

(1989) 02 KL CK 0028
In the High Court Of Kerala
Case No : M.F.A. No. 300 of 1983

State of Kerala

APPELLANT

Vs

Joseph Anchilose

RESPONDENT

Date of Decision : 10-02-1989

Acts Referred:

Arbitration Act, 1940 — Section 14, 32

Citation : AIR 1990 Ker 101

Hon'ble Judges : V. Sivaraman Nair, J;M. Fathima Beevi, J

Bench : Division Bench

Advocate : Govt Pleader and M.C. John, for the Appellant; M.P. Abraham, for the Respondent

Final Decision : Allowed

Judgement

Sivaraman Nair, J.—This appeal u/s 39 of the Arbitration Act (for short the Act) arises from an order of the Subordinate Judge, Trivandrum allowing O. P, (Arb) No. 173 of 1982. That was a petition filed u/s 14(2) of the Act. The present appellants had filed objections under Sections 16 and 32 of the Act to set aside or remit the award to the Arbitrator. Those objections were over-ruled. Hence this appeal.

2. The respondent had entered into a contract with the second respondent on 23-9-1975 for construction of balance work of 1000M of sea-wall south of 450M at the mouth of Moorat River in Iringal Village of Kozhikode District. The probable amount for the work was Rs. 12,11,445/-. The period of the contract was 18 months after the contractor commenced work. The site was handed over on 10-11-1975 on which date the work was be deemed to have commenced. It should have been completed by 9-5-1977. The work consisted of procuring and conveying granite stones of different specifications from designated quarries to the sea-shore, and dumping them to form the sea wall. It also involved construction of fascine mattress foundation. The granite stones of different specifications had to be collected and each stone had to be numbered. They were

to be dumped only after inspection. The construction was to proceed according to the specifications under the supervision of officers of the Irrigation Department.

3. The rates for labour and materials were specified in the contract. The quarry from which granite stones were to be transported to the work site was specified as Iringal quarry.

4. The contractor could not complete the work in time. He applied for extension of time on various occasions. Such extensions were granted as per terms of the supplementary agreement. Clause 2 of such agreement provided :

"The contractor shall carry out all further works as under the said agreement within the said extended period at the rates and in the manner agreed to therein subject to all the other conditions prescribed in the said agreement and shall not claim any enhanced rate for such items of work, on account of the extension of time either due to the increase in rate of labour or materials or on any other ground whatsoever".

Further extensions were granted under the same terms upto 31-3-1981. The work was completed on 30-4-1981. Contractor received the final bill in full and final settlement of all claims on 32-5-1981.

5. In the meantime, he had sought reference of the disputes and differences relating to the contract to the Government Arbitrator. He specified the disputes and differences in para 5 of the statement which he filed before the Arbitrator on 26-2-1981. He supplemented that statement by a statement of facts and claims dated 28-5-1981. In the former, he formulated the issues to be resolved in the Arbitration as items (a) to (h). Under item (a) he claimed 85% enhancement in view of the revision of schedule rates during 1976, 1978 and 1980; (b) Rs. 60 per M3 instead of Rs. 36 for providing fascine mattress foundation consisting of bush weed upto 5 cm dia; (c) expenses to inscribe numbers on each 200DM3 granite stone; (d) additional conveyance charges for procuring and conveying rubble from the quarry situated at a distance of 30 Km away from the site; (e) procuring and conveying of 45 DM3 stone from the distant quarry; (f) procuring and conveying of 20/40 DM3 stone from the distant quarry; (g) procuring conveying dumping and packing of 200 DM3 stone from the distant quarry; and, (h) idling wages to the labourers etc., whereby he sustained heavy loss due to introduction of new pattern of inspection procedure. He amplified his claims in para 9 of his statement dated 28-5-1981.

6. The claims were crystallised as items (a) to (s); They were :

(a) the amounts claimed were Rs. 38,138.75 towards enhanced rates; (b) Rs. 1,38,960/- as addition for providing fascine mattress foundation; (c) Rs. 4,65,794/- due to escalation of rates; (d) Rs. 6,311.50 on the quantity of 1942 M3 under item No. 4 of schedule of conveyance of quarry run etc.; additional 85% of the entire quantity of 1942 M3; (e) Rs. 5,826.00 under item No. 5 of schedule laying and packing quarry etc.; (f) Rs. 25,591.80 as enhancement for

the entire quantity of 5018 M3 under item No. 8 of schedule-conveyance of granite stones 45DM3 etc.; (g) Rs. 13,188/- as enhanced rate for the entire quantity under item No. 9 of the schedule-conveyance of granite stones 20 to 40DM3; (h) Rs. 34,927.20 85% enhancement in rates for the entire quantity of 50826 numbers for 200DM3 granite rubble under item No. 12 of the schedule; (j) Rs. 22,950/- for dumping 7650 numbers granite rubble of 200 DM3 under item No. 13 of the schedule; (k) Rs. 2,59,920/- for additional conveyance charges from 4-2-1979 to procuring and conveying granite quarry stones from quarries which were 30-40 kms. away from the work site; (l) Rs. 2,03,035.50 for dumping granite stones which are works not provided in the contract; (m) Rs. 50,000.00 as compensation for implementation of circulars/cost of avoidable delay in the completion of the work; (n) Rs. 25,000/- towards loss sustained by withholding amounts due to the contractor; (o) return of security deposit; (p) payment of final bill incorporating all the above claims; (q) return of the amount of Rs. 500/- which was retained as deposit; (r) interest at the rate of 18% per annum; and (s) cost of arbitration.

7. The appellants filed a detailed objection dated 5-9-1981 on 7-9-1981. They took three preliminary objections :

(i) that the claimant had not moved the next superior officer of the second respondent before referring the disputes for arbitration as required under the terms of the agreement; (ii) that final payment under the contract was received by the claimant in 5/81 in full and final settlement of all the claims under the agreement and any further claims were barred since they were to be treated as abated; and (iii) that the majority of the claims were or might and ought to have been referred by the claimant in the previous Arbitration Case No. 57 of 1979 and hence those claims were barred by constructive res judicata.

8. Appellants also maintained that the contractor had unduly delayed completion of the contract and he was not entitled to claim enhancement in the rates or any compensation for his delay in the completion of the work. According to them Iringal quarry was made available by acquisition on 1-2-1979 and the additional conveyance charges till that date were covered by the award of the Arbitrator in Arbitration Case No. 57 of 1979. The contractor had received an amount of Rs. 14,76,768/- on 12-5-1981 on completion of the work on 30-4-1981 and he had accepted the above amount in full and final settlement of all his claims against the Government. Detailed replies relating to each of the other claims were also given.

9. The contractor filed two lists consisting of 31 documents on 15-11-1981 and two more documents on 1-3-1982. The Arbitrator passed an award on 12-5-1982. He rejected the preliminary objections and awarded a consolidated amount of Rs. 5,00,000/- under the various heads. He also rejected the counter claims.

10. The contractor filed O. P. (Arb.) No. 173 of 1982 u/s 14(2), whereas the

appellants filed objections under Sections 16 and 32 of the Act. They reiterated their preliminary objections and contended that the Arbitrator erred in law in rejecting them. They specifically asserted that the contractor had not complied with the terms of the agreement, since he had not notified the immediate superior officer of the second respondent before he referred the dispute to the Arbitrator. They also asserted that since the contractor had received payment under the final bill in full and final satisfaction of his claims, there were no subsisting disputes or differences which the Arbitrator could have considered after 12-5-1981. They asserted further that the contractor who had raised some only of the differences which had matured then into disputes for arbitration in Arbitration Case No. 57 of 1979 should have been treated to have abandoned the other disputes and differences. The appellants also indicated that the award of a lump sum without specifying the items under which such an award was made was itself illegal.

11. The trial Court held, that the award being non-speaking and the Arbitrator having stated that he made the award after duly weighing and considering the allegations and evidence and after hearing counsel, the Court should not examine the matter any further. It held that since the preliminary objections and explanations of the contractor were adverted to and rejected by the Arbitrator, no further enquiry into those aspects was called for, since the court has no appellate jurisdiction over awards of Arbitrators. It also held that a lump sum award was by itself not illegal. There being no allegation of misconduct either of the Arbitrator or of the proceedings, the Court held that the award was unassailable on an over-all consideration.

12. Shri M. C. John, Govt. Pleader appearing for the appellants submits that the award of the Arbitrator was bad for errors apparent on its face, that there was no subsisting dispute in view of the contractor accepting payment in full and final settlement of all his claims during the pendency of the arbitration proceedings, that the arbitrator exceeded his jurisdiction in awarding rates in excess of the agreed rates and in allowing claims which were or ought to have been raised in Arbitration Case No. 57 of 1979. Shri M. P. Abraham, counsel appearing for the contractor, submits that the award does not contain any proposition of law on which it was based and which was erroneous. He submits that the award being non-speaking and the court having adverted to the objections before it made the award a rule of Court, there is no scope for interference in appeal. This is the controversy which we have to resolve in this appeal.

13. If an Arbitrator passes an award after due consideration of the claims and counterclaims with reference to the materials produced before him and after hearing the parties or counsel, as the case may be, the award of the Arbitrator may ordinarily be unassailable. It has often been stated -- it bears repetition -- that the Arbitrator is a Tribunal chosen by parties for good or bad and they have to abide by his decision on the disputes. But this proposition is hedged in by certain rules of caution. If the Arbitrator passes an award on the basis of a point

of law, which incidentally arises and on which his decision rests, and if the decision on the proposition of law is found to be erroneous, the Court has power and duty to interfere. Similarly, if there was any misconduct on the part of the Arbitrator or of the proceedings, the Court has to intervene. In cases where it is shown that the award was procured improperly, then again the Court shall intervene. It is true, that excepting in a very limited sphere, the Court has a duty to support awards of Arbitrators. It shall not be the anxiety of the court to tear such awards into shreds for purposes of finding fault with them or annulling them. These propositions have been stated and restated right from the decision of the Privy Council in *Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.* AIR 1923 PC 66. It was stated still earlier in *Hodgkinson v. Fernie* (1857) 3 CBNS 189, that--

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, a lawyer or a layman he is constituted the sole and final judge of all questions both of law and of fact..... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other which though it is to be regretted, is not, I think firmly established, viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award."

14. A catena of decisions of the Supreme Court *Seth Thawardas Pherumal Vs. The Union of India* (UOI), , *A.M. Mair and Co. Vs. Gordhandass Sagarmull*, , *S.B. Dutt Vs. University of Delhi*, ; *Alopi Parshad and Sons Ltd. Vs. Union of India* (UOI), , *Smt. Santa Sila Devi and Another Vs. Dharendra Nath Sen and Others*, , *Union of India (UOI) Vs. A.L. Rallia Ram*, , *Iftikhar Ahmed and Others Vs. Syed Meharban Ali and Others*, , *Allen Berry and Co. Pvt. Ltd. Vs. The Union of India* (UOI), New Delhi, have laid down guidelines which the courts shall bear in mind in exercising jurisdiction to interfere with arbitration proceedings. The decisions of the Supreme Court reported in *Hyderabad Municipal Corporation Vs. M. Krishnaswami Mudaliar and Mudaliar and Another*, , *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, , *Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others*, , *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, , *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, ; *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, and *Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd.*, also render considerable assistance in understanding the scope and amplitude of the power of the Court under Sections 14 - 17, 30, 32 and 33 of the Act in dealing with awards of Arbitrators. This Court had occasion to consider similar questions in *D'Cruz Brothers v. State of Kerala* 1982 KLJ 379 : AIR 1982 NOC 250 and *Alwaye Municipality Vs. K.A. Kochunny and Company and Another* etc., , where a Division Bench of this Court considered the extent of the Court's power to deal with a non-speaking award of an Arbitrator chosen by the parties.

15. A large number of recent decisions however have had occasion to consider

the gross abuse of the arbitral process because of the advantage not to give reasons and the limitation on the powers of Courts to interfere with the awards. Fanciful claims for enhancement above agreed rates had come up for particular notice in *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*,) and *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, . Award of amounts far in excess of the agreed rates and in contravention of the specific terms of the contract was noticed by this court in a series of recent decisions. We need refer only to *F.C.I. v. Pratap Transport Co.* (1987) 1 KLT 366, *State of Kerala v. Raveendranathan* (1987) 1 KLT 604, *State of Kerala v. Poulose* (1987) 1 KLT 781 and *State of Kerala v. Poulose* (1988) 1 KLT 541. On a reference to decided cases we find that wide spread abuse of arbitral processes have come up for notice before the various High Courts. One of us (Sivaraman Nair) had occasion to advert to these tendencies in the concurring opinion in MFA. No. 650/1980. The provocation for reference of the question whether arbitrators should be obliged to state reasons in their awards to a larger bench of the Supreme Court seems to be the need felt in some quarters to hold the arbitrators in rein. The same trend of reasoning was adopted by the Supreme Court of India in the *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, and *Food Corporation of India and Another Vs. Great Eastern Shipping Co. Ltd.*,

16. A provision for arbitration is of course a bargain which the parties enter into with open eyes. They make a conscious choice of a Tribunal to determine their disputes and differences. They also agree that the arbitrator need not state his reasons for his findings. They go in for a Tribunal of their choice with this in-built disadvantage, obviously for the purpose of expediting resolution of such disputes, and to avoid the rigid formalism and undue delay which may be involved in the regular judicial process. They agree to abide by the decision of the Arbitrator, whether it be good or bad. To resolve many of the disputes, service of a specialist may be necessary. In such cases, the arbitrator may be a specialist able to comprehend the differences better and resolve disputes speedier than the Courts. Arbitrators who are so chosen as alternative instrumentalities for resolution of disputes have freedom from formal processes of Courts. If a layman arbitrator -- even if he be a specialist -- is told that he is likely to be subjected to the rituals of judicial process, he may perhaps excuse himself. He has to have a considerable amount of play in the joints if he has to decide the disputes uninhibited by ritual formalism. But limits shall be set to his liberty also. Parties expect him to be honest and his decision to be the product of due deliberation. They rely on his expertise in the particular field of knowledge. He may not be legally trained and therefore his decision may not be formally perfect. He has nevertheless to advert to the limits within which he functions by reason of the terms of the arbitral agreement or the nature of the controversy which arises from the contract. He has to decide the dispute honestly on a consideration of the materials, pleadings, evidence, arguments etc., though he is not required to manifest such advertance by specific reference to all of them in the award, nor is he to render his decision in a formal judgment. He shall hold

the scales even between the disputants, shall be unbiased and shall conduct the proceedings in an impartial and dignified manner, so that he may not be accused of misconduct of himself or the proceedings. He shall not succumb to temptations which may render him liable to charges of personal misconduct or his award as one procured by improper means.

17. Our experience has been that abuse of arbitral process is rampant and it is essential that effective safeguards are evolved to arrest such abuses. Even in the United Kingdom, Arbitration Act was amended recently providing that in all cases where the parties seek a statement of reasons for his award, the Arbitrator shall be obliged to give the same. That amendment was occasioned because, at least in some cases, it was found that the sphinxlike stance of the arbitrator concealed possible abuses. An obligation that the arbitrator shall state reasons in his award is a far greater necessity in our country than elsewhere. The Supreme Court of India adverted to this requirement in the decision in *Food Corporation of India and Another Vs. Great Eastern Shipping Co. Ltd.*, .

18. We have to decide this appeal not on the basis of arbitration law in its pristine form elsewhere, but with advertance to the current realities of our times. We shall use the restraint which is called for because we are dealing with a bargain which the parties entered into with open eyes that a Tribunal of their choice, a forum to which they agreed shall decide the disputes even without an obligation to state reasons. We have, however, to take due note of the recent changes in law dealing with this aspect.

19. Will it be a valid award if the Arbitrator adverts to the preliminary objections and just rejects them? Is it not obligatory or at least open to the court in such circumstances to consider whether in rejecting the preliminary objections, the Arbitrator committed an error of law? Is it not open to a party to plead that an objection to the legality of the award is apparent on the face of it? We are of the opinion that it is open for the Court to consider the objection to the award and if need be to interfere with it. That may not be so if specific questions of law were referred to the Arbitrator and he erred in deciding such questions. It is, therefore, necessary for us to consider whether the three preliminary objections which the appellants raised before the Arbitrator and reiterated before the trial Court were specific questions of law which was referred to the arbitrator and if they were not, whether the award was based on a wrong determination of such incidental questions of law.

20. The first preliminary point urged by the appellants was that under Clauses 3 and 24 of the agreement, under which the reference was made, the contractor should have raised the dispute before the officer next higher to the second respondent. The Government Pleader appearing for the appellants rightly invited our attention to the decision of this Court in M.F.A. No. 192 of 1984 to the effect that Clause 24 of the tender notice read along with Clause 73 of the Madras Detailed Standard Specifications, postulates as condition precedent to a reference that the claimant should in! the first instance have urged his claims

before the next higher authority; and in the absence of such a reference the Arbitrator may have no jurisdiction to consider the dispute.

21. In his first statement dated 26-2-1981, the contractor had stated that the claimant had requested the authorities to consider his case favourably and to make payment of the same, but they were rejected under the second respondent's letter dated 24-1-1981. In the statement of facts and claims submitted by the contractor on 28-5-1982, he stated in para. 8, that "the claimant has already requested the authorities to consider his claims favourably and to make payment of the same. But they have been either rejected/denied or not even responded to at all. Thus disputes and differences have arisen between the parties. Under the agreement your good self is the named arbitrator. Hence your honour may be pleased to enter on the reference and to pass an award on the disputes issues". No specific submission was made in either of the two statements that the contractor approached the Chief Engineer, the next superior authority to the second respondent with his dispute. Item No. 31 of the documents which he produced along with the list on 15-11-1981, was a copy of the letter to the Chief Engineer dated 6-1-1981 with a copy to the Superintending Engineer. Curiously, the contractor did not produce the letter of the Superintending Engineer dated 24-1-1981 under which his claims were rejected. In any case, the contractor had no case that he had received any communication from the Chief Engineer rejecting his claims. We also find that the claims which he detailed in the two statements were not fully comprehended even by the letter dated 6-1-1981 which was alleged to have been sent to the Chief Engineer. What he ought to have done was to formulate the differences and disputes and he should have taken the formulations to the Chief Engineer. Only in case if the Chief Engineer -- the officer immediately superior to the second respondent -- rejected or refused to consider the claims could he have sought reference of such disputes for arbitration. In the light of the judgment in M.F.A. No. 192 of 1984, we are of the opinion that refusal on the part of the contractor to take the disputes to the Chief Engineer should have resulted in the Arbitrator refusing to entertain the reference. The only fact that the Arbitrator had adverted to this objection and rejected the same was not a proper reason for the trial Court to hold that there was no illegality apparent on the face of the award. The question of law which incidentally arose was wrongly decided by the Tribunal and its decision rested largely on such wrong determination of the point of law.

22. We should say the same about the next objection as well. The specific objection which the appellants urged before the Arbitrator was that final payment under the contract had been received by the claimant on 12-5-1981 in full and final settlement of his claims under the agreement. Any arbitration thereafter in respect of the contract was barred since all claims were settled and all differences were resolved with the final settlement which the contractor accepted without any reservation. The reference should not thereafter be pursued. The contractor did not file any replication. He rested his case entirely on the 33 documents which he produced on the two occasions. The arbitrator had called for

and the second respondent had submitted six copies of the final bill with details of payment relating to the work. It was not the case of the contractor that he had received payment under protest. We do not find any endorsement in the final bill to that effect. Nor do we find any letter written simultaneously or subsequently to the effect that the amount was received under protest. It is of course true that there was some delay in effecting the final payment according to the bill. But we have to remember that the work was completed only by 30-4-1981. The contractor had claimed payment from the second respondent in letter dated 31-10-1980 (document No. 30). Final payment was effected by the Executive Engineer. The absence of any indication that the petitioner received payment under the final bill not in full and final settlement of all his claims, but only under protest or reserving in him any right to contest the correctness of such payments was an important factor which the Arbitrator ought to have considered in deciding the question as to whether there was any subsisting dispute which may be resolved. The appellants having raised a specific plea that the claimant had accepted payment in full and final settlement, we would normally have expected the contractor to plead and prove that he accepted payment under protest or that he had recorded such protest either simultaneously or at least immediately after receipt of payment. We would have expected him at least to plead that he was forced to accept payment due to extraordinary circumstances without signifying his protest. He did not even file a replication much less produce any document that he had received payment under protest. It behoved the arbitrator to consider the preliminary objection with reference to the pleadings and evidence and then come to a conclusion one way or the other. The fact that the arbitrator need not give his reasons for deciding even a point of law or a mixed question of fact and law does not exonerate him from considering the pleadings and the evidence. The ritualistic recital that he considered the objections and the explanations will not do duty for an actual and effective consideration of the objections taken before him. We are of the opinion that the arbitrator committed an error of law in proceeding with the arbitration and in not effectively dealing with the preliminary objection that there was no arbitrable dispute.

23. The third preliminary objection which the appellants had taken was also on a proposition of law, viz., that the arbitrator was precluded by *res judicata* or principles of constructive *res judicata* from considering the disputes -- some of which were decided in and others which ought to have been referred to the arbitrator when disputes were referred to him in Arbitration Case No. 57 of 1979. The specific plea which the appellants raised before the Arbitrator was that most of the differences having crystallised into disputes and some alone of them having been referred and decided, there could have been no dispute regarding the matters which were referred and decided. They also urged that those disputes which were not referred but which might and ought to have been so referred, disabled the subsequent reference of those disputes on the application of the principles of constructive *res judicata*. It is significant that specific claims

which the appellants made comprehended the whole period of the contract and the claim for escalation was in relation to the entire quantities covered by the contract. For instance claim 9(a) of Rs. 38,138.75 represented 85% more in respect of item No. 1 of schedule to agreement reading "earth work excavation for foundation in ordinary soil etc. etc., claim (b) for enhanced rates in respect of fascine mattress foundation consisting of bush weed for the entire work. The claim for enhancement in respect of item 4 of the schedule -- Clause 9(a) -- Clauses 4, 5, 8, 9, 10, 12, 13, 3, 6 and 7 were all for the entire quantity for the whole period of the contract. The specific case advanced by the appellants was that more than 89% of the work was completed by 1979 when disputes in Arbitration Case 57 of 1979 were referred to Arbitrator. The award in that case settled disputes and differences regarding all the items of work up to that date. The arbitrator had no jurisdiction to make any further award in respect of those disputes and differences over again. If by that time 89% of the work was over, the contractor could and ought to have raised the disputes relating to those items at that time. The revision in the schedule rates was effected in 1977, 1978 and 1980. 89% of the work was completed before the third revision. It appears to us, that the appellants were right in contending that differences had matured into disputes by the time the earlier reference was made and the award in Arbitration Case 57 of 1979 settled all such disputes in respect of all such items of work as were specifically referred to in that case. We are also of the opinion that the appellants were right in urging that the refusal to seek reference in respect of other items which had matured into disputes by then operated as constructive res judicata against such reference being made on the subsequent occasion in the absence of any reservation to that effect. It is of course true, that the Arbitrator has referred to the preliminary objection and a statement of the contractor that perusal of and comparison with the earlier petition would show that the claims now raised were either expressly saved therein or arose after the prior reference. We are of the opinion that the Arbitrator or at least the lower Court was bound to consider which were the items which were barred by principles of res judicata or constructive res judicata and to limit the award only to such of the items as were not barred. This is not to say that the Arbitrator ought to have written a detailed order in respect of each of the items in dispute. But it behoved him to advert to the specific items which were not barred by res judicata or the principles of constructive res judicata. Refusal to do so appears to us to be an error of law apparent on the face of the award, and it vitiates the same. The arbitrator is bound by the ordinary law of the country. The principles of res judicata contain principles of public policy that there shall be some finality for decisions on disputes between parties. That wholesome rule applied not only to decisions of judicial Tribunals, but as well to Arbitral Tribunals. This position is well settled; in Spencer-Bower on "res judicata" (Turner Edition), it is stated :

"When any dispute or difference between parties is made the subject of arbitration, the "arbitral tribunal" (by which expression is meant the single arbitrator, or the several arbitrators, or the majority of them, or the umpire, or

other person or persons appointed to adjudicate on the matters submitted) is undoubtedly a judicial tribunal, and the doctrine of res judicata is accordingly applicable to its decisions, including the rules as to jurisdiction already enunciated."

24. In *Muhammed Nawaz Khan v. Alam Khan* (1891) 18 I A 73, the Privy Council held that if an award is valid, it is operative even though neither party has sought to enforce it by a regular suit or by summary procedure.

25. In *Bhajahari Saha Banikya v. Behary-lal Basak* ILR (1906) Cal 881, the Calcutta High Court reiterated that principle. In a still later decision, *Baidyanath Chatterjee Vs. Panchanani Dasi and Others*, another Division Bench of the Calcutta High Court observed :

"This conclusion is based upon the elementary principle that, as between parties and their privies an award is entitled to that respect, which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties" own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is binding."

26. In *Satish Kumar and Others Vs. Surinder Kumar and Others*, the Supreme Court approved the following proposition in an earlier unreported decision in *Uttam Singh Dugal and Co. v. Union of India*, Civil Appeal No. 162 of 1962 (at p. 836 of AIR) :

"The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference."

The Supreme Court approved the decision in *Bhajahari Saha Banikya* ILR 1906 Cal 881 (supra). In his concurring opinion, Hegde J., held (at p. 837 of AIR) :

"Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award. And the second stage relates to the enforcement of the award. Paragraph 7 of the First Schedule to the Arbitration Act lays down that "the award shall be final and binding on the parties and persons claiming under them respectively. Therefore it is not possible to agree with the Full Bench decisions of the Patna High Court and that of the Punjab and Haryana High Court that an award which is not made a decree of the court has no existence in law".

27, In *Pushraj Puranmal Vs. Clive Mills Co. Ltd.*, P. B. Mukharji J. observed (at p. 183 of AIR) :

"One arbitration agreement can produce one or more awards; and the law of arbitration, as I understand, does not nurse any dogma to say that it can never do so under any circumstances because of some fancied universal doctrine of legal merger of the arbitration agreement in the award.....This is however very far from saying that the same point can be decided over and over again by different awards, which of course cannot be done".

The decision in Partabmull Rameshwar Vs. Fulchand Kanahiyalal and Co., , M. S. Ramaiah v. State AIR 1973 Mys 17 and P.C. Ray and Co. (India) Pvt. Ltd. Vs. Union of India (UOI), , also followed the above principle. In P. C. Ray and Co. (supra) a Division Bench of the Calcutta High Court observed (at pp. 514-515 of AIR):

"Principles of res judicata as principles of general law are applicable to arbitration proceedings as well as awards. An award, if valid, is in fact, a final adjudication by a competent forum chosen by the parties themselves, and until set aside is conclusive upon the merits of the controversy submitted. An award will operate as res judicata in subsequent proceeding between the parties either in court or before the arbitrators unless the arbitrators in making the said award had acted without jurisdiction."

We have no hesitation, therefore, in holding that the principles of res judicata, including constructive res judicata, apply as much to arbitral proceedings, as they do to proceedings in courts. This, however, does not mean that differences which arise and mature into disputes after the first reference cannot be the subject matter of a further reference. That may. But issue which ought to have been referred because they had matured into dispute at the time of the initial reference cannot be the subject matter of a further reference.

28. The Government Pleader referred us to some of the important disparities in the claims raised by the contractor in his previous proceedings in Arbitration Case No. 57/79 and the present dispute. He claimed additional conveyance allowance due to the nonavailability of Iringal quarry in the prior reference up to the end of Jan., 1979. His specific claim in that dispute was that he had to procure and convey granite stones from quarries which were 14-22 Kms. away. The award of over Rs. 1,00,000/ - against the claim of over Rs. 3,00,000/- must be deemed to have taken in this claim for additional conveyance as well. The arbitrator should not have considered the claim for additional conveyance charges over again. What the contractor did was to claim as dispute number 9(a) conveyance charges for the entire period on the ground that due to non-availability of the quarry at Iringal, he had to procure granite stones from quarries 30 kms away. The appellants contended that Iringal quarry was made available by acquisition with effect from 1-2-1979 and there was no justification for claiming arty additional conveyance charges after that date. Here again, we are of the opinion that the Arbitrator was bound to consider this specific plea of res judicata raised by the appellants.

29. We do not propose to go into the other details of the case of the appellants since it is not necessary for us to do so. We are of the opinion that the Arbitrator and the Court below were wrong in assuming that the Arbitrator had jurisdiction notwithstanding the preliminary objections which the appellants validly raised. We are also of the opinion that these preliminary points involved propositions of law. The arbitrator arrogated jurisdiction to proceed further with the disputes only on the basis of a wrong determination. We hold further that those propositions of law were incidental to the assumption of jurisdiction and the determination by the Arbitrator. We should necessarily hold that the wrong determination on incidental propositions of law which was the basis of assumption of jurisdiction and the decision of the Arbitrator were illegalities apparent on the face of the award.

30. We have noticed that there was delay on the part of the contractor in completing the work. Whatever be the circumstances which occasioned such delay, the contractor had agreed, while executing the supplementary agreements whereby extension was granted to him, that he would not demand any enhancement in the rates consequent on the delay. He ought to have completed the work by 1977. He got extension only in terms of the supplementary agreement, the specific terms of which precluded him from claiming any additional rates. That being the very basis of the extension of the period within which the work was to be completed, the Arbitrator was bound to consider the claims only within the limits set by the parties by specific contract. May be the Arbitrator had discretion not to state reasons on his award, but he had no jurisdiction to over-step the limits set by the terms of the contract whereby Arbitration was provided for. It was so decided by this court in a series of decisions. (vide 1987 1 KLT 366, (1987) 1 KLT 604, (1987) 1 KLT 781 and 1988 1 KLT 541 etc.). It was so stated by the Supreme Court in *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, and *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, that a contract is not frustrated merely because of alteration in the circumstances in which the contract was made. Unforeseen circumstances justifying enhancement in the rates or prices not being within the comprehension of works contract particularly in cases where the contractor was alleged to be responsible for delay, the Arbitrator travelled beyond his jurisdiction in entertaining disputes for enhanced rates contrary to the terms of the contract. We do not think that it is necessary for us to high-light this point any further, because we are upholding the preliminary objections which ought to have precluded the Arbitrator from entertaining and continuing with the reference.

The result is that the appeal has to be allowed. Since we held that there was no arbitrable dispute after the contractor received payment on 12-5-1981 as per the final bill in full and final settlement of his claims, there is no need nor any justification to remit the matter to the Arbitrator. We allow the appeal and set aside the award of the arbitrator as also the judgment and decree of the trial Court.

In the circumstances of the case, parties will suffer their respective costs.