
(1997) 05 DEL CK 0100

In the Delhi High Court

Case No : Suit No. 205 of 1993 and Interim Application No. 4504 of 1994

National Research Development Corporation

APPELLANT

Vs

Silicon Ceramics Ltd.

RESPONDENT

Date of Decision : 30-05-1997

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1997) 4 AD 369 : AIR 1998 Delhi 52 : (1997) 2 ARBLR 173 : (1997) 42 DRJ 476 : (1997) 2 ILR Delhi 1

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : P.N. Bhardwaj, N.S. Safaya and Sushma Ambardor, for the Appellant;

Judgement

Anil Dev Singh, J.

(1) The petitioner is a Public Undertaking which is authorised to grant licences for use of the inventions, know - hows, expertise etc. developed by different Central Government laboratories, including Central Electronics Engineering Research Institute (for short 'CEERI'), Pilani. The respondent is a company incorporated under the Indian Companies Act and is manufacturing semi-conductor packages. The petitioner granted license to the respondent to use the process developed by Ceeri for manufacture of "TO-5, TO-18, etc." semi-conductor packages vide license agreement dated 23rd February, 1972 (for short 'the agreement'). It was agreed by the respondent to pay royalty to the petitioner at the rate of 3 per cent of the sale price of the semi-conductor packages manufactured by it. The royalty was to be paid by the 1st day of May and 1st day of November of every calendar year. The agreement postulated levy" of interest in case of failure to pay royalty on due dates. The agreement also provided for filing of returns by the respondent with the petitioner. It is the case of the petitioner that the respondent failed to file the returns and to pay the royalty as per the terms and conditions of the agreement despite repeated demands. The petitioner, in the

circumstances, Therefore, filed a petition in this Court u/s 20 of the Arbitration Act for appointment of an Arbitrator to adjudicate its claims against the respondent for payments due to the former from the latter on account of royalty and interest.

(2) The Court by its order dated August 1, 1989 directed the Managing Director of the petitioner to enter upon reference and in case he was unwilling to act, liberty was granted to him to appoint an arbitrator. Pursuant to this direction the Managing Director, by his letter dated 25th/26th September, 1989, appointed Mr. Justice Vyas Dev Mishra, retired Chief Justice of the High Court of Himachal Pradesh, as the sole arbitrator. Thereupon, Mr. Justice Mishra entered upon reference and proceeded with the matter. But, unfortunately, he expired on June 20, 1990. This necessitated the appointment of a new arbitrator. For this purpose the petitioner moved an application u/s 28 of the Indian Arbitration Act, 1940. The respondent did not file any reply to the application nor appeared in the matter despite service. On December 17, 1991, this Court appointed Mr. Justice S.S. Chadha, a retired Judge of this Court, as the new arbitrator to fill the vacancy caused by the demise of Mr. Justice Mishra. Pursuant to his appointment as Arbitrator, Mr. Justice Chadha made and published his award on September 5, 1992.

(3) The respondent challenged the award on a number of grounds, namely :-

1. The arbitrator Mr. Justice S.S. Chadha did not have the jurisdiction to deal with the matters in dispute as he was appointed in place of late Mr. Justice Vyas Dev Mishra who was appointed by the Managing Director of the petitioner instead of its Chairman which is the named authority in the arbitral clause for appointing the arbitrator for adjudication and determination of the disputes between the parties;

2. Since the agreement between the parties, permitting the respondent to use the know-how process, to manufacture TO-5, TO-18, etc. semi-conductor packages, covering a patent for glass to metal sealing was not registered under Sections 68 and 69 of the Patents Act, 1970 (for short 'the Act'), the license agreement including the arbitration clause is void ab-initio, and consequently the award entered by the arbitrator, is a nullity;

3. As the respondent manufactures TO-3 semi-conductor packages, which are not the subject-matter of the license agreement, the determination of the arbitrator that the respondent was liable to pay a sum of Rs. 1,67,305.00 as royalty for the first fourteen years of their manufacture is void ab-initio;

4. The arbitrator enlarged the scope of the arbitration by awarding royalty up to the year 1990 though in the claim petition the petitioner had claimed royalty up to the year 1995.

DISCUSSIONS and findings in regard to the above said points are as follows :-

(4) Point No.1 : Dealing with the first submission of the learned counsel for the

respondent it may be noticed that the petitioner filed an application u/s 20 of the Arbitration Act, 1940, seeking reference of the disputes between them pertaining to non-payment of royalty and interest thereon by the respondent. The respondent was duly served and it put in its appearance through its counsel. However, no reply was filed by the respondent in spite of the opportunity having been granted to it for this purpose. The matter came up before the Court on August 1, 1989, on which date the respondent did not appear. The Court found that the disputes were covered under the arbitration agreement. It also recorded that the Chairman of the petitioner who was the competent authority to act as an arbitrator or to appoint, any other person to act as such was being called the Managing Director w.e.f. May 1, 1987. It was in these circumstances that the Managing Director of the petitioner company was directed to enter upon reference and in case of his being unable or unwilling to act he was directed to appoint some other person as an arbitrator.

(5) The Managing Director, pursuant to the above said order, appointed Mr. Justice Vyas Dev Mishra, a retired Chief Justice of the High Court of Himachal Pradesh, as an arbitrator for the adjudication of disputes between the parties. As Mr. Justice Vyas Dev Mishra died on June 20, 1990, an application was moved by the petitioner u/s 28 of the Indian Arbitration Act, 1940 for appointment of another arbitrator in his, place. Neither any one appeared on behalf of the respondent nor any reply was filed on its behalf. The matter came up before the Court on December 17, 1991 on which date Mr. Justice S.S. Chadha was appointed as an arbitrator. The submission of learned counsel for the respondent is that at no point of time the nomenclature of the post of Chairman of the petitioner company was changed to that of the Managing Director. The actual fact was that the post of Chairman of the company always existed and still exists but when the Managing Director was directed to enter upon reference or to appoint any other person as an arbitrator, the post of Chairman was vacant as no incumbent had been appointed against it since 1982. In view of this position, the learned counsel submitted that the Court had no authority to authorise the Managing Director to appoint an arbitrator in violation of the arbitration clause, which vested the power to appoint an arbitrator with the Chairman of the petitioner company. Learned counsel further submitted that since the initial appointment of the arbitrator was illegal and void ab-initio the subsequent appointment of Mr. Justice S.S. Chadha by the Court in place of Mr. Justice Vyas Dev Mishra suffered from the same malady.

(6) I have considered the submission of learned counsel for the petitioner but I regret my inability to accept the same. Learned counsel for the respondent has not disputed that in case the Court had appointed Mr. Justice Vyas Dev Mishra as an arbitrator instead of directing the Managing Director to appoint an arbitrator, the appointment of Mr. Justice Vyas Dev Mishra would have been in order. If this position is accepted by the learned counsel for the respondent then there is no reason why by the same token the appointment of Mr. Justice S.S. Chadha should not be accepted as valid. Mr. Justice S.S. Chadha was admittedly

appointed by the Court on December 17, 1991 without there being any objection from any quarter.

(7) Learned counsel for the respondent however, submitted that Mr. Justice S.S. Chadha proceeded in the matter from the stage at which Mr. Justice Vyas Dev Mishra left off, Therefore, the illegality in the proceedings could not be cured by the appointment of Mr. Justice S.S. Chadha as arbitrator by the Court by its order dated December 17, 1991. In regard to this submission of the learned counsel for the respondent it only needs to be pointed out that it was on the agreement of the parties that Mr. Justice S.S. Chadha treated the proceedings which had taken place before Mr. Justice Vyas Dev Mishra as the proceedings having taken place before him. Besides, when the Court authorised the Managing Director of the petitioner company or his nominee to act as an arbitrator, he was the principal officer of the company as at that time the post of Chairman lay vacant. When the parties in the agreement provided for the Chairman or his nominee to act as an arbitrator in the event of disputes between them, the intention was to confer that authority on the principal officer or the first officer of the company. Since the post of Chairman was lying vacant from the year 1982, the Managing Director of the petitioner being the principal officer of the company in the absence of the Chairman was competent to act in terms of the arbitral clause. This was in keeping with the spirit and intention of the parties as exhibited by the arbitration clause and the necessity created by the situation. In the circumstances, Therefore, the submission of the learned counsel for the respondent is of no avail to him and the same is rejected.

(8) Point No.2: The argument of the learned counsel for the respondent is based on misreading of Sections 68 and 69 of the Patents Act, 1970. He submitted that glass to metal sealing is one of the steps for the manufacture of the semi-conductor packages. This process having been patented by Ceeri an assignment thereof could only be made by a registered agreement as per Section 68 of the Act. He also drew my attention to Section 69 of the Act, which lays down the procedure for registration of the assignment of the patent. He particularly laid emphasis on sub-section (5) of Section 69 and submitted that a document assigning a patent is not to be admitted as evidence of the title of any person to a patent unless the same is registered.

(9) He further submitted that as the agreement was not registered it is void ab initio and consequently clause 11 thereof under which the disputes were referred for arbitration had no existence and no valid reference could have been made. On the other hand, the learned counsel for the petitioner contended that the respondent is estopped from raising the question of jurisdiction of the arbitrator inasmuch as such an objection was not raised when the first arbitrator Justice Vyas Dev Mishra was appointed. The same was not raised even in reply to the application of the petitioner u/s 28 of the Indian Arbitration Act, 1940, for appointment of a new arbitrator after the demise of Mr. Justice Mishra. The respondent also did not raise the plea in its reply to the claim filed by the

petitioner before the arbitrator. Such a question was not even raised in the amended reply filed by the respondent. The conduct of the respondent clearly demonstrates that it had acquiesced to the jurisdiction of the arbitrator. The learned counsel for the petitioner also invited my attention to the opinion of the arbitrator that the respondent was not entitled to raise the question of non-registration of the agreement dated 23rd February, 1972 (Ext. R-2) before him for the first time during oral arguments. He particularly relied upon the following observations of the arbitrator :

"THE questions raised by Mr.N. Safaya, in my opinion, are mixed questions of fact and law. The agreement Exhibit R-2 stipulates that the Ceeri has developed a know how for the manufacture of semi-conductor packages and full rights in the said invention have been assigned to N.R.D.C. and the respondents are a party to this agreement which contained the arbitration agreement. The question of the agreement being void was not raised in the proceedings u/s 20 of the Arbitration Act, 1940 before the High Court of Delhi. These were not raised in the reply to the statement of claim or the amended reply and has been raised for the first time during arguments.

I, Therefore, do not allow the respondents to urge it before me (though I heard arguments on the merits of the objection)."

(10) In answer to the submission of the learned counsel for the petitioner the learned counsel for the respondent submitted that his client neither acquiesced to the jurisdiction of the arbitrator nor any question of waiver arises. The question of jurisdiction goes to the very root of the matter and can be raised before the Court at any stage of the proceedings including the stage after filing of the award. The question of the validity or otherwise of the contract is for the Court to determine and is not a matter for the decision of the arbitrator. Since the proceedings before the arbitrator were void for want of jurisdiction, the defect cannot be cured by appearance of the parties before the arbitrator. The learned counsel relied upon the decisions of the Supreme Court in *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, ; *The Union of India (UOI) Vs. Shri Om Prakash*, , *U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd.* and others, (1996) 1 A K R 236, *Union of India (UOI) Vs. G.S. Atwal and Co. (Asansole)*, .

(11) I have considered the rival contentions of the learned counsel for the parties. It is well settled that the dispute as to the validity of the arbitration agreement between the parties is for the Court to decide and can be raised by means of an application under Sections 30 and 33 of the Arbitration Act even after an award has been filed in the Court. In *Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd.* , it was held that if a contract is illegal and void, an arbitration clause which is one of the terms thereof must perish along with it and the dispute relating to the validity of the contract is in such a case for the Court and not the arbitrator to decide. Again in *U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd.* and others, 1996(1) A.L R 236, the Supreme Court laid down

that the arbitrators cannot clothe themselves with the jurisdiction to decide conclusively the arbitrability of the dispute and it is for the Court u/s 33 of the Arbitration Act to decide the question. The Supreme Court further laid down that the party challenging the award can seek a declaration from the Court u/s 33 of the Arbitration Act as to the invalidity or the non-existence of the arbitration agreement. In Union of India (UOI) Vs. G.S. Atwal and Co. (Asansole), , the Supreme Court reiterated the principle by stating that the question whether or not the matter referred to the arbitrator is within the ambit of the arbitral clause is for the Court to decide. It also laid down that it is for the Court to determine finally the arbitrability of the claim in dispute. Besides, it was held that there was no estoppel to seek a declaration that the arbitration agreement does not exist even where the party invoking Section 33 of the Arbitration Act participated in the proceedings before the arbitrator for the purpose of adjudication of the dispute regarding the existence of the arbitration agreement or arbitrability of the dispute.

(12) To counter the above authorities, the learned counsel for the petitioner cited Russel on Arbitration, 18th Edition, page 105. The relevant paragraph is extracted below :-

"IF the parties to the reference either agree beforehand to the method of appointment or afterwards acquiesce to 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 facts will amount to acquiescence."

(13) Learned counsel for the petitioner also cited the decision of the Supreme Court in Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, , where the Hon''ble Court while explaining the principle of waiver and estoppel held that long participation and acquiescence in the proceedings precludes a party from contending that the proceedings were without jurisdiction. it may be mentioned that in the above case the appellant therein had moved an application before the Calcutta High Court u/s 20 of the Arbitration Act for an order for filing the arbitration agreement and for appointment of an arbitrator including other consequential reliefs. In that application it was urged that the arbitrator named in the arbitration clause should not be appointed and instead an independent member of the bar be appointed as an arbitrator. A learned Single Judge of that Court appointed an independent arbitrator for the reasons recorded in his order This order came to be passed on April 19, 1983. The arbitrator thus appointed started the proceedings in which both the parties submitted to his jurisdiction and filed their respective claims. In the year 1985 the respondent challenged the validity of the order of appointment of the arbitrator. On December 8, 1986 another Single Judge of the same High Court set aside the order dated April 19, 1983 on the ground that the order appointing an independent arbitrator was without jurisdiction. The matter was carried to the

Supreme Court by way of special leave. The Supreme Court noted that the respondent was a party to the proceedings seeking extension of time to make and publish the award on various occasions. It also noted that the arbitrator had held seventy four sittings which were attended by the parties of both sides. Relying on the decisions in *Arbn. Jupiter General Insce. Co. Ltd. Vs. Corporation of Calcutta (with Award)*, ; *Chowdhary Mumtaza Hossein v. Mussumat Bibi Bechunnisa*, L.R. (1875-76) 3 is 209 at 220; and *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, , the Supreme Court held that the impugned judgment of the single judge of the Calcutta High Court dated December 8, 1986 could not be sustained and directed that the arbitration proceedings were to go on before the independent arbitrator appointed by the order dated April 19, 1983 of another Single Judge of that Court. The decision proceeded on the basis that the appellant therein had participated in seventy four hearings without protest before challenging the authority which indicated that the appellant had acquiesced in the proceedings before the arbitrator whose authority he subsequently challenged. In *Chellapan's* case on which reliance was placed in *Prasun Roy's* case the Supreme Court held that a party which submitted to the jurisdiction of the umpire and took part in the proceedings before him without demur will be precluded by his acquiescence from challenging the award for lack of jurisdiction. Similarly, in *Neelakantan and Bros. Construction Vs. Superintending Engineer, National Highways, Salem and Others*, , cited by the learned counsel for the petitioner, the Supreme Court held that if the parties to the reference either agree before hand to the method of appointment or afterwards acquiesce in the appointment made with full knowledge of all circumstances they will be precluded from seeking to invalidate the proceedings before the arbitrator. In all these cases there was no dispute relating to the existence or the validity of the arbitration clause.

(14) The reliance placed on the above decisions by the learned counsel for the petitioner do not apply to a situation where the jurisdiction of the arbitrator is challenged on the ground that the arbitration agreement is void ab initio. Such a situation is covered by the decision of the Supreme Court in the case of *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, , wherein it was held that an arbitration agreement being the very foundation on which the jurisdiction of the arbitrator to act rests the proceedings must be held to be without jurisdiction where the arbitration agreement is not in existence at the time when the arbitrator enters upon reference, and the defect is not cured by the appearance of the parties in the proceedings before the arbitrator even if that is without protest.

(15) Thus it is clear that where the party questions the very existence of the arbitration agreement on the ground of it being a nullity, the parties to the reference are not precluded from challenging the jurisdiction of the arbitrator or the award made by him in spite of the fact that they were parties to the reference and participated before the arbitrator. When the very foundation of the reference to the arbitrator is being shaken on the ground of the alleged invalidity

of the agreement containing the arbitration clause, the participation of the party in the arbitration proceedings culminating in an award will be of no consequence and he would be entitled to move an application before the Court u/s 33 of the Arbitration Act for a declaration that the arbitration agreement does not exist or the same is a nullity or void ab-initio.

(16) Therefore, the petitioner can legitimately raise the questions for determination whether or not the agreement dated February 23, 1972 is void, being vocative of Section 68 of the Act and whether it is to be excluded from being considered as evidence by virtue of Section 69(5) thereof. In order to resolve the controversy it will be necessary to examine Sections 68 and 69(5) of the Act. These provisions read as follows :-

"68. Assignments, etc. not to be valid unless in writing and registered. - An assignment of a patent or of a share in a patent, a mortgage, license or the creation of any other interest in a patent shall not be valid unless the same were in writing and the agreement between the parties concerned is reduced to the form of a document embodying all the terms and conditions governing their rights and obligations and the application for registration of such document is filed in the prescribed manner with the Controller within six months from the commencement of this Act or the execution of the document, whichever is later or within such further period not exceeding six months in the aggregate as the Controller on application made in the prescribed manner allows :

Provided that the document shall, when registered, have effect from the date of its execution."

"69.Registration of assignments, transmission, etc.

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(5)Except for the purposes of an application under sub-section (1) or of an application to rectify the register, a document in respect of which no entry has been made in the register under sub-section (3) shall not be admitted by the Controller or by any Court as evidence of the title of any person to a patent or to a share or interest therein unless the Controller or the Court, for reasons to be recorded in writing, otherwise directs."

(17) It is evident from a reading of Section 68 that it requires an agreement assigning a patent or a share in the patent, a mortgage, a licence, or the creation of any interest in a patent to be in writing and registered. At the same time Section 69 of the Act, lays down the procedure for assignment, transmission, etc. of the patent. u/s 69(5) assignment of a patent in favor of a person will not be admissible as evidence of his title thereto unless the same is registered. A perusal of the agreement shows that the process for manufacture of TO-5, TO-18, etc. semi-conductor packages was assigned to the respondent by the petitioner. In this regard, the agreement in so far as it is relevant states as follows :-

"WHEREAS the Central Electronics Engineering Research Institute, Pilani has developed a know-how for the manufacture of TO-5, TO-18, etc. Semiconductor Packages (hereinafter called the `said invention") and full rights in the said invention have been assigned to the Corporation,

And Whereas the Corporation is in possession of and is entitled to full rights in the said invention,

And Whereas the Corporation has agreed to grant to the Grantee such license to use the said invention and process and to manufacture and sell articles made in accordance with the said invention on the terms and conditions hereinafter contained:

Now This Deed Witnesses as follows :-

1. In consideration of the payment of Rs. 15,000.00 (Rupees Fifteen Thousand only) by the Grantee to the Corporation on or before the execution of these presents as and by way of premium and the payment of the royalty hereinafter specified, and the observance and performance by the Grantee of the covenants herein contained and on its part to be observed and performed this license is hereby granted for a term of 14 years from the First day of January 7, 1972 and shall comprise the right to use the said invention for the manufacture of TO-5, TO-18, etc. Semiconductor Packages at the Grantee's own Factory, and to sell the products manufactured in accordance with the said invention.

Provided That notwithstanding anything contained in sub-clause (i) of clause 5 of this licence, the Grantee shall pay royalty at the rate and in manner specified in sub-clause (i) of clause 3 of this license for a minimum period of 14 years computing from the date of start of manufacture and the license shall continue to remain in force for that period for that purpose even after the expiry of the period specified in clause 1 above.

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(18) The above shows that the agreement nowhere talks of assignment of a patent. Therefore, Section 68 has no application as it applies to an assignment of a patent or creation of an interest therein, etc. There is no patent covering the process of manufacture of semi-conductor packages which has been assigned to the respondent. Learned counsel for the respondent had not been able to lay his finger on any of the clauses of the agreement whereby any patent was assigned to the respondent. Clause 10 of the agreement inter alia provides that the agreement itself shall be the sole repository of the terms agreed to between the parties. Learned counsel for the respondent even in the face of clause 10 is trying to import something which is not contained in the agreement. In order to search for the terms agreed to between the parties one is not allowed to travel outside the agreement.

(19) Besides it is not the case of the respondent that the whole and complete process of manufacture of semi-conductor headers was patented. His only claim

is that the process for glass to metal sealing, which is one of the steps for the manufacture of semi-conductor headers has been patented. Even if this be so, Section 68 will not be attracted as complete and indivisible technology for manufacture of transistor headers including the selection of raw materials, various specifications, configuration of pellets sealing, polishing, testing, etc., has been assigned as a non-patent know-how. In short the assignment made by the petitioner in the instant case is not of a patent but is in respect of the complete process for manufacture of transistor headers.

(20) Reliance placed by the counsel for the respondent on Section 69(5) of the Act is of no avail to his client. The Section envisages that if an assignee or a licensee fails to apply for registration of a document under which assignment of a patent has been made to him, he will be precluded from relying on the document as proof of his title to the use of the patent. The provision does not concern the title of the assignor. The petitioner being the assignor its title will remain unaffected even if it be assumed for the sake of argument that the agreement required registration. Even otherwise u/s 69(5) there is no complete embargo on receiving in evidence an unregistered document, dealing with assignment of a patent. For adequate reasons to be recorded in writing the Court can always receive such a document in evidence. Even if Section 69(5) is held to be applicable this is a fit case where the agreement ought to be received in evidence as the respondent utilised the know-how for its advantage for 14 years without paying royalty. The respondent having drawn the benefit under the agreement cannot be allowed to shirk his responsibility of paying the royalty to the petitioner.

(21) In this view of the matter I hold that agreement including the arbitration clause is valid and is not hit by Section 68 of the Act.

(22) Point No. 3. Point No. 3 was also raised before the learned arbitrator. The learned arbitrator took pains in analysing the agreement and came to the conclusion that the process for the manufacture of TO-3 semi-conductor packages was covered by the agreement. In this regard the arbitrator noted that there was contemporaneous documentary evidence relating to the transfer of know-how to the respondent for manufacture of To Series semi-conductor packages/transistor headers. The arbitrator also noted that Mr. B.P. Rangarao, Managing Director of the respondent and Mr. K.N. Raju, an officer thereof, visited Ceeri, Pilani and their visit report dated January 15, 1972 (Ext. P-32) records the minutes relating to the matter of the transfer of know how of To Series semi-conductor packages to the respondent. The arbitrator also referred to letter dated July 24, 1972 (Ext. P-31), minutes of discussion dated July 31, 1972/ August 1, 1972 (Ext. P-35), and letters dated October 22, 1972 (Ext. P-36), October 25, 1972 (Ext. P-37), dated November 30, 1973 (Ext. P-30) and December 7, 1973 (Ext. P-41) to show that the respondent had been given know-how for manufacture of TO-3 transistor headers along with other headers of To series. In this regard, the arbitrator observed as follows :-

" RW-1 Shri B.P. Ranga Rao in his cross-examination (dated 8.4.1990) admits

that he did receive the original of Exhibit P-10 and must have received the original of Exhibit P-11. Along with the letter dated 26.4.1976, Exhibit P-10, inter alia, (i) the drawings for TO-3 dimensions (ii) Die drawings for TO-3 headers and parts (iii) standard drawings for TO-3 eyelets, cap, copper stud (iv) Jedec drawings for TO-3 (v) Graphite jig drawings for TO-3 were enclosed. It also enclosed a certificate mentioning the quantities of wire required for one lac pieces of TO-3. It also gives the addresses for obtaining ferronickel wire and brazing foil for TO-3."

(23) The arbitrator also alluded to the fact that the officials of the respondent visited Ceeri, Pilani from February 15, 1977 to February 23, 1977. The minutes of their visit were recorded in Ext. P-1 which reveal that training was provided to them in respect of the manufacture of the semi-conductor headers and this included TO-3 headers. The arbitrator relied upon the admission made by Mr. Rangarao in his cross-examination to the effect that the petitioner had transferred the technology of TO-3 to the respondent company. In this regard the learned arbitrator referred to the following part of the statement of Mr. Rangarao:-

"It is correct that TO-3 was talked about in 1972 as mentioned in Exhibit P-32. It is correct that drawing for dyes of TO-3 eyelets and caps were given to me by CEERI. It is correct that sample of TO-3 headers produced as per process by Ceeri were given to me. It is correct to say that the know how for the production of TO-3 given by Ceeri can be said to flow from my agreement with N.R.D.C. I, however, say that only incomplete know how for production of TO-3 was given. My dealing with Ceeri were only on account of my agreement with N.R.D.C."

(24) The arbitrator on considering the arguments and statements of the witnesses produced by the parties came to the conclusion that commercially viable technology, for TO-3 was developed and the same was transferred under the agreement to the respondent. However, the learned counsel for the respondent submitted that in the agreement there is no mention of the assignment of the process relating to the manufacture of TO-3 headers to the respondent. He also submitted that the arbitrator ignored clause 10 of the agreement whereby the agreement is the sole repository of the terms agreed to between the parties. It may be noticed immediately that while the respondent here is banking on this clause, in regard to Point No. 2 the respondent travelled beyond the terms of the agreement by adducing oral evidence for urging that the glass to metal sealing, a step the process of manufacture of semi-conductor packages, was covered by a patent. Without holding this against the respondent I am of the opinion that the finding of the arbitrator cannot be faulted as in coming to the conclusion that the assignment of the process of manufacture of TO-3 semi-conductor packages/transistor headers is included in the agreement, the arbitrator has not gone beyond the terms incorporated there in but has merely construed the agreement. Learned counsel for the respondent argued that clause 1 of the agreement only covers the assignment of the process

relating to the manufacture of "TO-5, TO-18, etc. semi-conductor packages". He further submitted that in clause 1 of the agreement the placement and mention of the semi-conductor packages namely, "TO-5" and "TO-18" is in the ascending order which excludes the possibility of including TO-3 in the word "etc." The argument of the learned counsel is based on misconception and misreading of clause 1 of the agreement providing for assignment of know how relating to "TO-5, TO-18, etc. "semi-conductor packages to the respondent. The mention of "TO-3" or TO-5" or "TO-18" headers do not signify the numbers but they are the names assigned to the transistor headers. The arbitrator while interpreting the agreement is also entitled to consider the conduct of the parties reflecting their understanding of the bargain. The fact that the respondent received know-how for manufacture of TO-3 transistor headers pursuant to the agreement between the parties shows that they understood the agreement to mean that the technology for TO-3 headers was covered by clause 1 of the agreement. The interpretation placed by the arbitrator on the agreement is plausible. In *Special Organising Committee v. Meetco Originally Middle East Exchange and Trade (Meetco) Group of Companies*, (1996) 4 Ad Del 1, it was held as follow:-

"....It may be that the interpretation sought to be placed by the respondent is also possible but that is no ground to set aside the award as when a contract is capable of two interpretations and two views are possible, one of the possible views adopted by the Arbitrators cannot be found fault with as it is legitimate for the Arbitrators to accept one or other of the possible interpretations and even if the Court is of the opinion that the other view appears to be better, the Court still cannot interfere. This Principle is adumbrated and has been followed in various judgments of the apex Court as well as the different High Courts in the country.

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Where the interpretation or construction placed by an Arbitrator on a clause of the agreement is conceivable and possible, the Court will have no jurisdiction to set aside the award. The Court while considering the award in proceedings under Sections 30 and 33 of the Arbitration Act cannot sit in appeal over the views of the Arbitrator. It cannot re-examine and re-assess the materials which were placed before the Arbitrators."

(25) Since in the present case the interpretation placed by the arbitrator in respect of clause 1 of the agreement is plausible and possible the same has to be affirmed. Assuming that the interpretation placed by the respondent is also possible but that does not make the award vulnerable as when a contract is capable of more than one interpretation the arbitrator can select any one of them.

(26) In *Hindustan Tea Co. Vs. K. Sashikant Co. and Another*, , the Supreme Court held that under the law the arbitrator is made the final arbiter of disputes between the parties and the award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts. Again in *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, , it was held that

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

(27) Having regard to the above discussion, Point No. 3 is decided against the respondent and the award of the arbitrator that TO-3 semi-conductor packages are covered under the agreement is affirmed.

(28) Point No.4: The grievance of the respondent is that the Arbitrator enlarged the scope of the reference by awarding royalty in favor of the petitioner up to the year 1990 even though in the petition filed u/s 20 of the Arbitration Act, 1940, the latter had claimed royalty up to the year 1985. In order to appreciate the submission of the learned counsel, it is necessary to set out paras 19, 20, 21 and 24 of that petition:

"19. That the respondent/defendant has failed to file the royalty returns and also to pay the royalty as per terms and conditions of the agreement. The respondent/defendant is liable to pay the amount of royalty on account of the product manufactured for which technical/know-how/project/process was transferred by the petitioner/plaintiff to them. The respondent/defendant is not entitled to claim any exemption or reduction regarding the payment of royalty accruing under clause 3 of the agreement either on the plea of having effected any improvement upon the patented process know-how or on the plan that the products to be manufactured under the patented/know-how/process have been manufactured by using any different process. The respondent/defendant were to remain liable for payment for royalty under the agreements, for all the articles manufactured by them and covered by the said agreement.

(29) That the respondent/defendant has thus without any just cause or reason has not filed royalty returns and has further failed to make the payment of the royalty amounts as well as default interest to the petitioner/plaintiff inspire of repeated demands, letters and reminders served on the respondent/defendant.

(30) That the respondent/defendant had failed to pay the undermentioned royalty and the default interest over the same. The petitioner/plaintiff is entitled for the following amounts from the respondent/defendant :-

S.No.	Year	Amount of Default interest calculated up to royalty 30th September, 1988.						
1.	2.	3.	4.	1.	1972	Nil		
2.	1973	Nil	3.	1974	Nil	4.	1975	Nil
5.	1976	Nil	6.	1977	Nil	7.	1978	4,434.00
8.	1979	20,300.00	9.	1980	18,179.00	10.	1981	31,664.00
11.	1982	4,032.00	12.	1983	5,459.00	13.	1984	8,477.00
14.	1985	23,614.00	15.	1986	9,917.88	Total	1,16,159.00	97,012.38
Grand Total : Rs. 2,12,171.38								

(Rupees two lacs thirteen thousand one hundred seventy one and paise thirty eight only).

(31) The petitioner/plaintiff is entitled to interests from 1st October, 1988

onwards till the date of payment as per terms and conditions of the agreement. But the respondent/defendant has not paid the above mentioned dues and instead is raising disputes.

(32) That the cause of action firstly arose on when the respondent/defendant failed to file royalty returns and failed to make the payment of the royalty after entering into agreement dated 23.2.1972 and raised the disputes about the same. Thereafter the cause of action arose on different dates, i.e., as detailed herein the paras mentioned above when the respondent/defendant raised disputes about the payment of royalty and the returns etc. The cause of action is till continuing from day to day as the respondent/defendant has failed to file royalty returns as per agreement and has failed to make the payments of the royalty and default interest as detailed in para 22 above. As the said disputes still subsist and the payment have not yet been made, the cause of action is continuing."

(33) As would be seen from the above, the case set up by the petitioner is that the respondent had failed to file the royalty returns and to pay royalty as per the terms of the agreement. This being so, the petitioner pleaded that the respondent is liable to pay royalty in accordance with the agreement from 1972 to 1985, i.e., for a period of 14 years. While in the aforesaid para 21 the claim for royalty is up to the above said period, in para 24 thereof the cause of action is stated to be a continuing one, from day to day, as the respondent failed to file the royalty returns and to make the payments thereof. It may be noted that the petitioner is entitled to receive royalty in accordance with clauses 1 and 3 of the agreement. The relevant portion of clauses 1 and 3 read as follows :

"1.....

Provided That notwithstanding anything contained in sub-clause (i) of clause 5 of this licence, the Grantee shall pay royalty at the rate and in manner specified in sub-clause (i) of clause 3 of this license for minimum period of 14 years computing from the date of start of manufacture and the license shall continue to remain in force for that period for that purpose even after the expiry of the period specified in clause 1 above.

XXxx xx

3. The Grantee will, during the continuance of the license observe and perform the covenants and provisions following, that is to say:

I) During the period of the said term the Grantee will pay to the Corporation for 14 years a royalty at the rate of 3% on the net ex-factory sale price of the material manufactured by it, in accordance with the said invention and marketed by it. Such royalties shall become due on the First of April and on the First of October in every year in respect of the articles manufactured and marketed or used by the Grantee during the preceding half year and shall be paid by the First day of May, and First day of November of that year. In default of payment of such

royalties on the due dates, the Grantee shall pay interest on the amount in default at the rate of Twelve per cent annum; However, the rate of interest may be reduced to ten percent if the royalty paid within six months from the due date.

XXxx xx "

(34) Thus, it is obvious that the respondent was to pay royalty to the petitioner at the rate of 3 per cent on the net ex factory sale price of the material manufactured by it in accordance with the invention for a period of 14 years computed from the date of start of manufacture. In support of the claim for royalty for a period of 14 years, the petitioner filed the affidavit of Shri Mukund Mehta. In that affidavit the petitioner claimed a sum of Rs. 1,84,305.00 on account of royalty along with interest amounting to Rs. 1,25,263.64) up to 1989. The Arbitrator granted a sum of Rs. 1,67,305.00 as royalty from 1977 to 1989 for a period of 12 years and Rs. 1,84,388.00 as interest calculated up to 30th September, 1992. Besides, the Arbitrator in respect of the years 1989 and 1990 made an Award directing the respondent to submit the royalty returns or a duly audited final accounts of the royalty payable at the net ex factory price of the material manufactured by the respondent. He further directed the respondents to pay to the petitioner the royalty for the above said two years together with default interest at the rate of 12 per cent per annum. At this stage it would be convenient to set out the relevant portion of the Award of the Arbitrator relating to the quantum of the royalty which was directed to be paid to the petitioner by the respondent petitioner, which is as follows :

"I hold that the petitioners are entitled to the following amounts of royalty and default interest 12% per annum calculated up to 30.9.1992 and make the award for amounts specified below :-

S.No.	Year	Amount of Default interest calculated up to 30.9.1992.	Royalty
1.	1977	Nil	Nil.
2.	1978	4,434.00	7,715.00
3.	1979	20,300.00	32,886.00
4.	1980	18,179.00	27,268.00
5.	1981	31,664.00	43,696.00
6.	1982	4,032.00	5,000.00
7.	1983	5,459.00	6,223.00
8.	1984	8,477.00	8,646.00
9.	1985	23,614.00	21,252.00
10.	1986	19,836.00	14,353.00
11.	1987	19,754.00	11,851.00
12.	1988	11,456.00	5,498.00
		1,67,305.00	1,84,388.00

I, Therefore, make an award of Rs. 1,67,305.00 for payment of royalty for 1st 12 years by respondents to the petitioners I further make an awards of 1,84,388 for payment of default interest calculated up to 30th of September 1992.

(35) For the years 1989 & 1990 (the remaining 2 years out of 14 years) I make an award directing the respondents to submit the royalty returns or duly audited final accounts of royalty payable on the net ex. factory sale price of material manufactured by the respondents. I make an award directing the respondents to pay to the petitioners this amount of royalty together with default interest at 12% per annum."

(36) Therefore, it is clear that the Arbitrator awarded royalty for a period of 14

years from the date of manufacture of the material in the factory of the respondent in accordance with clauses (1) and (3) of the agreement. While the petitioner had calculated the period of 14 years from 1972 to 1985, the Arbitrator, having regard to the date of manufacture as the date from which the period of 14 years was required to be reckoned, took the year 1977 as the starting point for computing the royalty. From the claim petition it is clearly evident that the petitioner was claiming royalty for a period of 14 years and the Arbitrator granted royalty for 14 years only. Thus, the fact remains that the number of years for which the royalty was claimed and awarded remained the same. The only difference, however, was regarding the starting and terminating points for reckoning the period of fourteen years. This being so the Arbitrator did not enlarge the scope of reference. Therefore, the award of the Arbitrator with regard to the quantum of royalty payable by the respondent to the petitioner has to be accepted.

(37) No further point was raised by the respondent. Accordingly, the Award is made a Rule of the Court and a decree in terms thereof is hereby passed.

(38) In case the respondent does not make the payment of the decretal amount to the petitioner within a period of eight weeks, the respondent will be liable to pay interest at the rate of 14% per annum from the date of the decree till realisation of the decretal amount.

(39) No costs.