

(2023) 02 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : Miscellaneous Petition No. 144 Of 2013, Arbitration Application
No.9900001 Of 2013

State Of J&K M/S C.R.Engineering Construction Pvt. Ltd

APPELLANT

Vs

M/S C.R.Engineering Construction Pvt. Ltd. State Of J&K

RESPONDENT

Date of Decision : 02-02-2023

Acts Referred:

Jammu And Kashmir Arbitration Act, Svt. 2002 — Section 39
Arbitration Act, 1940 — Section 3, 29, 30, 33, 41
Code Of Civil Procedure, 1908 — Section 34

Citation : (2023) 02 J&K CK 0027

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : M.A.Chashoo, Manzoor Ahmad Dar, Javaid, Z.A.Shah, Humaira Shafi

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1. By this common judgment, two appeals, one filed by the State of Jammu and Kashmir through Chief Engineer, Power Development Corporation (M.A No.144/2013) and the other filed by M/S C.R. Engineering Construction Pvt. Ltd., (AA No.9900001/2013) against the judgment and decree dated 11.06.2013 passed by the Court of Additional District Judge, Srinagar (hereinafter referred to as the ?District Court?), are proposed to be disposed of.

2. The instant appeals owe their origin to an award dated 31.08.2005 passed by the Arbitral Tribunal that was challenged by both the parties by filing objections thereto before the Court below where the award was submitted by the Arbitral Tribunal for making it rule of the Court in terms of the provisions of Jammu and Kashmir Arbitration Act, Svt. 2002 (hereinafter referred to as the ?Old Act?). Vide the impugned judgment and decree, the District Court, after modifying the award passed by the Arbitral Tribunal to a certain extent, made it rule of the Court.

3 The impugned judgment and decree of the District Court has been assailed by both the parties by filing instant appeals in terms of Section 39 of the Old Act. Before coming to the contentions raised in the appeals, let me give a brief backdrop of the facts leading to filing of these appeals.

4. Tenders were invited by the Government of Jammu and Kashmir for construction of Water Conduction on Sumbal Link Channels and Power House Construction as per the Tender Notice No.USHP-II/CE/3 of 1987 dated 30.11.1987. After invitation of the tenders, the following works under various orders were allotted to M/S C.R. Engineering Constructions Pvt. Ltd., Vishakhapatnam, Andhra Pradesh (hereinafter referred to as the 'Contractor'):

S.No.

Name of Contract by Govt./Chief Engineer

Construction of water conductor on Sumbal Link Div.II

Reach No

Value of contract with No. and date of Agreement

Date of completion

1.Page No.429

RD 6,690-7,000 m order USHP II/CE/4 works of 1988 dated 29.02.1988

1st Reach

Rs.46.50 lacs Agreement 26 of 88 dated 24.03.1988 Page 429

30.06.1989

2.Page 429

RD 8,470-9,915 m Under order No. USHP-II/CE/6- works of 1988 dated 29.02.1988

2nd Reach

Rs.217.90 lacs Agreement 24 of 88 dated 24.03.88 Page 429

30.11.89

3.Page 429

RD 10,575-11,250 m under Order No. USHP-II/CE/5-works of 1988 dated 29.02.88

3rd Reach

Rs.188.00 lacs Agreement 25 of 88 dated 24.03.88 Page 429

30.11.89

4. Page 42

RD 12,630-13,125 m under Order No. USHP-II/CE/9-works of 1988 dated 29.02.88

6th Reach

Rs.204.75 lacs Agreement 23 of 88 dated 24.03.88 Page 429

30.11.89

5. page 429

Power House Division

RD 14,000-14,610 m under Order No. USHP-II/CE/8-works of 1988 dated 29.02.88

8th Reach

Rs.118.60 lacs Agreement 6 of 88 dated 24.03.88 Page 429

30.11.89

5. Subsequently, the contractor was allotted another work of 'Wangath Link', namely WLD Reach RD 2000-3400 through negotiations under Agreement No. USHP-II/CE/19-Agri of 1988 dated 28.09.1988. The estimated cost of this work was Rs.113 lacs and the terms and conditions of this work were identical to those relating to other contracts. The work was to be completed by 31.08.1990. The mobilization advance of Rs.46,31,900/- was released in favour of the contractor for mobilizing the machinery, men and material. This was done against four Bank guarantees furnished by the contractor in favour of the Project Authorities/Government. Another sum of Rs. 88,79,000/- was released by the Project Authorities/Government in favour of the contractor on account of advance for machinery.

6. A dispute arose between the contractor and the Project Authorities/Government and the works aforesaid could not be completed by the contractor for different reasons which, according to the Project Authorities, are attributable to the contractor, whereas the same is being disputed by the Contractor. The Agreement between the parties contains an arbitration clause bearing No.54 whereunder the disputes, differences or questions with regard to any matter in connection with the contract, are referable to the Arbitrators, one to be nominated by the Government and other to be nominated by the contractor. The said arbitration clause further provides that, in case of differences between the Arbitrators, the decision of the Umpire, appointed by them before proceeding with the reference, shall be final and binding upon the parties.

7 In terms of clause 54 of General Conditions of Contract, the Government of Jammu and Kashmir nominated Sh. Ali Mohammad Mir as an Arbitrator on its behalf, whereas the Contractor nominated Sh. P.C. Agarwal as an Arbitrator on

his behalf. It seems that Sh.Ali Mohd. Mir refused to be an Arbitrator and, accordingly, the District Court appointed Mr. Qazi Ghulam Rasool, retired Chief Engineer as an Arbitrator on behalf of the Government. The order appointing Mr. Qazi Ghulam Rasool was challenged by the Government before the High Court, but without any success and the appeal was dismissed by the High Court in terms of order dated 07.05.2002. Thereafter, vide order dated 02.08.2002 passed by the District Court, the Arbitral Tribunal was directed to proceed with the arbitration.

8. The two Arbitrators, namely Sh. P.C.Agarwal and Mr. Qazi Ghulam Rasool appointed one more Arbitrator, namely Sh. Sham Sunder, retired Chief Engineer as 3rd Arbitrator. It seems that the Arbitral Tribunal initially submitted its award before the Principal District Judge, Srinagar, who, vide his order dated 10.02.2007 returned the award to the Arbitral Tribunal with a direction to it to resubmit the same before the Referral Court i.e the Court of Additional District Judge, Srinagar. Accordingly, the award was resubmitted by the Arbitral Tribunal before the District Court, which vide the impugned judgment/decreed, made the award rule of the Court with certain modifications.

9. As per the case set up by the Project Authorities/Government, the contractor, in all, has executed the work only to the extent of 19% and this too was executed by the contractor after the expiry of the scheduled period of time. According to the Project Authorities/Government, the contractor was under contractual obligation to start the work initially by 01.04.1988, but he failed to do so and he commenced the work only after two months when the amount on account of mobilization advance and machinery advance was released in his favour. It is alleged by the Project Authorities that the contractor suddenly abandoned the work in November, 1989 without any information and notice to the Department on the ground that there were disturbances in the Valley. According to the Project Authorities/Government, the other contractors, both local as well as non-local including M/S Janwari Associates Pvt. Ltd, M/S K.K.Chibber (Punjab), M/S K.C.Pvt. Ltd. (Delhi) and M/S Rash Builders, Srinagar were executing their allotted works in the same project, but the Contractor refused to execute the work despite the Department having issued a number of communications/reminders to the contractor for resumption of abandoned works.

10 It has been contended that the contractor did not respond to these communications and ultimately, a communication dated 20.09.1990 was received from the contractor whereby foreclosure of the contract was sought. It is averred that the Department immediately responded vide communication dated 13.12.1990 whereby the contractor was asked to report before the Engineer-in-charge for taking final measurements of the work done by him to facilitate foreclosure of the contract, but he failed to do so which left no alternative with the Department, but to take ex parte measurements in terms of clause 37 of the General Conditions of Contract. It is further pleaded that the contractor was offered a number of incentives, but he did not respond. In the backdrop of these

facts, the Project Authorities/Government have contended that they were left with no alternative, but to terminate the contract in terms of clause 38 of the General Conditions of the Contract.

11. On the other hand, the contractor has contended that, after allotment of the contract, machinery was purchased and arrangement regarding skilled and unskilled labourers from Punjab, Bihar, MP, Orissa and other parts of India was made. It is claimed that, in the year 1989, disturbances started in the valley, as a consequences whereof, there were a number of bomb blasts, hartals, curfew and killing of common people, Government officials, politicians and prominent political and social workers took place. It has been submitted that even the Central Government Offices were forced to close down in the Valley and, due to all these difficulties, the contractor faced obstacles in execution of the allotted works due to non availability of skilled and unskilled labourers. It is claimed that, due to these circumstances only, 19% of the work could be executed. It has been submitted that mass migration of a particular community took place from the Kashmir Valley due to the disturbances that were prevailing during the relevant period and it was a war like situation, as a result of insurgency and militancy. It has been submitted that, a number of non-local officials were killed which included even the Engineers working on different projects.

12 In the backdrop of the above situation, the contractor is stated to have made a request to the Project Authorities/Government to foreclose the contract in terms of clause 35 of the General Conditions of Contract. It has been submitted that, a number of representations were made to the Project Authorities, but they failed to act thereon, whereafter the contractor even offered to resume the work in case appropriate security was provided, which the Government failed to provide.

13 It has been claimed by the contractor that, instead of foreclosing the contract in the face of the situation prevailing in the valley at the relevant time, the Project Authorities unreasonably demanded resumption of work and they did not even extend the time for completion of the work. It has been submitted that the Project Authorities, instead of acceding to the reasonable request of the contractor, terminated the contract and they also refused to release the hypothecated and other machinery that was brought by the contractor to the site from Vishakapatnam and other parts of the Country. It has been further submitted that the Project Authorities illegally retained the machinery and material and put them to sale without even informing the contractor. It is also claimed that measurements of the work done were also taken by the Project Authorities in the absence of the contractor without even informing him. According to the contractor, the termination of contract is illegal.

14 The Arbitral Tribunal, after entering into the reference, considered the claims and the counter claims made by the parties before it and passed a speaking award dated 31.08.2005. A summary of the claims, counter claims and the awarded amount, in a tabular form, is given hereunder:

Claim No.

Detail of claim

Amt. claimed

Awarded Amt.

1.

Claim for compensation for the illegal withholding of plant and machinery of the claimant from Oct.1989 till the confiscation and sale of the same by the respondent to third parties

Rs.5,72,19,600/- R

Rs.4,35,25,831/- @18% from 1.4.1993

2.

Claim for compensation for the illegal confiscation and subsequent sale of claimant's plant and machinery by the respondent

Rs.67,70,819/-

Rs.60,33,000/- @ 18% from 01.04.1993

3.

Claim for the cost of materials lying at site and the site office and labour camps etc., taken over by the respondent

Rs.32,98,000/-

Rs.12,17,250.00/- @18% from 1.04.1993

4.

Claim for balance amount due under the final bill

Rs.89,84,925/-

Rs.69,54,526/-

5.

Claim for compensation towards loss of profit on the balance work taken away from the claimant by illegally terminating the contracts

Rs.1,24,20,150/-

Rs.58,14,623/-

6.

Claim for infructuous overhead expenses

Rs.38,13000/-

Nil

7.

Claim for infructuous advances paid to various labour gangs.

Rs.5,00,000/-

Nil

8.

Refund of security deposit recovered from the running account bills and call deposits lying with the respondent

Rs.6,80,420/-

Rs.6,80,420/-+18% from 1.4.1993

9.

Waiving of recovery of the balance mobilization advances and return of the bank guarantees furnished by the claimant towards mobilization advance

Rs.39,36,330/-

Rs.19,68,165/- on 50:50 liability

10.

Refund of interest recovered by the respondent towards mobilization advance

Rs.5,53,949/-

Nil

11.

Extra cost incurred for extension of validity period of bank guarantees

Rs.22,82,861/-

Nil

12.

Claim for interest

18%

13.

Cost of arbitration

Rs.4,00,000/-

To bear their costs.

Counter claims

1. Balance mobile advance

Rs.79,35,000/-

Rs.24,7725/-

2. Balance machinery advance

Rs.1,54,04000/-

Rs.13134660/-

3. Extra cost involved in reallocoting work to other agencies

Rs.7,18,20,600/-

Nil

4. Recovery on account of departmental materials

Rs.19,61,000/-

Nil

15. On the basis of the contentions raised by the parties before the District Court, the following issues were framed:

1. Whether the award is violated by quorum non justice? OPRs;
2. Whether the arbitrators have committed misconduct in delivering the award ? ORPs;
- 3.
4. Whether the award is bad due to being non stamped and unregistered ? OPRs;
5. Whether the arbitrators have traveled beyond the scope of agrmenet as well as terms of reference, as such award deserves to be rejected?.. OPRs;
6. Whether the award is liable to be set aside as the non notice of signing or filing of award in the court was served as respondents ? OPRs;
7. Whether grant of interest as per the New Act i.e Arbitrator and Conciliation Act 1997 being beyond the powers of arbitrators renders the award bad and enforceable ?OPRs
8. Whether the award has been pleas before the Court beyond the statutory powers, if so, what is its effect on the award? OPRs
9. Whether the award has been passed much beyond the claim as such is bad in law and liable to be set aside ?OPRs

10. Whether the conduct of the arbitrator was unfair, biased and prejudicial towards the respondents as such the award deserves to be set aside ? OPRs

11. Relief.

16 The District Court, after considering the contentions raised by the parties in their objections to the award, made it rule of the Court subject to the modification that claim No. 5 regarding compensation towards loss of profit has been disallowed. Besides this, the rate of interest has been modified to the extent of 12% instead of

18% from 30.04.1993 in respect of all the claims and counter claims and the same has been further modified to 6% w.e.f April 2010.

17 The Project Authorities/Government have challenged the impugned judgment/decree of the District Court on the grounds that despite there being overwhelming material on record to show that the Contractor was unwilling to carry out the contract, the District Court has come to a conclusion that termination of the contract was not in accordance with law which is patently an erroneous finding. It has been further contended that the District Court failed to appreciate the fact that the plant and machinery was never in possession of the Project Authorities, but the same was in possession of watch and ward staff of the contractor; that the Arbitral Tribunal has committed misconduct which is apparent on the face of record and this aspect of the matter has been totally ignored by the District Court; that constitution of three member Arbitral Tribunal is not envisaged under the old Act and on this ground alone, the award is liable to be set aside. It has also been contended that the Arbitral Tribunal had no jurisdiction to award pre-reference interest on the claims because of the fact that under the old Act, no such relief could be granted and that the provisions of Interest Act, 1978 were not applicable to the State of Jammu and Kashmir at the relevant time.

18 The Contractor on the other hand has challenged the decision of the District Court to the extent of disallowing the claim regarding loss of profit and reduction in rate of interest. It has been contended that the award has been passed under the old Act, as such, the amendment carried out in April 2010 in the Arbitration and Conciliation Act, 1996 is not applicable to the instant case, as such, the rate of interest could not have been reduced to 6% from April 2010. It has also been contended that, once it was concluded by the Arbitral Tribunal that the contract was terminated illegally by the Project Authorities, it was not open to the District Court to disallow the claim regarding future profits in favour of the contractor.

19 I have heard learned counsel for the parties and perused record of the case including the grounds of appeals.

20 Before dealing with the contentions raised by learned counsel for the parties, it would be apt to consider the scope of jurisdiction of this Court in an appeal to interfere in the findings recorded by the Arbitral Tribunal as upheld by the District

Court. This question has been discussed and answered by the Supreme Court in a number of judgments and it would be apt to refer to some of the decisions of the Supreme Court in this regard rendered in the context of the provisions contained in Sections 30 and 33 of the Arbitration Act, 1940.

21 In *Arosan Enterprises Ltd vs. Union of India*, (1987) 4 SCC 497, the Supreme Court observed as under:

"36. Be it noted that by reason of a long catena of cases, it is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law: In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award.

37. The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record: The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined"

22. In *Food Corporation of India vs. Joginder Pal Mohinderpal and another*, (1989) 2 SCC 347, the Supreme Court, while discussing the jurisdiction of Court to interfere in an award made by the Arbitrator, chosen by the parties, has observed as under:

"6.....

The jurisdiction to interfere by the Court of law of an award made by the arbitrator chosen by the parties is circumscribed. In India, there is a long history of arbitration. Arbitration is a mode of settlement of disputes evolved by the society for adjudication and settlement of the disputes and the differences between the parties apart from the courts of law. Arbitration has a tradition; it has a purpose. Arbitration, that is a reference of any particular dispute by consent of the parties to one or more persons chosen by the parties with or without an umpire and an award enforceable by the sovereign power were generally unknown to ancient India. Hindus recognised decisions of Panchayats or bodies consisting of wealthy, influential and elderly men of the Community and entrusted them with the power of management of their religions and social functions. The sanction against disobedience to their decision was excommunication, or ostracism and exclusion from all religions and social functions of the community. An agreement to abide by the decision of a Panchayat and its decision with regard to the line of boundary was held not to be

conclusive, since a reference to arbitration and award properly so called did not exist. See the observations in *Mukkudduns of Kimkunwady v. Inamdar Brahmins of Soorpai*. See also Bachawat's *Law of Arbitration* at page 1.

7. When power came to the East India Company, they framed Regulations in exercise of the power vested in them by the British Government. Some of these Regulations were touching arbitration. Bachawat gives description of the evolution of the Arbitration Act, 1940. Therefore, arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to fulfil today. It has great urgency today when there has been an explosion of litigations in the courts of law established by the sovereign power. New rights created, or awareness of these rights, the erosion of faith in the intrinsic sense of fairness of men, intolerant and uncompromising attitudes are all the factors which block our courts. The courts are full of litigations, which are pending for long time. Therefore, it should be the endeavour of those who are interested in the administration of justice to help settlement by arbitration, if possible. It has also a social efficacy being the decision by the consent of the parties. It has greater scope of acceptance today when there is a certain erosion of faith in view of the failure to appreciating the functions of the courts of law. It has also the advantage of not only quickness of decision but of simplicity of procedure. But in proceedings of arbitration there must be adherence to justice, equity, law and fair play in actions. However, the proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to. It is, therefore, the function of courts of law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of correction by the court of an award made by the arbitrator. We should make the law of arbitration simple, less technical and more responsive to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done. Sections 30 and 33 of the Act provide for the grounds on which an award of the arbitrator can be set aside. These were mainly, until recent changes made by statutory laws in England, in consonance with the English principles of Common Law as adopted in India. So far as the material of the present purpose is concerned, an award of the arbitrator can only be interfered with or set aside or modified within the four corners of the procedure provided by the Act. It is necessary to find whether the arbitrator has misconducted himself or the proceedings legally in the sense whether the arbitrator has gone contrary to the terms of reference between the parties or whether the arbitrator has committed any error of law apparent on the

face of the award. It is necessary to emphasise that these are grounds for setting aside the award but these are separate and distinct grounds. Halsbury's Laws of England, Vol. 2 4th Edn., para 623 reiterates that an arbitrator's award may be set aside for error of law appearing on the face of it. Though this jurisdiction is not to be lightly exercised. The award can also be set aside if, inter alia, the arbitrator has misconducted himself or the proceedings. It is difficult to give an exhaustive definition what may amount to a misconduct on the part of the arbitrator. This is discussed in Halsbury's Laws of England (supra). It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. See the observations of Russell on Arbitration, 20th Edn., page 422".

23. In *State of Rajasthan vs. Puri Construction Co.*, (1989) 2 SCC 38, The Supreme Court has, while considering the aforesaid aspect of the matter, observed as under:

"31. A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parties. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not

reduced to mockery of a fair decision of the lis between the parties to arbitration.

Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject”.

24 The aforesaid observations of the Supreme Court were relied upon by the said Court in its later judgment rendered in the case of Arosan Enterprises Ltd. vs Union of India and another, (1999) 9 SCC 449 and the Court observed as under:

“34. Turning attention on to the other focal point, namely the interference of the court, be it noted that Section 30 of the Arbitration Act, 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The use of the expression ‘shall’ in the main body of the Section makes it mandatory to the effect that the award of an arbitration shall not be set aside excepting for the grounds as mentioned therein to wit: (i) arbitrator or umpire has miscondacted himself; (ii) award has been made after the supersession of the arbitration or the proceedings becoming invalid; and (iii) award has been improperly procured or otherwise invalid.

35. The above noted three specific provisions under Section 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature

obviously had in its mind that the Arbitrator being the judge chosen by the parties, the decision of the Arbitrator as such ought to be final between the parties.

36. Be it noted that by reason of a long catena of cases, it is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law: In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award.

37. The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record: The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined".

25. From the foregoing enunciation of law on the subject, it is clear that the scope of interference by Courts in regard to an arbitral award is limited. It is also clear that the Court, considering an application under Section 30 or 33 of the Act, does not sit in an appeal over the findings and the decision of the Arbitrator. It is not open to the Court to re-appreciate the evidence or to examine the sufficiency or otherwise of the evidence. The award of the Arbitrator can be challenged only on the grounds mentioned in Section 30 and 33 of the Act. Thus, the only question, which arises for consideration before this Court, is whether there was any error on the face of the record and whether the Arbitral Tribunal has misconnected itself or the proceedings. It is also to be borne in mind that the award of the Arbitral Tribunal, in the instant case, has been considered by the District Court and on most of the issues, the award of the Tribunal has been upheld by the said Court. The scope of this Court to interfere with the award of the Arbitral Tribunal and the findings of fact recorded therein while exercising appellate jurisdiction becomes all the more circumscribed.

26 With the aforesaid legal position in mind, let us now proceed to determine the contentions raised in these appeals.

27 The first contention that has been raised by the Project Authorities/ Government is that the constitution of the Arbitral Tribunal was not in accordance with law, inasmuch as, there was no scope for appointment of a third Arbitrator in terms of the arbitration clause and the provisions contained in the old Act. In the above context, it would be apt to refer to clause 54.1 of the General Conditions of the Contract which relates to appointment of an Arbitrator. It reads

as under:

"54.1. Except as otherwise provided in Clause No.53 hereinbefore all disputes, differences or questions with regard to any matter in connection with this contract, shall be referred to the Arbitrators, one to be nominated by the Government and other to be nominated by the contractor and the decision of the two Arbitrators and in case of differences between the Arbitrators the decision of the Umpire, appointed by them before proceeding with the reference, shall be final and binding upon the two parties. The appointment of the Arbitrators and procedure to be followed shall be governed by the Arbitration Act Svt. 2002 or any statutory modification thereof. The Arbitrators or the Umpire may from time to time with the consent of the parties enlarge the time from making and publishing the award. The Arbitrators and the Umpire will be Civil Engineers only"

28. The afore-quoted clause envisages nomination of two Arbitrators, one by the Government and other by the Contractor and in case, there is any differences between the two Arbitrators, then the matter has to be referred to the Umpire. In the instant case, the Arbitrator appointed by the Government refused to act, as a result of which, another person was appointed as Arbitrator on behalf of the Government by the District Court. The order appointing the Arbitrator came to be challenged by the Government before the High Court, but without any success. The two Arbitrators nominated third Arbitrator and the proceedings of the Arbitration went on. These proceedings continued for more than three years and the parties appeared before the Arbitral Tribunal without any demur or protest. It is now too late in the day for the Project Authorities to raise objection with regard to nomination of a third Arbitrator. If, at all, the Project Authorities, had any objection in this regard, they could have challenged the proceedings before the appropriate forum or they could have even stopped appearing before the Arbitral Tribunal which they did not do. Even otherwise, all the three Arbitrators of the Arbitral Tribunal have come to the same conclusion and there is no difference of opinion between them, as such, even if the third Arbitrator is taken out of the picture, still then, the result of award would not get affected. The District Court has rightly rejected the objection of the Project Authorities in this regard.

29 The second and the most important aspect of the matter relates to the legality of termination of contract by the Project Authorities. As already noted, according to the Contractor, it could not execute the works because of the volatile security situation prevailing in the Kashmir valley at the relevant time, whereas according to the Project Authorities, the situation was not so bad in the Kashmir valley as would have justified the abandonment of works by the Contractor. It has been contended by the Contractor that he had made an offer to the Project Authorities to foreclose the contract on "as is where is basis" but the Project Authorities acted in an unreasonable manner by insisting upon resumption of the work which was not possible in view of the security situation prevailing in the Valley at the relevant time.

30 In the above context, if we have a look at the documents placed on record by the parties before the Arbitral Tribunal, the Chief Engineer vide his letter dated 23.11.89 has, after invoking clause 38 of the Agreement, informed the contractor that his contract is being terminated/rescinded with a further information that the balance work would be executed at his risk and cost through an alternative agency. On this basis, it is contended by learned AAG appearing for the Project Authorities that the notice of termination of contract in terms of clause 38.1 of the contract has been served upon the Contractor.

31 The argument of the learned AAG is not tenable because the negotiations between the parties did not stop with the issuance of the aforesaid termination notice. After the issuance of letter dated 23.11.89, there is a host of correspondence between the Project Authorities and the Contractor which supersedes the termination notice. The Contractor has addressed a number of communications to the Project Authorities highlighting the volatile situation prevailing in the Valley at the relevant time and, at the same time, making a request to review the works after peaceful conditions are ensured for working with suitable amendments. Vide letter dated 10.04.1990, the Project Authorities have advised the contractor to resume the work immediately without wasting further time. To the similar effect is another letter dated 12.07.1990. It seems that the Contractor has addressed a communication to the Project Authorities informing them that, due to prevailing conditions in the Valley, it was impossible to carry out any work and the Contractor has also made a request to finalize the contract on "as is where is basis" without any liabilities on either side. On 02.03.1991, another letter has been addressed by the Project Authorities to the Contractor informing him that the machinery deployed at site, either hypothecated or hired, cannot be released till completion of work. On 15.04.1991, a letter has been addressed by the Project Authorities to the Contractor asking him to attend the meeting for sorting out the issues. In their letter dated 30.12.1991, the Project Authorities have made it clear to the contractor that the contract has neither been foreclosed, nor terminated and he has been further informed that the Firm can take hypothecated machinery after repayment of machinery advance and completion of work as per the terms and conditions of the Agreement. Vide letter dated 02.09.1992, the Project Authorities have offered certain incentives to the contractor for resumption of the work and ultimately on 24.05.1993, the Project Authorities have informed the Contractor that, in terms of clause 38 of the Agreement, they have taken final measurements of the work done and that the hypothecated machinery as also other material lying at site are being taken over by the Project Authorities in terms of clause 38.2 of the Agreement.

32. From the foregoing sequence of communications addressed by the parties to each other, it is clear that, though the Project Authorities did issue a final notice of termination dated 23.11.89 in terms of clause 38 of the General Conditions of Contract to the contractor, yet they did not act upon the said notice, inasmuch as they continued to hold negotiations with the contractor offering him incentives to

résumé the work. However, the contractor on its part continued to express his inability to resume the work in view of the volatile situation prevailing in the valley at the relevant time. The sequence of communications addressed by the parties, as discussed hereinbefore, clearly shows that the termination notice dated 23.11.1989 addressed by the Project Authorities to the contractor was waived and superseded by conduct of the parties. Therefore, prior to finally deciding to call off the contract in terms of clause 38 of the General Conditions of Contract, it was incumbent upon the project Authorities to issue a fresh cancellation notice in writing to the contractor under the hand of the Engineer-Incharge. Without undertaking such an exercise, the action of the project

Authorities/Government in terminating the contract becomes illegal being violative of the terms of the Contract. The finding of the Arbitral Tribunal as upheld by the District Court, therefore, does not call for any interference.

33 It has been contended by learned AAG appearing for the Project Authorities/Government that a huge amount of compensation has been awarded in favour of the contractor, though he has executed only 19% of the total work allotted to him, whereas the Arbitral Tribunal has awarded a sum of Rs.4,89,33566/- along with interest in favour of the contractor which cannot be justified.

34 The contention of the learned AAG in this regard is without any merit for the reason that, in the instant case, the Arbitral Tribunal has awarded compensation in favour of the contractor once it found that the contract has been illegally terminated by the Project Authorities. Not only this, the hypothecated machinery and the material and machinery brought at site by the contractor which belonged to him was taken over by the Project Authorities and thereafter, put to sale. The Contractor has been awarded idling charges of the machinery as also the compensation on account of illegal action of the Project Authorities of putting not only the hypothecated machinery to sale, but also selling the machinery owned by the contractor. When all these components are taken together, the amount of compensation obviously has to be more than the cost of the works executed by the contractor. Thus, no fault can be found with the impugned award on this score.

35 It has been contended by the learned AAG that, as per the terms of the General Conditions of the Contract, the Engineer-Incharge has a right to take possession of the site of work including the plant, equipment and material and to put the same to auction, whereafter the sale proceeds thereof, have to be applied towards the satisfaction of sums due from the contractor. In this regard, reference has been made to clause 38 of the General Conditions of the Contract.

36. It is true that under clause 38 of the General Conditions of Contract, the Engineer-Incharge does have power to take possession of the plant and equipment along with the material at site and put the same to sale once the contract is terminated, but, in the instant case, it has been held that the very termination of the contract is illegal, therefore, any subsequent action taken by

the Engineer-Incharge including taking over of possession of the plant, machinery and equipment is also illegal. Even if, it is assumed that the Project Authorities had the power to take possession of the plant, machinery and material at site of the work, still then, as per clause 38.3 of the General Conditions of Contract, the Engineer-Incharge has to first direct the contractor to remove whole or part of the plant, equipment and material from the site of the work and if he fails to do so within the period specified in the notice in writing, the Engineer-Incharge has right to cause them to be sold.

37 There is nothing on record to show that the Engineer-Incharge, in the instant case, has issued any such notice to the contractor before taking over possession of the plant, equipment and material and putting them to sale. This omission on the part of the Engineer-Incharge has caused grave prejudice to the contractor, inasmuch as, he has been deprived of an opportunity to participate in the auction of the plant, machinery and material etc., if, at all, the same was required to be done and he has also been deprived of an opportunity to remove the same at his own expense. The Arbitral Tribunal has, therefore, rightly awarded compensation in favour of the contractor in this regard and the Project Authorities do not have any ground to challenge the same on account of their illegal actions. For the said reason, no fault can be found with the assessment and award of compensation by the Arbitral Tribunal in favour of the contractor on account of idling charges of the machinery/equipment.

38 Much emphasis has been laid by the learned AAG appearing for the Project Authorities on the contention that the Arbitral Tribunal was not having jurisdiction to grant interest in favour of the contractor for the pre-reference period. It has been contended that the old Arbitration Act did not provide for award of interest for pre-reference period and keeping in view the fact that the Interest Act 1978 was not applicable to the State of Jammu and Kashmir at the relevant time, therefore, pre-reference interest could not have been awarded on the claims. Learned AAG has relied upon a number of judgments to support his contention in this regard.

39 It is true that there are certain judgments which lay down the ratio that the pre-reference interest cannot be awarded by an Arbitrator appointed under the old Arbitration Act. In these judgments, it has been further held that since Section 34 of the Code of Civil Procedure has no application to the arbitration proceedings because an Arbitrator is not a Court, as such, the power to award interest cannot be exercised by the Arbitrator. So far as the award of interest for pre-reference period is concerned, in view of the conflicting judgments of the Supreme Court, the matter was referred to a Larger Bench in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa vs. N.C. Budharaj*, 2001 2 SCC 721. In the said case, the Supreme Court has, while answering the reference as to whether an Arbitrator has jurisdiction to award interest for the pre-reference period, observed as under:

"47.If that be the position, Courts which of late encourage litigants to opt for and

avail of the alternative method of resolution of disputes, would be penalising or placing those who avail of the same in a serious disadvantage. Both logic and reason should counsel courts to lean more in favour of the Arbitrator holding to possess all the powers as are necessary to do complete and full justice between the parties in the same manner in which the Civil Court seized of the same dispute could have done. By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to Civil Court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise he could have successfully asserted before Courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of his substantive rights under the various laws in force, according to which only even the Arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the Arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the Court thereunder, has to be upheld. The submission that the Arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers him power is too stale and technical to be countenanced in our hands, for the simple reason that in every case the appointment of an Arbitrator or even resort to Court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved and that if the Arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an Arbitrator, it is beyond comprehension as to why and for what reason and with what justification the Arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same.

48. For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in *Jenas case* [1988 (1) SCC 418] taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any Court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs”.

40 Regarding the interest pendente lite also, there was a cleavage of opinions. The question was, therefore, referred to a Larger Bench in Secretary Irrigation Department, Government of Orissa vs. G.C.Roy, (1992) 1 SCC 508 1992 1 508. The Court considered several cases and laid down the following principles:

43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) an arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law.

(The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. *Thawardas* has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena's* case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred”.

41. Regarding post award interest, the Supreme Court, in the case of Hindustan Construction Co. Ltd vs. State of J&K (1992) 4 SCC 217, held that an Arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realization whichever is earlier.

42 Again in Indian Hume Pipe Company Ltd. vs. State of Rajasthan, (2009) 10 SCC 187, the Supreme Court has, after noticing its earlier judgments, observed as under:

“13.Learned Single Judge also committed a grave error in coming to the conclusion that even though arbitrator was competent to award interest but it was not mandatory on his part to do so. The said reasoning does not appeal to be legally tenable and convincing for the simple reason, if the amount has been withheld wrongly and without any justification then of course the aggrieved party would be fully justified in claiming interest. This is the mandate of Section 34 of the Code of Civil Procedure as also Section 29 of the Act. Both the aforesaid provisions make it abundantly clear that power to award interest at all stages vests with the arbitrators. Arbitrators are bound to make the award in accordance with law and if there is no embargo or legal hurdle in awarding interest for the aforesaid three stages mentioned hereinabove then there cannot be any justifiable reason to deny the same.”

43 From the foregoing enunciation of law on the subject, it is clear that in a case where there is no specific bar in the arbitration agreement between the parties to the grant of interest, the Arbitrator would be well within his jurisdiction to grant interest at all the stages.

In the instant case, there is nothing in the General Conditions of the Contract or in the arbitration clause that would debar the Arbitral Tribunal from awarding interest at any stage in favour of the successful party. Therefore, the argument of learned AAG in this regard is without any merit.

44 It has been contended by learned counsel appearing for the Contractor that the District Court was not justified in declining the claim awarded by the Arbitral Tribunal in its favour on account of loss of profit once it was held that the contract was terminated in an illegal manner. There can be no quarrel with the proposition of law that once it is shown that the contract has been terminated illegally, the contractor is entitled to claim compensation on account of loss of expected profit. In the instant case, the Arbitral Tribunal had awarded a sum of Rs. 58,14,623 in favour of the contractor by calculating the expected loss of profit at 10%.

45 It is not unusual for the contractor to claim loss of profit arising out of illegal termination of contract. However, in order to establish what should be the actual

amount in such a situation to be awarded in favour of a contractor, it has to be shown by the contractor that if he had not pursued the activity in question and deployed his resources in another venture, he would have earned a certain amount of profit. This claim must satisfy the twin criteria of assessing damages resulting from breach of contract, proximity and measure. A person claiming damages on account of loss of profit must establish that he had the opportunity to deploy his resources in another venture and that such venture would have yielded profits.

46 Coming to the facts of the instant case, it has nowhere been pleaded or established by the contractor that he had any other venture in its hand at the relevant time and, but, for the fact that he was pursuing his contract with the Project Authorities, he would have taken up those ventures. In fact, it has been the case of the contractor that he wanted to get out of the project because of the extremely abnormal security situation prevailing in the valley at the relevant time. The contractor wanted foreclosure of the contract on "as is where is" basis as it was not possible to execute the works in those hostile conditions prevailing in the Valley at that time. The Project Authorities, without considering the genuine concerns of the contractor in execution of the work, in a unilateral manner, decided to terminate the contract, execute the works at the risk and cost of the contractor, they took over the possession of plant, machinery and material belonging to the contractor and even conducted measurements in a unilateral manner and declined the offer regarding foreclosure of the contract. For all these illegal actions, the Arbitral Tribunal has awarded compensation in favour of the Contractor, but, since the contractor has neither pleaded nor proved that he had any other contracts in hand which he could not execute because of the illegal actions of the Project Authorities, as such, the District Court has rightly declined to uphold the award of the Arbitral Tribunal to the extent of award of compensation on account of loss of expected profits. The same, therefore, does not call for any interference by this Court.

47 Lastly, it has been argued by learned counsel appearing for the contractor that the interest on the awarded claims could not have been reduced to 6% w.e.f April 2010 as the amendment is not applicable to the cases under the old Arbitration Act. It is true that the amendment is not applicable to the cases under the old Act, but then award of interest after the filing of the award before the Court is purely within the discretion of the Court. It would not be open to this Court to interfere in the discretion exercised by the District Court on this issue. The contention of learned counsel in this regard is, therefore, rejected.

48 For the foregoing reasons, I do not find any merit in these appeals. The same are, accordingly, dismissed.