2008, wherein this court referred to the "first claim," as directions sought by the NRDC qua the defendants for disclosure of accounts.

11.5 The court went on further, in this context, to refer to claims (a) and (b), obviously of the statement of claims filed by the NRDC. The said claims/prayers of NRDC were, accordingly, extracted in the judgment of 10.04.2008. As a matter of fact, I have extracted the said claims/prayers hereinabove.

11.6 It is quite clear, therefore, that on remand the learned arbitrator, i.e., Mr. Dinesh Dayal was required to deal with claim/prayer (a) and the first part of claim/prayer (b), which related to determination of royalty, if any payable to NRDC for the period spanning between the date when commercial production was commenced by the defendants and the date of termination of the license. The latter part of claim/prayer (b) with regard to damages claimed at Rs. 55,000/- per month for illegal use of SIG contacts manufactured by the defendants, could not be gone into, since this court had sustained the findings returned by late Mr. S.R. Goel, in his award dated 19.03.2001, with respect to issue nos. 8 & 9.

11.7 Therefore, in my view the learned arbitrator was right that the contention advanced on behalf of NRDC that he should consider its claim/prayer for award of royalty also, for the period between 07.04.1994 and November, 2001, could not be examined since its claim for damages was rejected and that the evidence placed on record vis-?-vis royalty could only be appreciated in the absence of pleadings in that behalf.

11.8 The learned arbitrator could not have gone beyond the directions contained in the judgment of remand of this court dated 10.04.2008. Due to unfortunate circumstances, which led to the demise of the earlier arbitrator, Mr. S.R. Goel, the matter on remand had to be examined by a new arbitrator, that is, Mr. Dinesh Dayal, though no change was made vis-?-vis the directions issued qua remand. The power to remit the matter under the 1940 Act is conferred upon the court u/s 16(1). The court while exercising this power may remand the entire matter or a part of the matter. The arbitrator on remand can only deal with that part which is remanded to him. As regards the part which is not remanded to him, he becomes functus officio. [See K.K. John Vs. State of Goa, . In the present case, NRDC not having challenged the judgment dated 10.04.2008, will have to hold its peace. The learned arbitrator could not have examined the matter which was not remanded to him as he had become functus officio vis-?-vis that part of the matter.

11.9 The learned arbitrator, in my view, was also right in holding that since there were no pleadings in respect of the same, no amount of evidence led could be examined with respect to claim for royalty between 07.04.1994 and November, 2001. Apart from the above, one also notices that there is as a matter of fact no prayer for claim of royalty for period post the termination of the license, which as indicated above, was terminated by NRDC on 07.04.1994.

12. This brings me to the next aspect of the matter which is with regard to the period obtaining between November, 1991 and 07.04.1994. In my view, the learned arbitrator in allowing claim/prayer (a) (see paragraph 4 above) has clearly accepted the fact that the defendants have deliberately kept back the record, which defendant no. 3, i.e., RW-1 clearly admitted in his testimony was available with him. This is evident from the following observations made in paragraph 39 of the impugned award. For the sake of convenience the same are extracted hereinbelow:

39. A perusal of the cross-examination of respondent no. 3 who appeared as RW1 shows that he had admitted that he was in possession of the relevant accounts. Now he has taken the stand that he has resigned from the partnership w.e.f. 12.8.2002 and the respondents are not in possession of the account books. He has not explained what has happened to the account books. He has not stated if the account books were surrendered by him to the other respondents or the same have been destroyed. He has taken the position that the respondents are not bound to maintain the account books beyond a period of six years in view of section 44AA. This does not mean that the account books have been actually destroyed. The respondent firm is a registered partnership firm. The respondents have not shown that the name of respondent no. 3 has been deleted from the list of partners in the records of the registrar of firms. It is apparent that the respondents are intentionally not producing the accounts as directed...

(emphasis is mine)

12.1 The other argument of Mr. Sharma, learned counsel for defendant no. 3, that the know-how/technology provided by the NRDC was imperfect or, that the NRDC did not have a patent with regard to the same and that the patent which they had, ceased to be operative w.e.f. 17.06.1981, according to me, would be of no relevance, in view of the fact that these very arguments were raised on behalf of the defendants during the course of the first round of litigation before late Mr. S.R. Goel. This court vide judgment dated 10.04.2008 sustained the findings of late Mr. S.R. Goel in his award dated 19.03.2001 that the defendants had been in substantial breach of the license executed in their favour. The observation with regard to imperfect and/or unviable technology, has to be examined in the light of the evidence available on record which, clearly seems to demonstrate that Dr. J.K.N. Sharma, CW1 had required the defendants to take certain corrective measures, which perhaps were not taken note of by the defendants and, thus, resulted in rejection of some consignments offered by the defendants to their customers, which included, RDSO, Lucknow. This aspect, in my view, would not

take away the right of the NRDC to claim royalty for the period referred to hereinabove.

13. In so far as the argument with regard to the illegality of the licence is concerned, the same is a misconceived submission for the reason that the testimony and the evidence led in that behalf is contrary to a written document, which is the license, which clearly indicates that the rights in the technology/ know-how were acquired by NRDC from CSIR, and that defendant no. 1 acknowledged and accepted NRDC's absolute ownership in the know-how.

13.1 Furthermore, the testimony of Mr. S.R. Mohta (RW-1) would show that NRDC had patented the technology, which was subject matter of patent no. 142645 dated 17.06.1974. According to defendant no. 3, the said patent ceased to be operative w.e.f. 17.06.1981. The testimony further reveals that the defendants had made a search with regard to the patent no. 142645 with the office of the Controller of Patents, located at Calcutta (now known as Kolkata), whereby certain documents were received by them. The testimony of defendant no. 3, however, does reveal that the said patent, i.e., patent no. 142645 did not relate to the process/know-how, which was supplied to the NRDC under the license dated 30.03.1989, and also, that the papers which were received by the defendants did not pertain to the process/know-how supplied to the defendants herein. Therefore, the entire argument of the defendants that they were not informed that the process/know-how supplied to them had been patented which, subsequently, had ceased to be operative even prior to the execution of the license, was baseless. The defendants, thus, having accepted the obligation under the license to pay royalty for use and exploitation of the process/know-how supplied to them by the NRDC, were bound by the terms and conditions contained therein.

13.2 The learned arbitrator having gone thus far appears to have erred in law by failing to draw an adverse inference against the defendants. As a matter of fact, this was precisely the underlying reason for the matter being remitted for reconsideration of claim no. 1, which comprised of claim/prayer (a) and the first part of claim/prayer (b).

13.3 This apart, there is substance in Mr. Bharadwaj's contention that there was evidence available on record with regard to SIG contacts manufactured by the defendants even between November, 1991 and 07.04.1994. A perusal of exhibit C/33-A, along with exhibit C/39 would show that RDSO, Lucknow had communicated to NRDC vide letter dated 27.08.1997 that defendant no. 1 was approved as a supplier in November, 1991 and, that, while it had figures of SIG contacts inspected during January, 1996 to December, 1996 which numbered 2,46,762; the figures for earlier years were not readily available though, efforts would be made in that behalf.

13.4 The subsequent communication exchanged between RDSO, Lucknow and NRDC dated 03.09.1998 (Ex. C/39), does indicate that efforts were made as

promised and, consequently, it got reported that between the date of approval of defendant no. 1 as its supplier (which happened in November, 1991) and September, 1998, defendant no. 1 had supplied 20,66,497 SIG contacts to it. The said exhibit makes it clear that the said total quantity comprised of 20,42,297 units of SIG contacts for use in plug-in-type relays, and the balance 24,200 units of SIG contacts for use in shelf-type relays.

13.5 Quite curiously, the learned arbitrator brushed aside the said evidence by stating that NRDC had not placed any evidence on record to show production of SIG contacts carried out between November, 1991 to April, 1994. The observations in that behalf are made in paragraph 36 of the impugned award, the relevant part is extracted hereinbelow:

....Similarly there is no evidence on record to show the quantity of SIG contacts produced by the respondent during the period November 1991 to April 1994.....The claimant also obtained figures about the production from 1991 to 2001 by way of Ex C39 and Ex C39/A. There is, however, no evidence on record from which the production for the period November 1991 to April 1994 can be calculated...

(emphasis is mine)

13.6 In my view, this approach was clearly erroneous.

14. The second aspect of the matter is with regard to the ex-factory sale price. The learned arbitrator was of the view that royalty was required to be paid by the defendants at the rate of 5% of the ex-factory sale price as per the provisions of clause 5(ii) of the license. The learned arbitrator also noted that ex-factory sale price had been defined in explanation (ii) to clause 5 of the license. The arbitrator concluded that there was no evidence of ex-factory sale price of SIG contacts manufactured by the defendants during the period November, 1991 to April, 1994. The observations in this regard are contained in paragraph 35 of the impugned award. For the sake of convenience the same is extracted hereinafter.

35. The evidence produced by the claimant with respect to the ex-factory sale price is the statement of CW2 Chander Mohan and the documents produced by him. Shri Chander Mohan visited RDSO Lucknow along with Shri S.K. Tandon on 26.8.1997. He submitted his tour report Ex. C/33 dated 3.9.1997 along with annexure Ex C/33-A to Ex C/33-E/2. As per the report Ex C/33 the respondents manufactured and got inspected from RDSO Lucknow 2,46,762 SIG contacts during the period January 1996 to December 1996. SIG contacts varied from Rs. 16/- to Rs. 22/-. In his report as well as his statement he has taken the average price of an SIG contact for the year 1996 as Rs. 20/-. The claimant has also filed on record Ex. C/36 which is the copy of an invoice of the Industrial Carbon dated 25.4.1997 where the price of each SIG contact has been quoted at Rs. 35/- Ex C/37 is a copy of a purchase order dated 19.12.1996 by the Controller of Stores Gorakhpur with respect to the order placed on the respondents which also shows the price of each SIG contact as Rs. 35/-. The cross examination of RW-1 Shri

S.R. Mohta also refers to the prices as reflected in the documents referred to above. Thus there is no evidence of the ex-factory price of the SIG contacts manufactured by the respondents during the period November 1991 to April 1994...

(emphasis is mine)

14.1 A careful perusal of the aforesaid observations would show that the learned arbitrator has been solely swayed by the fact that none of the material placed on record with regard to sale at ex-factory sale price pertained to the period November, 1991 to April, 1994. What the learned arbitrator failed to recognize was that in the cross-examination of Mr. S.R. Mohta, on the aspect of rate of SIG contacts he had asserted that he had been issuing bills, cash-memos, challans to his customers and that he was in possession of the records from 1991 till date. Notably, the cross-examination of Mr. S.R. Mohta, RW-1 was conducted on 18.02.2001. The relevant questions with regard to the same and Mr. S.R. Mohta's (RW-1) replies are extracted hereinafter for the sake of convenience:

.....Q. What was the rate per SIG contact in respect of plug in type relay, shelf type relay and Q type relay during 1991-92/January 1996 to December 1996 and in May-June 1998?

A. I have already replied the same were the prices during these period.

It is correct that I have been issuing bills, cash memo, challans etc. to the buyers in respect of the sale made by me. It is correct that I am in possession all the records of the same from 1991 till date. It is wrong to suggest that the respondent did not suffer any loss or damage after taking the licence from claimant. It is wrong to suggest that no misguiding information was provided to us.

Q. Did you pay any amount under the head "Royalty" from 1991 to till date?

A. No. ...

(emphasis is mine)

14.2 In my view, even though the question posed to Mr. S.R. Mohta (RW-1) pertained to the period 1991-1992, January, 1996 to December, 1996 and May-June, 1998, his answers emphatically stated that he had records available with him from 1991 till February, 2001. Therefore, it is quite clear that the learned arbitrator erred in law in not taking note of this aspect of the matter. The learned arbitrator should have appreciated the contents of exhibit C/33-A and exhibit C/39 to ascertain the quantity manufactured between November, 1991 till 07.04.1994.

14.3 Clearly even according to the learned arbitrator, the best evidence (in this case which was the books of accounts and other accounting documents) even though available with the defendants, was kept back. The arbitrator ought to have drawn an adverse inference based on the principles analogous to Section

114(g) of the Indian Evidence Act, 1872. An adverse inference, quite plainly, could have been drawn against the defendants, more particularly, defendant no. 3, once he came to the conclusion that the said defendant was in "possession of relevant accounts", notwithstanding the fact that the onus of proof did not lie on the defendants. The observations of the Supreme Court in that context as laid down in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, are apposite and the same are extracted hereinbelow:

...Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof....

14.4 Also see the observations of the Supreme Court and the Privy Council in this regard in Hiralal and Others Vs. Badkulal and Others, and AIR 1917 6 (Privy Council) respectively.

14.5 Similarly, the learned arbitrator ought to have ascertained the rate by applying the same principle. It is not as if the rates for the period after April, 1994 were not available to the learned arbitrator. As a matter of fact, Mr. S.R. Mohta (RW-1) in his cross-examination has quite clearly made the following assertions in his deposition:

...Q. What has been the sale price of per SIG Contact during the period February, 1999 to December, 2000?

A. It was from Rs. 11/- to Rs. 18/- per piece for plug in type relay per piece.

Q. Is it correct that the sale price per SIG Contact supplied during February 1999 to December 2000 was about at the rate of Rs. 35/- per SIG Contacts?

A. This price was for plug in type relay contact. Vol. There are two types of SIG Contacts...

14.6 The attempt of defendant no. 3 to explain away the defendants' production; albeit for the period February, 1999 to December, 2000, cannot cut much ice for the reason that Mr. S.R. Mohta (RW-1) in his testimony clearly admitted that the defendants had not informed RDSO that SIG contacts had been produced by them by using a process/know-how other than that which was supplied to them by NRDC; clearly there was an attempt by the defendants to keep back the record.

14.7 As a matter of fact, the record also shows that on behalf of the defendants,

in the first instance, affidavit of evidence had been filed by defendant no. 2 i.e., Mr. Bal Mukund Mohta, which was replaced with the affidavit of Mr. S.R. Mohta on the ground that he was the senior partner of defendant no. 1 and was more conversant with the facts of the case. An application in that behalf was moved before the earlier arbitrator late Mr. S.R. Goel, which is how the defendants tendered Mr. S.R. Mohta as their witness.

14.8 In these circumstances, I am clearly of the view that in so far as award dated 28.05.2009 allows claim/prayer (a), it will have to be sustained. It is ordered accordingly. However, to the extent the award dated 28.05.2009 declines relief to NRDC with regard to royalty claimed for the period November, 1991 to 07.04.1994, it would have to be set aside. In consonance with the same, the decision taken to deny NRDC's claim for interest on royalty for the said period and costs, is set aside. Therefore, first part of claim/prayer (b), which is extracted hereinbelow; claim/prayer (c) relating to interest and claim/prayer (d) relating to costs are remitted to the learned arbitrator for re-examination:

...An award for a minimum amount of Rs. 6,00,000/- on account of royalty due to the claimant from the respondents for the period when the respondents started commercial production of the licenced product till the date of termination of the Licence Agreement...

14.9 The necessary consequences of this would be that defendant no. 3's objections contained in IA No. 13663/2010 are dismissed. Resultantly, IA No. 13664/2010 has been rendered infructuous and the same is accordingly dismissed as having become infructuous.

The suit, IA No. 12111/2009 and IA No. 13665/2010 are accordingly, disposed of in the above terms. Consequently, the registry is directed to dispatch the arbitration record to Mr. Dinesh Dayal, ADJ (Retd.). The learned arbitrator shall render his findings in terms of the directions issued hereinabove based on the record already available with him as expeditiously as possible. In the circumstances, parties are, however, left to bear their own costs.