

(2009) 04 BOM CK 0147

In the Bombay High Court

Case No : Appeal No. 799 of 2004 in Arbitration Petition No. 493 of 2003 and Cross-Appeal (L) No. 3 of 2005

Patel Engineering Company Ltd.

APPELLANT

Vs

Konkan Railway Corporation Ltd.
 Konkan Railway Corporation Ltd. Vs Patel Engineering Company Ltd.

RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Arbitration Act, 1940 — Section 11, 11(6), 34
Arbitration and Conciliation Act, 1996 — Section 17, 2, 28(3), 30, 34
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 6 Rule 4
Limitation Act, 1963 — Article 158
Representation of the People Act, 1951 — Section 83(1)

Citation : (2009) 5 BomCR 256 : (2010) 3 CompLJ 646

Hon'ble Judges : D.K. Deshmukh, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Aspi Chinoy and Z. Andhyarujina, instructed by Munim and Co. in Appeal No. 799 of 2004 in Arbitration Petition No. 493 of 2003 and Kiran Bagalia, Asha Bhambwani and Latika Panakshari, in Cross-Appeal L No. 3 of 2005, for the Appellant; Kiran Bagalia, Asha Bhambwani and Latika Panakshari, in Appeal No. 799 of 2004 in Arbitration Petition No. 493 of 2003 and Aspi Chinoy and Z. Andhyarujina, instructed by Munim and Co. in Cross-Appeal (L) No. 3 of 2005, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Deshmukh, J.—The Appeal and the cross-objection take exception to the order dated 19th August, 2004 passed by the learned single Judge of this Court in Arbitration Petition No. 493 of 2003. That petition was filed by the Respondent in the Appeal i.e. Konkan Railway Corporation Ltd. u/s 34 of the Arbitration & Conciliation Act, 1996 (herein after referred to as the "Arbitration Act") to set aside the award dated 19th May, 2003 passed by the arbitral tribunal in respect of disputes and differences between the parties. The award held that the Appellant-Patel Engineering Co. Ltd. is entitled to recover a sum of Rs.

3,04,71,013.06 with interest thereon at the rate of 18% p.a.

2. In this judgment, Patel Engineering Company Ltd. shall be referred to as the Appellant and Konkan Railway Corporation Ltd. shall be referred to as the Respondent.

3. Brief facts giving rise to the disputes between the parties are, the Respondent invited bids for the construction of a tunnel in connection with one of its projects. The Appellant's tender was accepted and agreement in writing dated 27th November, 1991 for execution of the work for a total contractual cost of Rs. 6,81,02,517/- was entered into between the parties. The work was to be carried out in accordance with the said agreement, the schedule annexed thereto and in conformity with the printed schedule of rates, Special Conditions and the General Instructions which were incorporated therein by clause 5. These documents in turn incorporated other documents including the General Conditions of Contract for works.

The date of commencement of the work was 29th October, 1991 and the scheduled date of completion thereof was 28th April, 1994. The work was not completed by the scheduled date. It was substantially completed on 30th September, 1995. The Respondent issued a certificate dated 14th March, 1996 which specified the date of completion as 10th March, 1996.

4. The Appellant contended that despite its having completed the work satisfactorily the Respondent failed to pay various amounts due to it under the contract and made unauthorised deductions from its final bill. The Respondent having failed to settle the final bill the Appellant by its letter dated 1st July, 1998 requested the Respondent to refer the disputes to arbitration in accordance with Clause 63 of the General Conditions of Contract. The Respondent having failed to respond to this request the Appellant filed Arbitration Petition No. 321 of 1998 in this Court u/s 11 of the Arbitration Act. By the order dated 24th December, 1998 two of the arbitrators were appointed. The two arbitrators then proceeded to appoint the presiding arbitrator. That is how the arbitral tribunal was constituted.

5. The Respondent applied to the arbitral tribunal to hear its objection regarding the validity of the constitution of the arbitral tribunal as a preliminary issue. The arbitral tribunal by its order dated 8th October, 2002 rejected the objection and proceeded with the hearing of the reference on merits and made its award dated 19th May, 2003 holding that the Appellant is entitled to recover an amount of Rs. 3,04,71,013.06 together with interest at 18% p.a. from the Respondent.

6. Feeling aggrieved by that award the Respondent filed Arbitration Petition No. 493 of 2003 in this Court. In that petition, the Respondent also challenged the order dated 8th October, 2002 passed by the Arbitral tribunal rejecting its preliminary objection. The Arbitration Petition was decided by the learned single Judge by order dated 19th August, 2004. Apart from challenging the order on the preliminary issue, the Respondent challenged the award in respect of Claim No. 1, Claim No. 2, Claim No. 7, Claim No. 8(item No. 5) and Claim No. 10. The

award for awarding interest was also challenged. The learned single Judge rejected the challenge to the order of the arbitral tribunal on preliminary objection. The learned single Judge, however, upheld the challenge in respect of Claim No. 1, Claim No. 2(I Part), Claim No. 7, Claim No. 8 (item No. 5) and Claim No. 10. As a consequence the learned single Judge set aside the award to the extent he upheld the challenges raised to the award.

7. In the Appeal filed by the Appellant they are challenging the order of the learned single Judge in so far as it upholds the challenge raised to the award by the Respondent and in the cross-objection the Respondent challenges the order of the learned single Judge upholding the order of the arbitral tribunal rejecting the preliminary objection, the order of the learned single Judge upholding the award of the learned arbitral tribunal in relation to interest as also the order of the learned single Judge rejecting the challenge in relation to claim No. 2(I Part). We have heard the learned Counsel appearing for both sides. We have also perused the record.

8. Claim No. 7: Tunnel Hazards The Appellant had made this claim before the Arbitrators in respect of tunnel hazards. The Arbitrators in paragraph 7.5 of their award have observed thus:

After going through all the relevant provisions in the contract agreement and the facts brought out by the Claimant and the Respondent during their written and oral submissions, we find that this claim does not fall under "Tunnel Hazards" as the procedure laid down in the agreement was not followed by the Claimant. As such the claimant's request for a mutually negotiated rate as provided under clause 50.2.5 can not be applied. However, we find that the Respondent has made deviations by not providing lining for most part of the tunnel and therefore the contractor was required to provide the smooth surface of the excavated tunnel profile. This could not have been envisaged by the contractor at the time of quoting his rates. Therefore, we are convinced that he had to put in extra efforts by way of removing intrusions from the excavated surface of the tunnel. This may be in our opinion the cause of excessive over breaks. We are unable to appreciate that the excess over breaks are the result of the improper survey made by the contractors especially in view of the appreciation of the quality of the work accorded by the Respondents as is evident from para 2.7 above. As about 90% surface of the tunnel is not lined or united, we hold that only 90% of the over breaks beyond 10% be paid. The total reconciled quantity of the over breaks beyond 10% is 15,127.00 Cubic meters. Out of this, as per the details given on page 460 of the Respondents submissions, 3,952.74 Cubic meters is with contractor's own equipment and 11,175.84 Cubic meters with imported machines. In our view the rate for such over breaks should not be higher than what is payable to the Claimant for 5 to 10% over breaks (it may be seen that the claimant has also demanded this rate in his Claim No. 8 item 6, page 12 for excavation with imported machine) and therefore we hold that the rate for these over breaks be as payable to the contractor under agreement for over breaks

between 5% to 10% over breaks. The total amount payable to the Claimant for over breaks beyond 10% specified would be as under:

We therefore hold that the Claimant be paid this amount for over-breaks beyond 10% specified provisions. As far as the payment of interest on this amount is concerned, we propose to deal with it separately.

9. The learned Counsel appearing for the Appellant submits that the learned single Judge has committed a patent error in setting aside the award relating to claim No. 7 only on the basis of oral submission advanced on behalf of the Respondent at the hearing of the Petition, even though the arbitration petition makes no reference to Claim No. 7 nor contains any ground/material fact for impugning the same, and despite the Appellant's objection to such challenge being entertained. It was submitted that the Arbitration Petition does not refer to Claim No. 7 or the amount awarded for the same, nor does it contain any ground challenging the same. It was submitted that in view of the provisions of Section 34 of the Act a challenge to an award in the absence of a specific ground being raised could not have been entertained. It was submitted that all the grounds on which the award was sought to be set aside have to be taken in the petition itself and that having regard to the provisions of Section 34 of the Act a ground of challenge to the arbitral award cannot be entertained or added or introduced by way of amendment into a Petition filed u/s 34, after expiry of the period of limitation laid down by Section 34. The Appellant relied on the judgment of this court in the case of Mrs. Pushpa P. Mulchandani and Others (All Petitioners Through Constituted Attorney/Authority Holder Shri Phatu R. Mulchandani) Vs. Admiral Radhakrishin Tahilani (Retd.) and Others, , as also another judgment of the Division Bench of this Court in the case of Jhunka-Bhakar Kendrachalak Sanghatna and Others Vs. State of Maharashtra and Others, . The learned Counsel refers to Rule 803(C) of the Original Side Rules of this Court and submits that unless the material fact in relation to a specific ground is stated in the petition, the challenge cannot be entertained. It was submitted that the Respondent had accepted that there is no reference in its Arbitration Petition to claim No. 7 and it was contended that it can challenge the award made against Claim No. 7 in view of ground (Q) in its petition. It was submitted that the ground (Q) merely contains a general statement that arbitrators have ignored the mandate of the contract and reference is made in relation to claim No. 1 and claim No. 10 and there is no reference to claim No. 7. It was contended that when oral submissions were made at the hearing of the petition in relation to ground No. 7, it was pointed out by the Appellant that there is no ground in the petition challenging the award in relation to Claim No. 7. Therefore, Notice of Motion No. 1734 of 2004 for amendment of the petition by adding new ground (Z) was taken out. The learned single Judge dismissed the Notice of Motion and while dismissing the Notice of Motion the learned single Judge had said that if the challenge is covered by existing ground in the petition, the Respondent can argue it. It was submitted that the order of the learned single Judge holding that because of ground (Q) the Respondent can challenge the award made against

claim No. 7 is unsustainable.

10. On the other hand, on behalf of the Respondent it is submitted that on bare reading of Section 34, an aggrieved party can approach the Court by an application for setting aside the award. There is no prescribed format for this application. After having made an application the Court will set aside the award only if grounds under Sub-clauses 1 to 5 of Sub-section 2(a) are proved to exist. As soon as an application is made, the Award is under scrutiny of the Court and on such scrutiny, if the party is able to prove that any of the grounds mentioned in Sub-section 2(a) exists, the court may set aside the Award. It is not necessary for the party to apply to the Court in any particular form. The learned Counsel for the Respondent further submits that whenever, under any statute there is a provision of a superior authority supervising the power exercised, it is not necessary that full factual gamut is placed before the Court. The reason for it is, the entire building up of the case i.e. pleadings, issues, contentions, evidence has to be laid before the authority which holds the first trial. On the conclusion of the trial, both the parties are fully aware as to their respective pleas and the defences raised. When the order in the trial is under scrutiny of the superior authority, unless an entirely new ground which is not taken in the trial is taken for the first time before such superior authority, there is no question of a surprise to the other party. Similarly, for the same reason there is no question of violation of the principle of natural justice. When a plea in the nature of grounds mentioned in Sub-Section 2(a)(i) to (v), is raised during the initial trial and negated, the other party is deemed to have a notice that it would be challenged in the application u/s 34. Procedural Rules framed by the High Court requiring statement of material facts, would not have the effect of altering the scope of Section 34. Further, even if the party is unable to furnish proof in support of grounds i) to v) under Sub-Section (a) of Section 34, if, on the perusal of the proceedings placed before the Court, if the Court finds existence of grounds 1 and 2 of Sub-Section (2)(d) of Section 34, it can set aside the award. Once the matter is before the Court and if even in the absence of the parties, the Court finds that grounds I and II, of Sub-Section 2(d) exists, the Court can set aside the award. The learned Counsel further submits that it is true that Section 34 begins with recourse to the Court by an application and also provides a limitation for making an application. Therefore existence of an application is a sine-qua-non for the Court being seized of the matter. However, once the matter is under is under the Court's scrutiny, there is nothing to indicate in the language of Section 34 requiring elaborate dilation of facts and circumstances leading to the grounds under clause i) to v) of Section 34(2).

11. The learned single Judge has dealt with this objection raised on behalf of the Appellant to the consideration of challenge to the award made against claim No. 7 in paragraphs 112, 113 and 114 of the order. Paragraphs 112, 113 and 114 read as under:

112. Mr. Chinoy had submitted that no ground had been made in the Petition

challenging the award relating to tunnel over-breaks and that the ground relied upon in the petition viz. ground (q) was merely a general ground not adequate to entitle the Petitioner to challenge the award in this regard. He further submitted that the material facts regarding this ground of challenge have not been pleaded. He, therefore, submitted that the Petitioner was not entitled; to challenge the award in respect of Claim No. 7. The submission is unfounded.

113. The Petitioner had taken out a Notice of Motion being Notice of Motion No. 1734 of 2004 for amendment of the Petition. I dismissed that Notice of Motion on the ground that if the amendments sought constituted a new challenge it was barred by limitation in view of the judgment of this Court in Pushpa N. Mulchandani v. Admiral R. Tahiliani (2001) LJ Soft 74. On the other hand, if it was covered by an existing ground or was merely an amplification of an existing ground, the Petitioner would be at liberty to urge the same. I had made it clear to the Respondent that they were at liberty to deal with this ground of challenge including by filing a further affidavit or fresh documents. The Respondent however did not choose to file any further affidavit or documents. In ground (q) the Petitioner had expressly taken the ground that the arbitrators had while making the award ignored the mandate of the contract. It was further stated that the same amounted to re-writing the contractual terms which they had no power to do. The Respondent, thereafter, illustrated this contention by furnishing two examples. The examples pertained to Claim No. 1 and Claim No. 10. The illustrations were prefaced with the words:

This amounts to re-writing of contract terms which no Court has the power e.g. (emphasis supplied). It is thus clear that the challenge on this ground was not restricted to Claim No. 1 and Claim No. 10.

114. In the circumstances, these grounds formed the basis of the challenge in respect of all the claims. It was not necessary for the Petitioner in such circumstances to set out the claim numbers. Having challenged all the claims on this ground, it was again not mandatory for the Petitioner to press its challenge in respect of all claims. Indeed, in the affidavit in reply to the petition there is no grievance of ground (q) being vague. Nor was the Petitioners in any manner called upon to specify the claims it intended to challenge. It often happens that various grounds are taken in pleadings, only some of which are finally pressed.

12. Perusal of the above quoted paragraphs from the order of the learned single Judge shows that according to the learned single Judge he passed an order on Notice of Motion No. 1734 of 2004 dismissing the Notice of Motion. We asked the parties to produce the order passed on Notice of Motion No. 1734 of 2004. They informed us that they did not have a copy of order passed on Notice of Motion No. 1734 of 2004. Therefore, we called for the original records. Perusal of the original record of Notice of Motion shows that the learned single Judge has not made any order on that Notice of Motion either dismissing it or allowing it. However, it is common ground before us that when that Notice of Motion was heard, the learned single Judge during the course of hearing had observed that if

the challenge was covered by an existing ground, the Respondent would be at liberty to urge the same. The position as record stands, therefore, is that the Notice of Motion taken out by the Respondent for introducing a ground challenging the award made in respect of Claim No. 7 was not disposed of by the learned single Judge by any order made on that Notice of Motion. However, if one goes by the judgment which is impugned in the petition, the learned single Judge dismissed the Notice of Motion on the ground that if the amendment constituted new challenge, it was barred by the law of limitation laid down in Section 34 of the Act, and if it was covered by an existing ground, then the Respondent was free to argue it. Therefore, the question to be considered by us is whether the ground (q) of the petition of the Respondent was enough to comply with the requirement of law and was enough to give notice to the Appellant that by that ground the Respondent was challenging the award made by the arbitral tribunal in respect of Claim No. 7. Ground (q) reads as under:

q. The Arbitral Tribunal should have considered that as per the provisions of Section 28(3) of the Arbitration & Conciliation Act, the Arbitrators are under statutory obligation to decide in accordance with the terms of the contract. However, in the present award the Arbitrators either ignored the mandate of the contract clauses or interpreted in such a way to give benefit to the claimant contractor. This amounts to rewriting of contract terms which no court has the power e.g. In Claim No. 1, as per clause 42.1 of special Conditions of contract recovery of the scrap and unaccounted steel is permitted at twice the rate prevailing market rates- the arbitrators held that it is not just and equitable. Similarly, as per clause 10.4.8 of the Special Conditions of Contract, KRCL is not responsible for any power failure etc. and the contractors were advised to keep their own stand by DG set, however, the arbitrators ignored this clause and KRCL is held responsible for power failures.

13. So far as the Arbitration Act is concerned, the provisions that is relevant is contained in Sub-section 1 and Sub-section 2 of Section 34. It reads as under:

34. Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if:

(a) the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the

appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of Sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

14. Perusal of the above quoted provisions shows that the award made by the arbitral tribunal can be challenged by making an application to the court for setting aside such award. The section itself does not give any form of the application. But Sub-section 2 of Section 34 specifies the ground on which the award made by the arbitrator can be set aside by the court. This Court has framed Rules under the Arbitration Act. Rule 803C(a) is relevant for the present purpose. It reads as under:- 803C(a) Every petition shall be divided into paragraphs numbered consecutively and shall contain a concise form of statement of the material facts relied on and the nature of the relief asked for and shall clearly specify the persons liable to be affected thereby.

The original Arbitration Agreement or the Award or duly certified copy thereof, if any, shall whenever necessary be annexed to the petition.

15. Perusal of the above quoted Rule shows that it is a requirement of this Rule that the Petitioner makes a concise statement of the material facts relied on by the Petitioner in support of his challenge to the award. Section 34(3) prescribes the time limit within which the petition challenging the arbitral award can be filed. So far as this Court is concerned, it is now a settled law, that the time limit prescribed u/s 34 is absolute and unextendable and that a ground of challenge to arbitral award could not be introduced by way of amendment into the petition filed u/s 34, after expiry of the statutory period. If a general ground that the

arbitrators had acted contrary to the contract without specifying which claim awarded was contrary to which term of the contract is considered to be adequate pleading for setting aside the award u/s 34, the question of unextendable time limit or of ground not being permitted to be introduced by way of amendment would never arise. A Petitioner would only have to file one page petition alleging that the Arbitrator had acted contrary to the contract and then, thereafter at the hearing of the Petition the Petitioner would be able to refer to a specific claims awarded which according to him were contrary to specific clauses of the contract. If grounds and material facts regarding each challenge to the award are not stated, the opposite party would not know which part of the award is being challenged and the ground of challenge and would not be in a position to respond to or deal with the challenge. It is claimed that if the material facts in relation to challenge are stated in the petition, details can be provided subsequently. The question as to what constituted material facts in relation to challenge to an award has been considered by the Supreme Court in its judgment in the case of Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, . The Supreme Court in paragraph 13 of its judgment observed thus:

13. ...The High Court appears to have lost sight of the well recognised distinction between statement of material facts which is required under Order 6 Rule 2 CPC and particulars which are required to be stated under Order 6 Rule 4 CPC. In the context of Section 83(1)(a) and (b) of the Representation of the People Act, 1951, which contains provisions similar to Order 6 Rules 2 and 4 CPC, this Court, after posing the question, what is the difference between material facts and particulars, has observed: (SCC pp.250-51, para 29)

The word "material" shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. The material facts thus will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficiency of the words "material facts" will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all.

If a petitioner has omitted to allege a corrupt practice, he cannot be permitted to give particulars of the corrupt practice.

One cannot under the cover of particulars of a corrupt practice give particulars of

a new corrupt practice. They constitute different causes of action.

This is in consonance with the rule that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it. (See: *Abdool Hoosein Zenail Abadin v. Charles Agnew Turner*.) The same is true for the charge of misconduct. This means under Order 6 Rule 4 CPC particulars have to be furnished of the plea of fraud or misconduct raised in accordance with Order 6 Rule 2 CPC and it is not permissible to introduce by way of particulars a plea of fraud or misconduct other than that raised in the pleadings.

16. In our opinion, therefore, it cannot be said that only on the basis of what is contained in ground (q), challenge to the arbitral award in relation to the claim No. 7 could be raised. It was contended on behalf of the Respondent that the Court can u/s 34(2)(b) of the 1996 Act suo-motu consider setting aside the award regarding Claim No. 7 and reliance has been placed in the decision in the case of *Hastimal Dalichand Bora and Others Vs. Hiralal Motichand Mutha*, . Reference was also made to difference in the language used in Section 34(2)(a) and Section 34(2)(b) of the Act. Section 34(1) expressly stipulated that the award can be challenged only by an application for setting aside that award in accordance with Sub-section 2 and Sub-section 3 and therefore, this excludes any suo-motu action by the court to invalidate an award. The decision of this court in *Hastimal's* case was considered by the Supreme Court in its judgment in the case of *Madan Lal Vs. Sunderlal and Another*, . The observations of the Supreme Court in paragraphs 8 and 10 of its judgment in the case of *Madan Lal*, in our opinion, are relevant. They read as under:

8. It is clear therefore from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in Section 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Article 158 of the Limitation Act. If no such application is made the award cannot be set aside on any of the grounds specified in Section 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.

10. Learned Counsel for the appellant however urges that Section 17 gives power to the court to set aside the award and that such power can be exercised even where an objection in the form of a written statement has been made more than 30 days after the service of the notice of the filing of the award as the court can do so suo motu. He relies in this connection on *Hastimal Dalichand Bora v. Hiralal Motichand Muthe and Saha & Co. v. Ishar Singh Kripal Singh*. Assuming that the court has power to set aside the award suo motu, we are of opinion that power cannot be exercised to set aside an award on grounds which fall u/s 30 of the

Act, if taken in an objection petition filed more than 30 days after service of notice of filing of the award, for if that were so the limitation provided under Article 158 of the Limitation Act would be completely negative. The two cases on which the appellant relies do not in our opinion support him. In Hastimal case it was observed that "if the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void it would be open to the court to consider this patent defect in the award suo motu, and when the court acts suo motu no question of limitation prescribed by Article 158 can arise". These observations only show that the court can act suo motu in certain circumstances which do not fall within Section 30 of the Act.

17. It is to be seen that so far as 1996 Act is concerned, there is no provision similar to the Section 34 of the 1940 Act. Therefore, it cannot be said that in the scheme of 1996 Act there is any suo motu power in the court to set aside an award and the power of the Court of suo motu setting aside an award in 1940 Act do not extend to set aside the award on the grounds which fall within Section 30 of the 1940 Act. In our opinion, therefore, the submission has no substance. It is to be seen that the challenge both under Sections 34(2)(a) and 34(2)(b) is adversarial and adjudicatory and is not suo motu or inquisitorial. Under both Sub-sections 34(2)(a) and 34(2)(b) appropriate grounds and material facts for such grounds, need to be stated in the Petition. The only difference in Section 34(2)(b) is regarding the burden of proof, apparently on the basis that a Court would be aware of the law for the time being in force and the public policy of India. In our opinion, therefore, the learned single Judge was not justified in considering the challenge to the award in relation to Claim No. 7 only on the basis of ground (q) in the petition. The order of the learned single Judge to that extent is liable to be set aside.

18. Claim No. 2:

The Respondent challenged the award in respect of Claim No. 2. The challenge was in respect of the arbitrators having reduced the value of "R" in the forms specified in the contract for calculating escalation. The Arbitrators in paragraph 2.5 of the award, so far as Claim No. 2 is concerned, have observed thus:

2.5 In the instant case, explosive and detonators are supplied by the Respondent at fixed prices in accordance with the provisions of the contract and as such no price variation is payable for these items. Formula given under Clause 28.6 are to be adopted only in case of labour, fuel and other materials. Percentage of these components is given under Clause 28.4. It is to be noted that these percentages are for the gross value of the work executed. The confusion arises only because under Clause 28.6, "R" is defined as gross value of the work done by the contractor as per on account bill (s) excluding the cost of materials supplied by Corporation at fixed prices. Respondent has supplied at fixed prices explosives and detonators. If the value of these items is reduced from the amount of the gross value of the work done, percentage of labour, fuel & other material get automatically reduced and the total of all the components would no

longer be 100; i.e. reduction in value of R would automatically mean reduction in the percentage of the components specified under Clause 28.6. During oral submissions, the Claimant stated that in the initial stages, the Respondent has computed and paid the escalation amounts on the basis of the gross value of bill taken as R but at a later date they started making deductions for the supply of explosives and detonators. These deductions are not very logical as assuming that the Contractor has procured these items from the market at a fixed price, the value of R for computation of labour, fuel and other materials shall have to be considered all inclusive, although the Claimant would not get any escalation for explosives and detonators. In view of this we are of the opinion that for calculation of price variation for labour, fuel and other materials, gross value of work done as per on account bills be taken in computation as "R".

19. The learned Counsel appearing for the Appellant submits that the learned single Judge has set aside the award regarding Claim No. 2 solely on the basis that the Arbitrators had not interpreted Clause 28.6 regarding the components of "R", but had acted contrary to the same. It was submitted that it was contrary to the ground pleaded in the petition regarding Claim No. 2. It is ex-facie contrary to the contract. It is submitted that dispute regarding the correct interpretation of the clause had arisen between the parties and the arbitrators had granted the claim based on their interpretation of the said contract clause. It was submitted that the order of the learned single Judge is contrary to the settled legal position that even if such interpretation is found to be erroneous then also it cannot be interfered with. It was submitted that the only exception to this rule is where the arbitrators' interpretation of the contractual clause is challenged in the petition as disclosing an error of law apparent. It was submitted that the only ground on which the award in relation to Claim No. 2 was challenged was that the arbitral tribunal in awarding this claim has lost sight of the fact that as per the agreed conditions the fixed components is to be deducted from the gross value of running bills to arrive at the value of "R". The learned Counsel submitted that the learned single Judge has set aside the award made in relation to Claim No. 2 on finding that the arbitrators have acted contrary to Clause 28.6 in the contract. Such of ground was never pleaded in the petition. The learned single Judge has committed an error in holding that the Arbitrators have not interpreted the clause 28.6. The learned Counsel took us through the award to contend that the learned single Judge has himself noted that the Arbitrators have interpreted the clause.

20. On behalf of the Respondent it was contended that value of "R" is a mathematical formula. It does not allow interpretation. The arbitrators' reasoning cannot be construed as an interpretation. The arbitrators have after quoting the contract term, have completely ignored it while granting the claim. The appellants have made much ado about the language of the ground "J". The Respondent has contended that while arriving value "R" the arbitrators lost sight of the fact that value of material supplied at fixed rates had to be deducted. The import of the ground is that the contractual term has been given a go bye while

awarding the claim. The Award shows that after reproducing the clause the Arbitrators treated the Deduction clause as non-existent. The hair splitting of the ground is not justified in as much as the ground clearly takes exception to the fact that the awarded claim is by-passing the contractual term.

21. It was not disputed before us that if the term in the contract is interpreted by the arbitrators and if the interpretation of the term in the contract by the arbitrators is found to be erroneous by the court, then also the court cannot interfere with the award. The whole debate was whether the arbitrators have made the award against claim No. 2 on interpretation of the relevant clause or by disregarding that clause. In our opinion, it becomes clear from paragraph 2.5 of the award which is quoted above that when the arbitrators have found that literal reading of clause 28.6 leads to absurd result, they declined to read it literally and interpreted the clause and made the award. The learned single Judge, however, observed in paragraph 86 of the judgment thus:

86. I will assume that there was a dispute regarding the import or effect of the clause. I will also assume that the parties were not ad-idem about the interpretation of the clause. I will further assume that the arbitrators were called upon to interpret the clause. I cannot, however, assume that the arbitrators interpreted the clause as suggested by Mr.Chinoy. They quite plainly did not. This is clear from paragraph 2.5 of the award....

22. The learned single Judge, thus, assumed that the arbitrators were called upon to interpret the clause. But he holds that the arbitrators did not interpret the clause, but they disregarded it. In our opinion, it is clear from paragraph 2.5 of the award quoted above that when the arbitrators found that if the value of the material supplied by the Respondent is excluded while calculating the value of "R", it resulted in illogical situation and interpreting the relevant provisions of clause to mean that even the value of the material supplied by the Respondent is to be taken into consideration while arriving the value of "R", they awarded the claim. In our opinion, this was nothing but interpretation of the relevant clause of the contract and as it was not debated before us that if a particular clause in the contract is interpreted by the arbitrators, then even if the court finds that the interpretation is erroneous then also the court is not justified in interfering with the award, the award could not have been interfered with. The Supreme Court in its judgment in the case of Bijendra Nath Srivastava referred to above, even in relation to an award made under 1940 Arbitration Act, has held that the court has to regard the arbitrators' award binding between the parties since the arbitrator is a tribunal selected by the parties. Following observations of the Supreme Court in Bijendra Nath case, in our opinion, are relevant. They read as under: "20. We would now proceed to deal with the question as to whether the High Court was right in setting aside the award made by the arbitrator. As regards an award made by an arbitrator under the Act the law is well settled that the arbitrator's award is generally considered binding between the parties since he is the tribunal selected by the parties...."

23. In our opinion, the learned single Judge was not justified in interfering with the award made by the arbitrators in relation to claim No. 2. The order of the learned single Judge to that extent, therefore, is liable to be set aside.

24. Claim No. 8(5)

The Appellant claimed various amounts under the head "operation of the imported excavation machines". The contractual rate for this item is agreed to be Rs. 215 + 14% towards overheads and profits. Thus, initially contractual rate comes to Rs. 245.10 per Cubic meter for working on imported excavation machines. After the machines were imported the Appellant made a representation for revision of this rate. A subsidiary agreement was entered into between the parties on 4th May, 1994. In the subsidiary agreement the rate of Rs. 507/- per cubic meter was agreed. The case of the Respondent was that they agreed to the rate of Rs. 507/- per cubic meter under financial duress and therefore they were entitled to claim higher rate. The arbitrators accepted the case of the Appellant and held that the Appellant was entitled to payment at a rate higher than the one which is specified in the subsidiary agreement. The award made in relation to Claim No. 8(5) was challenged by the Respondent in grounds o, p, & r of the Arbitration Petition. Ground "r" alleged that the claim was an excepted matter. The ground has been rejected by the learned single Judge. There is no cross-appeal or cross-objection in relation to this. Ground "o" impugned the Arbitral tribunal's adding 25% towards other costs to the departmental working/cost of Rs. 406.47 per cubic meter and awarding Rs. 507 per cubic meter i.e. this ground accepted the rate of Rs. 406.47 per cubic meter, but alleged that there was no basis for the increase to Rs. 507 per cubic meter. Ground "p" alleges that the arbitrators had lost sight of the fact that the Appellant had already realised at the rate of Rs. 245.10 per cubic meter and additional benefits of Rs. 90 per cubic meter under the settlement agreement. Thus, the challenge to the award in this regard was that the arbitrators should not have awarded anything in excess of what is provided in the subsidiary agreement. The learned single Judge negatived the challenge that it was an excepted matter. He accepted the submission made on behalf of the Appellant that the rate mentioned in the supplementary agreement was agreed to by the Appellant under financial duress and therefore, held that as the supplementary agreement does not operate, the parties must revert to the rate mentioned in the original agreement. It is obvious that it was nobody's case that the Appellant is entitled to payment at the rate mentioned in the original agreement. Thus, the learned single Judge accepted the case which was not pleaded by the Respondent. The case of the Respondent was that the Appellant is entitled to payment at the rate mentioned in the supplementary agreement, which was admittedly higher than the rate mentioned in the original agreement. In our opinion, therefore, the order made by the learned single Judge setting aside the award made against this Claim No. 8(5) is liable to be set aside, because it has been set aside for a reason or ground which was not urged in the arbitration petition. The order made by the learned single Judge, therefore, in this regard is

contrary to the provisions of Section 34 of the Arbitration Act as also the principles of natural justice.

25. Claim No. 10

The Appellant had made this claim contending that during the course of the work there was automatic breakdown in electrical power on all the three working sites of the tunnel, which disrupted the work extensively and beyond any reasonable imagination. The effect of the break down was delay in execution of work and that increased over heads and idle labour costs. The Appellant, therefore, claimed an amount of Rs. 62,82,000/- with interest. Under the contract the Respondent was to provide for power upto the substation and thereafter the responsibility was of the Appellant. Clause 10.4.8 provided that the Respondent does not hold itself responsible for any power failure, power shut-down or break down of substation equipment. The arbitral tribunal held that because responsibility to bring power upto substation was on the Board, failure to supply power to substation is attributable to the Board and therefore, the claim was awarded. The learned single Judge held that this part of the award is contrary to Clause No. 10.4.8.

26. On behalf of the Appellant it was contended that the challenge to the award on this count on behalf of the Respondent was that the relevant clause in the contract has been overlooked by the arbitral tribunal. According to the Appellant, the clause was not overlooked by the arbitral tribunal, but the arbitral tribunal interpreted that clause and held that for failure of supply upto substation, the Respondent can be held liable.

27. It was contended on behalf of the Respondent that there is no clause in the agreement which makes Respondent liable for payment for delay caused due to power failure. On the contrary, clause 10.4.8 makes it clear that the parties have agreed that the Respondent will not be responsible for the delay, and therefore, according to the Respondent the award made in this regard was clearly contrary to the relevant terms of the contract.

28. Now, perusal of the record shows that the arbitrators have referred to clause 10.4.8 which in terms says that the Respondent will not be responsible for any power failure, power shut down or break down of the substation equipment. It is clear from the award that there is not even an attempt made by the arbitral tribunal to interpret this clause. The arbitral tribunal has held that to bring the power upto the substation was the responsibility of the Respondent and therefore when there was failure to bring the power upto the substation and because of that any delay was caused, then the Respondent can be held liable. But while recording this finding, the arbitral tribunal overlooked that under clause 10.4.8 the Respondent was not to be liable or responsible when there is a failure of power supply even due to break down of substation equipment. In our opinion, therefore, the finding recorded by the learned single Judge that the award made by the learned arbitrator in relation to Claim No. 10 is contrary to the term in the

contract is valid and the learned single Judge was perfectly justified in recording that finding. In our opinion, the learned single Judge has rightly set aside the award made against Claim No. 10 and no interference at our hands is called for with that part of the order of the learned single Judge.

29. Claim No. 1:

The Appellant claimed various amounts in respect of running bill No. 66,67 & 68. The Respondent contended that Bills Nos. 66 & 67 were passed, but payment in respect thereof has not been released as the amount thereunder were to be adjusted towards the recovery due from R.A. Bill No. 68, which was the final bill. The recoveries were on various counts. The recovery in relation to which claim No. 1 was made relates to recovery made in relation to steel not recovered. The Respondent adjusted an amount of Rs. 13,60,500/- on account of steel issued to the Appellant. The Appellant did not deny that amounts were to be recovered on this count by the Respondent, but contended that the same should be at the normal rate as against the rate at which the Respondent sought to recover the same viz. at the then prevailing market rate. The Arbitrators permitted the Respondents to recover amounts for those item only in the sum of Rs. 8,07,469/-. The learned single Judge has held that the award made by the learned arbitrators on this count is ex-facie unsustainable as is contrary to the existing clause in the contract.

30. It was contended on behalf of the Appellant that the finding of the learned single Judge is contrary to the record. It is submitted that the award refers to the relevant clause. It also refers to a joint note and the Appellant's case recorded therein that the steel had been used in ancillary work. The award also refers to the case of the Appellant that the steel was not accounted for and has been used for ancillary work and the fact that the Appellant had given details about usage of such steel in such ancillary work. The Arbitrators on the above basis denied the recovery under clause 42.16.5.1 which was for unaccounted steel and permit recovery only on normal market rate.

31. On behalf of the Respondent, on the other hand, it is submitted that the steel is supplied by the Respondent at fixed rate. Clause 42.5 of the special condition of contract is of deterrent nature. The contractor is not supposed to take material from the Respondent in excess of requirement. The parties with open eyes have accepted the terms of the contract. It is not open to the arbitrators to go beyond the agreed terms and award in violation of the term. The reason given by the arbitrators about availability of the steel and use for ancillary work is entirely irrelevant.

32. The judgment of the learned single Judge shows that according to the learned single Judge the arbitrators were not even called upon by the parties to find out what was the intention behind incorporation of that particular clause in the contract. We find our self in agreement with the reasons given by the learned single Judge. The claim has been granted going contrary to the term in the

contract by holding that the term has become outdated. None of the parties called upon the arbitrators to decide this aspect of the matter. The arbitrators, therefore, in our opinion, were not entitled to make an inquiry into the purpose for which the term was included in the contract. The submission on behalf of the Appellant that the arbitrators have interpreted the term in the contract and therefore that interpretation could not have challenged or even interfered with has no substance, because the Arbitrators have not interpreted the term, all that they have said is that the term has become outdated. The arbitrators have acted contrary to Section 28(3) of the Arbitration Act, which mandates the Arbitrators to decide in accordance with the terms of the contract. Therefore, we see no reason to disturb the order of the learned single Judge in so far as Claim No. 1 is concerned.

33. So far as the Appeal is concerned, therefore, in our opinion, the order made by the learned single Judge setting aside the award in relation to Claim No. 7, Claim No. 2, Claim No. 8(5) are concerned, they are liable to be set aside. With the result, the award made by the arbitrators in favour of the Appellant in relation to these claims will stand restored. So far as the order made by the learned single Judge in relation to Claim No. 10 and Claim No. 1 is concerned, it is upheld and appeal to that extent is dismissed.

34. Cross-Appeal Now, taking up the cross-appeal filed by the Respondent for consideration, the order of the learned single Judge in so far as it holds that the arbitrators were justified in rejecting the objection raised to the constitution of the arbitral tribunal is challenged in the cross-appeal. The objection, in short, was that the nominee of the Chief Justice u/s 11 of the Arbitration Act should have appointed the arbitrator following the procedure which is laid down by Clause 63(3) of the Arbitration Act. Clause 63 has been quoted by the learned single Judge in his judgment. It is common ground that the procedure laid down for constitution of the arbitral tribunal consisting of more than one arbitrator was relevant. Perusal of the relevant provision in the contract shows that when the arbitration clause is invoked by the contractor, the Respondent has to send a panel of more than three names of the officers of the appropriate status of the Corporation to the contractor, who has to suggest a panel from the three names out of the list so sent by the Corporation. The Chairman thus appoints one of the three names sent by the contractor as contractor's nominee and then appoints another arbitrator as nominee of the Corporation, who should be an officer of equal status. Then the two arbitrators appoint the third arbitrator. Admittedly, after the arbitration clause was invoked, the Corporation did not send the list of officers. Then the contractor made repeated request, but the Corporation did not send him the list of arbitrators. Therefore, the contractor filed an application u/s 11 before this Court. The nominee of the Hon"ble the Chief Justice by order dated 24th December, 1998 appointed two arbitrators. Perusal of the order passed by the nominee of the Hon"ble the Chief Justice shows that the objection was raised by the Respondent to the effect that in stead of the nominee of the Hon"ble the Chief Justice appointing the two arbitrators, he should call for a

panel from the Respondent and then make appointment of the arbitrators. That objection was overruled. The question, therefore, that arises for consideration is whether the nominee of the Hon'ble the Chief Justice while making appointment of arbitrators under Sub-section 6 of Section 11 is required again to direct the Respondent, who has failed to act according to the arbitration clause, to submit a panel and then make the appointment or is competent to make the appointment himself. According to the Respondent, the nominee of the Hon'ble the Chief Justice ought to have called upon the Respondent to submit the list of the arbitrators as required by clause 63 and thus should have followed the procedure laid down in clause 63.

35. On behalf of the Appellant, it was submitted that the arbitral tribunal has, in rejecting the objection raised on behalf of the Respondent, relied on the decision of the Supreme Court in the case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, wherein the Supreme Court has held that in a case covered by Section 11(6) right of the opposite party to appoint the arbitrator would continue till the application u/s 11(6) is filed. Once the application is filed, the right of the parties to appoint the arbitrator ceases. In the submission of the learned Counsel for the Appellant, therefore, there is no substance in the submission made on behalf of the Respondent that there is any error in the judgment of the learned single Judge in so far as this aspect of the matter is concerned. Perusal of the judgment of the learned single Judge shows that the learned single Judge has relied on the judgment of the Supreme Court in the case of Datar Switchgears Ltd. referred to above. The order of the learned single Judge further shows that he has considered every aspect of the matter in detail. The learned Counsel appearing for the Respondent could not point out to us anything which will show that there any error in the finding recorded by the learned single Judge. What is to be noted here is that even according to the Respondent the nominee of the Hon'ble the Chief Justice had jurisdiction to appoint the arbitrator in view of the failure of the Respondent to follow the procedure laid down u/s 63. But according to the Respondent that should have been done by following the procedure laid down u/s 63. Now, the question that arises is, had the learned single Judge decided to follow the procedure laid down u/s 63, he will be required to direct the Respondent to submit a list of arbitrators. The question arises as to what he would do, if the Respondent fails to submit the list of arbitrators, obviously, then he will have to appoint the arbitrator chosen by himself. The learned Counsel could not give any satisfactory reason as to why the Respondent, which failed to perform its duty under Clause 63 despite repeated request made by the Appellant should again be called upon to send a panel of arbitrators. In our opinion, as it is not even the case of the Respondent that the nominee of the Hon'ble the Chief Justice lacks jurisdiction to appoint the arbitrators and that the arbitrators appointed by him did not have the required qualification, there is no substance in this objection.

36. Claim No. 2 Freezing of Indices This claim pertains to escalation (price variation). The Respondent challenged the award, in so far as the arbitrators held

that the Respondent" freezing indices as of June, 1994 for the purpose of calculating the escalations on the extended period of contract were not correct and in conformation with the provisions of Clause 28.10 of the Special Conditions of Contract. According to the Respondent, as per the extension granted by the Respondent no escalation was payable after 1st July, 1994. Hence indices were frozen after 1st July, 1994 in respect of calculation of escalation for the extended period. This, the Respondent contended, was as per the relevant clause No. 28.10.2.1 & 28.10.2.2 of the Special Conditions of Contract. If Clauses 28.10.2.1 & 28.10.2.2 are to operate the freezing of the indices was justified. But after the arbitrators having come to the conclusion that the Appellant was in default, the said clauses do not come into operation.

37. We have heard the learned Counsel for both sides in detail on this aspect. Perusal of the record shows that the arbitrators have come to the finding of fact that the Appellant was not at fault and that extension was not required to be granted due to the fault of the contractor. This is the finding of fact recorded by the arbitrators and confirmed by the learned single Judge. In our opinion, therefore, we will not be justified in disturbing this finding. The arbitrators have also found on the basis of the contents of the letter dated 16th March, 1995 that the Respondent had itself waived the levy of liquidated damages. This is also a finding of fact. Really speaking the award made by the arbitrators in this regard is based on these two findings of fact, which we do not see any reason to disturb. In our opinion, therefore, we will not be justified in interfering with the order of the learned single Judge in so far as this aspect of the matter is concerned.

38. In the cross-objection the Respondent also challenges the order of the learned single Judge rejecting its objection to awarding of interest by the Arbitrators. The Respondent challenged the grant of interest by the Arbitrators at 18% p.a. on the ground that under Clause 15.4 of the General Conditions of Contract, no interest is payable by the Respondent to the Appellant. Perusal of the order of the learned single Judge shows that it was contended before the learned single Judge that the Appellant cannot urge this ground because the only ground on which the award in this regard is challenged in the petition filed by the Respondent was that the rate of interest awarded is exorbitant. The Respondent, however, again relied on the same ground in the petition i.e. ground No. (q) to say that even this ground can be urged. The learned single Judge has considered this ground on merits. Perusal of the judgment of the learned single Judge shows that the learned single Judge relying on the judgment of the Supreme Court in the case of *The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age*, , in which case also the Supreme Court has considered the term in the contract relating to payment of interest and held that the arbitrators have interpreted the term, they were within their jurisdiction in interpreting the term and therefore award in that regard cannot be challenged. It is clear from the order of the learned single Judge that it was not even submitted by the Respondent that awarding of interest at 18% p.a. is not justified. The only

submission was that awarding of interest is contrary to the term in the contract. As the arbitrators have considered that term in the contract and interpreted it to mean that it does not operate to prevent the arbitrators from awarding the interest, in our opinion, in view of the settled law in this regard that interpretation of a term in the contract is within the jurisdiction of the arbitrators and therefore, even if interpretation is found to be erroneous, it cannot be interfered with unless it results in failure of justice, we see no reason to interfere with the order of the learned single Judge in this regard. In view of this cross-appeal fails and is dismissed.

39. In the result, therefore, the Appeal is partly allowed as indicated above and the cross-appeal is dismissed.