

(1997) 08 SHI CK 0018
In the High Court Of Himachal Pradesh
Case No : F.A.P. No. 158 of 1990

R.J. Shah and Company Ltd.	Vs	APPELLANT
H.P. State Electricity Board and Others		RESPONDENT

Date of Decision : 29-08-1997

Acts Referred:

Arbitration Act, 1940 — Section 11 , 12, 14(1), 14(2), 20
Limitation Act, 1963 — Article 178

Citation : (1998) 2 ShimLC 211

Hon'ble Judges : M. Srinivasan, C.J.;A.L. Vaidya, J

Bench : Division Bench

Advocate : Soli Sorabji, Atul Chitale and Abhilasha Kumar, for the Appellant;
K.D. Sood, for the Respondent

Final Decision : Dismissed

Judgement

M. Srinivasan, C.J.—The Appellant and the first Respondent entered into an agreement on 2.12.1967 for the construction of Giri Hydro Electric Project, in District Sirmaur, in Himachal Pradesh. The estimated cost of the works was about Rs. 504 lakhs and the Project consisted of the following main structures:

Tender Cost :- Construction of

(i) Barrage Across River Giri Rs. 1,77,67,417/-

(ii) Head Race Tunnel Rs. 2,28,92,175/-

(iii) Laying of Penstocks Rs. 54,21,560/-

(iv) Power House Rs. 43,33,955/- ----- Total Rs. 5,04,15,107/-

2. That agreement was subsequently superseded by Anr. agreement dated 21.9.1979 with reference to the arbitration clause which was found in Clause No. 3.3.22 in the Original Contract. Under the new agreement the provision was for three Arbitrators called the High Powered Committee.

3. The work was to start from 17.12.1967 and to be completed in 3 years i.e. by 16.12.1970. But the work was not completed by the stipulated date. It was actually completed on 27.2.1978. On the completion of the Project the final bill was settled by the first Respondent at Rs. 12,31,56,348. But before that there were three references to arbitration and three awards were passed. The first award was passed on 4.12.1970, the second award was on 25.5.1973 and the third award was passed on 20.11.1976. Under the third Award the escalation of prices was taken note of and the rates payable for different works were fixed. As per that award the first Respondent was to pay a sum of Rs 47 lakhs in addition to the amounts already paid to the Appellant, for the work done prior to 30.6.1975, As regards the work done after 30.6.1975 the award directed the first Respondent to pay at the rate shown against each item of work and also observed that the rates shall be adjusted for the various escalations as detailed in the first Respondent's letter dated 23.12.1974 reckoning the minimum wages and the various indices obtaining on 30.6.1975 as the base. It is thereafter the work was completed and it is not in dispute that payments were made in accordance with the rates specified in the aforesaid award.

4. The Appellant made certain claims including a claim for damages on account of the delay in completion of the Project for which according to the Appellant the first Respondent was responsible. The claims made by the Appellant were disputed and the first Respondent made some counterclaims.

5. As the dispute had to be settled by arbitration as per the terms of the Contract the Government of Himachal Pradesh issued a Notification on 20.1.1980 appointing three persons to examine and adjudicate upon the claims and disputes as setout in the agreement dated 21.9.1979. The said three persons were:

(i) Hon"ble Justice Chet Ram Thakur-(Retd.) Retired Judge of HP. High Court as Chairman.

(ii) Shri N.G.K. Murti-Ex-Chairman Bhakra & Beas Management Board as a Member.

(iii) Shri V. Subramanian-Ex-Accountant-General of HP. as Member.

The High Powered Committee started functioning from 3.3.1980, but the Chairman died on 25.12.1980. The Government issued a fresh notification on 21.2.1981 appointing Mr. Justice D.B. Lal, Retired Judge of this Court as Chairman of the Committee to fillup the vacancy. While that Committee was functioning the Government issued a notification on 28.12.1981 abolishing the said Committee with immediate effect and by Anr. notification of the same date appointed a new Committee consisting of Mr. Justice D.K. Mahajan, Retired Chief Justice of Punjab and Haryana High Court, Mr. Y. Krishan Retired Deputy Controller and Auditor-General of India and Sh. M.S. Mukherjee, Finance Secretary.

6. The first Respondent filed a petition on 29.1.1982 in this Court being CMP No. 2 of 1982 u/s 33 of the Arbitration Act or in the alternative under Sections 5, 11 and 12 of the Act praying for appointment of the New Committee or revocation of authority of the old Committee. When the matter came up before the Court on 15th July, 1982, the Court passed inter alia the following order:

It is suggested by the learned Counsel for the applicant and Respondent No. 1 that an opportunity be given to bring about some sort of understanding regarding the constitution of a High Powered Committee. The learned Counsel for the State, however, urges that the Notification abolishing the first High Powered Committee is valid and the Government is not going to change its stand. In view of the suggestion of the learned Counsel for the applicant and Respondent No. 1, it is desirable that an opportunity be given to them for the purpose. Mr. Pathak, learned Counsel for Respondent No. 1, states that the Board may suggest some date and place to discuss the matter.. In case some agreed solution is worked out, the matter may be disposed of in accordance therewith and in case it is not so, the remaining arguments on preliminary issues would be heard...

7. Again on 23.9.1982 the following order was passed:

It is agreed by the learned Counsel for the Himachal Pradesh State Electricity Board and of the Contractor that each party will nominate the Arbitrator of their choice. So far as the appointment of the Chairman is concerned, it is agreed that after the parties have nominated the Arbitrators of their choice the question will be determined with the concurrence of the parties...

8. The matter was finally disposed of on 23.11.1982 with the following order:

It is agreed by the parties that they shall nominate one arbitrator each of their choice. It is further agreed that the third member would be nominated by the Government of Himachal Pradesh. The H.P. State Electricity Board has nominated Mr. D.K. Mahajan (Retired Chief Justice of Punjab and Haryana High Court) as its nominee whereas M/s. R.J. Shah and Company Limited has nominated Shri N.G.K. Murty (Ex-Chairman of Bhakra and Beas Management Board) as their nominee. It is further agreed that the Himachal Pradesh Government shall nominate a Chairman or Convener out of anyone of the three nominated members. It is stated by Mr. S.M. Sud that he has objection to the nomination of Shri Murty as an Arbitrator as the Electricity Board has alleged bias and misconduct against him. On the contrary, it is contended by Shri Pathak that similarly the R.J. Shah and Company Limited has objection to the nomination of Shri D.K. Mahajan as a nominee of the Electricity Board. Without prejudice to the rights of the parties to raise these matters in appropriate proceedings warranted under law, the Board of Arbitrators, consisting of the members nominated/to be nominated, will act as the Board of Arbitrators to adjudicate upon the dispute between the parties, under the Arbitration Act.

It is stated by Mr. Kapil Sibbal, who appears for the State of Himachal Pradesh, that the Arbitrator as agreed to be nominated by the State would be nominated

within four weeks from today. As such, it is expected that immediately thereafter, the Board of Arbitrators shall start proceedings from the stage as may be decided by the said Board of Arbitrators. The parties are at liberty to approach the Board of Arbitrators to start the proceedings after the process of nomination of Arbitrators is complete.

In view of the aforesaid agreement, the Petitioner does not press this petition. The petition is accordingly dismissed as withdrawn, with no order as to costs.

9. Pursuant to the same the Government issued a notification on 19th January, 1983 appointing Shri D.K. Mahajan, Retired Chief Justice of Punjab and Haryana High Court as Chairman, Sh. Y. Krishan, Retd. Deputy Comptroller and Auditor-General of India and Sh. M.G.K. Murti, Ex-Chairman of Bhakra and Beas Management Board as Members. The previous notification dated 28.12.1981 was thereby cancelled.

10. The said Committee commenced the proceedings on 8.4.1983 and continued the same till 1st of April, 1985. On 30.4.1985 it passed an award and filed it in this Court on 13.5.1985. After notice from the Court, objections were filed by the Appellant under Sections 30 and 33 of the Arbitration Act on 6.8.1985. Justice Mehrotra by his judgment dated 21.8.1990 overruled the objections and accepted the award. Consequently, he made it a Rule of the Court and a decree in terms thereof was passed. Aggrieved by the same the Appellant has preferred this appeal.

11. Several contentions were urged before the learned single Judge but before us learned Counsel has pressed only five of the contentions which are as follows:

(A) The award was invalid on account of want of Notice in writing to the Appellant u/s 14(1) of the Arbitration Act.

(B) The Government or the first Respondent had no authority to abolish the previous High Powered Committee headed by Justice Lal in the midst of its functioning without an order of Court u/s 5 of the Act read with Sections 11 and 12. Hence, the Committee headed by Justice Mahajan suffered from inherent lack of jurisdiction to enter upon the reference and even though the Appellant had taken part in the proceedings they are vitiated and void ab initio.

(C) The award is a non-speaking one and therefore invalid. The Arbitrators were bound to give reasons because they were appointed to adjudicate and finally determine "the claim which expression occurs in the agreement between the parties.

(D) The conclusions reached by the Arbitrators are inconsistent and the award is, therefore, bad on account of non-application of mind.

(E) One of the Arbitrators namely Sh. Y. Krishan is guilty of legal misconduct inasmuch as he directly corresponded with the first Respondent without marking copies to the Appellant. Thus, the Principles of Natural Justice have been violated

thereby vitiating the award.

FIRST CONTENTIONAL:

12. With reference to this contention reliance is placed on the language of Section 14(1) of the Arbitration Act. The said sub-section reads:

When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

According to the learned Counsel for the Appellant, the language of the Section is mandatory and the non-compliance with the Section would vitiate the award. We are unable to accept this contention. A perusal of Sections 14(1) and 14(2) shows that the purpose of the notice is to enable the parties to become aware of the award so that they may seek the filing of the award in Court and raise their objections thereto for which limitation has been provided. Thus, the notice under Sub-section (1) of Section 14 is only to enable the parties to act within there period of limitation. A failure to give such a notice will not invalidate the award as such. In the present case, the award was filed into the Court by the Arbitrators directly within a period of two weeks from the date on which they made it. The parties got notices from the Court and they were in a position to put-forward their respective contentions.

13. The matter is not res integra. The question has been considered by other High Courts and all the Courts have uniformly held that want of notice u/s 14(1) of the Act will not vitiate the award. In *Jamrdhan prasad v. Chandra Shekhar and Ors.* AIR 1951 Nag 198, a Division Bench of that Court held that the giving of written notice to either party is not essential to making of an award and the award does not become in valid because notice of the making of it had not been given.

14. A similar view is expressed by the Allahabad High Court in *Ram Bharosey Vs. Pearey Lal and Another*, In that case Justice Agarwala held that the validity of the award does not depend upon the notice of the same being given to the parties. Reliance was placed by the learned Judge on the judgment of the Nagpur High Court, referred to above.

15. In *Badarla Ramakrishnamma and Ors. v. Vattikonda Lakshmibayamma and Ors.* AIR 1958 AP 497 a Division Bench consisting of Chief Justice K. Subba Rao and Justice Jaganmohan Reddy, held that the provision in Section 14(1) relating to notice was not mandatory and that non-compliance with that provision did not vitiate the award as such. The Division Bench pointed out that the time under Article 178 of the Limitation Act did not commence until the notice had been served.

16. In *Union of India v. M/s. Ram Sarup Prem Singh* ILR 1975 HP 816, Justice D.B. Lal held that the making and signing of the award cannot be considered

illegal if either notice in writing is not given or the said notice is delayed for some reason or other and is not given forthwith. A similar view has been expressed by Justice Mehta in *Nagarbhai Motibhai Makwana v. The District Panchayat, Mehsane and Ors.* AIR 1984 Guj 114.

17. Thus, there are overwhelming authorities of the various High Courts that want of notice u/s 14(1) does not vitiate the award as such. Consequently, the first contention is rejected.

SECOND CONTENTION:

18. There is no merit in this contention also. We have already referred to the orders passed by this Court in CMP No. 2 of 1982 on 15.7.1982, 23.9.1982 and 23.11.1982. A perusal of those orders shows that the Appellant agreed for a re-constitution of the Committee. It was only because the Appellant had agreed to the same the first Respondent withdrew the petition and had it dismissed as withdrawn. Reliance is placed by the learned Counsel for the Appellant on the following sentence in the final order dated 23.11.1982:

Without prejudice to the rights of the parties to raise these matters in appropriate proceedings warranted under law.

We are of the view that the said sentence in the order of the Court cannot be caught hold of by the Appellant without any reference to the context and relied on to contend that the abolition of the previous Committee was not valid. The very first sentence in the same order dated 23.11.1982 reads:

It is agreed by the parties that they shall nominate one arbitrator each of their choice.

After the said order a notification was issued by the Government in January, 1983 referring to the agreement between the parties. The Appellant took part in the entire proceedings before the Arbitrator. It is not, therefore, open to the Appellant to contend at this stage that the abolition of the earlier Committee and appointment of the new Committee was invalid.

19. The Supreme Court had occasion to hold in *Neelakantan and Bros. Construction Vs. Superintending Engineer, National Highways, Salem and Others*, that if the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Hence, this contention is without any merit and it is rejected.

THIRD CONTENTION:

There is absolutely no substance in this contention also. It is by now well settled by the judgment of the Supreme Court that an award need not contain reasons and it is not invalid because it is a non-speaking awarded. Suffice it for us to refer to the judgment of the Constitution Bench of the Supreme Court in AIR

1990 1426 (SC) The Court held that an award passed under the Arbitration Act is not liable to be remitted or set-aside merely on the ground that no reasons have been given in its support except where the arbitration agreement or the deed of submission or an order made by the Court such as the one u/s 20, Section 21 or Section 34 of the Act or the statute governing the arbitration requires that the arbitrator or the umpire should give reasons for the award. This proposition was reiterated by Anr. Constitution Bench in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, Hence this contention is also rejected.

FOURTH CONTENTION:

21. This contention has been argued at length and it has been the main plank for the Appellant to contend that the award should be set-aside. According to the Appellant, the Arbitrators have rejected claims 2 and 4 of the first Respondent in toto and also rejected claim No. 10 of the Appellant. According to the Appellant the rejection of the claims made by both the parties in the same breath is inconsistent and it shows clearly the non-application of mind by the Arbitrators. In order to appreciate this contention we must refer to the relevant facts pertaining to the claims made by the parties.

22. Claim No. 10 by the Appellant was for a sum of Rs. 2,56,73,400 worked out till June, 1977. Five items were referred to under this claim for a total amount of Rs. 3,05,84,400. Having setout that claim the Appellant confined it to a sum of Rs. 2,56,73,400. In the claim statement, the Appellant setout the relevant particulars in paragraphs 31 to 34. It is sufficient to extract paragraph 33 here which reads as under:

33. Due to aforesaid fundamental breaches of the contract by the Project Authorities, the claimants suffered very heavy losses and damages due to the following:

- (a) Extra expenses due to rise in price of labour and material. Rs. 1,15,41,100
- (b) Extra expenses due to increased overheads. Rs. 24,99,300
- (c) Extra expenses due to increase in hire charges of equipment. Rs. 66,57,400
- (d) Extra expenses due to increase in amount of interest paid on borrowings. Rs. 78,76,400
- (e) Loss of Profit earning capacity. Rs. 20,10,200 ----- Rs. 3,05,84,400 -----

23. It will be seen therefrom that four items out of the five are for extra expenses said to have been incurred by the Appellant due to escalation in prices. The 5th item is loss of profit-earning capacity which is said to be on account of the delay in completion of the contract. The first Respondent put forward four claims out of which claim No. 2 and Claim No. 4 were on the footing that time for the completion of the work was an essential term of the contract and in view of

the delay in completion of the work the first Respondent suffered heavy loss for which the Appellant was bound to compensate. Thus, the claim of the first Respondent under Claim No. 2 and Claim No. 4 was on the basis of the delay in completion of the work for which according to the first Respondent the Appellant was to be blamed.

24. The argument of learned Counsel for the Appellant is that the Arbitrators having rejected claim Nos. 2 and 4 made by the first Respondent, have thus held that the delay in the execution of the work was not on account of any fault on the part of the Appellant. Consequently, the arbitrators ought to have proceeded on the footing that the first Respondent was responsible for the delay and liable to compensate the Appellant for the loss incurred by the Appellant. It is argued by learned Counsel that even if the arbitrators found that the Appellant was not entitled to the amounts claimed by the Appellant they should have considered whether the Appellant was entitled at least to a small portion thereof and passed an award. According to the learned Counsel the rejection of claim No. 10 in entirety would mean that the Arbitrators have given two inconsistent findings, one to the effect that the Appellant was not responsible for the delay in execution of the work and the other to the effect that the first Respondent was not responsible for the delay in execution of the work. That itself shows non-application of mind on the part of the Arbitrators.

25. In this connection reliance is placed upon the judgment of the Delhi High Court in *M/s. Bombay Ammonia Pvt. Ltd. v. Union of India* AIR 1987 Del 148. In that case the Arbitrator gave a finding on issue No. 1 that the contract was not executed by the claim contractor in terms of the agreement and a finding on issue No. 4 that the Department did not follow the correct procedure laid down in the conditions of contract for getting the balance work done at the risk and cost of the contractor and therefore not entitled for refund of Rs. 1,67,743.50 from the claim contractor. The learned Judge also held on issue No. 4 that there was no provision for the refund of the amount in the contract. Those two findings were held by the learned Judge of that Court to be inconsistent showing non-application of mind on the part of the Arbitrator. The relevant passage reads as follows:

...The decision of the arbitrator on the two issues, namely, issue Nos. 1 and 4 is contradictory which is the result of non-application of mind to the facts and matters placed before the arbitrator. An award which is the product of non-application of the mind of the arbitrator cannot be permitted to be sustained in law. This ground for setting aside the award would be covered within the expression "otherwise invalid" used in Section 30 of the Arbitration Act. Non application of mind to the materials on record suggests absence of fair play and indicates that the arbitrator did not function in manner befitting his rule.

26. With respect to the learned Judge, we are unable to find any inconsistency in the two findings. At any rate, this ruling will not help the Appellant herein unless he is able to convince us that the rejection of claim No. 10 of the Appellant

cannot co-exist with the rejection of claim Nos. 2 and 4 made by the first Respondent. If on the facts we hold that there is no inconsistency, no question of non-application of mind will arise.

27. Learned Counsel draws our attention to the judgment of the Supreme Court in *P.M. Paul Vs. Union of India (UOI)*, The Court held that if the contract work was not completed within the stipulated time then the contractor has got a right to ask for extension of time and he could claim difference in price. According to the learned Counsel in the present case what all he has claimed before the Arbitrator under Claim No 10 is the difference in price on account of the delay in the completion of the Contract. We are unable to accept this contention. We have already pointed out that five items are mentioned under Claim Nos. 10 and 4 of them are based on escalation in prices. We have also referred already to the third award passed on 20.11.1976 before the completion of the work under which the escalation of prices was taken into account and rates were fixed by the Arbitrator with regard to different items of work. Admittedly, payments have been made on the basis of those rates. It is not, therefore, open to the Appellant to re-agitate that claim under claim No. 10 in the present arbitration.

28. The 5th item referred to under claim No. 10 is based on the delay in completion of the work and it is said to be a compensation for the delay to which according to the learned Counsel, the Appellant is entitled to. In support of this contention, learned Counsel places reliance on a passage in *Hudson's Building and Engineering Contracts 10th Edition* pages 596-597. The said passage reads as follows:

The measure of damage as a legal problem gives little theoretical difficulty in cases of breach of contract by the employer. It is obvious that builders work for a profit, and, apart from his entitlement to the price, the damage to a builder caused by any breach of contract by the employer will be assessed in the light of its impact upon his profits.

The employers breaches are of two kinds from the point of view of damages, depending upon whether on the one hand they have the effect of bringing the work to an end, or preventing its starting, in which case the builder will be deprived of the right to his profits upon work never actually carried out, or whether on the other hand they merely reduce his profits upon (or increase the cost of) work done by him. In earlier editions of this work, these were described somewhat inaccurately as cases of prevention and partial prevention.

Reduced profitability or partial prevention can arise from many possible breaches of contract by the employer, such as failure to give uninterrupted or prompt possession of the site-see e.g. *Lawson v. Wallasey Local Board* (1882), or drawings, details and information-see e.g. *Tralope & Colls v. Singer* (1913)- or interference by other contractors, and so on. This type of damage is by far the commonest in building litigation where contractors are Plaintiffs.

At this point it may assist if an indication is given of the types of consequential

damage which contractors are likely to or may suffer when a contract is monetarily affected by an employer's breach, the heads of damage (apart from the direct damage immediately suffered on some individual work process which will obviously vary from case to case).

29. We are unable to appreciate how the above passage helps the Appellant in the present case. It is pointed out in the said passage itself that the possible breaches of contract by the employer are such as failure to give uninterrupted or prompt possession of the site or drawings, details or information or interference by other contractors and so on. In the present case, there is no such complaint. The only contention is that the execution of the work is delayed. The aforesaid delay is, according to the Appellant, on account of breach of contract by the project authorities but the materials on record show that even according to the Appellant the delay was due to several factors which were beyond the control of either party.

30. In the letters written by the Appellant seeking extension of time for the construction of work the relevant reasons are always given by the Appellant. It is seen from the correspondence that the delay in completion of works had been mainly due to natural, unavoidable and unforeseen circumstances necessitating changes in designs, increase in quantities and introduction of new items etc. and such factors were beyond the control of the parties. It is only because such factors were beyond the control of the Appellant, extension of time was being repeatedly given by the first Respondent. In one of the letters dated 23.3.1978 written by Supdt. Engineer to the Chief Engineer (Projects), several reasons have been set-out as having necessitated extension of time. In that letter it is stated as follows:

The factors elaborated above indicate that the delay has been on account of circumstances beyond the control of the contractors.

But in the same letter the Supdt. Engineer referred to the claim made by the Appellant for compensation in a sum of Rs. 2,56,73,400 and suggested that extension of time could be granted only if the Appellant withdrew that claim. But in all the prior correspondence the first Respondent had been granting extension of time only. On the condition that it would be without prejudice to the right of the Board to recover compensation in accordance with the provision of clause 2 of the contract. Thus, the materials on record show that the delay in completion of the work was due to reasons beyond the control of the either party.

31. It is, however, not necessary for us to decide in this case whether the Appellant was entitled to make a claim for compensation as has been done by and whether the first Respondent was entitled to stipulate a condition that the said claim should be withdrawn.

Before an extension was granted. The only question before us is whether (sic) of the Arbitrators on Claim No. 10 of the Appellant on the one hand and of claim Nos. 2 and 4 of the first Respondent on the other are inconsistent. The facts

stated above clearly show that there is no inconsistency as such. cannot be contended that just because claims 2 and 4 of the first Respondent are rejected claim No. 10 of the Appellant should have been allowed automatically. As pointed to already the delay in execution of the contract could be because of reasons beyond the control of either party and therefore the claims made by both the parties against each other on the ground that the other party is responsible for the delay and consequently liable for payment of compensation can be rejected.

32. It cannot also be said that the rejection of claims by both the parties in this case would show automatically the non-application of mind on the part of Arbitrators. As we have pointed out there could be valid reasons for rejection of both the claims. Just because the arbitrators have not set-out their reasons in the award it cannot be contended that there is non-application of mind on their part. A perusal of the entire award shows that they had applied their mind with reference to each claim. It is seen that with reference to claims 1, 3, 7, 8, 9, 13 and 14 made by the Appellant the Arbitrators have allowed certain amounts with regard to each claim. Claims 2, 4, 5, 6, 10, 11 and 12 of the Appellant were rejected in toto. Claims 1 to 5 of the first Respondent were rejected in toto. That itself shows that with regard to each claim the arbitrators have applied their mind. Further with regard to claim No. 10 of the Appellant, certain clarifications were sought by the arbitrators from the parties and they were furnished to the arbitrators on 26.3.1985. The arguments in the matter commenced on that date and they went on till 31.3.1985. That also shows that the Arbitrators were closely following the proceedings and getting clarifications as and when necessary from the parties before taking a decision in the matter.

33. It has been repeatedly held that it is not for the Court to probe into the mental process of the Arbitrators. If it is a non-speaking award the Court cannot say that there is an error in the reasoning of the Arbitrator. In *M/s. Neelkantan and Bros. Construction's* case already cited above, the court said, thus:

In this case the arbitrator gave no reason for the award. There is no legal proposition which is the basis of the award, for less a legal proposition which is erroneous. There is no appeal from the review, in such circumstances, the award and correct any mistake in the adjudication by the arbitrator.

34. In *Sudarsan Trading Co. Vs. Government of Kerala and Another*, the Court stated the law, thus:

29. The next question on this aspect which requires consideration is that only in a speaking award the Court can look into the reasoning of the award. It is not open to the Court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in *Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhar Rao*, In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has

done what he has done; he has narrated only how he came to make the award. In absence of any reasons for making the award, it is not open to the Court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator cannot be challenged. Appraisement 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 appraisement of the 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.

35. The same proposition is reiterated in *Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others*, . The Court observed, thus:

36. It is well settled that in the matter of challenge to the award there are two distinct and different grounds, viz., that there is an error apparent on the face of the record and that the arbitrator has exceeded his jurisdiction. In the latter case, the Court can look into the arbitration agreement but under the former it cannot do so unless the agreement was incorporated or cited in the award or evidence was made part of the agreement. In the case of jurisdictional error, there is no embargo on the power of the Court to admit the contract into evidence and to consider whether or not the umpire had exceeded the jurisdiction because the nature of the dispute is something which has to be determined, outside the award, whatever might be said about it in the award or by the arbitrator. In the case of non-speaking award, it is not open to the Court to go into the merits. Only in a speaking award the Court can look into the reasoning in the award and correct wrong proposition of law or error of law. It is not open to the Court to probe the mental process of the arbitrator and speculate, when no reasons have been given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. But in the later case the Court with reference to the terms of the contract/arbitration agreement, would consider whether or not the arbitrator/umpire has exceeded his jurisdiction awarding or refusing to award the sum of money awarded or omitted a consolidated lump sum.

36. Thus, it is not possible in this case to hold that the award is inconsistent or that it is vitiated by non-application of mind.

37. Learned Counsel for the Appellant places reliance on *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, The Court held in that case that if the agreed fact situation, on the basis of which agreement entered into, ceases to exist, the agreement to that extent would become otiose and the rate initially quoted by the contractor becomes irrelevant due to subsequent price escalation, the contractor's claim for compensation for the excess expenditure incurred due to the price rise cannot be turned down on ground of absence of price escalation clause in that regard in that contract and that the agreement as a whole must be seen." The ruling will have no application in the present case. As we have already pointed out that the rates have been revised in this case and the award had also

been passed by the arbitrators as between the parties on the basis of escalation of prices.

38. Reliance is also placed on *Dandasi Sahu Vs. State of Orissa*, . The Court held in that case that if the amount awarded by the Arbitrator 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. In that case the total value of the work not paid and the claim was for Rs. 12, 15,653 but the arbitrator awarded a lump sum of Rs. 25,00,156. In such circumstances, the Court found that it was disproportionately high. Learned Counsel contends that in this case no amount having been awarded whatever for claim No. 10 it is disproportionately low and therefore, the Court can hold that there is non-application of mind on the part of the Arbitrators. In view of the facts of this case already discussed above by us we are unable to accept this contention.

39. In *Union of India (UOI) Vs. Jain Associates and Another*, the Supreme Court held that grant of damages twice against the same claim by the Arbitrator was an error of law as well as facts. Reference was made by the Court to the decision in *Dandasi Sahu Vs. State of Orissa*, and the proposition was reiterated. The ruling has no applicability in the present case in view of the facts of this case.

40. In the circumstances, we have no hesitation to hold that there is no inconsistency whatever in the findings of the Arbitrators rejecting in toto claim No. 10 of the Appellant on one hand and claim Nos. 2 and 4 of the first Respondent on the other.

CONTENTION No. 5:

41. There is no merit in this contention also. After the Government issued a notification in January 1983 appointing three members of the High Powered Committee, the Secretary of the First Respondent-Board wrote a letter on 28.2.1983 to the Chairman of the Committee Sh. D.K. Mahajan with copies to the other members M.G.K. Murti and Y. Krishan as well as to the Appellant in which the Chairman was requested to convene a preliminary meeting of the Arbitration Committee for deciding the terms and conditions and the course of action that the Committee would like to adopt for adjudicating the reference. On receipt of the said letter Y. Krishan one of the members of the Committee wrote a letter dated March 2, 1983 to the Secretary of the first Respondent saying that he had received no communication regarding the constitution of the Arbitration Committee and the terms of reference of the Committee. He made a request that the copy of the order constituting the Arbitration Committee and the terms of reference be forwarded to him. In reply to that letter, the Secretary of the First Respondent Board wrote a letter dated 30.3.1983 and enclosed a copy of the notification constituting the Board of Arbitrators together with the copy of the agreement dated 21.9.1979 witnessing the terms of reference. After receiving that letter Y. Krishan wrote a letter on 29.4.1983 to the Secretary of the First

Respondent Board enclosing an extract of the minutes of the meeting of the Committee held on 8.4.1983 and informing the addressee that a copy of the minutes was sent to V. Subramanian who was a Member of the former Committee. The second paragraph of the letter reads, thus:

From Shri N.G.K. Murti's letter to Shri Subramanian-copy to me it appears that the record is voluminous and will need a steel cupboard. This will need to be considered before I take over the record. If a steel cupboard is required, the place where it will be lodged will also have to be considered.

According to the Appellant's counsel the above correspondence would show that one of the Arbitrators was not acting fairly and inasmuch as copies of the correspondence were not sent to the Appellant, the principle of Natural Justice was violated. According to the learned Counsel that has vitiated the award.

42. In support of this contention reference is made by learned Counsel to the judgment of the Supreme Court in Payyavula Vengamma Vs. Payyavula Kesanna and Others, . In that case certain statements of one of the parties were recorded by the Arbitrator in the absence of the other party. The Court found that the Arbitrator heard the Defendant No. 1 in the absence of the Plaintiff and no notice of that hearing was given by the arbitrator to the Plaintiff; nor had she an opportunity of having the evidence of the Defendant No. 1 taken in her presence so that she could suggest cross-examination or herself cross-examine the Defendant 1. In such circumstances the Court held that the proceedings of the Arbitrator were vitiated and there was a clear case of misconduct on the part of the Arbitrator. Learned Counsel who appeared in that case contended that no prejudice was caused to the Plaintiff by reason of the Arbitrator having obtained the statement of Defendant No. 1 and therefore, he was not guilty of legal misconduct. That contention was rejected as unsound. The Court held that the Arbitrator may be a most respectable man but even so his conduct could not be reconciled to general principles. The Court also pointed out that even if there was no bias the arbitrator was guilty of legal misconduct which vitiated the award.

43. The said ruling will not apply in the present case. As pointed out already correspondence between Y. Krishan and the first Respondent had nothing to do with the merits of the matter in dispute. Apart from that the counsel who appeared before the learned single Judge on behalf of the Appellant herein had submitted before the Court that the award may not be set aside only on the ground of bias. After referring to the aforesaid correspondence between Y. Krishan and the first Respondent, the learned single Judge has stated thus in his judgment:

The proceedings of the later date (August 28, 1983) show that the stand taken by the Board was that there was no discussion about the merits of the matter between Shri Y. Krishan and the Board or any of its representatives behind the back of the Contractor. It also shows that Shri Sibal stated that the allegation against one of the Members of the Committee was uncalled for, motivated,

frivolous and undesirable and amounted to intimidation of a Member of the Committee. And, further that, Shri Pathak stated that he did not want a decision of the matter by the High Powered Committee because he had taken objection to the conduct of one Member of the Committee.

What was urged by Shri Pathak before me in this respect was that the aforesaid aspect may be taken note of as part of his submissions regarding the unfair attitude of the Committee from the very beginning and the admission contained in the letter referred to in the two proceedings to the effect that there was only one agreement dated September 21, 1979, between the parties because a copy of only this agreement was seen by Shri Y. Krishan. However, according to Shri Pathak, the Award may not be set aside only on the ground of bias.

44. In view of the aforesaid statement, we do not find any merit whatever in the contention urged by the learned Counsel for the Appellant. Hence, this contention is also rejected.

45. In the result, all the contentions put forward by the Appellant fail and the appeal is dismissed. There will, however, be no orders as to costs.