
(1997) 01 RAJ CK 0077

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 340 of 1996

State of Rajasthan

APPELLANT

Vs

The Spencon (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 16-01-1997

Acts Referred:

Arbitration Act, 1940 — Section 13, 14, 17, 20, 30
Civil Procedure Code, 1908 (CPC) — Section 96
Contract Act, 1872 — Section 73
Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1997) 1 RLW 340 : (1997) 2 WLC 309 : (1997) 1 WLN 110

Hon'ble Judges : P.C. Jain, J

Bench : Single Bench

Judgement

P.C. Jain, J.—The appellants have filed this appeal u/s 39 of the Arbitration Act (for short the Act") read with Section 96 C.P.C. against the judgment and decree dated 17.4.1996 passed by the learned District Judge, Jaisalmer in civil suit no 5/92.

2. The facts relevant for the disposal of this appeal may be stated as follows. The Supdt. Engineer, IGNP, Jaisalmer Circle invited tenders on 2.2.1987 for manufacture and supply of 250 lacs pucca clay tiles of the size 30 cm. x 15 cm x 5 cm. manufactured by hydraulic compression. The estimate cost of the work was Rs. 1.5 crore and the period of completion was 3 years. The earnest money to be deposited was Rs. 3 lacs. The tender of the respondent was approved by the Secretary and conveyed to the respondent through the Addl. Chief Engineer, IGNP, Jaisalmer on 24.8.1987. The work order was given by the Executive Engineer, IGNP, 29th Div., Jaisalmer on 29.10.1987. Agreement No. 21 of 1987-88 was executed. The stipulated period of commencement was 13.11.1987 and the date of completion was 12.11.1990. Four tenders for manufacture of 250 lacs pucca clay tiles of the size 30 cm. x 15 cm. x 5 cm. by clay extrusion process for kiln nos. 2, 3, 4 and 5 were also invited by the Supdt. Engineer, IGNP, Jaisalmer on 13.10.1987. The estimate cost of each work was Rs. 1.40

crore and completion period provided was three years. Approval was obtained on 24.8.1987. The work orders for kiln nos. 2, 3, 4 and 5 were issued by the Executive Engineer, IGNP, Jaisalmer on 29.10.1987. The stipulated date of commencement was 13.11.1987 and work was to be completed on 12.11.1990. The respondent executed agreement nos. 17, 18, 19 and 20 of 1987-88. The Govt. of Raj. created one more post of the Chief Engineer at Jaisalmer in connection with the execution of the Indira Gandhi Nahar Pariyojna and the present works directly relate to the office of the Chief Engineer, IGNP, Jaisalmer. At present the officer-in-charge is the Executive Engineer, IGNP, 29th Div., Jaisalmer.

3. It would be proper to refer to the important salient features of the agreement, which have got a material bearing on the disputes raised in this appeal. The agreement, interalia, contained the following clauses:

Clause-2. The land required by the Contractor for the site of the bricks kiln, sheds and like purpose connected with the execution of this contract will be provided rent free by the Government but subject always to the following conditions namely:

(a) That the Selection, extent and situation of the land to be provided under this clause shall rest absolutely with the Engineer Incharge (Executive Engineer... IGNP., Division...) and that it shall not be open to the Contractor to object any land so supplied or to demand for any purpose any more land what the Engineer-In-Charge thinks fit to provide. The Contractor may examine the site plans and specifications, if any before tendering.

(b) That if at any time, the Contractor required other or more land than what the Engineer-In-Charge shall have provided, the Contractor shall obtain the same at his own cost and expenditure.

(c) Licence for kiln will be arranged by the Department and requisite fee for the same will be recovered/deducted from Contractor's 1st running bill.

(d) If the Contractor is licensed to use existing Government kiln for the purpose of this Contract, he shall his own costs bring the kiln into working order and carry out all the necessary repairs to be effected there during the currency of the Contract.

(e) Water will be supplied free of cost by the Department at the kiln site but a pucca diggi for storage of water for at least 15 to 21 days will be constructed by the Contractor at his own cost. No kiln apparatus or tools and plants of any sort whatever shall be supplied by the Government to the Contractor who shall make his own arrangement thereof. However, if for any special reasons, Government agree to issue on rent any special item or machinery or tools and plants it will, however, in no way effect the right of the Govt. in enforcing due fulfillment of all the conditions of this Contract ven in the event of such machinery or tools and plant being found unworkable at any time.

(f) The land provided by the Government to the Contractor under this clause shall remain the absolute property of the Govt. The Contractor shall use this land and the erection (if any) only as a licence under the Government for manufacturing of bricks and tiles under this contract. He shall in no case be considered to have the right to the sale and an exclusive possession of any Govt. land or promises provided to him under this contract.

(g) Over burdens in the moulding area upto 6" thickness will be removed by the Contractor at his own cost and beyond 6" thickness, if any, will be removed by the department at its costs.

(h) If there is any typographical or clerical error in the rates shown by the department in the "G" Schedule, the rates as given in the Basic Schedule of rates of the department for the area shall be taken as correct.

(i) The Contractor shall submit all bills on the printed forms to be had on application at the office of the Engineer-In-Charge and the charges in the bills shall always be entered at the rates specified in the tender or in the case of any extra work ordered in pursuance of the conditions, and not mentioned or provided in the tender at the rates hereinafter provided for such work.

(j) Where the Contractor is a partnership firm, the prior approval in writing of the Engineer-In-Charge shall be obtained before any change is made in the Constitution of the firm. Where the contract is an individual or a Hindu undivided family business concern, such approval as aforesaid shall likewise be obtained before the Contractor enters into any partnership agreement where under the partnership would have the right to carry out the work hereby undertaken by the Contractor. If prior approval as aforesaid is not obtained, the Contract shall be deemed to have been assigned to contravention of Clause 19 here of and the same action may be taken, and the same consequences, shall ensues as provided in the said Clause 10.

(k) It cannot be guaranteed that the work will be started immediate after the tenders have been received. No claim for increase of rates will be entertained, if the orders for starting work are delayed.

Clause 19. (a) If any question, difference or objection whatsoever shall arise in any way in connection with or arising out of this instrument or the meaning of operation of any part thereof or the rights, duties or liabilities of either party than same in so far as the decision of any such matter as herein before provided for and has been so decided every such matter constituting a total claim of Rs. 5,000/- or above, whether the decision has been otherwise provided for and whether it has been finally decided accordingly or whether the contract should be terminated or has been rightly terminated and as regards the rights and obligations of the parties as the result of such termination shall be referred for adjudication to a Sole Arbitrator to be appointed as hereinafter provided.

For the purpose of appointing the Sole Arbitrator referred to above, the Chief

Engineer will on receipt of notice and prescribed fee from the contractors send a panel of 3 names not below the rank of Superintending Engineer of the Rajasthan Government and who shall all be presently connected with the contract. The Contractor shall be receipt of the names as aforesaid, select anyone of the persons named, to be appointed as Sole Arbitrator and communicate his name to the Chief Engineer. The Chief Engineer shall in response appoint the said person as the Sole Arbitrator without delay.

The Arbitrator shall give reasons for award.

However, in the event of the Contractor failing to refer the matter in dispute to the Arbitrator within 180 days from the preparation of the final bill, all his rights and claims under the contrary shall be deemed to have been extinguished and waived.

Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modifications or re-enactment thereof and the rules made thereunder for the time being enforce shall apply to the Arbitration proceedings under this clause.

(b) The Contractors shall serve due notice to the Department in the case of change in the Constitution of the firm. This will be effective only when this change has been accepted to department.

4. In addition to the above terms and conditions, the following special conditions were also provided:

(1) Advance against machinery to the maximum extent of 10% of the tendered value will be given on the basis of an acceptable bank guarantee of equal amount as well as production of original bills of the firms from which the machines/equipments will be purchased and brought to the site for work. The amount of the advance, however, will not exceeds 70% of the total cost of the machines/equipments, excluding tax and the transportation charges. The machines against which the advance is given will be hypothecated in the name of Governor of Rajasthan. The hypothecation so mad will continue to remain until the entire amount of the advance is received. Three bank guarantee would also remain valid for the entire period until the entire amount is recovered.

The advance paid will be recovered on proportionate basis from each bill in the manner that by the time 75% of the cost of tendered work is completed, the entire amount is recovered.

(2) Materials such as C.G.I. Sheets, A.C. Sheets, various sizes of pipes and structural steels for construction of sheds at kiln site will be given free of cost and free of hire charges on returnable basis. The shortage to materials, if any, will be recoverable. The total value of the materials to be supplied by the department will not exceeds Rs. 5 lacs.

(3) The calorific value of the coal to be supplied to the Contractor will be got determined and consumption factor derived on the basis of that calorific value.

The coal will be supplied free of cost to the extent of consumption factor. In case of excess consumption, recovery will be made at single issue rate upto the extent of 10% and double the rate for the balance quantities. The" consumption factor will be worked out each year,

(4) The payment of sales tax @8.8% and royalty charges @4.60 per thousand accepted tiles will be the responsibility of the Contractor. The increase/decrease, if any, in the sales tax and the royalty charges would be paid/recovered from the Bills of the Contractors.

Excise duty, leviable will be paid by the Department. All the other taxes other than above (except Income Tax) will also be paid by the Department.

(5) The increased/decreased in the rates of the diesel per liter, if any, will be paid extra recovered by the Department on the basis of the following formula:

$$E = 4(P2 - P1)$$

Where E denotes extra payment/recovery for each 1000 tiles in Rupees.

P1 denotes prevalent rate of the diesel in Rs. per liter at Jaisalmer as on 2.2.1987.

P2 denotes the rate of diesel in Rs. per liter at Jaisalmer on the date of record entry of classified accepted tiles.

(6) Power supply is not available in the near vicinity of the kiln site. The Contractor will make his own arrangements for the required powers.

(7) These conditions will supercede any condition(s) (given with the tender documents) which is/are contradictory to these special conditions.

(8) The tiles/bricks would be manufactured in a semi mechanised kiln by clay extrusion/hydraulic compression process. These would be burnt in a high draught rectangular continuous kiln developed by Central Building Research Institute Roorkee. The factory shall have a production of 30,000 tiles per day.

(9) The tiles/bricks would be machine made and dried in shade under specially built sheds to avoid repaid drying. The kiln would be covered by roof to provide shade for labourers working on the kilns and also to keep the kiln functional during rains.

(10) All machinery and equipments will be provided by the contractor at his own cost.

(11) All building, sheds and other civil structures like the factory and office rooms engine room shed for drying tiles/bricks kiln and its roof, blower room etc. will be built by the Contractor at is own costs.

(12) Land will be provided by the Department free for erection of factory and taking earth for manufacturing tiles. The Contractor will hand over the area back

to the Department after clearance of site when the work is over and before payment of final bill.

(13) Water will be provided free of cost by the Department at the diggi to be built by the Contractor for one month requirement. Further conveyance for water would be done by the Contractor at his own cost. No compensation will be given for any interruption in supply of water by the Department. However, this interruption will be considered according to the merit in extension of time limit.

(14) Cement can be issued to the Contractor, if available at prevalent stock issue rate of the division for construction of building and sheds. The cost of cement would be recovered in running bills in 3 equal instalments.

(15) All T&P needed in the manufacture process will be arranged by the Contractor at his own cost.

(16) All residential or other accommodation for staff and hutments for labour will be built by the Contractor at his own costs.

(17) Contractor will take all measures for safe running of the machinery the kiln at his own costs. He will abide by the all safety regulations in force and as laid down from time to time.

(18) The tiles/bricks would be machine molded correct to size 300 x 150x5 cm and 230 x 110x70 mm respectively and have smooth surface.

(19) The soils used for the manufacture of tiles shall be thoroughly pulverised and processed so as to completely eliminate any gravel, coarse and granular lime and kankar particles, vegetable matters etc.

(20) The tiles shall be uniformly well burnt and free from irregularities such as hoist bends, cracks and lamination. The tiles shall be uniform in size, shape and texture.

(21) The tiles shall be free from impurities like particles of stone, lime and other foreign materials visible to naked eye on the surface or on the fractured surface of tiles obtained by breaking the samples.

(22) The tiles shall be cherry brown in colour and shall give a ringing sound when struck and its fracture when broken shall be clean dense and sharp at the edges.

(23) The tiles shall conform to the Indian Standards specifications for burnt clay tiles for use in tiling irrigation and drainage work, IS: 3367-1965.

(i) Size - 300 x 150 x 50mm

(ii) Warpage-Shall not exceed 3 mm.

(iii) Compressive Strength - Not less than 105 Kg/Cm²

(iv) Transverse Strength-Not less than 15 Kg/Cm²

(v) Water Absorption-Not than 15%.

5. In pursuance of the above terms and conditions of the agreements, land was allotted by the appellants to the respondent-contractor vide order No. 72/73 dated 3.1.1988. In accordance with the above conditions a sum of Rs. 40 lacs was also advanced to the contractor for the purpose of purchase of machinery and equipments. On the stipulated condition that the said machinery and equipments shall be hypothecated in the name of the Governor of Raj. and the contractor will have to submit a guarantee of the amount equal to the amount advanced and that bank guarantee would remain valid for the entire period until the entire amount is recovered. The contractor was further required to submit the original bills of the firms from whom he has purchased the said machinery and equipments. However, the respondent-contractor has neither produced the bills and bank guarantee nor he hypothecated the said machinery and equipments with the Governor of Raj. According to the respondent, the appellants did not provide appropriate land for establishing kiln shadows, plants etc. The respondent could, therefore, not start production on or before 13.11.1987. The respondent wrote many letters to the Executive Engineer, IGNP, Jaisalmer in this regard. The machinery and equipments reached the site in the year 1988 and the necessary staff recruited by the respondent also joined duties. Since the appellants could not provide land free of cost as per terms of the agreement, the respondent had to make a contract with the residents of village Dhani and obtained a land on lease. The appellants further failed to provide land for clay field near the site. Despite all these odds when the respondent started manufacturing process, Smt. Mukut Raj Laxmi and Ors. filed a suit u/s 212 of the Rajasthan Tenancy Act, against the respondent and they also obtained a stay order. The respondent further alleged that there was breach and violation of other material conditions of the contract as a result of which it became impossible for him to start manufacture of the contract commodities. The contractor-respondent was, therefore, compelled to invoke condition 19(A) of the agreement for initiating arbitration proceedings. The respondent gave notice to the appellants in response whereof the latter sent names of three Chief Engineers. The respondent, vide his order dated 17.5.1991, conveyed his acceptance of the name of Shri Jagdish Gehlot as the Sole Arbitrator on behalf of both the parties. However, the appellant did not reply. The letter written by the respondent for appointing of the Sole Arbitrator remained unreplyed. The respondent, therefore, filed an application u/s 20 of the Act before the learned Distt. Judge, Jaisalmer praying that Shri Jagdish Gehlot may be appointed as Sole Arbitrator to adjudicate the disputes that have been arisen between the parties. The application was resisted by the appellants on the ground that the respondent-applicant was guilty of contravening the material terms and conditions of the contract and it was he who was guilty of not starting manufacturing of the above commodity from the stipulated date. The non-applicants-appellants categorically denied any violation or breach of the conditions.

6. The learned Distt. Judge, after hearing both the parties, passed an order on 20.5.1994 accepting the application of the respondent-contractor. By the above order, the learned Distt. Judge has appointed Shri Jagdish Gehlot, Ex Chief Engineer to be the Sole Arbitrator to adjudicate the following disputes arising between the parties:

(1) Whether the non-petitioners did not fulfil the contractual obligations described in Annex. X ?d?

(2) Whether delay was caused on account of non-fulfillment of the contractual obligations as detailed in Annex. ?d? in the execution of the contracts and which eventually stopped the contract work?

(3) Whether the applicant was entitled to recover a sum of Rs. 4,08,63,700/-?

7. The learned Distt. Judge fixed a period of 6 months for rendering the award.

8. Shri Jagdish Gehlot, the Sole Arbitrator, entered upon the reference and passed an award on June 9, 1996. The learned Arbitrator, by a well reasoned award, awarded a sum of Rs. 1,24,32,332/- to the respondent-contractor. The details are as follows:

1. Change of source/extra item regarding Rs. 1,36,512.00 carriage of clay. 2. Extra item for putting grooves on tiles. Rs. 30,000.00 3. Payment for extra lead of stacking of Nil burnt tiles. 4. Payment of water charges prior to full Rs. 45,388.00 supply by IGNP. 5. Refund of security deposit. Rs. 3,03,950.00 6. Recurring establishments overheads. Rs. 4,38,741.00 7. Interest on capital amount. Rs. 5,82,000.00 8. Return of Plant No. 3 Rs. 34,052.00 9. Burnt tiles in stock. Nil 10. Green tiles in stock. Nil 11. Coal stock at site Nil 12. Diesel esclation. Nil 13. Statutory increase in minimum labour Nil wages during the contract period. 14. Withdrawal of discount in rates. Nil 15. Rejected tiles lifted by IGNP. Nil 16. Compensation for construction material Rs. 71,810.00 unused. 17. Cost of land acquisition. Rs. 28,080.00 18. Spare items in store lying idle. Rs. 60,000.00 19. Interest on bank dues. Nil 20. Interest on payment of due amount @ Rs. 59,995.00 15%. 21. Payment of capital investment. Rs. 50,69,834.00 22. Loss of profit. Rs. 55,71,960.00 TOTAL Rs. 1,24,32,332.00

9. Aggrieved by the above award, the appellants have filed this appeal. On 14.2.1996, the respondent contractor moved an application purporting to be u/s 17 of the Act before the learned Distt. Judge praying for making the award rule of the court. The learned Distt. Judge issued notice to the appellants and the latter filed reply by way of counter on 15.3.1996. The learned Distt. Judge, after hearing both the parties observed that the learned Arbitrator, by a well reasoned order, decided all the items and the challenge made by the appellants was not sustainable. He, therefore, accepted the award and ordered that the same may be made rule of the court. The learned Distt. Judge further observed that the above award comprises award of interest from Aug., 1989 to 31.3.1991. He, therefore, awarded interest @12% on Rs. 62,18,377/- from 1.4.1991 to

19.1.1996, from 20.1.1996 to 17.4.1996 and from 18.4.1996 to till the release of the amount of the award. He also computed interest from 1.4.1991 to 19.1.1996 and from 20.1.1996 to 17.4.1996 which comes to Rs. 33,83,780/- and 1,80,336/-. He, therefore, made a consolidated award of Rs. 1,61,96,448/-. He further directed the appellants to make the above payment within a period of four months. Failing which the respondent-contractor will be entitled to claim interest @15% from 1.4.1991 till the original amount Rs. 62,18,377/- is released. The appellants felt highly aggrieved against the above order of the learned Distt. Judge and filed this appeal.

10. I have heard Shri L.S. Udawat for the appellants and Shri J.P. Joshi for the respondent. The first objection raised Shri Udawat against the impugned order is that the learned Distt. Judge did not appreciate "he fact that the Arbitrator while passing the above award declined to entertain and adjudicate the counter claim filed by the appellants in the above arbitration proceedings. The counter claim made by the appellants distinctly related to the works of contract and it was the duty of the Arbitrator to have considered the same on merits alongwith the claim made by the respondent-contractor. Both the claims those out of the same agreements and related to the contract works which contained the arbitration clause which was invoked by the respondent contractor. The Soel Arbitrator wrongly relied upon the judgment of the Supreme Court of India in Orissa Mining Corporation Ltd. Vs. Prannath Vishwanath Rawlley, The Arbitrator, therefore, misconducted himself by refusing to entertain the counter claim of the appellants. Learned Counsel has relied on K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, and Union of India (UOI) Vs. Jain Associates and Another,

11. Learned Counsel for the respondent supported the award as also the judgment of the learned Distt. Judge confirming the award on the ground that the Arbitrator could only render award in respect of the points of dispute referred to it by the court under Sub-section (4) of Section 20 of the Act. In a reference made under Sub-section (4) of Section 20 of the Act, the Arbitrator has to work within the ambit of reference. He cannot enlarge the scope of reference as determined by the court. Shri Joshi submitted that the learned Arbitrator is not guilty of any misconduct inasmuch as he not only entertained the objection raised by the appellants but gave a definite finding of fact, that since he was adjudicating the matter in accordance with the points of dispute referred to by the court, he cannot enlarge the same. The scope of inquiry or Arbitrator in a matter referred to in Sub-section (4) of Section 20 of the Act is very limited. The Arbitrator cannot be expected to act independently and out of the purview of the reference made by the Court. He submitted that the Arbitrator took pains in appreciating the merits of the objection and even referred to the Orissa Mining's case which is fully applicable to the facts and circumstances of the present case. Shri Joshi further pointed out that the appellants did not even raised the question of counter claim before the Distt. Judge when the order of reference to the Arbitrator was made by the Distt. Judge. Even the appellants did not incorporate

this objection when an appeal was filed by the appellants against the order of the Distt. Judge appointing Shri Gehlot as an Arbitrator in memo of appeal which was eventually dismissed. He further submitted that the cases relied upon by Shri Gehlot are not at all relevant to the facts of the present case. The above judgment was also discussed in *Delhi Development Authority v. Major (retd.) I.S. Rekhi and Sons* 1995 (2) Arbitration Law Reporter 35. Shri Joshi further challenged the sustainability of the counter claim raised by the appellants on the ground that since the counter claim was not pressed before the Distt. Judge, the appellants cannot agitate the same in view of the prohibition contained in Order 2 Rule 2 C.P.C. For this proposition, Shri Joshi referred to *I.S. Rekhi's* case.

12. I have given my thoughtful consideration to the submissions made in this regard and I find no substance in the objection raised by the appellant. It may be stated that the order of reference was made by the Distt. Judge under Sub-section (4) of Section 20 of the Act. In order of reference passed under Sub-section (4) the limits of the authority and jurisdiction of the Arbitrator are defined. The power and jurisdiction of the Arbitrator flow from the order of reference. The Arbitrator has, therefore, necessarily to restrict his award only to the claim as put forward before the Court and referred by it to the Arbitrator. In *Orissa Mining's* case, the Supreme Court has made the following observations:

Section 20(1) of the Arbitration Act, 10 of 1940 provides that where a difference has arisen and where any persons have entered into an arbitration agreement they may apply to the Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. Sub-section (4) of Section 20 provides that the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties. When an agreement is filed in court and order of reference is made then the claim as a result of the order of reference is limited to a particular relief and the arbitrator cannot enlarge the scope of the reference and entertain fresh claims without a further order of reference from the court. On a construction of Section 20 of the Arbitration Act the plea on behalf of the appellant will have to be accepted.

13. The cases cited by the learned Counsel for the appellants are distinguishable on facts. In the above two cases, the award was not made on any reference made u/s 20(4) of the Act. In *K.V. George's* case, the Arbitrator made award on the basis of claim of one party ignoring the counter claim of another party. It was held that the Arbitrator mis-conducted himself as it was his duty to consider both claim and counter claim before making an award. The case was under Sections 30 and 13 of the Act. In *Union of India v. Jain Associates'* case, the court found the award vitiated on the ground that the Arbitrator mis-conducted himself in not considering the counter claim filed by the other party only on the ground that it was filed with delay. Obviously, this case was also filed u/s 30 of the Act. Both these cases do not relate to the limited scope of arbitration u/s 20(4) of the Act. The Arbitrator, therefore, in my opinion, committed no illegality or irregularity in not entertaining the counter claim of the appellants.

14. It may also be stated that when the respondent moved an application seeking appointment of Arbitrator and making reference to him of the dispute that arose between the parties, the appellants while filing a counter did not raise any counter claim. Even in the appeal against the order of the learned Distt. Judge dated 20.5.1994, no ground based on counter claim was incorporated in the memo of appeal. I agree with the observations made in Delhi Development Authority v. I.S. Rekhi & Sons 1995 (2) Arbitration Law Reporter 35.

15. Now, the merits of the objections raised in this appeal. Before I proceed to examine the objections, it would be proper to take note of the observations made by the apex Court with regard to the powers of the Arbitrator in rendering the award and the scope of the Court to interfere: with such award.

16. In State of Rajasthan v. Puri Construction Co. Ltd. and Anr. 1995 (1) ALR 1, it was observed:

The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts.

Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties, (emphasis supplied) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction.

Where the reasons have been given by the arbitrator in making the award the Court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator.

17. In Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, it was enjoined upon the Courts not to challenge the reasonableness of the reasons given by an arbitrator in making his award.

18. In Smt. Santa Sila Devi and Anr. v. Dharendra Nath Sen and Ors. 1963 (2) SCR 410 it was held that Court should approach an award with a desire to support it if that is reasonably possible rather than to destroy it by calling it illegal.

19. In M/s. Hind Builders Vs. Union of India, , the apex Court defined the scope of judicial interference in following terms:

In a matter on which the contract is open to two equally plausible interpretations, it is legitimate for the arbitrators to accept one or the other of the available interpretations and, even if the Court may think that the other view

is preferable, the Court will not and should not interfere.

20. In *State of Rajasthan Vs. R.S. Sharma and Co.*, , the Supreme Court, while examining the scope of Section 14 of the Act, laid down the following principles:

The law as it stands today is clear that unless there is an error of law apparent on the face of the award, the award cannot be challenged merely on the ground of absence of reasons. In the present case, the arbitrator gave no reasons for the award. There is no legal proposition which is erroneous. There have been a large number of sittings before the arbitrators. Parties have been heard. There was no misconduct in the proceedings. There has been no violation of the principles of natural justice. In such a situation interests of justice and administration of justice would not be served by keeping at bay final adjudication of the controversy in this case on the plea that the question whether an unreasoned award is bad or not, is pending adjudication by a larger bench. Justice between the parties in a particular case, should not be kept in a suspended animation.

21. In *Union of India v. Jain Associates and Anr.* (supra) term "mis-conduct" has been interpreted and it was observed that the above term comprehends non-application of mind by the Arbitrator to relevant aspect of the dispute. In a Case of non-application of mind in a non-speaking award, it is not possible to separate bad portion from the good portion of the award, the entire award has to be set aside. It is, therefore, clear that the Court has not been invested with the power to re-examine the merits of the award with reference to materials produced before Arbitrator. When the Arbitrator passes a speaking award giving good reasons, challenge to the award cannot be sustained unless the reasons are totally erroneous.

22. Learned Counsel for the appellants has contended that the Sole Arbitrator has exceeded his jurisdiction in allowing extra items for carriage of clay, grooves on the tiles and payment of water charges prior to full supply by 1GNP and awarding Rs. 1,36,512/-, Rs. 30,000/- and Rs. 45,385/- respectively. The Arbitrator travelled beyond the scope of the terms and conditions of the contract in awarding the above amounts to the respondent-contractor.

23. Learned Counsel for the respondent had justified the awarding of above amount and he referred to the reasons given by the Arbitrator for allowing the above claim in favour of the respondent-contractor. perusal of the award shows that the Arbitrator dealt with the item regarding carriage of clay at pages 26 to 30 and has assigned good reasons for allowing the same. The claims with regard to putting grooves on tiles and payment of water charges prior to full supply by 1GNP have been dealt with by the Arbitrator in the same manner in the award as items 2 and 4. The reasons given by the Arbitrator are sound and cannot be challenged.

24. The main ground of challenge canvassed by Shri L.S. Udawat is that the Arbitrator without considering the counter claim of the State awarded amounts under items 6, 7, 8, 16, 17, 18, 20, 21 and 22. According to him, the above

amount could not have been awarded by the Arbitrator as per law laid down by Hon'ble Supreme Court of India in the case of Union of India v. Jain Associates (supra). He has contended that the Arbitrator was not competent to decide item No. 5 in favour of the claimant respondent on the ground that it was on account of the breach of the contract that the appellants claimed forfeiture of the security deposit. Regarding item No. 6, his contention is that the Arbitrator, under item No. 21, allowed payment of capital investment to the tune of Rs. 50,69,834/-. It was, therefore, against law to have allowed interest on capital amount. With regard to items 6 and 22, it was argued that while awarding loss of profit to the tune of Rs. 50,71,960/-, the Arbitrator ought not to have allowed recurring establishments over heads to the tune of Rs. 4,38,741/-.

25. Shri Udawat very vehemently argued that the claim in respect of items 21 and 22 were essentially based on the alleged breach of contract. If the Arbitrator felt persuaded to award loss of profit, he could not have passed award in respect of payment of capital investment inasmuch as loss of profit would also include payment of capital investment. As a matter of fact, loss of profit embraces within its fold all the items because loss of profit is always computed taking into consideration the various facts of the case which contributed to the damages having a clear nexus with the alleged breach. By allowing both the items 21 and 22, the award has resulted in enriching the contractor which cannot be allowed legally. Shri Udawat also challenged other items but his arguments with respect to items 21 and 22 have got the element of vehemence. Shri Udawat has placed reliance on Union of India v. Jain Associates and Anr. (supra).

26. Learned Counsel for the respondent, on the other hand, has fully supported the award. He profusely quoted the reasons assigned by the Arbitrator under each head. He commended the award and submitted that the Sole Arbitrator utilised all his technical experience in appreciating the various items of disputes. He logically analysed the pros and cons of the rival arguments canvassed before him. His reasoning is well founded, lucid and rational. He, therefore, contended that on account of the limited scope of interference in the award by the Court, the whole award must be upheld. Regarding items 21 and 22, he has stated that, the appellants not only broke the contract but the manner in which it was done shows that all sorts of obstacles and hindrances were put when the respondent-contractor tried to execute the contract. The contractor-even went to the extent of taking the land on lease at his costs when the same was not provided by the Executive Engineer as per terms of the contract. This shows the bonafide of the respondent-contractor, in carrying out his contractual obligations. In order to carry out the manufacture and supply of the tiles purchased costly machineries. The other party, by placing all sorts and hindrances, never allowed the respondent-contractor to proceed with the above work. On account of hot and harsh climate of the desert, extensive damage was caused to the machinery. The respondent-contractor for carrying out the above work executed the necessary work like construction of office building, labour quarters, stores etc. by incurring heavy expenditure. When the contractor was finally convinced that the defaulting

party would not allow execution of the contract, he tried to shift the costly machineries to Udaipur, but the Executive Engineer obstructed such removal by resorting to litigation. The contractor, therefore, did not succeed in warding off the possible damage to the machineries. u/s 73 of the Contract Act, the Arbitrator was right in compensating the contractor in respect of capital investment made by him. If the appellants would have allowed the contractor to shift the machinery in time, the resultant damage caused to machineries could have been substantially avoided. He has quoted the award in respect of these two items in detail and submitted that while allowing damages in respect of item No. 21, the Arbitrator computed depreciation according to the provisions contained in the Income Tax Act. A perusal of Annex. VIII shows the details of such computation made by the Arbitrator. The Arbitrator has taken pains in ascertaining the actual loss caused to the contractor by referring to all the relevant law and also inspecting the site. The Arbitrator has given detailed reasons for allowing item No. 21.

27. Regarding item No. 22, Shri Joshi has submitted that the Arbitrator examined the facts which existed at the relevant time and observed that two kilns against agreements 18 and 19 had come into production and some tiles were also supplied to IGNP. In respect of kiln No. 3 relating to agreement No. 20, he found that all civil works were completed and plant and machinery was also at site except for extrusion plant which had come but. had to be sent back. He further observed that the bricks were also moulded and transported at the site. He concluded that had there been no dispute, there was no doubt in coming up of kiln No. 3 also in operation in due course. He, therefore, considered loss of profit for breach of the above three agreements namely, 18, 19 and 20. He declined to consider the claim of the contractor in respect of the remaining two kilns 17 and 21. The Arbitrator observed at pages 60 and 61 that ordinarily a contractor expects profits in the execution of the contracted works while submitting tenders. At page 61, the Arbitrator very cogently observed that from three kilns, the contractor would have supplied 75 lacs tiles to the department against which he has already supplied 35, 55, 600 tiles. In Annex. VII, the Arbitrator has given details how he worked out the loss in profit of the contractor. Shri Joshi has, therefore, submitted that the award is so exhaustive, reasoned and legally sound that no interference is possible. He placed reliance on the case *State of Raj. v. Puri Construction Co. Ltd. and Anr.*

28. I have given my anxious and serious consideration to the rival submissions and also took into consideration the case law cited at the bar. Now, I proceed to examine the items challenged by Shri Udawat. As regards items 1, 2 and 4, I have gone through the award. The Arbitrator has very ably dealt with the rival contentions made before him. At page 28 of the Award, the Arbitrator has referred to the letter written by the Chief Engineer, IGNP, Bikaner on 24.3.1990. He quoted the contents of the letter and concluded that the contention of the respondents about number of tiles for which it was paid was correct. In Annex. 1, he has given all the relevant details. Regarding item No. 2, the Arbitrator has

referred to the correspondence that ensued between parties and concluded that the grooves were put on the tiles at the behest of the officers of the IGNP. Regarding item No. 4, the Arbitrator found the respondent-contractor entitled to payment of Rs. 45,388/- as computed in Annex. III payable by the appellants.

29. Regarding refund of security deposit, I need only to state that the Arbitrator in his award has found the appellants guilty of the breach of the contract. This finding of fact recorded by the Arbitrator and based on cogent evidence and material has been accepted. Once there is a breach of contract, the aggrieved party is legally entitled to claim refund of security deposit. The Arbitrator has, therefore, correctly allowed the respondent contractor to withdraw the security deposit amount.

30. Regarding items 6 and 7, if considered conjointly with items 21 and 22, it becomes clear that items 6 and 7 are embraced in items 21 and 22. When the Arbitrator has awarded payment of capital investment, it would not be justifiable to allow interest on such capital amount. Hence, the Arbitrator was not correct in awarding interest on capital amount amounting to Rs. 5,82,000/-. Similarly, regarding recurring establishment overheads, it may be stated that the loss of profit is computed by various aspects of the contract and it includes all the items which contributed to such loss over-head establishment expenditure incurred in order to carry out the contract which is aimed at getting profit. If there is a breach of contract as has been found in the instant case, the contractor will be entitled to damages on account of loss of profit which invariably includes sundry expenditure like establishment expenditure etc. There was no justification for awarding recurring establishment expenditure separately. Hence, the amount in respect of item No. 6, ought not to have been allowed.

31. Now, I may deal with items 21 and 22. The Arbitrator, in his report, dealt with these two items at pages 58 to 63. A perusal of the award shows that the Arbitrator has recorded a clear finding that the costly machineries purchased by the contractor got damaged substantially on account of hot and harsh climate of the desert. On account of the indecisive attitude adopted by the officers of IGNP, the manufacture and supply of bricks could not proceed ahead at the stipulated rate and eventually came to a standstill. Since the above machineries were lying unprotected in the open and harsh climate of the desert, the substantial damage was caused to the machineries which would not have been caused to such machineries in normal climate. The Arbitrator took note of the fact that the contractor made an attempt to minimise the loss and attempted to shift the machineries to Udaipur but the officers of the IGNP would not allow it and on account of the litigation and proceedings taken u/s 145 Cr. P.C, the contractor could not save the machineries by removing the same to a safer place. Obviously the appellants are liable for causing the above damage to the machineries. It was the direct result of the act of the appellants. After giving a positive finding that the above machineries got damaged on account of the breach of contract and also by causing obstruction in the removal of the same by the contractor, the

Arbitrator tried to ascertain the loss and by applying the provisions of depreciation as contained in Income Tax Act, and as computed in Annex. VIII, allowed a sum of Rs. 50,69,834/- to the claimant. I do not find any substance in challenge made by Shri Udawat that items 21 and 22 are not distinct and item 21 ought not to have been allowed separately because under loss of profit the Arbitrator has awarded all the reasonable compensation distinctly related to the breach of the contract. I have already stated that loss of capital investment was peculiar in the sense that ordinarily in normal climate such loss would not have arisen. When the Contractor tried to save the machineries by removing the same to Udaipur, he was not allowed to do so by the appellants. If the machineries would not have been exposed to harsh climate of the desert on account of the non-fulfillment of the contractual obligations by the appellants, such loss could have been minimised. I attach due importance to the fact that the machineries were inspected by the Arbitrator. He was, therefore, the best judge of the conditions of the machineries and the damage caused to them. The Arbitrator can also not be found fault with by applying the recognised principles of depreciation as enshrined in the Income Tax Act. In this connection, I may refer to the observations made in State of Raj. v. Puri Construction Co. Ltd. (supra) in para 31, the following observations were made with regard to the facts of the case and the law laid down:

The contractor's case was that because of delay in handing over the site and for non supply or delayed supply of materials essential for the construction work thereby putting obstacles and hindrances to execute the work within the stipulated time and ultimately repudiating the contract and seizing machineries etc. of the contractors, he not only suffered huge loss but was practically reduced to bankruptcy. It is the case of the contractor that on account of illegal seizure of costly machineries by the appellant, he was prevented from undertaking other works of contract. A part of machineries seized by the appellant have been sold for Rs. 20 lacs. In the award, the arbitrators have recorded that the appellant admitted that the remaining machineries would cost about Rs. 5 lacs. That part, constructions of labour quarters, laying of roads etc. at substantial cost incurred by the contractor have been incurred by the appellant after repudiation of contract. It may be stated here that the first part of construction work of Mahi Bajaj Sagar Dam was given to M/s. R.S. Sharma. A lump-sum award of Rs. 75,41,755 was awarded in favour of M/s. R.S. Sharma. The machineries of M/s. Sharma were not seized by the appellant. Such lumpsum award of more than Rs. 75 lacs without indicating how such quantum was determined was upheld by this Court and the decision is reported in State of Raj. v. R.S. Sharma & Co. (supra). The respondent contractor has urged that the machineries including those seized and sold at depreciated value will now cost about 2.5 crores of rupees. Considering the magnitude of work involving costly machineries & materials, if the two arbitrators in their wide experience have quantified the total damage and has given the award for Rs. 1 crore in favour of the respondent, it cannot be held that such award is so patently unjust and irrational and shocking to the

conscience of the Court, that the same should be interfered with. As already indicated in the case of other contractor concerning first part of the work in Mahi Bajaj Sagar Dam, namely, R.S. Sharma & Co. the arbitrators quantified damages to the extent of over Rs. 75 lacs without indicating how such damages had been quantified. But challenge to such award by the State of Rajasthan failed and the award has been upheld by this Court. We, therefore, dismiss the petition of objection and additional objection challenging the validity of the award.

32. As regards the computation in loss of profit the Arbitrator has proceeded to ascertain the expected production and supply of bricks and the resultant loss on account of breach committed by the appellants. The relevant details are given in the award.

33. I have already stated the scope of judicial scrutiny when the award of the Arbitrator is challenged. I am aware of the observations made in State of Raj. v. Puri Constructions Co. 's case. It was observed in that case that Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. Whether a particular amount liable to be paid is a position within the exclusive competency of the Arbitrator. By purporting to construe the contract, the Court cannot take upon the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken on a contract, the decision of the Arbitrator on certain amount awarded is a possible view that perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the Arbitrator in making the award, the Court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The Arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the Arbitrator. I, therefore, upheld the finding of the Arbitrator as regards items 21 and 22.

34. For the above reasons I accept the appeal in part. The order of decreeing the amounts of items 6 and 7 is set aside. Rest of the order is hereby confirmed. There will be modification in the calculation of interest on account of this order which may be carried out. It is also made clear that the finding of this appeal will not adversely affect the fate of other proceedings which might be pending between the parties in different courts. The respondent will get proportionate cost of the appeal from the appellants.