

(2015) 10 CAL CK 0030
In the Calcutta High Court

Case No : G.A. No. 4026 of 2000 and Award Case No. 32 of 2000

Neycer India Limited

APPELLANT

Vs

GMB Ceramics Limited

RESPONDENT

Date of Decision : 14-10-2015

Acts Referred:

Arbitration Act, 1940 — Section 14, 16, 30, 33, 35
Contract Act, 1872 — Section 73

Citation : (2015) 10 CAL CK 0030

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Gautam Chakraborty, Sr. Advocate, Ritabrata Mitra, P. Sinhav, Sumit Dhar and Indranil Karfa, Advocates, for the Appellant; Ranjan Deb, Pramit Kumar Roy, Senior Advocates, Suparna Mukherjee, Shaunak Ghosh and Avirup Mondal, Advocates, for the Respondent

Judgement

Sambuddha Chakrabarti, J.—Neycer India Limited, i.e., the petitioner herein, and GMB Ceramics Limited, i.e., the respondent herein, decided to enter into an agreement for collaboration on November 29, 1986. As is not very infrequent in such agreements, dispute and differences arose between the parties sometime thereafter. The agreement contained a clause for referring the dispute to joint arbitrators, each nominated by the parties and an umpire, to be nominated by the arbitrators, with a limited jurisdiction to decide on disputes which could not be resolved by the arbitrators. The arbitrators nominated Justice E.S. Venkatramaih as the umpire.

2. The joint arbitrators passed an Award on May 26, 1998 agreeing only on two points. Consequently the matter was referred to the learned Umpire.

3. On the death of Justice E.S. Venkatramaih, this Court by an order dated February 11, 1999 appointed Justice Murari Mohon Dutt as the Umpire. The learned Umpire passed an Award on June 23, 1999 for a sum of Rs. 11,69,62,910/- along with interest at the rate of 15% per annum which is to run

from two months after the date of Award till realization. Neycer India Limited has challenged the said Award by filing an application under Section 30 of the Arbitration Act, 1940 (the Act, for short).

4. Before I go into the merits of this case, it is pre-eminently necessary to consider the scope of interference on an application under Section 30 of the Act, particularly in view of the submissions of the respondent restricting the scope of judicial interference.

5. Section 30 of the Act, for the sake of convenience is produced below:--

"S 30 (Misconduct)

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid under Section 35 ;

(c) that an award has been improperly procured or is otherwise invalid."

A bare reading of the above provision unmistakably brings out that, though divided into three clauses, an Award can be set aside on six grounds, viz.,

"i) that the arbitrator or umpire has misconducted himself;

ii) that the arbitrator or umpire misconducted the proceedings;

iii) that the award was made after the arbitration was superseded;

iv) that the award was made after the proceedings became invalid under Section 35 ;

v) that the award was made improperly procured; and

vi) that the award was otherwise invalid"

6. That an application under Section 30 of the Act is not an appeal in disguise is not a question in dispute any more. The petitioner also did not try that. A court of law does not sit in appeal on the Award passed by an arbitrator. It has also been judicially accepted that it is not open to a court to re-appreciate the evidence and arrive at a fresh finding unless, of course, there is an error apparent on the face of it which makes it unsustainable.

7. Thus, a court cannot examine the correctness of the findings of an arbitrator or an umpire as a court of appeal is required to do. Mr. Ranjan Deb, the learned Senior Counsel for the respondent, has submitted that even if Section 30 does not put an embargo on a court to set aside an Award, it can exercise its jurisdiction only in very limited circumstances. While elaborating its stand the respondent argued that even a court of appeal does not interfere with a discretionary order passed by the first court. A decision is not to be set aside by the appellate court only because it is not right. The order is set aside only when

it is wrong. The scope of interference by a court of appeal is much wider than a court hearing an application for setting aside of an award.

8. A very serious argument of the respondent is that the petitioner has not made any alternative case of modification of the Award or remand of it. Except a few grounds taken by the petitioner, there is no allegation that the Umpire did not consider the submissions of the petitioner. Mr. Deb argued that as the umpire was the sole judge of the quality and quantity of evidence the petitioner cannot challenge the factual finding making the decision of the umpire binding on both the parties. Even if the petitioner in a given case may have a grievance that the materials on record do not justify the conclusion reached by the arbitrators or the umpire that is not amenable to judicial scrutiny in an application under Section 30 of the Act. It is the ground of perversity alone on which a court may set aside an Award.

9. Mr. Deb submitted that there are two facets of perversity. First, there are no materials at all for arriving at the conclusion; and, secondly, the materials on record do not justify the conclusion. According to the respondent that the use of the expression perversity of the Award is restricted to the first aspect, i.e., the Award is based on no materials. The second limb of perversity is a forbidden area for the court to enter as its concept is alien to the scope of Section 30 of the Act.

10. In support of his contention, Mr. Deb relied on the case of State of U.P. Vs. Allied Constructions, . A three-judge bench of the Supreme Court in that case after considering several judgments held that an Award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 or 33 of the Act is attracted. Section 30 is restrictive in its operation. The court is precluded from re-appraising the evidence. Even in a case where the Award contains reasons the interference therewith would still not be available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closure scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one the court will refrain itself from interfering.

11. Maharashtra State Electricity Board Vs. Sterilite Industries (India) and Another--> , is an authority on a proposition that unless the error of the law is patent on the face of the Award neither the High Court nor the Supreme Court can interfere with the same. The Supreme Court noticed the legal position already settled on the point that an arbitrator's award both on the facts and law is final. A court cannot review an award and correct any mistake in the adjudication of an arbitrator unless the objection to the legality of the award is apparent on the face of it.

12. Mr. Deb also relied on the case of Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., . While summarizing the legal position on the scope of the legal review the Supreme Court, inter alia, held that

"(i) in a case where an arbitrator travels beyond the contract the award would be without jurisdiction and would amount to legal misconduct and because of that it would become amenable for being set aside by a court;

(ii) an error relatable to interpretation of the contract by an arbitrator is an error within the jurisdiction and such error is not amenable to correction by courts as this is not an error apparent on the face of the Award;

(iii) if a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the Award bad on its face;

(iv) the Award contrary to substantive provision of law or against the terms of the contract would be patently illegal;

(v) whether the parties have deliberately specified the amount of compensation in express terms the party who has suffered by such breach can only claim the sums specified in the contract and not in excess thereof;

(vi) if the conclusion of the arbitrator is based on a possible view of the matter the court should not interfere with the Award; and

(vii) it is not permissible to a court to examine the correctness of the findings of the arbitrator as if it were sitting in appeal over its findings."

13. The respondent also relied on the case of *The Union of India (UOI) Vs. Shri Om Prakash*, . The Supreme Court held that the words: "or is otherwise invalid" in clause (c) of Section 30 are wide enough to cover all forms of invalidity including invalidity of the reference. There was no reasons why the general and unqualified language of Clause (c) should not include an Award or an invalid reference which is a nullity.

14. *Food Corporation of India Vs. Joginderpal Mohinderpal*, , makes an elaborate discussion on the scope of interference by the court on an application under Section 30 of the Arbitration Act. An Award of an arbitrator, it was *inter alia* held, can only be interfered with or set aside or modified within the four corners of the procedure provided by the Act. It is necessary to find whether the arbitrator has misconducted himself or the proceedings legally in the sense whether the arbitrator has gone contrary to the terms of reference between the parties or whether the arbitrator has committed errors of law apparent on the face of the Award. The Supreme Court further held that it is not a misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. In case of errors apparent on the face of the Award it can only be set aside if there is any proposition of law which is apparent on the face of the Award, namely, in the Award itself or any document incorporated in the Award. An error of law is not to be presumed. If there is a legal proposition which constitutes the basis of the award and which is erroneous only then the Award can be set aside. If the Award is a speaking Award in the sense that the

arbitrator has chosen to give reasons, unless it is demonstrated to the court that such reasons are erroneous as propositions of law or that the arbitrator has taken a view which it could not be possibly sustained or any view of the matter, the challenge to the Award of the arbitrator cannot be sustained.

15. In the said judgment, i.e., Food Corporation of India (Supra), while laying stress on the increasing importance of arbitration as a mode of settlement of disputes between the parties the Supreme Court held that the function of the court of law is to oversee that the arbitrators act within the norms of justice. Once they do so and the Award is clear, just and fair the court should, as far as possible, give effect to the Award and make the parties compel to adhere to and obey the decision of their chosen adjudicator.

16. Mr. Deb took great pains to establish the limited scope of interference by court on an application under Section 30 of the Act. He, therefore, also relied on the case of Sudarsan Trading Co. Vs. Government of Kerala and Another, . After considering a large number of cases on the point of misconduct as enumerated in Section 30 of the Act, the court observed that there are two different and distinct grounds involved in many of the cases. The first was the error apparent on the face of the Award and the other was that the arbitrator exceeded his jurisdiction. The Supreme Court had made a very important distinction while explaining the scope and relative importance of these two grounds. In the latter case a court can look into the arbitration agreement, but in the former it cannot unless the agreement was incorporated or recited in the Award. With reference to the facts of that particular case and while allowing the appeal the court held that the High Court from whose judgment and order the appeals arose before the Supreme Court fell into an error of deciding the question of interpretation of the contract. One of the points of error is indicated was that the High Court had examined the different claims not to find out whether they were within the disputes referable to the arbitrator but to find out whether in arriving at the decision the arbitrator had acted correctly or incorrectly. The High Court had no jurisdiction to examine the different items awarded, clause by clause, by the arbitrator and to hold that under the contract these were not sustainable in the facts found by the arbitrator.

17. Sudarsan Trading Company (Supra) is also an authority for a proposition that reasonableness of the reasons given by the arbitrator cannot be challenged. Appreciation of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

18. To further establish the consistently held view of the court on this point for a very long time Mr. Deb relied on a Division Bench judgment of this Court in the case of Chhogmal Rawatmal Vs. Sankalchand G. Shah--> . That was an appeal from an original order. It was held that an Award could be set aside on the

ground of error of law when it is manifest on the face of the Award. If the court is satisfied that the arbitrators were guilty of misconduct, the court should set aside their Award. The expression "legal misconduct" is an ambiguous term. It means and includes some honest, though erroneous, breach of duty causing a miscarriage of justice. If there has been a mishandling of the arbitration proceedings or serious neglect of duties on the part of persons vested with judicial authority to determine the rights and liabilities of the parties which is likely to lead to substantial miscarriage of justice the court is justified in setting aside an award. To decide an issue of fact without any evidence or material before the arbitrators is a serious dereliction of duty. Ordinarily the court will not review the arbitrator's conclusions or findings provided they act within the authority and according to the principles of justice and behave fairly to both the parties. The Division Bench, *inter alia*, also held that an arbitrator may be right or wrong, but he is entitled to come to a conclusion if there is evidence or if there is material on which he can determine the matter. But in the absence of any evidence or any material or even any allegation to that effect he is guilty of legal misconduct if he comes to any such finding or determine damage on basis of some issue involved in the matter (i.e., extension of due date, in the facts of that case). However, with reference to the facts of that particular case it was held that if the arbitrators had blindly accepted the rates fixed by the Gunny Traders' Association and did not exercise their judgment and fail to apply their mind to the question of damages which were to be assessed they would be guilty of misconduct and dereliction of duty. This was not simply a mere mistake of law. It was a more fundamental question. No court or judicial authority could possibly Award this damage in clear contravention of the law of the land.

19. Again in *Life Insurance Corporation of India Vs. M.L. Dalmia and Co. Ltd.*, it was *inter alia* sought to be argued before a learned Single Judge of this Court that the arbitrator was guilty of legal misconduct in arriving at the compensation without any evidence and that no reasonable man could have come to the conclusion which the arbitrator had arrived at without the required evidence to substantiate the items in the statement of claim. Distinguishing the case of *Chhogmal Rawatmal (Supra)* on the ground that it was a case where there was no evidence at all the learned Judge held that the weight or the appreciation of the evidence by the arbitrator should not be considered by the court in coming to a finding whether there was legal misconduct or not. The learned Judge also approvingly quoted an observation from the case of *Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd.*, : "In my opinion, appraisal of evidence by the arbitrator is ordinarily never a matter which this court questions and considers... The arbitrator in my opinion is the only judge of the quality and quantity of evidence and it will not be for this court to take upon itself the task of being a judge of the evidence before the arbitrator".

20. The same view has been expressed by the Supreme Court in the case of *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, . While considering the scope of Section 30 of the Act the Supreme Court observed that a court cannot sit in

appeal over the views of the arbitrator by re-examining or reassessing the materials. The scope for setting aside an Award is limited to the grounds available under the Act which have been well-defined by a long line of decided cases.

21. Moolchand and Others Vs. Kashiprasad Shukla, , has, inter alia, laid down the well-recognized restrictions on a court to interfere with an Award. Since the arbitrator is chosen by the parties and entrusted with power to decide a dispute, an Award is ordinarily not liable to be challenged on the ground that it is erroneous. The court should approach an Award with a desire to support it, if that is reasonably possible rather than to destroy it by calling it illegal. An Award is liable to be set aside on the ground of an error on the face thereof. Relying on the principles laid down in a series of judgments, the Division Bench of the Madhya Pradesh High Court held that a court has no jurisdiction to override the decision of the arbitrators or to substitute its own even where the question is a mixed question of law and fact.

22. Again, a Division Bench of this Court in the case of Union of India Vs. Binod Kumar Agarwal, had reiterated the well-settled principles of law regarding the scope of interference by the court on an application under Section 30 of the Act. The Division Bench observed that the courts hearing applications under Section 30 of the Act do not exercise any appellate jurisdiction. Reappraisal of evidence by the court is impermissible. Interpretation of a contract is a matter for the arbitrator to determine. Even in a case where the award contains reasons, interference will still not be available within the jurisdiction of the court unless the reasons are totally perverse or the Award passed is based on wrong proposition of law. An arbitrator is the sole judge of the quality and the quantity of evidence. It may be possible that on the same evidence the court might have arrived at a different conclusion from the one arrived at by the arbitrator. But that by itself is no ground for setting aside an award by the arbitrator. When the parties choose their own arbitrator to be the judge in a dispute between them they cannot, when the Award is good on the face of it, object to the decision either upon law or on facts. Therefore, when a mistake does not appear on the face of the Award and the documents appended to or incorporated therein, the Award should neither be remitted nor set aside.

23. The respondent next relied on the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), . A three-judge bench of the Supreme Court had laid down the law that the legality of an Award cannot be challenged on facts; but it can be challenged on questions of law provided the legality is apparent on the face of the Award. A wrong construction of the contract is an error of law and can be challenged, provided the error appears on the face of the Award. In determining what such error of law is, the Supreme Court held, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. Referring

to a large number of English and Indian decisions, the Supreme Court held that an arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks to be just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the courts provided his error appears on the face of the Award.

24. The last judgment relied on by Ravindra Kumar Gupta and Company Vs. Union of India (UOI), . While discussing the scope of interference by a court with an Award passed by an arbitrator the Supreme Court had reiterated that the concerned High Court from which the appeal was filed, committed a serious error in re-appreciating the evidence led by the parties before the arbitrator. The said evidence, the Supreme Court held, was duly scrutinized and evaluated by the arbitrator. With regard to the claim in question, the arbitrator had given elaborate reasons. Therefore, findings recorded by the arbitrator cannot be said to be either perverse or based on no evidence. Substitution of the conclusion reached by the arbitrator by High Court with its own opinion on appreciation of evidence was not permissible while examining the objections to the Award under Section 30 of the Act.

25. As mentioned earlier, the petitioner never questioned the validity of the submission of Mr. Deb from a pure point of law. On the other hand, the petitioner readily accepted the well-settled principle that an objection under Section 30 of the Act is not an appeal and, therefore, the scope of interference is really rather restricted. On behalf of the petitioner company, it was never submitted that while deciding an objection under Section 30 of the Act, the court's power was co-extensive with that of an appellate authority or a court enjoys the liberty of re-appreciation of evidence substituting a plausible conclusion drawn by the arbitrator by its own decision or that an erroneous decision on facts or law is liable to be set right unless the error appears on the face of the Award. Accepting the circumscribed scope of interference the petitioner endeavoured to establish that even within the very narrow limits of exercise of power by the court the award in question calls for intervention.

26. Before we consider the respective cases, it is necessary to summarize what may be culled out from the judgments cited by the learned Advocates for the parties:

"i) The court will not interfere with an Award of an arbitrator and try to correct any mistake in his adjudication except on certain well-defined principles and in certain circumstances e.g., when an objection to the validity of an award or a mistake is apparent on the face of it.

ii) The court has jurisdiction to investigate into the merits of the Award and to examine the documentary and oral evidence for finding out if any error of law was committed by the arbitrator. (Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd.,)

iii) If an arbitrator decides a matter disregarding, ignoring or misunderstanding the law he will misguide himself and this amounts to a legal misconduct. When such an error is apparent on the face of the Award, the Award is liable to be set aside.

iv) If a conclusion is reached which no person properly instructed in law could have reached the Award becomes vulnerable to be interfered with on the premise that misconception of law has been responsible for the wrong decision.

v) So long as the arbitrator is within the scope of his authority his decision will be accepted as valid and binding. (Gobardhan Das Vs. Lachhmi Ram and Others,). But an arbitrator cannot enlarge the scope of the reference.

vi) The court cannot re-appreciate the evidence and can arrive at a conclusion different from the one reached by an arbitrator if that is also a plausible one. Given the restriction, if an arbitrator fails to take evidence produced by a party into consideration that will certainly amount to a misconduct. If certain documents are material in arriving at a just decision and it can be shown on the face of the Award that they were not considered by the arbitrator he would be guilty of misconduct.

vii) Except in the case of statutory arbitration if an arbitrator fails to apply the law of limitation, the Award would be liable to be set aside. (Ramdutt Ramkissen Dass vs. E.D. Sassoon and Co.AIR 1929 103 (Privy Council)).

viii) Where an arbitrator makes a mistake either in law or in fact but such mistake does not appear on the face of the Award, the Award is not liable to be interfered with. Thus, a case where an Award is liable to be interfered with is one when the mistake or the error appears on the face of the Award.

ix) "Judicial Demolition" of an Award is possible only when some legal proposition is stated in the Award and which is erroneous. (Ramdutt Ramkissen Dass vs. E.D. Sassoon and Co.AIR 1929 103 (Privy Council)).

x) For the conclusion to be reached by an arbitrator there must be some evidence supporting it. If the Award is based on no material or evidence at all it can be assailed as being erroneous on the face of it.

xi) Even if the Evidence Act per se does not apply to an arbitration proceeding the basic principles of law relating to evidence generally apply to arbitration proceedings.

xii) An arbitrator cannot ignore the law and misapply it in order to do what he thinks to be just and reasonable."

27. Before applying the tests to a given case it is essential to appreciate the connotation of what is meant by an error apparent on the face of the Award. This need felt is all the more important as the scope of interference has been restricted to a mistake appearing on the face of the Award only and not to all mistakes, both in fact or law, that might have been committed by an arbitrator.

In the case of *Ramdutt Ramkissen Dass vs. E.D. Sassoon and Co.* AIR 1929 103 (Privy Council) , it has been held that an error of law on the face of the Award means that one can find in the Award or the document actually incorporated thereto some legal proposition which forms the basis of the Award and which can be said to be erroneous.

28. It is trite that the law to be applied must be based on the facts of a given case. In *R.S. Hartley Ltd. v. Provincial Insurance Company Ltd.*, reported in [1957] 1 Lloyd's Rep. 121, Lord Chief Justice Goddard of the Queens Bench Division on being moved to set aside an Award on the ground that the arbitrator had misconducted himself or the proceedings, had held that the first thing that strikes anybody reading a notice of motion is that the decision of the case in the first instance must depend upon the facts which are found by the arbitrator. Whether he has applied the law properly or not depends on the facts. The court has no right to find the facts unless the arbitrator or the parties state a case.

29. In *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning and* AIR 1923 66 (Privy Council) , the Judicial Committee of the Privy Council held that an error in law on the face of the Award means "that you can find in the Award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the Award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound".

30. In the case of *James Clark (Brush materials) Ltd. v. Carters (Merchants) Ltd.*, reported in [1944] K.B. 566, Lord Justice Tucker held that in determining whether the Award should be remitted or set aside on the ground that there is an error of law appearing on the face of it the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the Award, but must take it at its face value. Again, in the case of *Nils Hiemeakt v. G. Merel & Company Limited*, reported in [1959] 2 Lloyd's Rep. 292 Mc. Neyr J. had held a certain part of the Award to be not maintainable as it was outside the jurisdiction of the arbitrator to deal with the matter.

31. Now turning to the facts. As mentioned before the petitioner entered into a collaboration agreement in November 1986 agreeing to provide technical know-how, aid and to collaborate with the respondent for establishing and manufacturing sanitaryware products. The collaboration agreement underwent some amendment. A consolidated agreement has been filed in court on behalf of the respondent company. The salient features of the agreement may be summarized to the extent relevant for the present purpose.

"i) The petitioner described as the collaborator has the necessary know-how, expertise and experience in the manufacture of sanitarywares. At the request of the respondent the collaborator agreed to impart technical know-how, aid and

assistance as also to financially collaborate to enable GMB Ceramics Ltd. i.e. the respondents, to establish and achieve production of sanitaryware products which were broadly described in Appendix 1 to the agreement.

ii) The consideration of imparting such know-how and rendering services the respondent company agreed to pay Rs. 20 lacs as fee to the petitioner and to meet the costs and out-of-pocket expenses that might be incurred by the collaborator.

iii) The petitioner agreed to impart technical know-how and expertise including several information connected therewith for establishing manufacture of 4000 M.T. of sanitary products per annum in the first stage of the proposed factory to be built and established in the State of Orissa. The collaborator would have no objection in the respondent's adopting other models or designs and colours of sanitary products. The concerned senior executives as may be determined by the petitioner were to be made available for discussion in the office or at the factory site of the respondent as and when it became necessary and as may be agreed upon by and between the parties.

iv) On the basis of the requirements, the petitioner was to prepare and furnish detailed drawings relating to the factory layout on the basis of which detailed design and civil construction of the factory would be undertaken by the respondent.

v) The agreement provided for the stipulated the areas on which the collaborator was to assist the respondent relating to the technical know-how, finalization of tender, supervision of the plant etc.

vi) It was also agreed upon that the collaborator would assist the respondent in selection of personnel and to arrange for in-plant training of at the most 50 employees in different sections of the factory at Vadalur. The petitioner also undertook to depute technicians, not more than 5, for supervising and assisting in the start-up production in the GMB factory. If the optimum production was reached earlier than what was anticipated the petitioner might withdraw any or all of their expert technicians in consultation with the petitioner. The petitioner agreed also to retain at site at least one expert technician of the general supervisory level till optimum production was reached with a right to replace or substitute such a person with an expert technician of similar competence. The fees to be paid by the GMB for different grades of employees have also been mentioned in the agreement.

vii) It was specifically incorporated by the addendum that optimum production should be deemed to have been achieved if the plant produced 60% of the installed capacity of seven thousand TPA in the first year, 70% in the second year and 85% (six thousand TPA) in the third year. Such production was to be based on the general norms for materials and utilities of which not less than 50% of the finished products should be of the quality comparable with contemporary Indian "A" Class quality products sold in the market.

viii) The collaborator and its associate companies agreed to invest in the project by way of share capital as promoters' contribution subject to a maximum of Rs. 18 lacs or 60% of the equity participation of GMB whichever was lesser.

ix) The collaboration agreement also contained terms of payment of Rs. 20 lacs in the manner provided therein.

x) As requested by GMB the petitioner also agreed to license GMB to use the legend GMB-NEYCER to cover further period with mutual consultations on the same terms and conditions as applicable subject to the renewal of clause 16 of the agreement. For the license to employ the legend GMB agreed to pay the collaborator royalty at the rate of 2% on the net sales value realized by GMB on the products manufactured by it during the period of agreement.

xi) The petitioner also agreed to help the respondent in organizing, marketing and sales department and further render advise in sales promotions for which GMB was to pay the petitioner at the rate of 2% on the net sales value. The petitioner was to advise on the sales or marketing policy which would help in building up a good image of GMB-NEYCER product in the market.

xii) The period of the agreement between the parties would start from the date of the execution of the agreement coupled with the advance payable as mentioned in the agreement and shall ensure for 5 years reckoned from the date of this agreement. During the currency of the agreement the collaborator agreed to share with GMB the advances and developments in the know-how and technology, if any, achieved or acquired by the collaborator in relation to the sanitaryware products covered under the agreements.

xiii) It was further agreed that, subject to the delivery of equipments, the collaborator should endeavour to commission the plant within 18 calendar months from the date of sanction of term loan by financial institution.

xiv) All disputes, the agreement recited, arising out of or in connection with the agreement was to be settled by arbitration in accordance with the provisions of the Indian Arbitration Act, 1940. Each party was to nominate an arbitrator for and on its behalf and the two arbitrators were to select an umpire before they entered upon their reference of arbitration."

32. For some time after the execution of the agreement, the collaboration continued without creating any problem. Disputes and differences occurred thereafter and ultimately the matter was referred to the arbitration. The respondent herein filed a statement of claim which was subsequently amended. By the original statement of claim the respondent, inter alia, claimed an Award for Rs. 882.73 lacs in its favour against the petitioner. Alternatively it claimed an enquiry into the damages suffered by the claimants and an Award for the amount found due on such enquiry in favour of the GMB. Subsequently, the statement of claim was amended by which the GMB, inter alia, claimed for an Award for Rs. 1716.57 lacs in its favour. The other claims remained as they were in the original

statement.

33. The case of the respondent, inter alia, was that in terms of the contract the respondent was bound and obliged to commission the plant within 18 months from the date of sanction of the loan by the financial institutions. On or about May 19, 1987 the financial institution sanctioned the loan to the claimant and as such the petitioner was bound and obliged to commission the plant on or before November 19, 1988.

34. But the petitioner neglected, refused and delayed to impart the requisite expertise and perform its obligations under the contract. In the month of December 1988, two meetings were held between the parties and it was further pointed out by the respondent about the failure, neglect and inordinate delay as well as defective workmanship of the petitioner in execution of the works under the contract. The statement of claim mentions several areas of the alleged failure on the part of the petitioner in discharging its duties under the agreement. It mentions that because of the failure on the part of the petitioner, the respondent was compelled to extend the time for commission of the factory upto January 31, 1989. But in spite of it, the petitioner failed and neglected to commission the factory even by that date. By reasons of the failure of the petitioner to commission the factory, the respondent had to take steps to commission the factory. But it was not able to do so till December 7, 1989. Even then the factory was unable to achieve the anticipated production.

35. As mentioned before GMB claimed a sum of Rs. 1716.57 lacs under different heads in schedule "A" to schedule "F" for the losses and damages alleged to have been suffered by it for several breaches of contract committed by the petitioner.

36. The petitioner herein filed a rebuttal statement wherein the allegations of the respondent company as to the failure of the petitioner in discharging its obligations under the contract were denied. It was the case of the Neycer that because of the high standard of its products and popularity of its brand several entrepreneurs had approached it for technical know-how for assistance as well as in setting up similar units for manufacturing and marketing a similar range of products. GMB was one such applicant who approached the petitioner. Neycer was not required to erect complete or commissioning the claimants' factory. Therefore, any alleged delay or any alleged loss or damage to the claimant was of no relevance to Neycer.

37. The petitioner also denied that it was bound and obliged to commission the claimant's factory and referred to Clause 10 of the agreement. The obligation of the petitioner herein was only to depute expert technicians to assist the claimants in commissioning its plant after the claimants had erected its plant and machinery. Neycer had deputed its experts for its plant and machinery, as well as expert technicians for supervising and assisting the start of production.

38. While rebutting the claim of the respondent the petitioner took a stand that

the agreement contained mutual rights and obligations and it was imperative on the part of GMB to perform its obligations before it could insist on Neycer performing its part of the bargain. The responsibility of the petitioner herein was restricted only to advise and assist the claimants with a technical information. The primary duty in matters, such as installing and commissioning the equipment etc., lay with GMB which delayed in the performance of the obligations under the agreement. The outcome of the meetings in December 1988, as mentioned in the statement of claim, has not been truly represented in the statement of claim. The minutes did not make any reference to any such alleged defects or the alleged assurance for the rectification thereof. The rebuttal statement contains a detailed account of how the petitioner company discharged its part of the obligation under the agreement. It has been specifically denied that Neycer failed to depute its technical personnel for general supervision of the claimant's factory.

39. Neycer had specifically denied the allegation about the delay in commissioning the factory and consequently the loss allegedly suffered by the claimant. Neycer stuck to the point throughout the rebuttal statement that since it was not the petitioner's responsibility to commission the factory any alleged delay was not attributable to it.

40. Neycer further denied that it was obliged to permit the claimant to use the brand name and or legend GMB-NEYCER or that it was a condition of the contract that the claimant could use the brand name. It was within the rights of Neycer to refuse to grant a license to use the logo. On the contrary, the respondent herein unauthorizedly introduced a new logo under the name and style of GMB STERLING NEYCER. The petitioner denied the alleged loss and damages as claimed by the respondent.

41. After the amended statement of claim was filed on behalf of the respondent the petitioner also filed an additional counter statement denying the allegations made therein.

42. The umpire by the Award impugned, inter alia, held that the respondent was entitled to realize from the petitioner a sum of Rs. 11,69,62,190/- in respect of its claim for damages as per the schedules appended to the statement of claim. Damages against each schedule had been mentioned in the Award. The claim under schedule "B" has not been allowed. The said sum of rupees was to be paid by the petitioner within two months from the date of the Award. In default, the said amount was directed to bear interest at the rate of 15% per annum till realization.

43. The petitioner in this application under Section 30 of the Act has assailed the Award on as many as 219 grounds.

44. The submissions of the petitioner may be classed under several broad heads which are as follows:--

- "i) Scope of reference;
- ii) The umpire exceeded his jurisdiction;
- iii) The umpire allowed new claims by way of amendment which were barred by limitation;
- iv) Factually incorrect assumption;
- v) Non-consideration of evidence and acting without any evidence and wrongful interpretation of documents;
- vi) Against the law of the land;
- vii) Speculative Award without any basis of anticipatory or future damages;
- viii) Non-application and misapplication of mind; and
- ix) Mitigation of damages."

45. Of them, the first two points are inter-connected and are taken up together for consideration. While elaborating these points Mr. Chakraborty, the learned Senior Counsel for the petitioner, referred to clause 24 of the arbitration agreement which reads as follows:

"All disputes arising out of or in connection with this agreement shall be settled by arbitration in accordance with the provision of the Indian Arbitration Act, X of 1940. Each party shall nominate as arbitrator for and on their behalf and the said two arbitrators shall select an umpire before they enter upon their reference to arbitration. The unanimous opinion of the two arbitrators and where they deliver, the decision of the umpire thereon shall be final and binding on the parties thereto. The said Civil Court, Madras, shall be the only court which shall have jurisdiction to enforce the arbitration Award obtained under these clauses."

46. According to the petitioner apart from the clause referred to above, the scope of reference and, therefore, the jurisdiction of the umpire, are to be culled out from various letters and correspondence between the parties which throw light on the scope of the dispute and the reference. Mr. Chakraborty relied on several documents, mostly letters, in support of the contention that the award was both beyond the scope of reference and in excess of the umpire's jurisdiction. According to the correspondences, the petitioner submitted, the respondent's claim should have been confined to Rs. 2 crores only as over-run costs. But the umpire erred in holding that all the disputes and claims appearing in the petition have been referred to arbitration. The petitioner heavily relied on a portion of Clause 13 of the agreement which clarified:

"It is clearly understood that the collaborators and their associate companies shall not be called upon to find ways and means to provide additional funds in the event of over-run arising from whatsoever causes there may be and it will be the sole responsibility of GMB for procuring additional funds that may be needed."

47. The same objection was taken before the umpire as well. It appears from the Award that the present petitioner submitted that neither the arbitrators nor the umpire could travel beyond the reference and the jurisdiction was derived from the reference only. Several cases were cited on behalf of the petitioner on the point. The umpire inter alia held that in the present case there was no clear or specific reference to dispute. As before me, so also before the umpire, Neycer relied on several correspondences contending that the terms of reference has to be culled out from the documents on record. The umpire accepted this part of the petitioner's submissions, referred to some portions of the documents and ultimately rejected the contention of the petitioner that the respondent's claim was confined to the over-run costs only.

48. The petitioner strongly relied on a letter written by GMB on October 6, 1989 which has been marked as Ext. G/68. In the second paragraph of the said letter, GMB agreed not to put Neycer's brand name except that the wares which had been manufactured would be sold with Neycer's brand name. The letter also mentioned: "Now the matter boils down to our claim for overrun amount only for which we will decide about the name of the arbitrator and let you know in due course."

49. While analyzing the content of the letter the umpire observed that the expression "over-run" amount was not specific and of very wide amplitude. Under the agreement, the collaborator were required to endeavour to commission the plant within 18 calendar months from the date of sanction of term loan by financial institutions. It was the case of GMB that due to the breaches committed by Neycer, the plant could not be commissioned within 18 months from the date of sanction of the loan which was May 19, 1987. Therefore, the plant should have been commissioned by November 19, 1988 which was mutually extended till January 31, 1989. Neycer still had failed and neglected to commission the same within the same time. Assuming that the allegations of GMB were true, the learned Umpire held, there could be no doubt that during this over-run period GMB must have incurred over-run costs and suffered damages.

50. According to the umpire the over-run amount included within it both costs incurred and damages suffered. He had also taken a letter dated October 19, 1989 written by GMB (Ext. G/71) into consideration wherein GMB mentioned "..... for adjudication of our claim for rupees over two crores in respect of all our losses sustained and is being sustained by us due to various breaches committed and still being committed by you [Neycer] under the said agreement".

51. From this the umpire concluded that the dispute as mentioned in the said letter related to all the losses sustained and still being sustained by GMB due to various breaches committed and still being committed by Neycer. The dispute enumerated in this letter covered all claims and disputes as pleaded in the statement of claim including the claim on account of its deprivation of the use of the logo.

52. The umpire inter alia had also referred to Ext. G/72, again a letter by which GMB claimed Rs. 2 crores on account of over-run costs. The petitioner herein sought to argue from this letter along with others that it must be taken that GMB had referred to arbitration their claim to over-run costs only and no other claim. So far as the claim of all losses sustained and to be sustained by it as mentioned in the said letter, it was contended on behalf of Neycer, as the rights of these claims have been reserved by GMB these claims should not be considered as part of its claim in the arbitration proceedings.

53. The umpire declined to accept this contention of the petitioner. For him, the expression "over-run" includes within it both costs incurred and damages suffered and that is the true meaning or connotation of the word in the context in which it has been used. While justifying the interpretation put by him, he referred to the letter marked as Ext. G/72 where GMB had alleged that the costs of the project escalated to abnormal high and GMB was forced to ask for further financial assistance for over-run of rupees over two crores from financial institutions. GMB did not claim damages on that account or compensation but reserved the right to claim the same. This was reserved for the claim petition. Therefore, the umpire concluded that if the dispute has to be culled out from the correspondence between the parties it must be held that all the disputes as pleaded in the claim petition both before and after the amendment have been referred to arbitration.

54. Mr. Deb submitted that this point was very seriously taken by Neycer before the umpire and the umpire after considering the relevant documents and after a detailed discussion on the point decided it against the petitioner. He further argued that as a result of the failure on the part of Neycer, disputes and differences arose between the parties and Neycer by a letter dated September 19, 1989 invoked the arbitration clause and appointed its arbitrator and called GMB to nominate its arbitrator to decide on the said dispute and in other disputes that may be raised between the parties (Ext. G/67).

55. G/68 is a letter from GMB in reply to G/67. GMB inter alia replied that it would make its claim for over-run amount for which it would nominate an arbitrator and would inform Neycer in due course. Subsequently, GMB by the letter marked as Ext. G/68 informed Neycer the name of the nominated arbitrator for adjudicating its claim for over rupees two crores in respect of the loss sustained by it due to the breaches committed and as well as being committed by Neycer. Finally by a letter dated October 24, 1989 GMB raised dispute which had arisen between the parties due the laches and negligence on the part of Neycer.

56. Mr. Deb submitted that the Award had recorded that both the parties had agreed before the umpire that all the issues should be decided de novo even regarding those where there was no differences of opinion between the arbitrators.

57. I have considered the submissions of the learned Senior Counsels and the relevant documents as well as the Award. The message sent by GMB appointing Mr. O.P. Jhunjhunwala as its nominee arbitrator for adjudication of claim for over rupees two crores in respect of all the losses sustained and was being sustained by it due to various breaches including those committed and still being committed by Neycer under the agreement. The letter is absolutely clear and specific. There is no scope to put any meaning other than the one that appears from a plain reading of the letter itself. The effort to interpret the words "all the losses sustained by GMB" as embracing all the claims and disputes as pleaded in the claim petition is a rather laboured one. Consequently, it is an error on the face of the award and an impermissible one. When this message had been sent on October 19, 1989, the statement of claim was not filed. Therefore, there was absolutely no scope to refer to all the disputes subsequently raised as being covered by the disputes referred to in the earlier letter.

58. In the case of London and North-Western and Great Western Joint Railways company v. J.H. Bilinton Ltd., reported in 1899 AC 79, Their Lordships of the House of Lords held that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen. Any contention that the parties could, when they were sued for the prices of the services, raise then for the first time the question whether or not the charges were reasonable and they have a right to go to the arbitrator, is untenable. In the ordinary course of things some questions had arisen between the parties which they wanted to arbitrate upon and a submission to arbitration was agreed upon in the form that all matters in difference shall be submitted to A.B. That would be a condition precedent to the arbitrator entering upon any form of enquiry that the person who insisted that there was difference should show that the difference had arisen before the submission to arbitration was made.

59. Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council) has laid down a proposition of law that an arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract and he has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract he has acted without jurisdiction. If an arbitrator gives reasons for the award disclosing an error apparent on the face of it, it can be interfered with by the court. The said judgement further lays down that an arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Act. An arbitrator or umpire cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is it is open to the court to see what dispute was submitted to him. If that is not clear from the award it is open to the

court to have recourse to outside resources. If an arbitrator, the court observed relying upon a large number of judgements, wanders outside the contract and deals with matters not allotted to him he commits a jurisdictional error and such error can be established by looking into materials outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or depending on the construction of the contract. The ambiguity of an award can be resolved by admitting extrinsic evidence.

60. Again the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council)* , is an authority for the proposition that to find out whether an arbitrator has travelled beyond his jurisdiction it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the record. In order to determine whether an arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator if there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim. The award passed by the arbitrator in respect thereof would be in excess of jurisdiction. The Supreme Court further held in the judgment that an award made by an arbitrator disregarding the terms of reference or the arbitration agreement or the terms of contract would be a jurisdictional error which ultimately requires to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of agreement. A deliberate departure or conscious disregard of the contract not only manifests disregard of the authority or misconduct on his part but may tantamount to mala fide intention.

61. In the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council)* , a Division Bench of this court had held that some disputes must have arisen between the parties and the particular dispute had arisen wholly before the matter went before the arbitrators. The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action but upon the existence of a dispute and accordingly it is only the existence of a dispute which confers jurisdiction upon a private forum to adjudicate upon with dispute.

62. Relying on these decisions the petitioner argued that in entertaining the claim not raised by the claimants in the series of correspondences constituting the terms of reference the umpire exceeded the jurisdiction. According to them the jurisdiction of the umpire was restricted to Clause 24 of the agreement and the issues referred to arbitration over which the appointed arbitrators could not reach a consensus. The umpire exceeded his jurisdiction in considering the damages as claimed in Schedules "A", "C", "D" and "E", future interest payable to the banks for delay in commissioning a plant and compensation for not

allowing the respondent to use the logo of Neycer which GMB agreed not to use.

63. The contention of the respondent was that the arbitrators are creatures of the contract and, therefore, did not have any inherent power. But, Mr. Deb submitted, if an umpire starts deciding a case which is not within the scope of the reference an objection has to be raised which should be evident from the pleadings and if no objection is raised at that stage a party is not entitled to raise such objection in an application under Section 30 of the Arbitration Act. In the present case there was no specific reference of dispute to the arbitrator. As such the umpire considered various correspondences exchanged between the parties to cull out the disputes between them. Such correspondences referred to by the umpire are Ext. G-66, G-67, G-68, G-71 and G-72 and the umpire came to a finding that all the claims appearing in the petition filed before and after an amendment have been referred to the arbitrators.

64. There cannot be any doubt that the respondent in various correspondence has quantified its claim to Rs. 2 crores. For example, in Ext. G-66, a letter dated September 11, 1989, GMB intimated that the delay because of the alleged failure on the part of Neycer has caused an over-run to the extent of Rs. 2 crores. In Ext. G-71, i.e., a letter from GNB on October 6, 1989, the petitioner was intimated that: "Now the matter boils down to our claim for over-run amount only for which we will decide about the name of arbitrator and let u know in due course." [*italics added*]. The communication dated October 19, 1989 was more specific. The respondent herein had appointed their nominated arbitrator for adjudication of the claim for over Rs. 2 crores in respect of all their losses sustained and were being sustained by them due to various breaches committed and still being committed by the petitioner under the agreement. Ext. G-72 is a communication dated October 24, 1989 by GMB to Neycer. After listing the alleged failures on the part of the petitioner to the fulfillment of the agreement the respondent intimated that in view of non-fulfillment and the breaches committed by Neycer the cost of the project has escalated abnormally high and they were forced to take further financial assistance for over-run of over Rs. 2 crores from financial institutions for which Neycer was solely responsible.

65. Reading these communications both together and separately, the court is left with no other alternative but to agree with, even keeping in mind the parameters and scope of restricted interference, the contention of the petitioner that the scope of reference could not be extended beyond what was mentioned in the letter dated October 19, 1989, i.e., Ext. G/71, more so as it was by this letter that the claimant had appointed its nominee arbitrator. It is by this letter that the arbitrator was nominated by the respondent herein for adjudication of their claim for Rs. 2 crores due to various alleged breaches on the part of the petitioner and Rs. 2 crores was quantified as the loss suffered by GMB on all counts.

66. Therefore, there was hardly any scope for the umpire to exceed the jurisdiction or scope of reference beyond the same. The other claimed that the umpire entertained were obviously outside the scope of the reference and,

therefore, beyond his jurisdiction.

67. It cannot be gainsaid that the error has surfaced on the face of the Award itself inasmuch as the error is of a nature which strikes the eye at the very first sight. Even without a detailed examination of the correspondence the portions of the communications made by GMB to Neycer, as referred to and quoted by the umpire, makes the mistake apparent on the face of it. That apart, as laid down by the Supreme Court in Rajasthan State Mines and Minerals Limited (Supra), an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award. Thus, if an arbitrator or an umpire exceeds his jurisdiction and goes beyond the scope of reference, an award is liable to be interfered with even without an error apparent on the face of it.

68. This is not a case where the evidence on record has not been considered. But this is a case which suffers from a perversity on a very different ground. The exhibits were such that after reading which no one would come to the conclusion that the reference was not restricted to the over-run expenses of Rs. 2 crores and the umpire committed a serious wrong in not appreciating that the claim was for compensation for over-run expenses alone which formed the scope of the reference. The Umpire appears to have put great stress on the meaning of the word "reserve" as appearing from the letter of GMB, dated October 24, 1989 (Ext. G/72): "Since you want us not use your brand name we agree not to use your brand name in our products reserving our rights to claim all damages and compensations from you without prejudice to our rights and contentions in the matter". The umpire held that GMB had reserved the right to claim an amount on account of damages and this reservation was kept for the claim petition. In Ext. G/72, the dispute has been clearly referred and only the right to claim all damages and compensation has been reserved.

69. This conclusion of the umpire appears to be on the face of it erroneous inasmuch as the scope of reference could not be extended after the letter dated October 19, 1989 by which GMB had appointed its nominee arbitrator. The contrary view taken by the umpire that all claims made in the statement of claim were to be included in the dispute between the parties is not a correct application of the reference. In Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council) , the Supreme Court held that certain claims awarded by the arbitrator were beyond the scope of agreement and, therefore, they could not be sustained. The Supreme Court held, under such circumstances, that the arbitrator had misconducted himself in the proceedings and, therefore, the Award was liable to be set aside on the ground of legal misconduct on the part of the arbitrator under Section 30 of the Act.

70. It is not factually correct to argue that the petitioner did not take this objection to the scope of reference in its pleading. In the rebuttal statement the petitioner herein has specifically denied that the alleged probable losses or damages formed the subject matter of an action against the petitioner. The claimant had addressed a telex to the petitioner that it was nominating its

arbitrator to adjudicate its claim far over Rs. 2 crores. The said Rs. 2 crores, the rebuttal statement continued, had by the time of filing the claim grown to Rs. 8 crores. Describing the claims claimed by GMB as pure afterthought Neycer accused GMB of indulging in kite-flying taking advantage of the fact that no court-fee was payable in arbitration proceedings. Thus, the objection of the respondent to the point of the petitioner about the umpire's exceeding the jurisdiction, on the lack of pleadings must fall through.

71. Thus from the above discussion I hold that claim of the respondent should have been restricted to Rs. 2 crores as the overrun cost. The umpire exceeded his jurisdiction in entertaining the claims beyond it.

72. That takes us to the next part of the exercise. The maximum limit of the claim that could be entertained is not the same as validity thereof. And it is far this that the other submissions of the parties are required to be addressed.

73. The learned Senior Counsel for the petitioner has further argued that the amendment allowed by the arbitrator was barred by limitation and as such against the law of the land. After the original statement of claim was filed the respondent filed an amended statement of claim. According to the GMB, it suffered damages which had been enumerated in schedule "A" to schedule "F" of the claim petition. The bone of contention was to the amendment relating to schedules "D", "E" and "F". Schedule "D" related to damages for the petitioner's failure, neglect and refusal to set up sales personnel recruitments and dealer's network and guidance for marketing policy. schedule "E" was the claim for loss of profit. Schedule "F" was for payment of interest on account of delay in commissioning the plant and for the breach of contract as alleged against the present petitioner. It appears that there were two grounds on which amendment was challenged. First, the ground of limitation, and secondly, incorporating a new cause of action.

74. The umpire held that by the amendment sought the original disputes were not altered nor the heads under which the damages claimed could be said to have been changed. Therefore, by the amendment GMB has not made any attempt to change the cause of action. After referring to several judgments the umpire held that the amendment merely revised or recast the amount of damages without introducing any dispute or incorporating any new allegation. As such there can be no question of the amendment being barred by limitation. He further held that both on a consideration of factual and legal aspects and the contention of learned counsel of both the parties the amendment of the claim petition was not beyond the scope of reference. Therefore, the amendment was allowed.

75. Mr. Deb the learned Senior Counsel for the respondent submitted that the umpire merely held that the amendment to the claim of GMB was enhancement or reduction of the amount of money claimed by GMB as damages and such amendment was revised and recast in the quantification of damages only. Since

the amendment did not constitute the addition of a new cause of action but amounted to no more than adding to the facts already on the record the amendment was rightly allowed. Mr. Deb referred to Section 73 of the Contract Act which says that when a contract is broken the party who suffers such breach is entitled to receive compensation for any loss or damage caused to him from the party who has breached the contract. Mr. Deb, the umpire had considered this provision of law before coming to the finding that the petitioner having admittedly broken the contract it was liable to pay compensation for the losses and damages caused to GMB.

76. Mr. Deb relied on the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning and* AIR 1923 66 (Privy Council) , and submitted that the claim for a definite sum of money was not a condition precedent to the exercise of jurisdiction by the arbitrator. But the arbitrator should determine and assess even prospective damages arrived after the date of submission of the statement of claim. Mr. Deb further submitted that where the amendment does not constitute addition of a new cause of action or raise a new the amendment would be allowed even after the statutory period of limitation.

77. The umpire does not appear to have given a very serious consideration to the point of limitation taken before him by the petitioner herein. He has merely stated that since the amendment does not introduce any new dispute or incorporate any new allegation there cannot be any question of amendment being barred by limitation.

78. The petitioner argued that the cause of action to the alleged breach arose on January 31, 1989 being the allegedly extended date and, therefore, any claim made beyond three years should have been barred by limitation. In support of their contention, Neycer argued that the claim for compensation for breach of any contract expressed or implied arises only when the contract is broken. The petitioner also assailed the Award on the ground that the particulars of the claim as mentioned in schedule "E" definitely constituted a new cause of action inasmuch as the original claim was for damages arising out of the delay of one year in achieving optimum production. By the amendment GMB claimed damages for loss of projected profit for a period of five years from 1989 to 1993-94. Again, in respect of schedule "F" to the original claim GMB's case was that it was compelled to incur interest which it would not have incurred but for the delay in commissioning the plant. By the amendment it purported to claim payment of interest for delay in commissioning the plant and for breach of contract. This, according to the petitioner, was an entirely new cause of action and also barred by limitation. Neycer argued that the loans granted by the banks and the interest to be paid thereon were the subject matters of contract with the respective banks and does not come under Clause 24 of the agreement. Neycer could not have been held responsible for providing additional funds and interest in the event of any over-run arising from whichever cause.

79. In support of its contention the petitioner relied on *Champsey Bhara and Co.*

vs. The Jivraj Balloo Spinning and AIR 1923 66 (Privy Council) . In that case the Supreme Court factually concluded that by the date the application for amendment was filed the reliefs stood barred by limitation. The Supreme Court approvingly quoted the ratio of another judgment that the right to relief must be judged to exist as on the date a suitor institutes the legal proceedings. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of tribunal it cannot blink or be blind to events which stultify or render inept the decretal remedy. Relying on this observation, the Supreme Court held that where the appeal is delayed by necessary implication the relief of amendment cannot be given. The Supreme Court further observed that the alternative relief was available to be asked for when the suit was filed but not made. He cannot be permitted to amend the plant after the suit is barred by limitation during the pendency of the proceeding in the appellate court or the second appellate court.

80. In the present case the conclusion of the umpire is based on the ratio of Juggilal Kamlapat (supra) that it is the jurisdiction of the arbitrator to assess the damages. Therefore, the quantum of damages can always be altered by amendment and no objection to such amendment can be entertained. The umpire had also considered the judgments relied upon by the petitioner herein and had distinguished the same. Since the finding and decision of the umpire on the issue are on the well-defined principle of law it cannot be said to be a mistake to be interfered with in an application under Section 30 of the Act.

81. The petitioner has taken a further point that the umpire has proceeded arbitrarily and on incorrect factual assumptions. It bolstered up its contention by relying on clause 20 of the agreement which deals with the time schedule. Subject to the delivery of equipments, clause 20 stipulated, the collaborator should endeavour to commission the plant within 18 calendar months from the date of sanction of term loan by financial institutions.

82. The petitioner made a grievance that the contention of Neycer that commissioning of the Tunnel kiln was the commissioning of the plant was not accepted by the umpire. The conclusion of the umpire that each equipment has to be commissioned and, thereafter, all the equipments have to be commissioned together lacks factual basis and is not based on evidence. The finding of the umpire is thus contrary to clause 20 of the collaboration agreement, the petitioner submitted. The trial production has nothing to do with commissioning of the plant and, therefore, the umpire proceeded entirely on a wrong factual basis. Referring to Ext. G/81 which is a letter written by the Industrial Finance Corporation of India (IFCI) on May 19, 1987, the petitioner argued that the umpire concluded that the said letter was indicative of the sanction of the loan applied for as it had quoted 8705014 as the sanction code. The umpire failed to appreciate that the letter did not convey consent of the financial institution. On

the contrary, the letter expressly mentioned that the proposal for grant of financial assistance to GMB had been considered and the financial institution was agreeable in principle to provide certain facilities as mentioned therein. The term loan and underwriting assistance were subject to approval or sanction of their respective sanctioning authorities. The said letter further stipulated that the company was required to enter into a loan agreement with IFCI in respect of the rupee term loan and was to convey acceptance of terms and conditions of the letter of underwriting to be issued by IFCI in due course.

83. One of the stipulations mentioned in the said letter was that drafts of the loan agreement covering the facilities as mentioned in the said communication would be forwarded to the company by IFCI after the company had accepted the terms and conditions of the letter of intent. Paragraph VII of the said letter specifically mentioned that the communication should not be construed as giving rise to any binding obligation on the part of the IFCI unless the company communicated to IFCI within 30 days from the receipt thereof that the terms and conditions set out therein were acceptable to it and unless the loan agreement and other documents relating to the above facilities were executed by the company in such form as might be required by IFCI within four months from the date of the letter of intent or such further time as may be allowed by IFCI in its absolute discretion.

84. Assailing the finding of the umpire that the letter, in fact, conveyed the consent of the financial institution the petitioner argued that the umpire overlooked the overall tenor of the letter and erred in not appreciating that the letter could not be treated as a letter of sanction.

85. The respondent in reply submitted that the Award had been passed by the umpire after consideration of documentary and oral evidence produced on behalf of both the parties. There is hardly any allegation that the umpire did not consider the submission of the petitioner and, therefore, the allegation of his proceeding on factually incorrect assumption is not sustainable. According to Mr. Deb, it is not clear from the submissions of the petitioner how the umpire had proceeded with the factually incorrect assumptions or which portion was given undue weightage by him. It is only after considering all the exhibits and evidence adduced by the parties that the Award had been made. Therefore, the question of factually incorrect assumption does not and cannot arise. Mr. Deb reiterated that the umpire being the master of facts the court has no right to interfere or reconsider the facts.

86. According to GMB the point taken by the petitioner here was also taken by it before the umpire that the period of 18 months mentioned in clause 20 of the agreement depended upon two conditions viz., sanction of loan to GMB by the financial institutions and delivery of the equipments by GMB to Neycer for the purpose of commissioning the plant. It is nobody's case that the plant was commissioned before November 18, 1988 or even January 31, 1989 or that the equipment was not delivered before those two dates. The umpire after relying

upon the exhibited documents and oral evidence came to the conclusion that with the change of management in Neycer the commissioning of the plant took place, in fact, only upon the trial run towards the end of August 1989 and by that time Neycer had abandoned the project. The umpire had conclusively held that sanction of financial assistance was accorded by the financial institution to GMB on May 19, 1987 and there was a delay of seven months and, therefore, he reduced the quantum of damages proportionately on that score.

87. I have given my anxious consideration to the respective cases. The grievances expressed by the petitioner about an erroneous reading of the documents on record does not constitute an error apparent on the Award itself calling for an interference by this court in an application under Section 30 of the Act. Even if it can be argued by the petitioner that a proper reading the Ext. G/81 should have led the umpire to hold that the said document was not a document of sanction, ultimately this is a matter of appreciation of evidence. Obviously sanctioning financial assistance and disbursement of money by a financial institution are two different propositions. The financial assistance had been sanctioned subject to compliance of certain formalities by the concerned company. The conclusion reached by the umpire about the sanction of loan by IFCI with reference to the sanction code is a plausible one and, therefore, must not be submitted by the courts' own. In any case, the mistake on the part of the umpire, even if accepted, is not an error apparent on the face of the Award calling for an interference.

88. Again the contention of the petitioner that the umpire was in error in proceeding on the basis that clause 14b of the agreement can be interpreted to mean that approving in principle to grant term loan assistance to GMB was, in fact, granting of such loan and his alleged misinterpretation of clause 10 of the agreement do not attract the vice of perverse finding liable to be interfered with under Section 30 of the Act.

89. Relying on a large number of correspondences the petitioner contended that the conclusion reached by the umpire that by not posting any senior level technician for a long period at a stretch till the achievement of optimum production on the plea that it was not necessary the whole project failed to the severe loss and prejudice of GMB, was an unfounded one inasmuch as he had failed to take several documents into consideration which could have led him to a different finding. There is hardly any scope of re-appreciation of evidence and coming to a conclusion different from the one reached by the umpire unless the courts hold that this has resulted in an error so gross and so obviously apparent on the Award itself. The errors pointed out by the petitioner do not qualify for the same.

90. Neycer further contended that the Award is vitiated by non-consideration of evidence and arbitrary reliance on the part of the evidence. The petitioner referred to the agreement dated January 31, 1987 between GMB and M/s. Heimsoth for supplying certain equipments and machinery to GMB. The

correspondence between M/s. Heimsoth and GMB have been greatly relied upon by Neycer in assailing the finding of the umpire that the responsibility of commissioning the plant was on Neycer subject to delivery of equipments. The version of the umpire that Neycer was responsible for everything done by it including the engagement of M/s. Heimsoth and GMB had to depend upon Neycer is not borne by the records. Neycer further argued that the evidence of Mr. R. A. Jalan, the Managing Director of GMB, brings out the position that the delivery period of equipment was one of the contingencies on the basis of which clause 20 of the agreement depended. The umpire misread the evidence of Mr. Jalan and failed to appreciate that the period of 18 months would run not only after the sanction but also after the delivery of all equipments. The petitioner submitted that even if financial sanction was made on May 19, 1987 Mr. Jalan had admitted that the delivery of equipment had taken place in July and August 1988. Tunnel kiln was delivered in January/February 1989 which was the nerve centre of the plant.

91. According to the petitioner, this non-consideration of the material evidence is a misconduct on the part of the umpire. The petitioner relied on *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning and* AIR 1923 66 (Privy Council) . In the said case, the Supreme Court held on the facts of that case that the arbitrator had misconducted the proceedings by ignoring two very material documents to arrive at a just decision to resolve the controversy between the parties. That apart the arbitrator had arrived at inconsistent conclusion even on his own finding. The Supreme Court further observed that misconduct under Section 30 of the Act does not have a connotation of moral lapse. It comprises legal misconduct which is complete if the arbitrator on the face of the Award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

92. The context in which such observations were made by the Supreme Court was the satisfaction of the court that Ext. P 11 and Ext. P 16 of that case were material documents to arrive at a just and fair decision to resolve the controversy between the parties and in the background of the particular controversy of that case the Supreme Court observed that even if the department had not produced these documents before the arbitrator, it was incumbent upon him to get hold of all the relevant documents for the purpose of a just decision. Therefore, that was a case of non-consideration of material evidence and passing an Award ignoring the vital materials. Such is not the case here. It cannot be said that the umpire had totally ignored the materials on record. Thus on facts the case of *K.P. Poulose* (Supra) is distinguishable. All that the petitioner contends under this particular head is an alternative reading of the materials on record. The umpire had read the evidence and interpreted them which cannot be said to have been done in a manner as no man instructed with law would have done.

93. The petitioner further relied on a case of Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council) , for the same proposition that an Award ignoring the very materials and relevant documents throwing light on the controversy to have a just and fair decision, would vitiate the Award as it amounts to a misconduct on the part of the arbitrator.

94. This case can also be distinguished on facts. In that case, the arbitrator failed to summon the document which was an interdepartmental correspondence and the "handing over note" of the chief engineer of the project to his successor. The Supreme Court held that this note had a material bearing on the merits of the case and threw light on the share of the responsibility of the parties to the contract and the extent of their responsibilities as well. Therefore, the matter was remanded to the Division Bench of the High Court for considering the matter afresh taking into account the relevant documents. Once again, this is not a case of non-consideration of any particular piece of evidence. On the other hand, at the most what could be argued by the petitioner was a wrong appreciation of evidence. Apart from the fact that re-appreciation of evidence is not permissible at this stage I find no reason to hold the finding of the umpire to have been vitiated by any error apparent it on this particular ground of attack on the award.

95. The petitioner next argued that the Award of the umpire was against the law of the land. Elaborating on the same, it has been submitted that a stale claim barred by law of limitation was permitted to be brought on record by way of an amendment after the commencement of the proceeding and in the process Section 73 of the Contract Act 1872 has been completely ignored by the umpire while making the Award.

96. So far as the first point, i.e., allowing a time barred amendment is concerned, it has already been dealt with earlier in this judgment that the error alleged to have been committed by the umpire cannot be said to be of such a nature which may call for an interference by this court keeping the scope of interference, settled by a series of judgments, in mind.

97. Mr. Chakraborty submitted that for the purpose of adjudicating damages it is necessary that the damage must fall within the realm of Section 73 of the Contract Act. In other words, damages suffered should be the direct consequences of a breach by an erring party and any damage which fails to satisfy these tests, is construed as remote and not to be granted.

98. Neycer has although argued that the umpire had awarded damages which are extremely remote and cannot have any bearing even if it is accepted that the petitioner had indeed caused any breach of its obligation under the agreement. The umpire also failed to take into consideration that no damage could be claimed by the GMB without first attempting to mitigate the same. And GMB did not make any effort towards the same. The petitioner relied on the case of Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council) , for a proposition that one of the principles in the matter of interference

by the Courts with the Award of the umpire is that except where the umpire has based his decision on an erroneous legal principle which appears on the face of the Award an error of law by itself would not be sufficient to interfere with it. The expression "on the face of the Award" has been described to be the Award itself or some paper accompanying it wherein the umpire records his reason for his ultimate conclusion. Where the conclusion in an Award has been given by the umpire is founded on the erroneous assumption in law such Award can be interfered with under Section 30 of the Act as the Award can, to that extent, be said to suffer from an error apparent on the face thereof.

99. In that particular case the conclusion of the umpire was based upon an assumption that the payment of minimum guarantee charges was relatable to the extent of supply made. This assumption was found to be legally erroneous and therefore, the Supreme Court held that to that extent, the Award suffered from an error of law apparent on the face thereof.

100. Neycer next relied on the case of Champsey Bhara and Co. vs. The Jivraj Balloo Spinning and AIR 1923 66 (Privy Council) . The Supreme Court had held that if an Award sets forth a proposition of law which is erroneous, the Award is liable to be set aside under Section 30 of the Act. The immediate context of such observation by the Supreme Court was a finding by the arbitrator that the judgment of the High Court in second appeal would not operate as a res judicata as regards title to the properties but was only a piece of evidence. The Supreme Court observed that if the judgment of the High court operated in law as res judicata it was an error of law apparent on the face of the Award if the Award had held anything contrary.

101. I am afraid, this judgment also does not really help the petitioner inasmuch as the connection between the ratio of that case and the finding of the umpire of the present case is very far fetched and a rather remote one. The petitioner could not show that a settled proposition of law as obvious as a judgment operating as a res judicata has been ignored by the umpire or the umpire committed such an error as to go against a settled principle of law. Therefore, this contention of the petitioner assailing the award vis-?-vis this particular point of challenge fails.

102. The petitioner next argued that the Award at places was completely speculative and without any basis. According to the petitioner, the umpire failed to realize this in respect of schedule "C" and schedule "D". Schedule "C" is in respect of damages for preventing the claimant to use the brand name GMB-NEYCER under that head. The respondent claimed that by desisting the claimant to use the said brand name the claimant was deprived of the advantage and benefit of goodwill of the brand image of Neycer which had been built over a period of 25 years. On the face of a highly competitive market, it would take at least 5 years to create the claimant's own brand image and achieve a breakthrough in the market at an average minimum expenditure by way of advertisement in media of Rs. 70 lacs per annum and the claimant claimed Rs.

3.50 crores as damages under the said head.

103. Mr. Deb argued that this submission of the petitioner that the Award was speculative and remote has already been dealt with extensively by the umpire and apart from Schedule "B" which had been rejected the other claims have been substantially allowed by him. The respondent argued that it is an admitted position that Neycer was liable to fulfil certain obligations under the agreement and in terms of clause 18 of the agreement the obligations of the parties were to be fulfilled in a timely manner to achieve the desired objectives as set forth in the feasibility report. Admittedly, Neycer failed to or neglected to commission the plant within the stipulated time of 18 months and it finally abandoned the project. The commercial production of the unit started on December 8, 1989 and being inexperienced in this field and having no expertise, GMB could not achieve the targeted objectives as envisaged under the project report. Had Neycer fulfilled its obligations in accordance with the project report and the agreement, GMB would have achieved the targeted objectives and in 5 years' time the plant would have been loan free. Therefore, the claims made by GMB were based on the project report and cannot be said to be speculative and remote.

104. Mr. Deb drew my attention to several documents and submitted that Neycer had asked GMB not to use its logo on the products of GMB by a telex message. GMB by a letter, dated October 6, 1989 (Ext. G/68) informed Neycer that since Neycer had asked GMB not to use the logo it would not put Neycer's brand name on the sanitarywares which would create a lot of hurdle for GMB. But in order to minimize the are of confusion and complication, GMB assured that it would use other pictorial representations on its new stationery until its new stationery was printed and whatever wares have already been manufactured which did bear the brand name of Neycer GMB would sell them unless Neycer wanted sending them to the market. In such case, the amount of the same would be borne by Neycer.

105. While defending the claim of damages under Schedule "C", Mr. Deb submitted that Neycer had a brand name of 25 years when the agreement was signed. As such the question of advertisement in respect of a brand name having a 25 years brand image was completely different than from making a new brand competing with a brand of 25 years old. Therefore, the Umpire did not misconduct himself or the proceedings and the Award is not perverse or is not otherwise liable to be set aside only because the Umpire thought that the respondent/GMB would spend at least Rs. 50 lacs per annum for a period of 5 years to attempt to achieve the brand name, comparable to GMB-NEYCER with the brand name of GMB. The cost of advertisement in respect of a brand having 25 years of experience is insignificantly small than that of the cost of advertisement to create a brand name of 25 years old. Therefore, the Umpire had rightly concluded that Rs. 50 lacs was required per year over a period of 5 years to achieve the position in the market of a new brand in comparison to a brand having 25 years market reputation. Mr. Deb referred to the letter of Sista dated April 3, 1990 which said that Rs. 60-70 lacs per annum would be required.

But the Umpire thought that Rs. 50 lacs would be sufficient. This is a discretion perfectly exercised by the umpire and his mental process in arriving at the conclusion cannot be a ground for setting aside the Award.

106. Mr. Deb further argued that as per clause 16 of the agreement, the obligation of Neycer was to collaborate for 5 years in respect of the use of GMB-NEYCER legend. This meant not to take any active steps to treat the other collaborator as competitor. The umpire has lawfully appreciated the evidence and he did not commit any mistake warranting any interference from this Court in touching the entire Award as granted under Schedule "C". to spend money on account of advertisement in respect of brand name having 25 years is a completely different proposition from spending money in order to create a brand name within a period of five years which is at par equivalent with a brand name having 25 years of market reputation.

107. The only reason for before the Umpire to accept the claim under Schedule "C" was an opinion of an advertising agency Sista's Pvt. Ltd. which was an estimate made on April 3, 1990. By the said opinion, it was observed that product such as the one that GMB was launching required an advertising backing of at least Rs. 60-70 lacs per annum for 5 years in order to build a favourable brand image nationwide.

108. The umpire held that if GMB could use the brand name of Neycer it would not have had to spend the same amount. he further recorded the contention of GMB that it had to spend the same amount of Rs. 70 lacs every year. The umpire did not find any reason not to accept the estimate prepared by Sista's Pvt. Ltd. The minimum of the estimate was Rs. 60 lacs per year and the umpire thought that Rs. 50 lacs per year would be quite sufficient for the purpose of GMB's brand name.

109. It is not clear why the umpire awarded Rs. 50 lacs per year and what made him think that it to be quite sufficient. There is no evidence that GMB had actually spent Rs. 50 lacs per year over advertisement and publicity. It would have been one thing if the Award had been made in year 1990 when the question of estimated cost for advertisement could have been a relevant consideration. But when the Award was passed the five years" period had long expired and the consideration ought to have been the amount actually spent over advertisement. There is no evidence that GMB actually spent the sum of Rs. 50 lacs per year for a period of 5 years.

110. On the contrary, it appears from the Director's report of GMB, dated December 5, 1989, that due to non-fulfillment of obligations by Neycer there was a delay in the project implementation. The collaborator had restrained GMB from using the brand name and the company i.e., GMB had claimed from the collaborators an amount of Rs. 2 crores for the losses sustained in the implementation of the project and compensation for not providing the marketing assistance and the brand name.

111. From the balance-sheets appended to the Director's Report it appears that till April 30, 1988 GMB had spent Rs. 79,414/- towards advertisement and publicity. From the said Balance Sheet it also appears that for the year ending on March 31, 1989 a sum of Rs. 8,10,307/- was spent on advertisement and publicity and Rs. 8,880/- was spent on advertisement and film expenses. Again from the balance sheet as on March 31, 1990, it appears that the cost of advertisement and publicity came down to Rs. 5,79,704/- (Schedule 9A and Schedule 15 taken together) and the expenditure over advertisement film was Rs. 4,08,217/-. The Balance sheet as on March 31, 1992 (Ext. G/110) reveals that a sum of Rs. 4,73,088/- and Rs. 11,91,242/- were spent over advertisement and publicity for the year ending on 31.03.1991 and 31.03.1992 respectively. Ext. G/115 is the Annual Report for the year 1992-1993. The Balance sheet as on March 31, 1993 discloses that towards advertisement and publicity Rs. 60,436/- was spent by the company. Therefore, the conclusion by the umpire is entirely speculative and not based on any evidence whatsoever. Irrespective of what the company had actually spent the umpire had accepted the opinion of an advertising agency when nobody from the said agency come to depose. He should have, while passing the Award in the year 1999, taken into account the amount actually spent. Damages cannot be determined on the basis of an opinion given by an advertising agency without any regard to the actual expenditure incurred by the company.

112. In such view of it, I hold that the finding of the umpire under Schedule "C" is not only speculative but also perverse as based on no material whatsoever. This is not only a mistake on the part of the umpire, it's a mistake on the face of the award itself calling for an intervention by the court.

113. The petitioner next argued that the Award is liable to be set aside on the ground of non-application or misapplication of mind by the umpire. In support of his contention, Neycer referred to the definition of over-run amount as used by the umpire. At p. 14 of the Award, the Umpire held that the expression over-run amount is very wide and there could not be any doubt that during the overrun period GMB must have incurred over-run costs and suffered damages. The petitioner argued that this definition was in complete contradiction to the damages awarded by him which clearly seems to dissect over-run damages and costs incurred to be distinct and separate which was in violation of any interpretation of the term over-run. The term over-run is in respect of time and cost of such over-run. the costs and damages suffered has been quantified to be Rs. 2 crores by the respondent. The statement of claim does not make out a case for enquiry into damages.

114. It has been the contention of the petitioner that the umpire had ignored the parameters set forth in the agreement. The respondent that the umpire took into consideration an agreement between the petitioner and its sub-contractor. The petitioner in reply submitted that even if the arbitrator had taken into consideration such an agreement between the petitioner and the sub-contractor

the same cannot bind or guide commercial relation of the petitioner and the respondent which is to be guided entirely by the agreement between them.

115. The petitioner relied on the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council)* , for a proposition that though an arbitrator is not bound to disclose as to what interpretation he has made and what inference he has derived from the documentary evidence he is bound to refer in the Award that he had considered all the documents placed before him, no matter whether he relies on them or discards them from consideration. An Award can be interfered with only in limited circumstances as provided under Ss. 16 and 30 of the Act. Even with all the limitations on the powers of a court and probably because of these limitations it can be held that if the amount awarded was disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case where the arbitrator could be said to have not applied his mind amounting to legal misconduct.

116. The petitioner further made a point that the umpire erred in granting damages contrary to the principle of law settled for awarding such damages. The petitioner relied on the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council)* , where the Supreme Court held that it is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of a work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established claims of loss of profit could not have been granted in his favour. In the absence of any evidence, the arbitrator cannot award the same.

117. The petitioner next argued that the court has to take into consideration the reasonableness of an Award in view of the very recent decision of the Supreme Court in the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning andAIR 1923 66 (Privy Council)* , which laid down that the principle of *Wednesbury* reasonableness will have to be satisfied to uphold the sanctity of an Award. Although delivered in the context of Arbitration and Conciliation Act, 1996 it can be also applied to an Award made under the Act of 1940. The Supreme Court held that in every determination whether by court or by other authority that affects the rights of a citizen or leads to any civil consequences the court or authority concerned is bound to adopt a judicial approach in the matter. Equally important is the principle that a court and a quasi-judicial authority must, while determining the rights and obligations of parties do so in accordance with the principles of natural justice. No less important is the principle now recognized as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of the *Wednesbury* principle of reasonableness. Decision that falls short of the standard of reasonableness are

open to challenge in a court of law in writ jurisdiction, but no less in statutory processes wherever the same are available. The Supreme Court laid down that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it untenable, resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making Awards, will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

118. The respondent reiterated its basic defence for an award about the umpire's prerogative to assess the evidence. Since, the umpire is the sole judge of the quality and quantity of evidence the petitioner cannot challenge the factual finding making his decision binding upon both the parties. Since there are materials on record, Mr. Deb submitted, the Award is not perverse to that effect. The allegation that materials do not justify the conclusion cannot be a ground of perversity in considering the application for setting aside of the Award.

119. One example, in support of his submission given by Mr. Deb is that the claim under Schedule "B", i.e., expenditure for development in research and technology, had been disallowed by the Umpire in its entirety. Although the reason for rejection of the claim might not be the only correct conclusion that being a plausible one, respondent could not have challenged the said conclusion in an application under Section 30 of the Act.

120. Mr. Deb submitted that the Award runs into 86 pages with reasons. The umpire had taken into consideration all the relevant papers and pieces of evidence. A plain reading of the Award will show the exhibits have also been duly considered while passing the Award by the umpire. As such, under Section 30 of the Act this court cannot re-appraise the evidence once that has already been considered by the umpire. The question of non-application of mind does not and cannot arise.

121. I have considered the respective submissions on the point raised by the petitioner on the non-application or misapplication of mind by the umpire. Since the submission of the respondent is based on the settled principles of law on the scope of interference by the court in a proceeding under Section 30 of the Act, except of course this court's finding on the issues regarding exceeding of jurisdiction and the damages awarded under Schedule "C", I quite agree with the submissions of the respondent. It is not a fact that the umpire did not apply his mind on other issues. Even if he had not discussed all the exhibits or the evidences before him the Award cannot be set aside upon the re-appreciation of evidence inasmuch as the mistakes pointed by the petitioner, except on two counts as mentioned earlier, do not amount to an error apparent on the Award itself justifying any interference by the court.

122. The petitioner next argued that there is no pleading of mitigation of damages in the statement of claim. Relying on an observation in Halsbury's

Laws of England (4th edition) Vol- 12, Para 1193, the petitioner argued that in the instant case the claimant did not take reasonable steps to mitigate the loss which it claims to have sustained consequent upon the petitioner's alleged wrong. If a party fails to do so he cannot claim damages for any such loss which he ought to have reasonably avoided. According to the petitioner, there is no evidence about the steps taken by GMB to mitigate the alleged loss suffered by the respondent. There is no evidence also to show that GMB took alternative steps or employed personnel to advise and help to commission the plant for which GMB claims to have suffered loss and damages. The claims are based on presumption that if everything had gone normal GMB would have earned the profits, but in that case it would also have to pay for adjustment of loan and interest.

123. In this connection, the petitioner relied on the case of *Champsey Bhara and Co. vs. The Jivraj Balloo Spinning and* AIR 1923 66 (Privy Council) . The Supreme Court had observed that the principle of mitigation of loss does not give any right to the party who is in breach of the contract. But it is a concept that has to be borne in mind by the court while making an award in damages. The Supreme Court relied on the statement of law in *American Jurisprudence* (2nd edition) Vol-22, Para 33, which says that the 1general doctrine of avoidable consequences applies to the measure of damages in actions for breach of contract. Thus, the damages awarded to a non-defaulting party to a contract will be determined and measured as though that party had made reasonable efforts to avoid the losses resulting from the default.

124. In reply Mr. Deb referred to Schedule "D" to the statement of claim which was for damages for neglect and renewal to set up sales personnel recruitment dealer as per the contract. According to the respondent, the documents exhibited and the evidence adduced by Neycer were considered by the umpire. There is no cause for interference. GMB was a new entrant in the relevant market but it could not utilize the dealership network of the petitioner and, therefore, discount had to be given to the dealer for sale of the product. It had to lower its price for the ultimate consumer which has been claimed under Schedule "D". The damages are neither remote nor speculative. The respondent did certainly try to mitigate its losses. It is not the case of the respondent that as the monthly production was about 7000M.T. per month and as the products of the Neycer were sold at a particular rate the respondent would have got the entire amount. In fact, the respondent attempted to sell the product to the extent possible.

125. Mr. Deb further argued that the ground that the respondent failed to mitigate their losses have not been taken before the joint arbitrators or the umpire and as such cannot be taken into consideration by this court in an application under Section 30 of the Act. In any event, GMB was compelled to sell the products at a discounted price as Neycer refused to share its brand name and dealership network with GMB. This compelled the respondent to sell the products to the extent possible at a lower price and thereby it perfectly mitigated the loss.

126. It is true that mitigation of damages as a contention of the petitioner going against the Award, does not appear to have been taken before the umpire. In that case it will not be proper for the court to go beyond its jurisdiction and to enter into the issue. Moreover, the correspondence by GMB to Neycer go a long way to suggest that GMB was trying to mitigate its damages. That apart on the ratio of the judgment itself relied on by the petitioner, i.e., M. Lachia Setty & Sons Ltd. (supra) mitigation of damages is not an essential pre-condition for the Award of damages in all cases. The Supreme Court had approvingly quoted the statement of law from American Jurisprudence (supra) that it is clear that in contract cases as well as generally there is no duty to minimize damages because no one has a right of action against the non-defaulting party if he does not reasonably avoid certain consequences arising from the default. Such a failure does not make the non-defaulting party liable to suit. It only indicates that the damages actually suffered are greater than that the law will compensate.

127. Therefore, the doctrine of avoidable consequences is only a statement about how damages will be measured. But, in the present case for the reasons mentioned above the petitioner cannot assail the Award on the ground that mitigation of damages was not considered by the umpire or the principles governing the grant of damages were violated by the umpire.

128. Thus, from the above discussion, I do not find any reason to interfere with the Award on any of the grounds on which the petitioner has assailed the same except that the Umpire had exceeded the jurisdiction and the scope of reference by not appreciating that the claim of GMB was confined to the over-run cost of Rs. 2 crores only as also my findings on the damages awarded under Schedule "C" to the statement of claim. The other points raised by the petitioner, for the reasons mentioned against each of them, are liable to be rejected while disposing of an application under Section 30 of the Act.

129. Therefore, the next part of the exercise will be to see to what extent if any the claimant was successful in establishing its claim.

130. Schedule "A" to the statement of claim deals with the damages for delay in commissioning the factory as mentioned in paragraph 20 of the statement. The umpire held that the date of sanction was May 19, 1987 and as such in view of clause 20 of the agreement, the factory was to be commissioned by November 18, 1988. But it was granted an extension till January 30, 1989. The further finding in the award is that the commissioning of the plant took place with the start of the trial run and thus there was a delay of about seven months as against the claim of GMB that there was a delay of 11 months. The umpire held that the correctness of the amounts spent against different items has not been challenged before him. The total amount claimed under Schedule "A" was 61.52 lacs and, therefore, for seven months it was reduced Rs. 39,14,910/-. GMB was entitled to realize the said sum of rupees as damages for the delay of seven months in commissioning the plant.

131. Before me, the petitioner has assailed the various expenses appearing under Schedule "A". Neycer submitted that the items mentioned in Schedule "A" are the expenses that GMB had in any case to incur for its establishment, even if there had not been any delay and no damages. A very fundamental question had been raised by the petitioner: "Do the claims appearing under Schedule "A" qualify to be called damages?" A more fundamental issue which was required to be addressed by the umpire was whether the costs that the respondent had to incur like personnel expenses, establishment expenses, utility expenses etc., could be claimed as damages at all. In paragraph 20 of the statement of claim GMB had mentioned that by reason of the delay in commissioning the factory by the Neycer the claimant suffered loss and damages to Rs. 61.52 lacs as and by way of personnel expenses, establishment expenses etc. The claimant would not have incurred the said expenses or any portion thereof had the respondent commissioned the said factory by January 31, 1989.

132. In the rebuttal statement, Neycer had taken a point that it was not the responsibility of Neycer to commission the factory, therefore, any alleged delay cannot be attributed to it. Neycer had submitted that unless equipments were delivered the period of 18 calendar months does not start running. GMB failed to deliver the equipments and the Tunnel kiln ought to have been delivered much earlier. With reference to clause 20 of the agreement the petitioner submitted that the umpire proceeded with the assumption that the responsibility for operationalising the plant lay with Neycer. There he was entirely wrong. Appendix 2 to the agreements lists the obligations of Neycer. Beyond that, it was not expected to burden any other responsibility nor can it be saddled with anything more. Paragraph 20 of the statement of claim is restricted to the period from February 1, 1989 to December 7, 1989. According to the petitioner the period of 18 calendar months should be reckoned from December 7, 1989 and would end on June 6, 1989.

133. Based on this the petitioner submitted that the finding of the umpire in respect of claim under Schedule "A" to the statement of claim was a misconceived one. Schedule "A" does not qualify to be called damages. In the agreement there was no stipulation that establishment costs of GMB were to be borne by Neycer. Irrespective of whether Neycer challenged the expenses claimed under Schedule "A", GMB is not entitled to claim them as damages if they do not otherwise qualify to be classed as that.

134. An overall reading of the materials on record does not really support the claim of the petitioner herein. Undoubtedly, there was an agreement for collaboration and the whole project was conceptualized as a horizontal expansion of Neycer. Till there was a change in the management of Neycer, the relation between the two warring companies was quite cordial. There was a provision for assurance of guaranteed production and a project report was also prepared. Neycer had put its weight behind the project and wanted for a tie-up with GMB by using its name. It is also a factor that Neycer did not challenge the expenses

alleged to have been incurred by GMB. The procedure followed in judicial proceedings and recognized as a settled principle of law requires that the objection taken by GMB cannot be brushed aside on the ground that the expenses did not represent damages per se. Therefore, the amount granted by the umpire, i.e., Rs. 39,14,910/- as damages for delay of seven months is sustained.

135. So far as Schedule "C" is concerned, I have already found that the conclusion of the umpire that GMB had to spend a total sum of Rs. 2.5 crores as speculative and based on a big hypothetical "if". The claimant had never spent Rs. 50 lacs per year over advertisement and publicity. There was also no reason to award the said sum by way of damages in the year 1999. Therefore, even assuming that because of withdrawal of the logo GMB had to incur some expenses over advertisement and publicity the same must be confined to the amount actually spent and not what an advertising agency advised them to spend for five years in order to catch the competitive market. The umpire committed a serious mistake in overlooking that awarding the said amount in favour of GMB would result in an unjust enrichment. Therefore, as it appears from the balance sheet, the total expenses over advertisement, publicity and film come to Rs. 35,31,794/- from the year 1989 to 1993 (both year inclusive) as per the break-up mentioned above.

136. According to the agreement GMB had to pay royalty of 2% to Neycer on the sales value to be realized by GMB on its production during the period of agreement. The umpire took a year wise ex-factory sales realization for five years into consideration and arrived at a total sum of Rs. 2,587.36 lacs and after deducting therefrom a discount of 10%, the net sale value, according to the umpire's conclusion came to Rs. 2,328.63 lacs. Therefore, Neycer was entitled to the royalty of 46.57 lacs being 2% of the said net sale value. Without going into re-appreciation of evidence the figure may be safely taken as authentic. No party has challenged the figure either. Since the actual sum spent by GMB over advertisement and publicity was less than the amount spent on advertisement and publicity, it is not entitled to any sum under Schedule "C".

137. Under Schedule "D", GMB had claimed damages for neglect and failure on the part of Neycer to set up sales personnel recruitment and dealers' network as per the agreement. The umpire after considering the pleadings of the parties, the evidence on record, both oral and documentary, and after considering the objections of the petitioner had allowed GMB's claim for Rs. 123.61 lacs. Neycer assailed the finding of the umpire on the claims under Schedule "D" on various grounds. The most primary amongst them was that it was not required to recruit man for GMB. All that it was required to do was to guide GMB.

138. However, discount on sales was allowed by the umpire, though not by the arbitrators. Clause "c" of the schedule "D" was new claim which had no connection with the sales of Neycer. On the contrary, the evidence adduced clearly shows that the quality of the product was excellent. The Director's report

for the succeeding years bolstered up the contention of the petitioner that production was improving and the future was quite bright. Moreover, the umpire could not appreciate, the petitioner argued, that the loss claimed by GMB consequent upon its lowering the prices of the commodities should not be attributed to the fault on the part of Neycer. The umpire did not consider why did GMB have to lower its prices and erred in awarding damages without being satisfied about the responsibility of Neycer or the mode of awarding damages.

139. I have considered the submissions. But the court, for the reasons mentioned earlier, cannot re-appreciate the evidence and come to a conclusion different from the one reached by the umpire after re-considering the materials on record.

140. One of the points by the Neycer was that the discount on sales can never be linked with Neycer. It cannot be, however, glossed over that if the collaboration agreement had worked smoothly and as expected it would have been far easier for GMB to capture the market without facing any stiff competition from Neycer itself. As a result of the failure of the agreement a new entrant in the market had to give a discount on sales and I hold that the umpire's conclusion is quite plausible one which does not warrant any interference. The objection to individual items under Schedule "D" calls for a re-appreciation of evidence which is against the settled principle of law. The error pointed out by Neycer in the umpire's Award, so far as schedule "D" is concerned, is not an error apparent on the face of it. Therefore, the Award for Rs. 123.61 lacs should not be disturbed.

141. Under Schedule "E" GMB after amendment of the Statement of Claim, claimed a sum of Rs. 394.96 lacs as actual loss of profit.

142. Mr. Deb submitted that this concept of loss of profit was to put the affected party in a position where it would have been in the event there was no breach by the wrong-doer. The conclusion in Schedule "E" is based on the project report. The figures of the project report has not been challenged by the petitioner. Particularly, when the said report had been prepared by Sigma Consultants Pvt. Ltd. on the instructions of Neycer itself.

143. Neycer challenged the claim under Schedule "E" on the ground that the basic hypothesis for the claim was the profit that GMB might have made if everything had gone right. Neycer cannot be held responsible for the loss of any projected profit. That apart, the project report was restricted to 6000M.T. per year. The increase was not contemplated in the project report.

144. The umpire while disposing of the claim under Schedule "E" referred to Paragraph 24 of the claim and took the evidence, both oral and documentary, into consideration. He had also considered the contention of Neycer that it was not responsible for the losses suffered by GMB. In support of the same, the petitioner had relied on the report of the BIFR. I quite agree with the observation of the umpire that the findings of the Board are not sacrosanct. He had also taken the loss of profit of GMB on the basis of the installed capacity of 6000M.T.

per year. Moreover, the correctness of the accounts under Schedule "E" has not been challenged before the umpire as they were on the basis of the project report. Therefore, the Umpire allowed the claim of Rs. 346.45 lacs under Schedule "E" and I find nothing wrong in it.

145. But the said amount in its entirety cannot be allowed under the Schedule "E". Rs. 1,62,75,910/- (39,14,910 + 123.61 lacs) has already been allowed under Schedules "A" and "D" respectively. Therefore, the remaining portion of the total permissible claim of Rs. 2 crores (Rs. 2,00,00,000 - Rs. 1,62,75,910) i.e., Rs. 37,24,090/- is allowed under Schedule "E".

146. After finding the total amount of damages that can be awarded in favour of the claimant has been satisfied, the other claims need not be gone into.

147. It is true that the petitioner has not filed any application under Section 14 or Section 16 of the Act but has prayed for setting aside of the Award under Section 30 thereof. I have found that GMB could at most claim a sum of Rs. 2 crores from Neycer by way of damages. Even if, it is an application under Section 30 of the Act when separate claims under different heads are severable, the award of damages on the claims that can be retained, should not be set aside. In the case of Champsey Bhara and Co. vs. The Jivraj Balloo Spinning and AIR 1923 66 (Privy Council) , the Supreme Court held that the error which had occurred in the Award related to a matter which is distinct and separate from the rest of the Award. There is no valid justification for setting aside the entire award when the invalid part is separable from the valid part of the award.

148. I find that the claims of the respondent are distinct and separate under different schedules. As such, here also there is no justification for setting aside the entire award.

149. The Award of damages in excess of Rs. 2 crores is, therefore, set aside.

150. There shall be no order as to costs.

151. Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.