
(1991) 11 KL CK 0006
In the High Court Of Kerala
Case No : M.F.A. No. 124 of 1984

State and another

APPELLANT

Vs

V.P. Jolly

RESPONDENT

Date of Decision : 15-11-1991

Acts Referred:

Arbitration Act, 1940 — Section 16, 16(1)(a), 16(1)(c), 30, 35

Citation : (1992) 1 KLJ 1

Hon'ble Judges : M. Jagannadha Rao, C.J;T.L. Viswanatha Iyer, J;K. John Mathew, J

Bench : Full Bench

Advocate : M.C. John Government Pleader for State, for the Appellant; M.P. Abraham and M.A. George for Intervener, for the Respondent

Final Decision : Allowed

Judgement

Jagannadha Rao, C.J.—This reference to Full Bench made on 27-2-1989 appears to us to be largely covered by the recent judgment of the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, dealing with non-speaking awards of arbitration. The referring order of the Division Bench to the Full Bench reads thus in its concluding paragraph:

In view of the decisions is STATE OF KERALA v. POULOSE (1988 (1) K. L. T. 541) and STATE OF KERALA v. POULOSE (1987 (1) K. L. T. 781) which state that even non-speaking awards are liable to be set aside if the award is contrary to the basic features of the contract or traverses beyond its terms, which are contrary to the views expressed by the various Supreme Court decisions including the latest pronouncement in Jawahar Lal Wadhwa and Another Vs. Haripada Chakroberty, , we are of the opinion that the matter requires consideration by a - Full Bench of this Court.

The facts of the case are as follows : The respondent, V. P. Jolly, was a contractor for certain road works and he entered into an agreement with the Government

on 19-12-1977 and the works were to be completed in 15 months. He contended that there was delay on the part of the Government in handing over the site, supplying cement and iron etc, that there were rains, floods etc. which delayed completion. The defence statement of the Government to the claim statement filed by the contractor before the Arbitrator reveals that time was extended for completion of the work upto 31-12-1982 and that for that purpose a supplemental agreement was executed between the parties in which the contractor agreed not to claim compensation for the extra work or expenditure and not to claim higher rates for labour, material etc. The said supplemental agreement stipulated that payment would be according to the terms and conditions in the original agreement, the only benefit being extension of time. Nonetheless, the contractor raised a dispute referring the claims as claims (a) to (n) in his claim statement dated 9-12-1982 claiming extra compensation and higher rates. This was stoutly refuted in paras 3, 6 and 10 of the defence statement and counter claim of May 1983 which specifically referred to the terms of the supplemental, agreement not to claim extra. After several adjournments, the hearing of the case took place, as disclosed from the Arbitrator's record, only on 27-7-1983 (see pages 215-216 of record.) The notes of the arbitrator show that the claimant raised five issues and the Department is recorded to have referred to "supplemental agreement", on the same date, 27-7-1983. He did not even care to look into the objections and call for the supplemental agreement. The Arbitrator, Sri: K. C. George, Chief Engineer (Arbitration), however, passed a non-speaking award awarding various sums under claims (a), (b), (c), (e), (g), (n) amounting to Rs 2,30,000/- and he rejected claims (d), (f), (j), (m) and (n). On claims (j), "(k) and (1), he directed the Government to pay the final bill as per his award. Certain other incidental directions were also given. The appellant moved the Court in September 1983 for setting aside the award as being "against the terms and conditions of the agreement", and contending that there is no justification for awarding compensation and damages, that the "Arbitrator misconducted himself in passing the award without any basis and in ignoring the evidence in the case" and that the Arbitrator "failed to carry out strictly the mandates of Agreement".

2. The learned Subordinate Judge in his judgment dated 18-11-1983 in the O. P. (Arb) 201 of 201 of 1983 rejected the appellants' objections on the ground that the award was a non-speaking award, that there was no error apparent on the face of the award, and that so far as the plea of misconduct is concerned, "nothing is pointed out, to indicate that this is true". A decree was passed in terms of the award. The appellants appealed to this court and contended that the court ""overlooked" the claim statement and the defence statement which formed part of the award, that the award was based on no evidence and that there was misconduct on the part of the Arbitrator.

3. Before us, an objection was raised for the respondent that the plea of misconduct and the plea that the Arbitrator acted in violation of the terms of the agreement are now raised in the appeal for the first time by the appellant. We

cannot agree. The points raised, in paras 3, 6 and 10 in the defence statement set out above show that there is no substance in the above objections for the respondent. In those paragraphs, the appellant pleaded that the Supplemental agreement did not permit any additional compensation or higher rates to be awarded and that the award was without jurisdiction and at any rate, there was misconduct. In fact, the referring order by the Division Bench clearly admits that these pleas had been raised in the defence statement before the Arbitrator.

4. The main point that is referred to the Bull Bench is whether, if the Arbitrator had acted in excess of his authority or had violated the bounds or limits set in the contract, it can be attacked on any of the grounds mentioned in Sections 16 and 30 of the Act, as contended for the appellants, as being outside the Arbitrator's jurisdiction of as-amounting to misconduct, or whether, as contended for the respondent contractor, such inquiry must fail if there is no error apparent on the face of the award or in a document incorporated therein. The question incidentally arises whether there is a total bar against looking into anything outside the award, much less to the terms of the contract. It is argued for the respondent that, in the case of a non-speaking award, to permit the appellant to attack the award on the ground that the Arbitrator has acted, contrary to the terms of the contract will amount to adding a new ground of attack not covered by section 16 or 30 of Arbitration Act.

5. We shall first deal with the question whether the attack of the appellant that the Arbitrator has acted contrary to the main contract or acted in excess of the authority, amounts to a new ground of attack not covered by Section 16 or 30 of the Arbitration Act.

6. Historically, before 1854, the position in England was that High Court controlled the arbitrator by use of writ of certiorari. The court either Quashed the award and sent the parties to square-one or it did nothing. The only exception was where the parties had incorporated Richards Clauses named after its author, Mr. Richards, the "average stater" - which could empower the court to remit any matter instead of setting aside the entire award. However, the statute soon filled the gap permitting statutory remission for reconsideration when Section 8 of the Common Law Procedure was enacted and that was replaced by Section 10 of the English Arbitration Act, 1889 and then by Section 22 of the 1950 Act. The English Act, permitted remission but did not enumerate any specified grounds. Chitty J. in *IN RE MONTGOMERY JONES LTD* (1898) 78 L. T. 407 laid down four grounds for remission-(i) award being bad on its face, (ii) there being misconduct on the part of the arbitrator. (iii) there being an admitted mistake by the arbitrator and his request for remission, and (iv) where additional evidence has discovered after the making, of the award. These grounds were not meant to be exhaustive according to Fletcher Moulton L. J. in *IN RE BAXTERS AND MIDLAND RLY. CO.* (1906) 95 L. T. 20 and according to Diplock L. J. in *MARGULIES BROTHERS LTD v. DAFNIS THOMAIDAS & CO. (U. K) LTD.* (1) All E. R. 777). The grounds are not exhaustive and the court could extend the remedy of remission to cases of

"procedural mishaps" or misunderstanding", leading to non-adjudication of the matter; intended to be adjudicated (per Lord Donaldson of Lymington M. R. in KING v. THOMAS MCKENNA LTD (1991 0) W. L. R. 1234).

7. It is true that the Arbitration Act, 1940 is an act to consolidate and amend the law relating to Arbitration. It is to be noted that Section 16 of the Act deals with "remission," of an Award. It says that the court may, from time to time, remit an award or any matter referred to arbitration, to the arbitrators or umpire for reconsideration upon such terms as it thinks fit

(a) Where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration and such matter cannot be separated without effecting the determination of the matters referred or

(b) where the award is so indefinite as to be incapable of execution, or

(c) Where an objection to the legality of the award is apparent upon the face of it.

These three grounds mentioned in Section 16 of our Act have been held by the Supreme Court to be exhaustive, in B. B. RAJWANSHI v. STATE OF UTTAR PRADESH (A. I. R. 1988 S. C. 1089, para 12, 13). It was observed that otherwise this power is capable of serious mischief.

8. So far as the power to set aside an award granted by Section 30 of the Act is concerned, the section itself states that an award shall not be set aside except on one or more of the following grounds, namely :

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

(b) that an award has been made after the issue of an order by the court, superseding the arbitration or after the arbitration proceedings have become invalid u/s 35; or

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

9. The result is that the three grounds in Section 16 permitting remission and the three grounds in Section 30 permitting setting aside of the award are exhaustive and no new grounds can be added. In fact, in B.B. Rajwanshi Vs. State of U.P. and Ors, the Supreme Court has observed:

...an award of the arbitrator can only be interfered with or set aside or modified within the four corners of the procedure by the Act.

(emphasis supplied)

10. If, therefore, the grounds in Sections 16 and 30 are exhaustive, and if, as in the present case, the ground of attack is that the arbitrator has acted contrary to the terms of the contract or in excess of his authority, whether such grounds of attack can fit into any of the categories covered by Sections 16 and 30 or whether it would be outside those provisions ?

11. We shall first examine the matter from the point of the contention of the respondent, namely, whether such an error can amount to an error apparent on the face of the award u/s 16 (1) (c).

12. In the case of a non-speaking award, it is now too well-settled, right from the case of HODGINSON v. FERMIE (1857) (3) C. B. (NS) 839 (III) R. R. 614) to CHAMSEY BHARE v. JIVRAJ BALLOO SPINNING & WEAVING CO. LTD. (AIR 1923 P. C 66) and down to the recent cases in 1991 decided by the Supreme Court, - that the court cannot set aside the award unless the error of law is apparent on the face of the award or in a document incorporated therein. Further, in cases Where the ground of attack is that the non - speaking award is bad on its face (as distinct from an attack based on jurisdiction), it is not permissible for the court even to look into the agreement unless the same is incorporated in the award. In our view and obviously, the attack itself as per the appellant's contention, being based on the arbitrator's alleged violation of the terms of the contract, or his alleged action in excess of his authority, such an attack cannot obviously be proved unless one is permitted to resort to the terms of the main contract, relating to the award of extra compensation or extra rate. But in the case of a non-speaking-award one has to be confined to the award itself or to any document incorporated therein. If the contract is not incorporated in the award, it is not permissible for the court to look outside the award and refer to the terms of the contract. Therefore, the attack cannot succeed on the ground of error of law apparent on the face of the award, u/s 16(1)(c).

12. (a) The next alternative is to see whether it falls under the head of "jurisdiction" or scope of reference u/s 16 (1) (a), -- that is within the jurisdiction which the "arbitration clause" has conferred on the arbitrator. Now, it is necessary to notice that there is a distinction between the terms of the main contract whose terms determine the rights and obligations of the parties on the one hand and the arbitration clause, on the other. The latter may be part of the contract itself or "", may indeed be covered by independent contract or by correspondence. But the distinction is real. The arbitration clause determines the jurisdiction of the arbitrator u/s 16 (1)(a) while the main contract determines the rights and obligations of the parties. The arbitrator cannot determine matters not referred to him nor can he omit to decide questions falling within its scope as stated in Section 16 (1) (a). It is settled law that while dealing with the question of jurisdiction of the arbitrator u/s 16(1) (a) as arising from the scope of the arbitration clause, it is permissible for the court to look into the arbitration clause in order to establish whether the jurisdiction has been exceeded or not been exceeded or not 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" (AIR 1923 66 (Privy Council) ; DALMIA DAIRY INDUSTRIES LTD v. NATIONAL BANK OF PAKISTAN (1978 (2) Lloyds Rep. 224), quoted in Sudarsan Trading Co. Vs. Government of Kerala and Another, :

13. If, however, the attack is that the arbitrator is acting in violation of the terms

of the main contract between the parties, or has acted in excess of the powers given to him under the contract, can it be brought u/s 16 (1) (a) as amounting to a question of jurisdiction? If so, there should be no objection in following the principle, in CHRISTOPHER BROWN LTD 1954 1 CB 8) etc. to look into affidavits, pleadings and the main contract to find out if the terms of the main contract or the limits or bounds "set upon his powers.

14. In our view, the latest decision of the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, clinches the issue in favour of the appellants. That decision has now clearly laid down that if an arbitrator while giving a non-speaking award, acts in contravention of the clear, obvious or patent terms of the main contract which deals with the rights and obligations of the parties, such action will be without jurisdiction. It is also held that for the purpose of finding out if the arbitrator has so acted, it is open to look outside the award, including affidavits, pleadings and term: of the main contract. Such conduct also amounts to legal misconduct. In our opinion, whatever doubts there might have been as to the somewhat similar observations of the Supreme Court in SUDARSHAN TRADING CO v. STATE OF KERALA while dealing with the correctness of two judgments of this court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, and STATE OF KERALA v. RAVEENDRANATHAN (1987 (1) KLT 604) the matter is now set at rest and the legal position is placed beyond the pale of controversy by the Supreme Court in its aforesaid judgment in ASSOCIATED ENGINEERING CO. v. GOVT. OF ANDHRA PRADESH. The contention related to various claims. For our purpose, the decision of the Supreme Court under claims II, III, VI and IX are important. In respect of these four claims, after referring to the terms of the main contract - as distinct from tie arbitration clause - Thommen, I observed (in Para 21)

These four claims are not payable under the contract. The contract does not postulate in fact prohibita payment of any escalation under claim No. III for napa stabe or claims No. VI for extra lead of water or claim No. IX for flattening of canal slopes or claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract." and again:

This conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction. See Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others,

Thommen, J. also held as to whether for this purpose, affidavits pleadings and the contract can be looked into (in Para 26):

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled out side the bounds of the contract and thus exceeded is jurisdiction. In order to see what the jurisdiction of the arbitrator is it is open to the court to see what dispute was submitted to him. If

that is not dear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself *Bunge & Co. v. Dewar and Webb* (1921) 8 LIL Rep. 436)

It is again observed (see para 27) that if the arbitrator act in contravention of the terms of the contract, he acts outside his jurisdiction. It is further Held that such an error which goes to the root of the jurisdiction, can be established by looking into material outside the award, Extrinsic evidence is admissible because

the dispute is not something which arises under or in relation to the contract or dependant on the construction of the contract or to be determined within the award.

(emphasis supplied)

The learned judges of the Supreme Court said that in the case before them, the umpire decided "matters strikingly outside his jurisdiction. He out stepped the confines of the contract. He wandered for outside the designated area. He digressed far away from the allotted task". His error arose not by misreading or misconstruing or misunderstanding the contract, but by

acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the "contract and awarded in excess of his authority. In may respects, the award flew in the face of the provisions of the contract to the contrary. *ANISMINIC LTD., v. FOREIGN COMPENSATION COMMISSIONER* (1969 (i) All. E. R. 208 (HL)).....(See also *Mustill and Boyd's Commercial Arbitration*, 2nd Edn., Halsbury's Laws of England, Vol. II 4th Edn.

We may point out that the trend in this behalf was set in 1984 by *Jagannatha Shetty, J.* (as he then was) and *Venkatachala J.* in *M. S. RAMAIIH v. STATE OF MYSORE* (I. L. R. 1984 (2) KARNATAKA 452 AT 487) wherein it was observed that;

an arbitrator is not a conciliator. He has no right to dole out charity. He gets no jurisdiction to award compensation when a party by express terms of a contract has no right to receive it.

The same principle was laid down in judgments of this court in *STATE OF KERALA v. RAVEENDRANATHAN* (1987 (I) K. L. T. 604) by *Thommen, J.* (as he then was) and *Balakrishnan, J.*, and in *STATE OF KERALA v. POULOSE* (1987 (1) R.L.T. 781) by *U. L. Bhat, J.* (as he then was) and *Sankaran Nair, J.*

15. It was argued for the respondent before us vehemently that these two rulings of this court have been wholly disapproved by the Supreme Court in *M/s SUDARSHAN TRADING CO. v. GOVT. OF KERALA* (AIR 1989 S. C 890, in para 32 and 23). In our view, this submission is not correct. In our view, these two judgments of this Court, to the extent they held that the arbitrator acting in

excess of his powers or authority under the main contract or beyond the bounds or limits set therein, was acting without jurisdiction, have not been overruled by the Supreme Court in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, . This is clear from the use of the words "in so far as" (in paras 32 and 33) by the Supreme Court. The Observations of this court, if any, overruled are only those relating to court's power to set aside a non-speaking award, after "construing" the terms of the contract and then that the arbitrator must have exceeded the terms or limits set in the contract. Only to that extent these judgments are overruled. As stated above the Supreme Court in *SUDARSHAN TRADING CO's* case has not overruled the view of this court in the abovesaid two rulings to the extent they held that it would be open to the Court to set aside an award if it was "evident" on the face of the contract or on a plain reading of the contract without construing the same that the arbitrator trespassed the plain or obvious limits set to his authority by the terms of the contract. In fact, when the case, *STATE OF KERALA v. POULOSE* (1987 (1) K.L.T 781) came up for decision before the Supreme Court on 16-4-1990 (long after *SUDARSHAN TRADING CO.'s* case was disposed of), the decision of the High Court therein claim 2, setting aside the award and being opposed to the agreed terms was affirmed by the Supreme Court. (vide C A No. 2009/90 dated 16-4-1990). Further, if there is any doubt, in this behalf, the same is now removed by the latest decision of the Supreme Court in *ASSOCIATED ENGINEERING GO. v. GOVERNMENT OF A. P.* (1991 (4) S. C. C. 93). Apart from the Karnataka and Kerala High Courts which have dealt with the question (frequently arising in the context of non-speaking awards, the decision of the Andhra Pradesh High Court rendered by Jeevan Reddy J. (as he then was) and Neeladri Rao, J. in *STATE V. ASSOCIATED ENGINEERING ENTERPRISES* (AIR 1990 A. P. 294) is also to the same effect. That was also a case of a non-speaking award.

16. It has to be noted that initially this principle was laid down in cases relating to speaking awards. These cases are: *State of Andhra Pradesh Vs. M/s. Associated Engineering Enterprises, Hyderabad*, , *GOBARDHAN DAS v. LACHMI RAM* (AIR) 1954, SC 689 at 692) *THAWARDAS PHERUMAL v. UNION OF INDIA* (AIR 1955 S. C 468), *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, and *Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others*, . That principle was extended to non-speaking awards by the Karnataka, Kerala and Andhra Pradesh High Courts and has now firmly been accepted by the Supreme Court in *Associated Engineering Co. Vs. Government of Andhra Pradesh and another*, .

17. Reference to *ANISMINIC LTD v. FOREIGN COMPENSATION COMMISSION* (1969 (1) All E.R. 208 (HL) by Thommen, J. in the context of the arbitrator's jurisdiction, in our view, is a new and important development in this branch of law. Sabyasachi Mukherji, J. (as he then was) had also referred to that case in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, . In *ANISMINIC LTD's* case, it was laid down that if a tribunal or authority after entering upon an inquiry for which it has jurisdiction, makes a determination taking into

consideration a factor which it ought not to have, it will be acting without jurisdiction and its decision will be acting without jurisdiction and its decision will be a nullity. The determination by it must be real and not purported. This principle in ANKMINIC has also been referred to by Mustill & Boyd Commercial Arbitration, 2nd Ed. pp 497-498 as being applicable to the arbitrator's powers.

18. While our Supreme Court has thought it fit to apply the principle in ANISMINIC. LTD to arbitration cases in India, it is to be noted that English Courts are not yet prepared to do so. IN BIAKH v. HYUNDAI (1988 (1) L.I.L.R. 187 at 190), Steyn, J. after referring to Mustill & Boyd, Commercial Arbitration, p. 464, refused to apply the aforesaid case to arbitration cases on the ground that that case lays down principles which can be applied only in the "public law field"- He observed that "comparisons between public law field and arbitration law are different" and that the "error by arbitrators in their assessment of the parties" substantive rights and obligations does not and cannot amount to an excess of jurisdiction warranting a declaratory relief to that effect. If the contrary were to be conceded, observed Steyn, J., "the whole philosophy underlying the system of limited and filtered appeals.....would be eroded". In another case, in BANK MELLAT V. G. A. A. DEVELOPMENT (1988(2) L. I. L. R. 44), Steyn, J. reiterated the same stand after referring to Mustill & Boyd's Commercial Arbitration (p. 497-498)"s view that "if the arbitrator having found a breach, mistakenly proceeds" to award a remedy other than the one prescribed by the contract, he acts in excess of jurisdiction and the award can be set aside". He went on to say that there is no "binding authority" in England that excess jurisdiction exercised by the arbitrator is a ground for setting aside the award. Steyn, J. thought that the "proper interpretation" of all the clauses in the contract - whether spelling out "primary rights and obligations, exceptions or liability, or limitations of liability", are matters falling within the jurisdiction of the arbitrator and any mistake by him to the construction of any such clause in a contract cannot amount to an excess of jurisdiction. "And there is no need", observed the learned Judge, "for such a power because the concept of misconduct is broad enough to cover bizarre interpretations where arbitrators consciously and deliberately refused to apply a clearly applicable provision of a contract, e.g. a limitation of liability for consequential "loss" In our view, while the view of Steyn, J. for bringing the question under the head of misconduct cannot be found fault with, his objections to bringing it under the head of "excess of jurisdiction" does not convince us. So far as blading authority is concerned, there is plenty, e.g. BUNGE v. DEWAN & WEBB (1921 (8) L1. L. R. 436); A. G. for MANITOBA v. KELLY ((1922) 1 A. C. 268 (PC)) and FALKINGHAM v. VICTORIA RAIWAYS COMMISSION ((1900) A. C. 452 (PC)) and in fact, these are the cases strongly relied upon by Thommen, J. on the question of excess jurisdiction. The other objection that the court would be construing the contract between the parties is not unsurmountable for, there may be several cases where, the exercise of excess jurisdiction may be patent from a mere look at the contract. Again an objection to the award, even if it could be sustained tinder the head of "misconduct may

still be a good ground for the setting aside of the award on the ground of exercise of excess authority. Finally, while there is no doubt that the System of arbitration is not a subordinate system of State adjudication and that it is an entirely private system of adjudication (EXORMISIS v. CONSOO) 1975 (1) L I. L. R. 432), there is also the opposite view that arbitration law belongs to the field of "public law" because the arbitrator is a "delegate of judicial powers" which are essentially the property of a State (Mustill A Boyd, Commercial Arbitration, 2nd Ed. p. 1).

19. Acceptance of the principle in ANISMINIC is not a necessary condition for making "excess jurisdiction as valid ground for setting aside a decision. In Australia, Anisminic is not accepted but at the same time principle of "excess jurisdiction is also accepted. In PUBLIC SERVICE ASSOCIATION (SA) v. FED. CLERKS UNION ((1991) 65 CLR 610 at 623) McHugh, J. observed.

The phrases, excess of jurisdiction and "want of jurisdiction" are not terms of art.....Speaking generally, it can be said that there is a "want of jurisdiction" when a court or tribunal does an act which is beyond its general power or authority and that there is "excess of jurisdiction" when it does an act, the doing of which is within its general power or authority, but which was done in breach of conditions which authorise the doing of acts of that class or nature."

(emphasis supplied)

20. As stated in STATE OF KERALA v. REYEENDRANATHAN (1987(1) KLT 604 at 612) the exercise of "excess jurisdiction" contrary to the terms of the agreement of the parties could amount, to there being no contract in relation to that claim. In that case, Thommen, J. observed:

The objection raised by the State against the claim made by the contractor was not one pertaining to the construction of the contract or to the maintainability of the claim in terms of the contract, but to the existence of the contract itself in relation to the claim. According to the State; there was no contract between the parties to support such a claim; and in respect of it, there was no submission to arbitration. An action to support such an award, in the words of Lord Goddard C. J.: will fail for the very good reason that there was no submission" (M. GOLODETZ v. SCHRIV & ANOTHER - (1947) 80 L. I. L. R. 647 (KB))

(emphasis supplied)

It is important to note that M. GOLGDETZ v. SCHRIV and another ((1947)80 LI. L.R 647 (KB)) is also referred to by the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . Excess authority exercised would, therefore, amount to exercising jurisdiction in respect of a matter for which there is no submission. That is how this ground for setting aside the award comes u/s 16(1) (a) of the Act.

21. Lastly, we shall deal with the alternative contention of the appellant, that the exercise of excess jurisdiction in a patent manner - which does not involve any

interpretation of the contract - also amounts to technical or legal misconduct u/s 30 of the Act. This aspect has also been clearly decided by the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . There, Thommen, J., observed (at p. 103).:

He (the arbitrator) commits misconduct if by his award, he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II,-4th Edn., para 622). 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 malafide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority, vitiates the award.

Thommen, J. further observed (Page 105):

In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself in manifestly disregarding the limits of his jurisdiction "and the bounds of the contract from which he derived his authority thereby acting ultra fines compromise.

Obviously, reference to such action being ultra fines compromise is referable to OMAHENE v. CHIEF OBENG (AIR 1934 P. C. 185 at 188) wherein that phrase occurs and to which case, reference has been made by the Supreme Court.

22. In the context of what may amount to arbitration "misconduct" we may refer to a few ratings. The Supreme Court in The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, observed that in excluding a particular relevant factor while arriving at valuation of property, the umpire must be held to have misconducted". In K.P. Poulose Vs. State of Kerala and Another, it was held that "ignoring very material documents" amounted to misconduct. Entertainment of a fresh, claim put before him for the first time was held, in Orissa Mining Corporation Ltd. Vs. Prannath Vishwanath Rawlley, to be misconduct More important is that failure to consider objections of one party that a particular term of the contract precluded the opposite party from claiming a specific amount was again held to amount to misconduct Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, . Several rulings of this - court and other High Courts are to a" like effect. The English Law is the same. In O'Connor and Whitlaw's Arbitration, IN RE (1919) K. B. 1242) it was held that failure to deal with a particular claim amounted to legal misconduct. Allowing an unclaimed sum and disregarding an admission was also held to be misconduct. (SOCIETE FRANCO TUNISIENNE D'ARMEMENT TUNISA v. GOVT. OF CEYLON (1959 (1) All E. R. 78 at 80). Bizarre interpretations by arbitrators and conscious and deliberate refusal to apply clearly applicable provisions of the contract (e.g. a limitation of liability for consequential loss) would amount to misconduct (BANK MELLAT v. G. A. A. DEVELOPMENT (1988 (2) LI L.R 44 at 54). It may incidentally be noted that American decisions have developed a doctrine of "manifest

disregard". (See: WILKO v. SWAN (1953) 346 U.S 427) referred to in detail in Mustill v. Boyd. pp. 603, 704 APP IV). Again, in the case of misconduct either in its ordinary sense or technical or legal misconduct, as it is known in arbitration law, - the parties are not confined to the award on its face or to any document incorporated therein. Such conduct can be proved with reference to evidence outside the award (LIANG, SON & CO. LTD v. EAST CHEAP DRIED FRUIT CO. - (1961) (1) LI. L. R. 142 at 145). There Ashworth, J. observed ".....in cases of misconduct, or as I think, in cases alleging want of jurisdiction, the party challenging the award has a wider field over which he can roam"

23. Applying the above principles, we hold alternatively that the action of the arbitrator in totally ignoring even to refer to the supplemental agreement in the award, let alone complying with its terms which prohibit grant of additional compensation and extra rates, - the same must be held to amount to clear misconduct requiring the award to be set aside.

24. In the result, we hold that decisions of this Court in STATE OF KERALA v. POULOSE (1988 (1) KLT 541) and STATE OF KERALA v. POULOSE (1987(1) KLT 781) and other decisions of this Court are correct, in so far as they state that even non-speaking awards are liable to set aside if the awards are contrary to the basic or rather obvious features of the contract or traverse beyond the obvious terms of such contracts and so long as such decisions can be arrived at without interpreting or construing the terms of the contract. The violation must be evident from a mere look at the terms of the contract. To that extent, these decisions are not contrary to the decision of the Supreme Court in Jawahar Lal Wadhwa and Another Vs. Haripada Chakroberty, . These rulings, to above extent, are supported by the decision of the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . The decision of the Supreme Court in Jawahar Lal Wadhwa and Another Vs. Haripada Chakroberty, does not overrule the aforesaid Kerala cases to the above extent.

25. We answer the reference accordingly. Coming to the facts of the case, the contention for the contractor is that under claim (g) of para 10 of the Claim Petition before the arbitrator, he is entitled to Rs. 85,000/- being 100% extra over the rate of compensation agreed to as per the original contract for delays on the part of the Government. The case of the appellant, on the other hand, is that the contractor was granted extension upto 31-12-1982 after taking into consideration all factors only on condition of his completing the works as per agreed rates and that in the supplemental agreement the contractor agreed to complete the work as per the terms and conditions of the original agreement and therefore Rs. 85,000/-was awarded under claim (g) contrary to agreed terms, and is liable to be set aside. We may point out that the arbitrator, having noted in his notes on the first and only date of hearing, 27-7-1983 (see pp. 215 - 216 of the arbitrator's report) that the supplemental agreement and other factors were, in fact, relied upon for the Department at the hearing, erred in proceeding to deliver his award without even advertng to the plea in paragraph 3, 6 and 10 of

the defence statement based on the supplemental agreement. He does not even care to say in his award that the supplemental agreement was relied upon in the defence statement at the first hearing of the case on "27-7-1983. As per the notes, it is clear that the supplemental agreement was strongly relied upon by the appellants even at the first hearing. If the supplemental agreement precluded any extra compensation of higher rates, there can be no doubt that the arbitrator acted in excess of his jurisdiction and in awarding Rs. 85,000/- under claim (g) the award is liable to be set aside u/s 16 (1) (a), in view of the decision of the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . In any event, the arbitrator committed technical or legal misconduct in not even referring to the objection raised in the defence statement in paragraphs 3,6 and 10 based on the agreed terms in the supplemental agreement: Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, . The award of Rs. 85,000/- under claim (g) is therefore, liable to be set aside u/s 30 of the Act for technical or legal misconduct of the arbitrator.

In the circumstances, we set aside the award of Rs. 85,000/- as per claim (g) and remit the award to the arbitrator for reconsideration in accordance with law so far as claim (g) is concerned. Appeal is allowed and the matter is remitted to the arbitrator to that extent. Rest of the decree is confirmed. There will be no order as to costs.