
(2009) 08 BOM CK 0156

In the Bombay High Court

Case No : Appeal from Order No. 108 of 2005

S.D. Shinde, Contractor through its partner, Annasaheb
Shripati Shinde

APPELLANT

Vs

Government of Maharashtra, Irrigation Department and
Others

RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(1), 20(4), 30, 33

Contract Act, 1872 — Section 28

Limitation Act, 1963 — Article 137

Citation : (2010) 2 MhLj 39

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : V.J. Dixit, instructed by P.R. Katneshwarkar, for the Appellant; G.B. Rajale, for Respondent No. 1, G.K. Thigle, for Respondent Nos. 2 and 3 and S.M. Godsay, for Respondent Nos. 4, 5, 7, 8 and 9, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Borkar, J.—By this appeal from order the present appellant-original plaintiff-contractor challenges the judgment and order passed by learned Joint Civil Judge, Senior Division, Ahmednagar, in Regular Civil Suit No. 595 of 1997 on 3.04.2003, thereby refusing to pass decree in terms of the award passed by sole Arbitrator Shri A.K. Shenolikar on 14.12.1997.

2. Briefly stated, the facts giving rise to the this appeal are that the appellant was earlier sole proprietary firm in the name and style "M/s S.D. Shinde Contractor" owned by one Shri S.D. Shinde. He expired during pendency of suit, on 14.1.1990 and after his death the suit was continued by his legal heirs. Present appeal is filed by one of those legal heirs i.e. Annasaheb Shripati Shinde claiming to be partner of the said firm M/s. S.D. Shinde Contractor. Respondent Nos. 2 to 8 are the remaining heirs of deceased S.D. Shinde. The original dispute decided by the sole arbitrator was between late Shri S.D. Shinde contractor and

Respondent No. 1-Government of Maharashtra through Irrigation Department.

3. Along with suit, learned trial judge has also decided two miscellaneous applications, viz. Miscellaneous Application No. 1 of 1998 filed by Respondent No. 1-State under Sections 30 and 33 of the Indian Arbitration Act, 1940 ("The Arbitration Act" for short) for setting aside the award passed by the sole Arbitrator Shri A.K. Shenolikar; ARBI Miscellaneous Application No. 1 of 1999 was filed by one Bapusaheb Shripat Shinde on behalf of M/s S.D.Shinde Contractor for making the award of the sole arbitrator as rule of the court and for passing decree in terms of the award in the name of legal heirs of late S.D.Shinde who died on 14.1.1990. Basically, this appeal from order is challenging the refusal by the learned trial judge to pass decree in terms of the award passed by sole arbitrator and also the order setting aside the said award.

4. Late Shri S.D.Shinde who was a civil contractor, had submitted a tender in respect of construction of earthwork structure and lining of Kukadi Left Bank Canal. The tender was accepted in respect of the work in kilometer No. 91 to kilometer No. 110 of the said Project. The work order was issued in favour of the claimant-appellant by the Executive Engineer vide letter No. AB/LCB/91 to 110/2257 dated 23/7/1983 and the parties entered into contract which was for Rs. 4,01,77,153/=. According to contract, the work was to be completed within eighteen calendar months. Thus date of completion was stipulated to be 22.1.1985. However, it is now admitted position that the work could not be completed within stipulated time and both the parties agreed to the extension of time which was given on five occasions. Ultimately, Respondent No. 1 foreclosed the contract on 25.1.1990 on the application made by the appellant. Thus, 25.1.1990 is the date on which the work was taken away or foreclosed by Respondent No. 1. It is further admitted position that the the appellant-original contractor had given application for foreclosure of the contract and its date is mentioned as 13.3.1990, but it appears that the the month was wrongly mentioned as there is no dispute regarding date of foreclosure being 25.1.1990. Final bill was submitted on 14.12.1990. On 18.1.1995 the application was filed by appellant-original contractor to Respondent No. 1 for appointment of arbitrator.

5. As per application M.A. No. 1/1995 para 2, Superintending Engineer rejected claim on 11.1.1991 and on 21.1.1991, S.D. Shinde Contractor first requested for nomination of Arbitrator. However, in spite of repeated letters from 21.1.1991 onwards, arbitrator/s were not appointed either by Respondent No. 1 or by Central Water Power Commission as per terms of the contract and, therefore, the original contractor Shri S.D. Shinde filed Miscellaneous Application No. 1 of 1995 in the court of Civil Judge, Senior Division, Ahmednagar u/s 8 of the Arbitration Act. That application came to be decided by learned Civil Judge on 25.2.1997. Admittedly, none of the respondents, including Respondent No. 1 and its officers and the Chairman, Central Water Power Commission, New Delhi participated in the proceedings. Although initially Respondents had appeared in the matter and engaged Shri V.D. Athare, District Government Pleader they did not file their say.

Later on Shri A.R. Phadnis, District Govt. Pleader also appeared for sometime. Consequently, application proceeded without any written statement and as suggested by the original contractor, Shri A.K. Shenolikar, retired Chief Engineer, Nagpur, was appointed as the sole arbitrator. The order passed by learned Civil Judge, Senior Division on 25.2.1997 in Arbitration M.A.O.1 of 1995 needs to be quoted at this stage as it is argued that the court while appointing the arbitrator has exceeded its powers u/s 8 of the Arbitration Act and also made a reference of certain disputes to the arbitrator which were beyond agreement and thus vitiated the appointment of the arbitrator and the reference. The order reads:

1. The Petition filed u/s 8 of the Indian Arbitration Act, 1940, is allowed.
2. Shri Shitolikar (Shenolikar), Retired Chief Engineer, Nagpur, is appointed as Arbitrator for settling the dispute in respect of payment of additional and extra work carried by the petitioner outside of Contract LCB-9/83-84.
3. The Arbitrator now appointed shall give his Award within 3 months from the date of this decision.

(Note: emphasis is supplied to highlight term of reference.)

It is the direction in paragraph No. 2 of the order, which is criticised

6. Shri Shenolikar, pursuant to his appointment as arbitrator, passed award on 14.12.1997. The arbitrator accepted almost all major claims of the contractor Shri S.D. Shinde and awarded compensation as follows;

As per paragraph 6.5 of the award, the compensation amounts awarded are as below.

The learned Arbitrator awarded interest of Rs. 133.22 lacs for the period 10.12.12.1988 to 5.3.1999. He did not award interest pendente-lite but awarded future interest from 1.3.1998 till actual payment.

7. For passing decree in terms of the said award, Regular Civil Suit No. 595 of 1997 was filed by the present appellant-contractor in the Court of Civil Judge, Senior Division, Ahmednagar. Learned Civil Judge by his judgment and order dated 3.4.2003 set aside the award holding that the appointment of the learned Arbitrator and reference of disputes to him were not as per the law and, therefore, he refused to pass decree in terms of the award and set aside the award. It is this judgment and order which is challenged in this appeal.

8. Heard learned Counsel for respective parties. Together, they have taken me through the entire record.

9. The award was quashed and set aside by the learned Civil Judge on the grounds of limitation, misconduct on the part of the arbitrator, invalid reference amongst other grounds. However, before going to the actual discussion of various facets with reference to the facts of the case, I may refer to the case law cited before me and in the light of the same, factual matrix of the case can be

considered.

10. Shri V.J. Dixit, learned Senior Counsel, instructed by Shri P.R. Katneshwarkar for the appellant referred to the judgment of learned Single Judge of our High Court in the case of R.P. Souza & Co. v. Chief Engineer, PWD 1993 (3) Bom.C.R.738. In paragraph 15 of the judgment, after referring to the facts of the said case, it was observed that the work was to be commenced on 18.1.1992 and was to be completed in October 1994. The final bill was prepared by the respondents only on 16th January 1996. In other words, it took nearly two years for the respondents to prepare the final bill in respect of the work carried out by the applicants. Under such circumstances, it was held that the Respondent was not entitled to raise the question of limitation. Shri Dixit, learned Senior Counsel, argued that in the present case, final bill was submitted on 14.12.1992 and, therefore, application to the court for appointment of arbitrator filed on 18.1.1995 cannot be said to be beyond the period of limitation.

11. Second case relied upon by learned Senior Counsel Shri Dixit is Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, . In para 32, it is observed;

On a conspectus of these decisions, it clearly transpires that if a question of law is specifically referred and it becomes evident that the parties desired to have a decision on the specific question from the arbitrator about that rather than one from court, then the court will not interfere with the award of the arbitrator on the ground that there is an error of law apparent on the face of the award even if the view of law taken by the arbitrator does not accord with the view of the court.

In the present case, it is not that any question of law was referred to the sole arbitrator. Further, in paragraph 33 of the same judgment, it has been observed to following effect;

Not only the respondent did not have recourse to an application u/s 33 of the Arbitration Act, but of its own it referred a specific question of law to the arbitrator for his decision, participated in the arbitration proceeding invited the arbitrator to decide the specific question and took a chance of a decision. It cannot therefore, now be permitted to turn round and contend to the contrary on the nebulous plea that it had referred the claim/dispute to the sole arbitrator without prejudice to its right to contend to the contrary.

It is argued before this Court that though Respondent No. 1 and its officers had not taken part in the arbitration proceedings in Arbitration M.A. No. 1 of 1995, Respondent No. 1 had appeared before the sole arbitrator Shri Shenolikar and participated in the proceedings and, therefore, it cannot challenge the appointment of the arbitrator.

12. Another case cited by Senior Counsel Shri Dixit is International Airports Authority of India Vs. M/s. Mohinder Singh, . It is observed in paragraph 12 as follows;

12. ...Moreover, the appointment of the arbitrator was made by the petitioners themselves and the petitioners by long participation of the arbitration proceedings before the arbitrator accepted such appointment and it is neither valid nor legal nor proper on the part of the petitioners now to allege that the appointment of the arbitrator by the Chief Engineer of the petitioners in charge of the work at the material time was not proper.

13. In the case of Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, , which is relied upon by the appellant, the Apex Court was considering Sections 30 and 33 of the Arbitration Act. In paragraphs 26 and 28 following observations are made;

26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration Clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.

28. The decision in Associated Engg. Co. case relied upon by Shri Maninder Singh does not in any way persuade us to take a view different than the view arrived at by the High Court. At p.103 Thommen J speaking for the Court observed as follows; (see para 24.)

24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the fact of it.

14. The next case cited by Senior Counsel Shri Dixit is T.P. George Vs. State of Kerala and Another, , it has been laid down;

Arbitrator is competent to award interest at four stages, namely, from the stage of cause of action till filing of proceedings, during pendency of proceedings before the Arbitrator, further interest i.e. from the date of award and date of decree and interest arising from the date of decree till payment.

15. In the present case, it is argued that the arbitrator has awarded interest of Rs. 133.22 lacks from 10.12.1988 to 5.3.1995 which was during period of the contract. It is worth noting that the period of original contract was extended from time to time with consent of both the parties and this had happened on five occasions and the last extension was upto 25.1.1990 when the contract was foreclosed. Under the circumstances, the arbitrator could not have awarded interest for eight years. It is also submitted that entire approach of the arbitrator was partisan and he only wanted to oblige the contractor Shri S.D. Shinde. He did not consider the fact that because of fault of contractor, extensions of time had to be given. He overlooked that extensions were with consent of both the parties. In such circumstances, particularly when extension of time is with consent of both sides, there should not have been award of interest from back date i.e.10.12.1988.

16. Shri S.M. Godsay, learned Advocate for Respondent Nos. 4, 5, 7, 8 and 9 cited some authorities. In Mohinder Kumar Jain v. Beas Construction Board and Anr. 1991 Arb. W.L.J. 589, wherein observations in Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, are referred which read thus:

Where a contract authorises a party to appoint an Arbitrator, but no arbitrator is appointed by that party within the time stipulated in the notice served by the other party, Court would get jurisdiction in terms of Section 8 of the Act to appoint an arbitrator.

It is argued that since Respondent No. 1 and Central Water Power Board have not exercised their right to appoint arbitrator in spite of notice, Respondent No. 1 is not entitled to complain about appointment of sole arbitrator by the court.

17. Learned Counsel Shri S.M. Godsay also relied upon the case of Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, , which is referred to above. In para 9, Sections 8 and 20 of the Arbitration Act are discussed. In paragraph 10, observations in para 3 in the case of Union of India v. Prafulla Kumar Sanyal are referred to which are to following effect:

If no such arbitrator had been appointed and when the parties cannot agree upon an arbitrator, the court may proceed to appoint an arbitrator by itself. Thus if an arbitrator had been appointed whether in the agreement or otherwise, the court shall make an order of reference to him. In this case, Clause 29 of the agreement provides that every dispute shall be referred to the sole arbitration of the person appointed by the President of India or if he is unwilling to act to the person appointed by the arbitrator. An arbitrator, in fact, has not been appointed by the President though provision has been made for such appointment If an arbitrator had not been appointed, as required in the sub-section, the court is to find whether the parties could agree upon an arbitrator. If there is no such agreement, the court will have to appoint arbitrator of its choice.

18. In Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd., , it has been held that unilateral appointment of an arbitrator and unilateral reference by one

party without consent of other is illegal and therefore the award given such Arbitrator is nullity and void ab initio and such award can be set aside u/s 30.

In paragraph 14 to 19 of judgment in the said case, various earlier rulings have been referred and in paragraph 20 it has been observed:

20. Thus, there is ample judicial opinion available for the proposition that the reference to a sole Arbitrator as contemplated by para 1 of the First Schedule has to be a consensual reference and not an unilateral reference by one party alone to which the other party does not consent.

19. It is argued by Advocate Shri Godsay that though Shri A.K. Shenolikar was an arbitrator suggested by the contractor Shri S.D. Shinde, Respondent No. 1 and its officers did not suggest any other name as an arbitrator and now they cannot complain about appointment of Shri Shenolikar as sole arbitrator by the court.

20. It may be noted that some of the authorities are referred to by more than one Advocate. I am not again referring to the same case, but I refer to ratio laid down in cases cited.

21. On the other hand, Advocate Shri Rajale for Respondent No. 1 also cited some authorities. In the case of P. Manohar Reddy and Bros. Vs. Maharashtra Krishna Valley Dev. Corp. and Others, following observations are made;

19. A plain reading of the aforementioned provisions clearly show that Clause 54 does not envisage raising of a claim in respect of extra or additional work after the completion of contract. The jurisdiction of the Civil court u/s 8 of the Act or u/s 20 thereof can be invoked if the disputes and differences arising between the parties was the one to which the arbitration agreement applied.

20. The contractual Clause provides for a limitation for the purpose of raising a claim having regard to the provisions of Section 28 of the Contract Act. It is no doubt true that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a Clause providing for limitation so as to enable a party to lodge his claim with the other side is not invalid.

22. It is argued before this Court that the application for appointment of arbitrator ought to have been made within a period of thirty days after Defect Liability Period is over. Since admittedly foreclosure of the work by both the sides was on 25.1.1990, the period of six months thereafter would end on 25.7.1990 and as per the terms of agreement between the parties, application to the court ought to have been made within thirty days i.e. 25.7.1990. The period of three years if counted from that date, it comes to 25.7.1993 and therefore the application made to the court on 18.1.1995 for appointment of an arbitrator is barred by limitation and, therefore, the view taken by the learned Civil Judge, Senior Division cannot be faulted with.

23. Here, I may refer to Clauses 54-A and 55-A of the contract. I reproduce them from statement of claim filed by the appellant.

54A. If the contractor considers any work demanded of him to be outside the requirements of the contract or considers any drawings record or ruling of the Executive Engineer, K.I.P. DN No. III 51 ROR on any matters in connection with or arising out of the contract or carrying out of work to be unacceptable, he shall promptly ask the Executive Engineer, in writing for written instructions or decision. Thereupon, the Executive Engineer shall give his written instructions or decision within a period of 30 days of such request.

Upon receipt of the written instructions or decision the contract shall promptly proceed without delay to comply with such instructions or decision.

If the Executive Engineer K.I.P. DN No. III 51 ROR fails to give his decision in writing within a period of 30 days after being requested or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision appeal to upward authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. This official shall give a decision within a period of 60 days after the contractor has given the said evidence in support of his appeal.

If the contractor is dissatisfied with this decision the contractor within a period thirty days from receipt of the decision shall indicate his intention to refer the dispute to Arbitrator failing which the said decision shall be final and conclusive.

To be deleted where condition 54 is included.

* To be adopted in the tender documents for works whose estimated cost put to tenders is Rs. 50 lakhs or more, in which case condition 54 is deleted.

All the disputes or differences in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows.

Within 30 days of receipt of notice from the contractor or his his intention to refer the dispute to arbitration the Chief Engineer (S.P.) irrigation dept. Pune C shall send to the contractor a list of three officers of the rank of Superintending Engineers or higher, who have not been connected with the work under this contract. The contractor shall within 15 of receipt of this list select and communicate to the Chief Engineer, the name of one officer from the list who shall then be appointed as the sole Arbitrator. In case contractor fails to communicate this selection of name within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within 30 days as stipulated the contractor shall send a similar list to the Chief Engineer within 15 days. The Chief Engineer shall then select one officer from the list and appoint him as the sole Arbitrator within 15 days. If the Chief Engineer fails to do so, the

contractor shall communicate to the Chief Engineer name of one officer from the list who shall then be the sole Arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The Arbitrator shall determine the amount of costs to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor shall not be withheld unless they subject matter of the arbitration proceedings.

All awards shall be in writing and in case of award amounting to Rs. One lakh and above, such awards shall state the reasons for the amount awarded. Neither party is entitled to bring a claim to arbitrator if the arbitrator has not been appointed before the expiration of 30 days after defects liability period.

*55-A Arbitration (For Entire Work)

All disputes or differences in respect of which the decision is not final and conclusive, shall be referred to the adjudication of three arbitrators. One to be nominated by the owner, the other by the contractor and the third by the Chairamn, Central Water Commission, New Delhi. If either of the parties fail to appoint its Arbitrator within 60 (sixty) days after receipt of notice for the appointment of an Arbitrator then the Chairman Central Water Commission, New Delhi shall appoint an Arbitrator. A certified copy of the appointment made by the "Chairman" shall be furnished to both parties.

To be deleted where condition 55 is included.

* To be adopted in the tender documents for works whose estimated cost put to tenders is Rs. 50 lakhs or more, in which case condition deleted.

The arbitration shall be conducted in accordance with the procedures of Indian Arbitration Act, 1940, or any statutory modifications thereof. The decision of the majority of arbitrators shall be final and binding upon the parties and the expenses of the arbitrators shall be paid as may be determined by the arbitrators.

Performance under the contract, shall if reasonably possible, continue during the arbitration proceedings and payments due to the contractor by the owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and in case of claims equivalent to Rupees one lakh or more, such awards shall state reasons for the amounts awarded.

Neither party is entitled to bring a claim to Arbitration if arbitrator has not been appointed before the expiration of 30 days after defects liability period.

24. It is submitted that in this case Clause 55-A is more attracted and the arbitration agreement clearly lays down that neither party is entitled to bring a claim to the arbitrator, if arbitrator has not been appointed before expiration of thirty days after defect liability period and under the circumstances the learned

Civil Judge ought not to have entertained Arbitration M.A. No. 1 of 1995, it is argued that the case of R.P. Souza and Co. (supra) was a decision in the facts of its own case and it is not a proposition of law that limitation should start only from the date of submitting final bill nor it is a law that merely because there was delay in preparation of final bill, limitation would extend. It may be noted that the contractor is also entitled to submit his claim of final bill and in this case, it is not shown when did he submit his claim. But, in M.A. No. 1/1995 in para 2 in items 5 & 6, it is stated that the Superintending Engineer informed rejection of claims to S.D. Shinde on 11-1-1991 and so, S.D. Shinde made request for nomination of arbitrator on 21.1.1991. So, cause of action arose on 11-1-1991. Moreover, as held in the case of P. Manohar Reddi (supra), there could be special contractual Clause providing limitation for the purpose of raising claim. So, in the circumstances, in my opinion, learned Civil Judge did not commit any error in holding that Arbitration M.A. No. 1 of 1995 was time barred and the Civil Court could not have appointed arbitrator when application was filed before it after limitation was over.

25. Advocate Shri Rajale for Respondent No. 1 cited a rulings in the cases of The Union of India (UOI) Vs. Shri Om Prakash, and M/s. Harbans Singh Tuli and Sons Builders Pvt. Ltd. Vs. Union of India, . In paragraphs 11 and 12 of its judgment in M/s H.S. Tuli & Sons Builders Pvt. Ltd. the Apex Court discussed ingredients of Sections 8 and 20 of the Arbitration Act. It would be useful to quote paragraphs 11 and 12 which show distinction in the context or situation in which Sections 8 and 20 of the Arbitration Act apply.

11. The learned Additional Solicitor General, Mr. Reddy, after taking us elaborately through the various provisions of Arbitration Act would submit that Section 8(1)(a) is attracted unless the agreement provides for arbitrator by consent of parties or where there is no concurrence in the appointment. In other words, three ingredients are necessary to apply Section 8 which are as follows.

(i) There must be an agreement to appoint an arbitrator.

(ii) The parties do not concur in the appointment.

Therefore, the said Sub-section has no application to a case in which the agreement provides for appointment of an arbitrator by one of the parties or by nominated persons.

12. In contrast, Section 20 confers power-

(i) to order the agreement to be filed; and

(ii) to make an order of reference to the arbitrator appointed by the parties or where the parties cannot agree to the appointment of an arbitrator appointed by court.

Where, therefore, the Clause in the agreement provided arbitrator to be appointed by Engineer-in-Chief, if he refuses, recourse to Section 8(1)(a) or 1(b)

cannot be had. It must be u/s 20(4).

It is further observed in paragraphs 16 to 18 as follows;

16. Section 8 of the Arbitration Act occurs under Chapter II which deals with arbitration without intervention of court, while Section 20 falls under Chapter III which deals with arbitration with intervention of court.

17. In our view, Section 8 provides a simple machinery for appointment of an arbitrator, initially, as seen from Sub-section 1(a) or for supplying the vacancy as seen from Sub-section 1(b) if the said vacancy occurs during the period of arbitration.

18. Sub-section 1(a) would apply to a case of initial appointment of an arbitrator or arbitrators. The implication is in the arbitration agreement, the arbitrator or arbitrators must not have been named. Where, therefore, they are named, this Section will have no application. Similarly, the arbitrator or arbitrators are required to be appointed by all parties to the reference with consent. On the contrary, if there is some other mode of appointment, for example, Section 4, where the parties to the agreement agree that the arbitrator has to be appointed by a person designated in the agreement either by name or hold, for the time being in office, certainly, this Section will not apply.

26. In the present case, I have already quoted the order passed by the learned Civil Judge, Ahmednagar passed on 25.2.1997 while deciding Arbitration M.A. No. 1/1995. Clause 2 of the order needs to be reproduced once again for ready reference.-

2. Shri Shitolikar (Shenolikar) Retired Chief Engineer, Nagpur, is appointed as Arbitrator for setting the dispute in respect of payment of additional and extra work carried by the petitioner outside of Contract LCB-9/83-84.

27. It is argued before this Court that the learned Civil Judge while appointing Shri Shenolikar, Retired Chief Engineer, as arbitrator, also referred the disputes to the arbitrator outside the contract LCB-9/83-84. Thus, the subject-matter which was not covered by the contract was also referred by the learned Judge to the arbitrator and this is clearly invalid reference which is nullity in the eye of law as observed in the case of Union of India v. Om Prakash (supra) in which, after referring to Sections 8 and 20 of the Arbitration Act and their ingredients, it is observed that Section 20 confers power on the court to order the agreement to be filed and further to make an order of reference to the arbitrator appointed by the parties or where the parties cannot agree upon an appointment, to an arbitrator appointed by court. Sub-section (1) of Section 20 makes it clear that the provisions of the Section can be availed of only if no proceedings under Chapter II has been initiated. Section 8 does not contain any provision empowering the court to make an order of reference to the arbitrator as one finds in Sub-section (4) of Section 20. The Court further observed at the end of paragraph 4;

4. ...Thus, it seems clear that the court in the instant cases had no jurisdiction, after appointing an arbitrator u/s 8(2), to proceed further to make an order referring the disputes to the arbitrator.

In paragraph 5, it has been observed that such award is invalid and, therefore, could be set aside. Further observations in the same paragraph are as follows;

5. ...The words "or is otherwise invalid" in Clause (c) of Section 30 are wide enough to cover all forms of invalidity including invalidity of the reference. We do not find any reason why the general and unqualified language of Clause (c) should not include an award on an invalid reference which is a nullity.

Thus, while disposing of arbitration Miscellaneous Application No. 1 of 1995, reference made by learned Civil Judge to the arbitrator of disputes which were outside the contract between the parties is invalid and, therefore, can be set aside u/s 30 of the Arbitration Act. Here, I may also refer to ratio laid down in the case of H.P. State Electricity Board v. R.J. Shah & Co. (supra)

28. It is argued before this Court that the arbitrator was quite aware of error committed by the court in making reference of disputes outside the contract. But, he attempted to give go-by to the same, by observing in paragraph 4.3.4 of his award to following effect;

...As Sole Arbitrator was appointed by the Court order the legality of which cannot be tested before me as I do not enjoy powers of appeal to correct the flaws, if any, in the court order. I have been appointed by a court order which has not so far been questioned by any of the parties in any judicial courts having power of appeal over it. I must hold that as an arbitrator appointed by a proper court order, I have jurisdiction to decide the matter before me whatever may be the implications of the Clause 55A of the contract.

29. So, it is submitted that even before the arbitrator, it was argued that the reference by court of the disputes outside the contract between the parties was not proper and it is also submitted that the reference was time barred. However, the arbitrator accepted the line of argument as advanced by Advocate of the present appellant and other than Respondent No. 1 that limitation would start from submission of the final bill. In my considered opinion, reference made by learned Civil Judge to the arbitrator in Arbitration M.A. No. 1 of 1995 is invalid and the award passed consequent thereto is nullity.

30. It is also argued before me that that the arbitrator has awarded rates which were higher than the rates prescribed and allowed under the contract. Reference was made by Advocate Shri Rajale for Respondent No. 1 to the case of Food Corporation of India Vs. Chandu Construction and Another, and more particularly to paragraphs 9 to 11 wherein scope of Section 30 of the Arbitration Act for setting aside the award of the arbitrator by the court is discussed and the word "misconduct" within the meaning of Section 30(a) of the Arbitration Act was considered. Paragraphs 9 to 11 read:

9. On the other hand, learned Counsel for the claimants submitted that it was within the domain of the arbitrator to construe the terms of contract in the light of evidence placed on record by the claimants, particularly the terms of similar contract entered into by FCI with the other contractors. It is asserted that the view taken by the arbitrator being plausible, the High Court was justified in declining to interfere with the award.

10. While considering objections u/s 30 of the Arbitration Act, 1940 (for short "the Act"), the jurisdiction of the court to set aside an award is limited. One of the grounds stipulated in the Section on which the court can interfere with the award is when the arbitrator has "misconducted" himself or the proceedings. The word "misconduct" has neither been defined in the Act nor is it possible for the court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word "misconduct" in Section 30(a) of the Act does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award are opposed to all rational and reasonable principles resulting in excessive award or unjust result.

11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.

In paragraphs 13 and 15 following observations are made;

13. In *Continental Construction Co. Ltd. v. State of M.P.* it was emphasised that not being a councilor, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action.

In paragraphs 19 and 20 it has further been observed by the Apex Court as follows;

19. ...The claimants had submitted their tender with eyes wide open and if

according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with FCI and no other.

20. Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has outstepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself.

In the present case, if we have a glance at the award passed by the arbitrator, it is clear that he has ignored the major term in the contract incorporated in clause/para 2 in the statement of claim filed by contractor Shri S.D. Shinde which reads;

2.00. Special Work and Site Conditions No. 10-Water for Irrigation. Water may have to be released in the canal during rabi season and no compensation for such stoppage of work is payable. The rate quoted will be inclusive of dewatering and defilling necessary.

It is Clause 2.10, but wrongly typed as 2.00 in the paperback.

31. In spite of full knowledge of condition that water may have to be released in canal during rabbi season and no compensation for such stoppage of work is payable, still the arbitrator has awarded amount as loss suffered by contractor due to washing away of material because of dewatering and desiting as a result of release of water. The amount claimed under this head is Rs. 91,73,640/=. The term quoted is condition No. 10 in the original contract and at para 2.10 in the statement of claim, it is clearly indicated that the rate quoted will be inclusive of dewatering and defilling necessary. The Arbitrator awarded Rs. 14,18,000/= as compensdation for stoppage of work due to canal releases. It is also clear that the revised rates were awarded by the learned arbitrator, thereby going beyond the terms of the contract and as observed in FCI v. Chandu Construction (supra), the arbitrator could not have allowed revised rates beyond the terms of original contract when extension of contract was by consent of both sides and there was no fresh contract for revision of rates and escalation of rates. The amount claimed was Rs. 1,25,15,527/- and actual amount awarded under this head is

Rs. 91,28,000/= . Even for the period during the contract the compensation of Rs. 15,72,000/= was awarded. When extensions of contract and foreclosure of the same were with consent of both the sides, idle machinery charges and idle overhead compensation should not have been allowed by arbitrator unless those were provided in the original contract.

32. After carefully scrutinising the award made and reasons given for the same by the learned arbitrator, in my opinion, he has clearly exceeded his jurisdiction and authority. He was bound by the terms of the contract and, therefore, should have decided the claims/disputes within the framework of the contract. He was not working as a conciliator. It is also pointed out that though the original contract was for Rs. 4,01,00,000/= and total bill sanctioned was for Rs. 5,49,00,000/=. In paragraph Nos. 6.3.1. and 6.3.2 of the award, learned Arbitrator has given reasons for awarding revised rates, but he did not say that he was awarding rates as per the contract between the parties.

33. Having given anxious consideration to the arguments advanced before me, the reasons given in the award, the terms of the contract and the reasons given by learned Civil Judge while deciding R.C.S. No. 595 of 1997, in my opinion, this appeal has no merits and the same, therefore, deserves to be dismissed. Appeal from Order is therefore dismissed.