

(2003) 05 AP CK 0001

In the Andhra Pradesh High Court

Case No : CMA No's. 953, 1079 of 1994 and CRP No. 2726 of 1994

T.A. Choudhary

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 01-05-2003

Acts Referred:

Arbitration Act, 1940 — Section 30

Contract Act, 1872 — Section 23, 54, 55, 59, 73

Citation : (2004) 3 ALD 357

Hon'ble Judges : R. Subhash Reddy, J;G. Bikshapathy, J

Bench : Division Bench

Advocate : K. Prabhakar, in CMA No. 953 of 1994 and Government Pleader for Arbitration in CMA No. 1079 of 1994 and CRP No. 2726 of 1994, for the Appellant; K. Prabhakar, in CMA No. 1079 of 1994 and CRP No. 2726 of 1994 and Government Pleader for Arbitration for Respondent Nos. 1 and 2 in CMA No. 953 of 1994, for the Respondent

Judgement

G. Bikshapathy, J.—All the CMAs, and CRP can be disposed of by a common judgment as they arise out of an award passed by the learned Arbitrator dated 30-9-1991.

2. The facts culminating in the present cases are traced out as follows:

For the sake of convenience, the parties are hereinafter referred to as the department and the Contractor respectively.

3. The Contractor entered into an agreement with the department for the works forming approaches to the R&B in M.18/4 of Guntur-Repalle Road (K.M.06 of Nidubrole-Govada Road) in Ponnur Municipal limits including the formation of the service roads on either side of the overbridge of Nidubrole in lieu of level crossing No. 267 of Vijayawada-Gudur Section in Guntur District.

4. Agreement was entered on 27-11-1978 between the parties and the time for completion of the work was fixed at 15 months from the date of handing over the

site. According to the department, the site was handed over on 27-11-1978, but the work was completed only by the end of January, 1985. After the work was over, the Contractor laid a claim on 16-6-1992 to the Superintending Engineer and thereafter he filed OP No. 21 of 1988 for appointment of Arbitrator, Accordingly, the Honourable Sri Justice C. Sree Ramulu, Judge (Retd.), High Court of Andhra Pradesh was appointed as Arbitrator to adjudicate all the disputes between the parties. He entered the reference and passed the award on 30-9-1991. Thereafter the Contractor filed OS.No. 1088 of 1991 to make the award Rule of Court and filed OP No. 269 of 1992 to set aside the award to the extent, the learned Arbitrator rejected the claims. OP No. 47 of 1992 was filed by the department to set aside the award dated 30-9-1991 insofar as it allowed the claims of the Contractor. By a common judgment dated 30-11-1993, the Civil Court decreed the suit OS.No. 1088 of 1991 making the award as Rule of Court except claims No. 1, which was rejected. The learned Arbitrator also allowed the interest @ 6% per annum from the date of the decree. He dismissed OP No. 269 of 1992 filed by the Contractor and also OP No. 47 of 1992 filed by the Department except claim No. 4. Aggrieved by the judgment and decree passed by the Civil Court in OS No. 1088 of 1991, the department filed CRP No. 2726 of 1994 and dismissing the OP No. 47 of 1992 of the department to set aside the award, the department filed CMA No. 1079 of 1994. CMA No. 953 of 1994 was filed by the Contractor challenging the judgment and decree of the Civil Court insofar as it rejected the claims of the Contractor. The details of the claims made by the Arbitrator and the decision of the Arbitrator are set out infra. A claim petition was filed by the Contractor under Clause 73 of PS to APDSS for adjudication of the disputes relating to the execution of the work referred to above and the learned Arbitrator entered on reference on 30-12-1989 and passed the award on 30-9-1991.

5. It was the case of the Contractor that on account of the delay on the part of the department in handing over the site completely, the work could not be completed and on account of the non-completion of the Land Acquisition proceedings in most of the places, the work was held up and consequently the time for completion of the work was extended from time to time on account of which the Contractor was made to pay escalated rates. On the other hand, it was the case of the department that the delays are attributable to the Contractor and that they are not liable for payment of any extra amounts. The details of the amounts claimed by the Contractor and allowed/rejected by the learned Arbitrator are as follows:

Claim No.	Description	Amount claimed	Amount awarded
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Rs.	Rs.
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- | | | | |
|----|--|-------------|------------|
| 1. | Compensation towards element of escalation | 16,00,000/- | 5,70,000/- |
| 2. | Loss due to idle labour and advances | 6,70,000/- | Rejected |
| 3. | Idle wages for machinery | 2,62,000/- | -do- |

4. Payment for overlap and spacer bars on Steel reinforcement in RCC items 1,20,000/- 89,400/-

5. Refund of seigniorage recoveries 61,812/- Allowed

6. Waiver of penalties 2,000/- Allowed

7. Overhead charges 2,00,000/- Rejected

8. Loss of profit 20,00,000/- 62,134/-

6. However in respect of the aforesaid amounts, the Civil Court made the award Rule of Court except claim No. 4 which was disallowed. To the said extent, the Contractor filed an appeal before this Court.

7. The learned Arbitrator framed the following issues for consideration:

(1) Whether the delay in the execution of the work was caused by the defaults, indecision and breaches committed by the department?

(2) Whether the claimant is entitled to any of the claims, if so, to what extent?

(3) Whether the claimant is entitled to any interest on the amounts claimed ?

8. The learned Arbitrator has considered the issue relating to the delay in execution and defaults on the part of the parties. After reference to various correspondence between the Contractor and the department, the learned Arbitrator observed that the delays and breaches were solely attributable to the department. The learned Arbitrator also found that the complete site was not handed over on 27-11-1988 and additional sub-ways were approved while the work was in progress. It was also admitted that there was some items of work, which was entrusted to some other Contractors and the work in Block Nos. 5 to 8 were withdrawn from the works of the claimant. After a detailed discussion and also taking into consideration Ex.C-90, the learned Arbitrator found that the department was solely responsible for the delays.

9. The learned Government Pleader tried to contend that the said finding of the Arbitrator is wholly illegal and contrary to the material on record. But, we are not prepared to accept his contention. The learned Arbitrator has thoroughly discussed this issue with reference to the voluminous documents pressed into service by both the parties. The learned Arbitrator categorically found that the correspondence of the department itself disclosed that the department was responsible for the delay. It was also observed that there was lot of demand from the public regarding subways which resulted in additional work. The telephone lines were not cleared and thus they caused obstruction to the work. It was also found that the site was cleared off by removing the stagnated water and made fit for forming the service road in 1981. Thus, he came to the conclusion that the construction of bridge across Tungabhadra Drain and Srirangapuram channel in Repalle-Guntur road and subway on Repalle side approach abutting Railway bridge and the overbridge over the Railway track are closely interlinked with the

present work of the Contractor and the works were completed in 1981-84 resulting in delay and completion of the work within the agreed period. He also found that the work in respect of one block was interconnected with the adjacent blocks as such unless and until the work in a particular block is completed, the work of the adjacent block could not be commenced. Thus, we do not find any infirmity in the findings recorded by the learned Arbitrator holding that the Department was solely responsible for the delays and committed breach of agreement.

10. The learned Arbitrator clubbed claims No. 1, 2, 3, 6, 7 and 8. He awarded a sum of Rs. 7,85,346/- after rejecting the claim under Clause Nos. 2, 3 and 7.

11. The learned Government Pleader submits that the above claims as awarded by the learned Arbitrator are not sustainable as the learned Arbitrator erred in not taking into account that the agreement was entered at 19.9% excess over the estimated rates. The estimated value based on SSR of 1977-78 was Rs. 37,23,549-31 while the value for the agreement was Rs. 44,67,667/-. The learned Arbitrator allowed 30% escalation out of which 19.9% was already taken care of in awarding the work. Therefore, 19.9% should have deducted from the awarded amount under the said award.

12. The learned Government Pleader would also submit that under Clause 59 of Preliminary Specifications to A.P. Detailed Standard Specifications (PS to APDSS), the Contractor-claimant is only entitled for extension of time and he is not entitled for any compensation. He also submits that the Arbitrator has to consider the matter within the framework of the terms of the contract and he cannot wander beyond the scope of the contract. Inasmuch as under Clause 59, the payment of compensation is prohibited, the learned Arbitrator ought not to have allowed the claims referred to above. Strong shelter is taken by the learned Government Pleader under Clause 59. He relies on the decision of the Supreme Court reported in *State of U.P. v. Abhai Kishore Masta*; 1994 (5) SCALE 57, and *General Manager Northern Railways and Another Vs. Sarvesh Chopra*, .

13. On the other hand, the learned Counsel for the respondent submits that this issue has been settled in various decisions of the Supreme Court as well as this Court and it was found when Clause 59 is not applicable, it is open for the Arbitrator to award the amounts and such a decision of the Arbitrator cannot be interfered with.

14. Both the Counsel relied on host of the decisions which will be referred to hereinafter.

15. Before going into the spectrum of Clause 59, it is necessary to refer to the parameters of interference over the award of the Arbitrator by the Courts u/s 30 of 1940 Act. It is needless to mention that the judgments on this aspect are numerous. However, in order to avoid repetition and to touch upon the relevant issues, we are inclined to refer to few judgments, which have almost traced out the entire gamut of principles settled by the Supreme Court in various cases

right from the inception.

16. The Supreme Court in *Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority*, , while dealing with the scope of Section 30 held thus:

"5. The scope for interference by the Court with an Award passed by the Arbitrator is limited. Section 30 of the Arbitration Act, 1940 (for short "the Act") provides in somewhat mandatory terms that an Award shall not be set aside except on one or more of the grounds enumerated in the provision. The three grounds set out in the Section are:

- (a) that an Arbitrator or Umpire has misconducted himself or the proceedings;
- (b) that an Award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35;
- (c) that an Award has been improperly procured or is otherwise invalid.

Interpreting the statutory provision Courts have laid stress on the limitations on exercise of jurisdiction by the Court for setting aside or interfering with an Award in umpteen cases. Some of the well recognised grounds on which interference is permissible are:

- (1) Violation of principle of natural justice in passing the Award;
- (2) Error apparent on the face of the Award;
- (3) The Arbitrator has ignored or deliberately violated a clause in the agreement prohibiting dispute of the nature entertained.
- (4) The Award on the face of it is based on a proposition of law, which is erroneous, etc.

6. In *U.P. Hotels and Others Vs. U.P. State Electricity Board*, , this Court in Paras 17 and 18 observed as follows:

"17. It appears that the main question that arises is : whether the decision of this Court in *Indian Aluminium Company Vs. Kerala State Electricity Board*, , case was properly understood and appreciated by the learned Umpire and whether he properly applied the agreement between the parties in the light of the aforesaid decision. It was contended that the question whether the sums payable under Clause 9 included discounts. On the aforesaid basis it was contended that there was an error of law and such error was manifest on the face of the Award. Even assuming, however, that there was an error of law in arriving at a conclusion, such an error is not an error, which is amenable to correction even in a reasoned Award under the law. Reference may be made to the observations of this Court in *Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others*, , where it was reiterated that an Award can only be set aside if there is an error on its face. Further, it is an error of law and not mistake of fact committed by the Arbitrator which is justiciable in the application before the

Court. Where the alleged mistakes or errors if any of which grievances were made were mistakes of facts if at all and did not amount to error of law apparent on the face of the record, the objections were not sustainable and the Award could not be set aside. See also the observations of this Court in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, , where this Court reiterated that reasonableness of the reasons given by an Arbitrator in making his Award cannot be challenged. In that case before this Court, there was no evidence of violation of any principle of natural justice and in this case also there is no violation of the principles of natural justice. It may be possible that on the same evidence some Court might have arrived at some different conclusion than the one arrived at by the Arbitrator but that by itself is no ground for setting aside the Award of an Arbitrator. Also see the observations in *Halsbury's Laws of England*, 4th edn., Vol.2, at pages 334 and 335, para 624, where it was reiterated that an Arbitrator's Award may be set aside for error of law appearing on the face of it, though that jurisdiction is not likely to be exercised. If a specific question of law is submitted to the Arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the Award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the Arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion; but if it appears on the face of the Award that the Arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the Award. 18. It was contended by Mr. F.S. Nariman, Counsel for the appellant, that a specific question of law being a question of construction had been referred to the Umpire and, hence, his decision, right or wrong, had to be accepted. In view of Clause 18, it was submitted that in this case a specific reference had been made on the interpretation of the agreement between the parties, hence, the parties were bound by the decision of the Umpire. Our attention was drawn to the observations of this Court in *Smt. Kusum Gupta alias Kusum Bansal Vs. Haryana State Small Industries and Export Corpn., Chandigarh*, where this Court held that under the law, the Arbitrator is made the final arbiter of the dispute between the parties, referred to him. The Award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts. Where the Award which was a reasoned one was challenged on the ground that the Arbitrator had acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."

17. Yet in another recent case in *M/s. Sikkim Subba Associates Vs. State of Sikkim*, , the Supreme Court copiously referred to the earlier decision right from *Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Limited* AIR 1923 PC 66 and observed thus:

"(12) Relying upon the ratio in *Champsey Bhara and Company v. Jivraj Balloo*

Spinning and Weaving Company Limited, AIR 1923 PC 66 this Court in, Alop Parshad and Sons Ltd. Vs. Union of India (UOI), observed that the Award may be set aside on the ground of an error on the face thereof, when in the Award or in any document incorporated with it, as for instance, a note appended by the Arbitrator(s) stating the reasons for the decision wherein the legal propositions which are the basis of the Award are found to be erroneous. A specific question submitted to the Arbitrator for his decision, even if found answered wrongly involving an erroneous decision in point of law also, was considered not to make the award bad on its face so as to call for interference. While emphasizing the position that "misconduct" in Section 30(a) of the Act comprises legal misconduct, this Court held it to be complete in itself when the arbitrator was found to have, on the face of the award, arrived at a decision by ignoring very material and relevant documents which throw abundant light on the controversy to help a just and fair decision or arrived at an inconsistent conclusion on his own finding (K.P. Poulse Vs. State of Kerala and Another,). In M/s. Chahal Engineering and Construction Co. Vs. Irrigation Department, Punjab, Sirsa, , this Court held that the words "is otherwise invalid" in Clause (c) of Section 30 of the Act would include an error apparent on the face of the record. In Trustees of The Port of Madras Vs. Engineering Constructions Corporation Limited, , after advertng to the ratio of the Constitution Bench of this Court in Raipur Development Authority Vs. M/s. Chokhamal Contractors etc. etc., ; AIR 1990 1426 (SC)), this Court held that the error apparent on the face of the award contemplated by Section 16(1)(c) and Section 30(c) of the Act is "an error of law" apparent on the face of the Award and not an error of fact and that the Arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. In State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., , it was held that the Court, in a proceeding to set aside the Award cannot exercise jurisdiction, as if on an appeal by re-examining and reappraising the evidence considered by the Arbitrator and come to the decision that the arbitrator was wrong (See also U.P. Hotels and Others Vs. U.P. State Electricity Board, and Sudarsan Trading Co. Vs. Government of Kerala and Another,).

(13) In Union of India (UOI) Vs. Jain Associates and Another, , this Court held as follows:

"7. In K.P. Poulse Vs. State of Kerala and Another, , this Court held that misconduct u/s 30(a) does not connote a moral lapse. It comprises of legal misconduct which is complete if the Arbitrator, on the face of the Award, arrives at an inconsistent conclusion even on his own finding, by ignoring material documents which would throw abundant light on the controversy and in arriving at a just and fair decision. It is in this sense that the Arbitrator has misconducted the proceedings in the case. In that case the omission to consider the material documents to resolve the controversy was held to suffer from manifest error apparent ex facie. The award was accordingly quashed. In Dandasi Sahu Vs. State of Orissa, this Court held that the arbitrator need not give any reasons. The award could be impeached only in limited circumstances as provided under

Sections 16 and 30 of the Act. If the award is disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case of non-application of mind amounting to legal misconduct and it is not possible to set aside only invalid party while retaining the valid part. In other words the doctrine of severability was held inapplicable in such a situation. It is, therefore, clear that the word misconduct in Section 30(a) does not necessarily comprehend or include misconduct of fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the Arbitrator, which on the face of the Award, are opposed to all rational and reasonable principles resulting in excessive Award or unjust result or the like circumstances which tend to show non-application of the mind to the material facts placed before the Arbitrator or Umpire. In truth it points to fact that the Arbitrator or Umpire had not applied his mind and not adjudicated upon the matter, although the Award professes to determine them. Such situation would amount to misconduct. In other words, if the Arbitrator or Umpire is found to have not applied his mind to the matters in controversy and yet, has adjudicated upon those matters in law, there can be no adjudication made on them. The Arbitrator/Umpire may not be guilty of any act which can possibly be construed as indicative or partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilty of any moral turpitude, that is, in the sense of non-application of the mind to the relevant aspects of the dispute in its adjudication. In *K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another*, this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter-claim made by the respondent. In *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, the counterclaim was rejected on the ground of delay and non-consideration of the claim, it was held, constituted an error on the face of the Award."

(14) It is also, by now, well settled that an Arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider it to be fair and reasonable. Arbitrator was held not entitled to ignore the law or misapply it and cannot also act arbitrarily, irrationally, capriciously or independently of the contract (See *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, *Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprises*). If there are two equally possible or plausible views or interpretations, it was considered to be legitimate for the Arbitrator to accept one or the other of the available interpretations. It would be difficult for the Courts to either exhaustively define the word "misconduct" or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of arbitration, when on the face of the Award it is shown to be based upon a proposition of law which is unsound or findings

recorded which are absurd or so unreasonably and irrational that no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere. So far as the case before us is concerned, the reference to the Arbitrator is found to be a general reference to adjudicate upon the disputes relating to the alleged termination of the agreement by the State and not a specific reference on any particular question and consequently, if it is shown or substantiated to be erroneous on the face of it, the Award must be set aside."

18. The Supreme Court in Food Corporation of India Vs. Joginderpal Mohinderpal, observed thus:

"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 a 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 appreciate 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 arid 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 then 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 responsible 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, as 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. 24th ed., para 623 reiterates that an Arbitrators 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."

19. In Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. Vs. Union of India (UOI) and Others, , it was held that where an Arbitrator is called upon to decide the effect of the agreement, he is really to decide a question of law i.e., of interpreting the agreement and hence his decision is not open to challenge. This was a case of reasoned Award and the reference was to a specific question of law and since the reference was a specific question of law, the decision of the Arbitrator was held not open to challenge.

20. In Continental Construction Company Limited v. State of Madhya Pradesh (1998) 3 SCC 82, the Supreme Court observed as follows:

"If no specific question of law is referred, the decision of the Arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The Arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The Arbitrator is a Tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the Court provided his error appears on the face of the Award."

21. In Sudarsan Trading Co. Vs. Government of Kerala and Another, , the Supreme Court observed as follows:

"It is not open to the Court to probe the mental process of the Arbitrator and speculate", where no reasons are giving by the Arbitrator, as to what impelled the Arbitrator to arrive at his conclusion. In the instant case the Arbitrator has merely set out the claims and given the history of the claims and then Awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the Award. In absence of any reasons for making the award, it is not open to the Court to interfere with

the award. Furthermore, in any event, reasonableness of the reasons given by the Arbitrator, cannot be challenged. Appraisal of evidence by the Arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the 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.

Once there is dispute as to the contract, what is the interpretation of that contract, is a matter for the Arbitrator and on which Court cannot substitute its own decision. If on a view taken of a contract, the decision of the Arbitrator on certain amounts awarded, is a possible view though perhaps not the only correct view, the award cannot be examined by the Court. Therefore, the High Court had no jurisdiction to examine the different items awarded clause by clause by the Arbitrator and to hold that under the contract these were not sustainable in the facts found by the Arbitrator.

In the instant case, the Court had examined the different claims not to find out whether these claims were within the disputes referable to the Arbitrator, but to find out whether in arriving at the decision, the Arbitrator had acted correctly or incorrectly. Thus, the Court had no jurisdiction to do, namely, substitution of 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 was liable to be paid or damages liable to be sustained, was a decision within the competency of the Arbitrator. By purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the Arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the Arbitrator to grant a particular remedy."

22. It has been held by the Supreme Court that reasonableness of the reasons assigned by the learned Arbitrator cannot be gone into unless the award is per se preposterous or absurd. Even the appraisal of evidence by the Arbitrator is beyond the scanning powers of the Court.

23. In *Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir*, the Supreme Court observed as follows:

"The present case is precisely one of the same type as the one before the Judicial Committee. The arbitrators have just awarded amounts to the Contractor, against its claim, on Item Nos. 2 and 5. They make no reference to the contract or any of its clauses. Yet the State contends that since these are items covered by certain terms of the contract, Court should look at those terms and interpret them, if this done it is said, the State's interpretation is bound to be accepted and that apparently accepted by the arbitrators will be found to be wrong. It is this

contention that has been accepted. This cannot be done. Even if, in fact, the Arbitrators had interpreted the relevant clauses of the contract in making their Award on the impugned items and even if the interpretation is erroneous, the Court cannot touch the Award as it is within the jurisdiction of the arbitrators to interpret the contract. Whether the interpretation is right or wrong, the parties will be bound; only if they set out their line of interpretation in the Award and that is found erroneous can the Court interfere." .

24. Again in *State of Rajasthan Vs. Puri Construction Co. Ltd. and Another*, , the Supreme Court considered the scope of interference. It observed thus:

"By and large the Courts have disfavoured interference with arbitration Award on account of error of law and fact on the scope of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the Awards as far as possible. 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. However, in the anxiety to render justice to the party to arbitration, the Court should not reappraise the evidence 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. If a question of law is referred to Arbitrator and the Arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. Even if it is assumed that on the materials on record, a different view could have been taken and the Arbitrators have failed to consider the documents and materials on record in their proper perspective, the Award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the Arbitrator may be held to be erroneous. An error of law or fact committed by an Arbitrator by itself does not constitute misconduct warranting interference with the Award."

25. In *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, , the Supreme Court observed as follows:

"It is settled law that the Arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdiction error which could be corrected by the Court and for that limited purpose agreement is required to be considered. For deciding whether the Arbitrator has exceeded his, jurisdiction reference to the terms of the contract is a must it is true that Arbitration Clause 74 is very widely worded, therefore, the dispute was required to be referred to the arbitrator. Hence, the Award passed by

the arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibit entertaining of the claims made by the Contractor."

26. In U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd., , the Supreme Court held thus;

"When the Arbitrators have applied their mind to the pleadings, the evidence adduced before them and the terms of the contract, we do not think, it is within our scope to reappraise the matter as if this were an appeal, and it is clear that where two views are possible - in this case there is no such scope - the view taken by the Arbitrators would prevail."

27. It is also to be noted that the approach of the Court towards the Award should be always be supported if it is reasonably possible rather than to destroy by calling as illegal (See Smt. Santa Sila Devi and Another Vs. Dharendra Nath Sen and Others,).

Validity and Interpretation of Clause 59 read with Clause 73 of P.S. to APDSS.

28. Coming to the interpretation of Clause 59 vis-a-vis Clause 73, there are number of conflicting decisions of various Division Benches of this Court. But, however, these decisions were rendered in the wake of the facts of a particular case with reference to the terms and conditions of the contract.

29. The issue that arises for consideration is the applicability of the Clause 59. In fact in most of the arbitration cases, the Government is projecting Clause 59 as a penumbral protection to avoid the consequences of delays/defaults from any cause whatsoever. Moreover, in none of the cases dealt with by the Supreme Court and the Division Benches except Raghunadha Roa's case (1988 (1) ALT 461), the validity and interpretation of Clause 59 was considered. Therefore, it became necessary for us to consider in detail the parameters and effect of this P.S.59.

30. For proper appreciation of the case, Clauses 59 and 73 of P.S. to APDSS are necessary and both the clauses are extracted below:

"59. Delays and extension of time :--No claims for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except as hereinafter defined. Reasonable extension of time will be allowed by the Executive Engineer or by the office competent to sanction the extension for unavoidable delays, such as may result from causes, which, in the opinion of the Executive Engineer, are undoubtedly beyond the control of the Contractor. The Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.

In the event of the Executive Engineer failing to issue necessary instructions and

thereby causing delay and hindrance to the Contractor, the latter shall have the right to claim an assessment of such delay by the Superintending Engineer of the Circle whose decision will be final and binding. The Contractor shall lodge in writing with the Executive Engineer a statement of claim for any delay or hindrance referred to above, within fourteen days from its commencement, otherwise no extension of time will be allowed.

Whenever authorized alterations or additions made during the progress of the work are of such a nature in the opinion of the Executive Engineer as to justify an extension of time in consequences thereof, such extension will be granted in writing by the Executive Engineer or other competent authority when ordering such alterations or additions.

73. Arbitration:--In case of any dispute or difference between the parties to the contract either during the progress or after the completion of the works or after the determination, abandonment, or breach of the contract, as the interpretation of the contract, or as to any matter or thing arising thereunder except as to the matters left to the sole discretion of the Executive Engineer under Clauses 20, 22, 27(c), 29, 36, 37 and 40 of the preliminary specification or as to the withholding by the Executive Engineer of payment of any bill to which the Contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration of the Superintending Engineer of the nominated circle mentioned in the "Articles of Agreement" (hereinafter called the "Arbitrator") and the Award of such Arbitrator shall be final and binding of the parties unless contested by either party in a Court of law. Provided however that in cases where the Executive Engineer has entered into the contract on behalf of the Governor, the dispute or difference shall, in the first instance, be referred by or through the Executive Engineer to the Superintending Engineers of the circle, in which the work lies and his decision thereon obtained before referring such dispute or difference to arbitration under this clause. Progress of the work shall not be suspended or delayed on account of the reference of any dispute or difference to the Superintending Engineer of the circle in which the work lies or to arbitration under this clause. The decision of the Executive Engineer or the Superintending Engineer of the circle in which the work lies, as the case may be on such dispute or difference shall be conclusive until reversed by the Superintending Engineer or the Arbitrator. Either party may within a period which shall be fixed by the Arbitrator, file before the Arbitrator a statement of the case and also all the documents relating to or having a bearing on the case. The Arbitrator shall see that the Award is passed, if reasonably possible, within a period of four months from the date of his entering upon the reference, but if any extension of that period is considered by him to be necessary, either suo motu or on the application of either party to the reference, the parties hereby agree and consent to such extension as the Arbitrator may from time to time consider reasonably necessary, and any such extension shall forthwith be communicated by him in writing to each of the parties hereto. The Arbitrator

shall not be bound to observe the ordinary rules of procedure applicable to trials before Judicial Tribunals not to hear to receive formal evidence but may pass on award on the documents or statements of the case filed by both the parties under or on personal inspection. The Arbitrator shall have power to view the subject-matter of the dispute with or without the parties or their agents. The Arbitrator shall also have power to open up, review and revise any certificate, opinion decision, requisition or notice, save in regard to the matters expressly excepted and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given upon every any such reference the costs of any incidental to the reference and Award respectively shall be in the discretion of the Arbitrator, subject to the condition that the amount of such cost to be divided to either party shall not in respect of, i.e., monetary claim exceed the percentage set out below of any such Award irrespective to the actual fees costs and expense incurred by either party; provided that where a monetary claim is disallowed in full, the said percentage shall be calculated on the amount of the claim. The Arbitrator may determine the amount of the costs to be awarded or direct the same to be taxed as between solicitor and client or a party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid.

The percentage above referred to in this clause are 5 per cent on any such monetary award which does not exceeds Rs. 10,000/-, 3 performed cent on the next Rs. 40,000/-or any part thereof 2 per cent on the next Rs. 50,000/- or any part thereof and 1 per cent on any excess over Rs. 1,00,000/-:

Provided that Government shall not be liable to any claim in respect of any such dispute or difference until liabilities, and the amount referred to is decided by the Arbitrator:

Provided that payment to the Contractor based on the arbitration award shall be made only after acceptance of the Award by the Chief Engineer if the value of the award is less than Rs. 20,000/- be and the Government if the value is Rs. 20,000 above."

31. While dealing with Clause 59, the following points would arise for determination:

- (a) Whether Clause 59 imposes arbitrary or unreasonable condition?
- (b) Whether it is hit by the provisions of Contract Act?
- (c) Assuming it is valid clause, how it has to be construed and interpreted ?
- (d) How this clause was considered under various judgments?
- (e) What are the final conclusions?

32. Issues (a) and (b) can be decided jointly.

33. The meaning of the words "compensation" and "damages" is spelt out in various law dictionaries.

34. Meaning of word "compensation" in Black's Law Dictionary 6th Edn. reads thus:

"Compensation. Indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value. That which is necessary to restore an injured party to his former position. Remuneration for services rendered whether in a salary, fees, or commissions. Consideration or price of a privilege purchased.

Equivalent in money for a loss sustained; equivalent given for property taken or for an injury done to another; giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; recompense in value; recompense or reward for some loss, injury, or service, especially when it is given by statute; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or satisfaction for injury or damage of every description (including medical expenses). An act which a Court Orders to be done, or money which a Court or other Tribunal Orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury. *Hughson Condensed Milk Co. v. State Board of Equalization*, 23 Cal.App. 2d 281, 73 P.2d 290, 292. See also Damages."

Similarly, the word "damages" has been explained:

"Damages. A pecuniary compensation or indemnity, which may be recovered in the Courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Restatement, Second, Torts 12A. Money compensation sought or awarded as a remedy for a breach of contract or for tortuous acts.

Damages may be compensatory or punitive according to whether they are awarded as the measure of actual loss suffered or as punishment for outrageous conduct and to deter future transgressions. Nominal damages are awarded for the vindication of a right where no real loss or injury can be proved. Generally, punitive or exemplary damages are awarded only if compensatory or actual damages have been sustained."

35. In Merrian Webster's Dictionary of Law, the meaning of the word "compensation" is "something that makes up for a loss or that is received for breach of contract". But, however, there is distinction between these two connotations viz., damages and compensation. We are not inclined to go into this aspect inasmuch as, what is stipulated in P.S. 59 is the compensation and not the damages. Therefore, it has to be only interpreted that compensation means "giving an equal or substitute of equal value or that, which is necessary to

restore an injured party to his former possession."

36. u/s 23 of the Contract Act, the consideration and object of an agreement is lawful unless it is vitiated by the factors as contained in the said Section. Section reads thus:

"SECTION 23 What considerations and objects are lawful and what not The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

37. Section 73 of the Contract Act postulates thus:

"where a contract has been, broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

38. Therefore, it has to be considered whether the provisions stipulating avoidance of compensation damages are unlawful. As per Section 73, it is imperative that a party who breaches the contract is liable to pay compensation. Hence, a clause in the contract making the person who breaches the contract not liable for compensation run contrary to Section 73. u/s 23 the object of an agreement is lawful unless, among other stipulations, is of such a nature that if such an agreement is permitted it would defeat the provision of law. Therefore, Clause 59 being contrary to Section 73 can be said to fall outside in the category of unlawful agreement.

39. It is well settled that no agreement can override the statutory provisions and such an agreement is void, ab initio. But, however, this is subject to the principle of waiver and acquiescence under certain circumstances. While it is open for the party to waive his individual or personal right and acquiesce the same, the said waiver must be conscious and voluntary. However, the principle of waiver is not applicable in case of waiver of public rights or fundamental rights under the Constitution.

40. On the question of waiver with reference to Clause 59, the Division Bench of this Court in *M. Ganga Reddy v. State of A.P.* 1996 (3) ALD 434 , observed as follows:

"It is well settled that a waiver of right may be oral or written or inferred from

conduct. Waiver can also arise from a promise of forbearance to enforce a term of the contract. The proposition is succinctly stated in Chitty on Contracts (Volume-1, 25th Edn.) at para 1495 as follows:

"Waiver may also be held to have occurred, if without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation;

Again at Para 1497, it is stated that:

"The party who forbears will be bound by the waiver and cannot setup the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered."

What is said at para 1498 is also apposite:

"Where one party has induced the other party to accede to his request, the party seeking the forbearance will not be permitted to repudiate the waiver and to rely on the letter of the agreement."

This is exactly the situation here as apparent from the documents referred to or forming part of the Award. Though there must be a promise or representation to attract the principle of waiver as pointed out in the Law of Contract by Treitel (8th Edition, at page 102), the promise need not be express and direct.).

"There must be a promise (or an assurance or representation in the nature of a promise) which is intended to affect the legal relationship between the parties and which indicates that the promisor will not insist on his strict legal rights, arising out of that relationship, against the promisee. Here, as elsewhere, the law applies an objective test. It is enough if the promise induces the promisee reasonably to believe that the other party will not insist on his strict legal rights."

However, "to bring the equitable doctrine into operation, the promise or representation must be "clear" or unequivocal, or "precise and unambiguous.""

On the facts of the case, it can be reasonably said that there was waiver of the right to enforce Clause 59. Alternatively, we hold that the Arbitrator's finding that there was an assurance to pay the extra rates cannot be said to be perverse or vitiated by an error of law apparent on the face of the award. The assurance may not be direct or express but it is possible to take the view that there was an implied promise to pay the extra rates for the work done beyond the agreement period notwithstanding Clause 59. The promise had emanated from a competent officer who signed the agreement itself. If the view taken by the Arbitrator is reasonably possible or plausible, we cannot interfere with the Award on the ground of error apparent on the face of the Award. We, therefore, uphold the Award in regard to Claim No. 1(e) and the learned Additional Judge, City Civil

Court, was justified in confirming the award on this item."

41. An agreement offending a statute or public policy or forbidden by law is not merely void, but it is invalid from vitality. It cannot become valid even if the parties thereto agreed to it. The concept that an agreement may be void in relation to a specified person and may be valid or voidable between the parties thereto is not applicable to an agreement the formation whereof law interdicts or which falls within the prohibitory range of Section 23 of the Contract Act. Thus, no legal relations are created by the agreement offending a statute or public policy enabling neither party to enforce the agreement. (See: *Nutan Kumar and others Vs. IInd Additional District Judge, Banda and others*,).

42. Similarly, if a contract is expressly prohibited by laws, the contract is void, ab initio and cannot be enforced at all. The contract could be that which is in contravention of law to safeguard the revenue may or may not be void according to the object, is to make contravention expensive or prohibited. In the later case, it would be void. (See *Commissioner of I.T., Mysore, T.C. Coorg and Bangalore Vs. Union Tobacco Co., Ernakulam*, , *Pamulapati Bhushayya Vs. Kommareddy Chinnapareddi and Another*, etc.)

Statutes relating to Excise, Opium Act, Food Control Act are examples of statutes which prohibit transactions not only for the purpose gaining revenue, but in the interest of public health, morality or welfare and infringement to their provisions will make an agreement unlawful. (See *Indian Contract Act - Pollack and Mullah 12th Edn. P.622*)

43. P.S. 59 also came up for consideration before this Court in the case reported in *Y. Raghunadha Rao v. State of A.P. 1988 (1) ALT 461*.

44. Dealing with the constitutional validity of this clause Justice K. Ramawamy (as he then was) held that opening part of Sub-clause (1) of Clause 59 and the supplementary specifications relieving the liability of the State were arbitrary, unreasonable, unjust and unconscionable.

45. Where a party suffers by a breach of contract, he is entitled, at all events, to claim damages therefore, though in some cases, he may be entitled to the equitable reliefs. When there is a breach of contract, the party, who commits the breach does not co instanta incur any peculiar obligation or liability nor does party complaining of the breach become entitled to a debt or amount due from the other party. The only right, which he has, is the right to sue for damages for the injury he has sustained. He gets the compensation as a result of the fiat of the contract and not by reason of any existing obligation on the part of the person in breach. The Court in the first instance must decide that the defendant is liable and then proceed to assess what that liability is. A claim for damages for breach of contract, is, therefore, not a claim for some presently due and payable. The Court is competent to award reasonable compensation in case of breach, even if no actual damage is proved or shown to have been suffered in consequence of breach of contract. (See: *Union of India (UOI) Vs. Raman Iron*

Foundry, and Maula Bux Vs. Union of India (UOI), .)

46. The principle on which the damages were usually awarded is stated by Parke B. in *Robison v. Harman* (1848) 154 ER 363 and *Anglia Television Limited v. Reddy* (1971) 1 All E.R. 690, as follows:

"The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed."

47. With regard to the measure of damages, the governing principle is to effect a *restitutio in integrum*, in regard to the actionable damage, namely the damage which occurs in the ordinary course of things. It is as if the plaintiff is placed in the position he would have been in, had the contractual obligation been performed. This rule was propounded in *Hadley v. Baxendale* (9 Exch. 341 at Page 355), The rule is "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may be fairly and reasonably be considered either (arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or (2) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. If the special circumstances under which the contract was actually made were communicated by the Plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach, which they would reasonably contemplate, would be the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. On the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Therefore, in the absence of special circumstances known to the defendant, on the basis of which the contract was made is only liable for such loss as to the flow from the breach in the ordinary circumstances.

48. In *Dwaraka Das Vs. State of Madhya Pradesh and Another*, , it was held that where the appellant-Contractor claimed damages of Rs. 20,000/- is 10% of Rs. 2 lakhs which is the value as against the respondent Government for having illegally rescinding the contract, the claim cannot be disallowed on the ground that there was no material on record to show that the appellant has actually suffered loss to the extent of claim made.

49. Where one of the parties to the contract has right to perform the contract in one of the two ways and there is a breach, the damages will be assessed on the

basis of his minimum legal obligation. The law presumed that the contract would have been performed in the way most beneficial to him and damages will be assessed on this basis. That is, damages are based on the mode of performance least profitable to the plaintiff and least burdensome to the defendant. (See : Withers v. General Theatre Corporation Limited (1933) 2 K.B. 536 and The Mithalis Angelas 1971 (1) Q.B. 164).

50. In case of employment contract between the employer and employee, there is a universal tendency on the part of the employer to insert those terms, which are favourable to him in a printed and standard form, leaving no real meaningful choice to the employee except to give assent to all such terms. In such a situation the parties cannot be said to be in even position possessing equal bargaining power. Where the parties are put on unequal terms the standard form of contract cannot be said to be the subject-matter of negotiation between the parties and the same is said to have been dictated by the party whose higher bargaining power enable him to do so. (See Unikel Battlers Ltd. Vs. Dhillon Kool Drinks,).

51. Similarly, in service contracts, the consent of the employee to the clause empowering the employer to terminate the services of the employee within three months notice or in lieu of it three months salary appears to have been obtained by means of undue influence. But in fact such a clause cannot be brought u/s 16(1) of the Contract Act but they should be denounced u/s 23 being opposed to public policy. Where a standard form of contract is entered into by the Government or its instrumentality with a private person containing unreasonable, unfair and irrational terms, such terms cannot be binding being opposed to public policy, since the other party who is a weaker party accepting the dotted line contract neither have the power to bargain or to assume to have equal bargaining power. (See LIC of India v. Consumer Education and Research Centre (1995) 2 SCC 482).

52. In the same zone, Rule 9 of Service Discipline and Appeals of 1979 empowering the Corporation to terminate the services of the permanent employees with three months notice was held to be unfair, unreasonable and unconscionable and opposed to public policy. (See : Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,).

53. So also similar provision was struck down in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , as is unreasonable and being opposed to public policy.

54. Therefore, where the dotted line contracts are concluded between the Government or its instrumentalities with private persons containing unreasonable, unfair and irrational terms purporting to override the provisions of the Contract Act or purporting to restrict its liability unreasonably or arbitrarily amounts to opposed to public policy.

55. Admittedly, in the instant case the Contractor is expected to commence the work only after the site is handed over. Therefore, handing over of the site is a sine qua non for performance of the contract and it is virtually in the realm of reciprocal promises.

56. u/s 54 of the Contract Act, when a contract consisting of reciprocal promises, one of them cannot be performed or that its performance cannot be claimed till the other has performed and the promisor of the promise fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party to the contract for any loss which such other party may sustain by non-performance of the contract. Moreover, it is not possible for the Contractor to commence the work unless the site is handed over without any obstructions. The law does not compel a man to do that which he cannot possibly perform (*Lex non cogit Ad. Impossibilia*). Thus, when the performance of the contract cannot be achieved by law, the same cannot be made possible through contract itself. Applying the same principle, in the instant case, when once the Contractor is not expected to commence the work unless the site is handed over, it amounts to the promisor not performing his initial obligation and therefore, it is incumbent on his part to compensate the other party for any loss which other party may sustain. In such a situation, this provision of Clause 59 cannot come in the way and the same cannot be given effect to. Even if the said clause is considered with reference to 55, result would be the same. Of course, we will discuss the effect of the decision of the Division Bench in Associated Company's case. Section 55 reads thus:

"Section 55 effect of failure to perform at fixed time, in contract in which time is essential

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. Effect of such failure when time is not essential - If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. Effect of acceptance of performance at time other than that agreed upon. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

57. Where the contract specifically provides for the performance to take place within the stipulated time and that the time is the essence of the contract and

contract is rescinded on account of the non-compliance of the terms, the Courts in the absence of conduct amounting to the estoppel or waiver would not interfere to order specific performance. But, if the parties do not attach much importance to performance within a particular time, then, default in performance at the due date only entails a liability to compensate the other party. In such a case, it is incumbent on the party accepting performance beyond time, to give notice to the defaulter that he intends to claim compensation for non-performance in time. Therefore, what is required to be established is in case covered by Section 55 where the time is essence of the contract, it is open for the department to rescind the contract and recover the damages if any arising out of non-performance of the contract by the Contractor. But, when once the time is extended by the department, it has to be inferred that time was not made the essence of the contract. Moreover, the very insertion of Clause 59 itself indicates that time was not treated as essence of contract inasmuch as extension of time was permitted under Clause 59. Therefore, when such is the situation, the inescapable conclusion is that the contract executed between the Contractor and the department, time was not the essence of contract, but however, it, has to be completed within a reasonable time. Mere acceptance of extension of time is not ipso facto indication that the Contractor waived his right to compensation. But, at the same time, it has to be noted that the Department cannot take advantage of its own lapses to deny the rightful claim for compensation by the Contractor. These ingredients are very much present in the clause itself.

58. A wrongdoer cannot be rewarded. This approach cuts the very basic tenets of principles under common law jurisprudence in staking claim for delays/compensation. Therefore, considering the provision contained in Sections 23, 54, 55 and 73, we hold that Clause 59 cannot be pressed into surmise, to meet this kind of situations.

59. Another issue that falls for consideration is construction and interpretation to be placed on Clause 59?

60. Clause 59 contemplated extension of reasonable time. The expression "no claim for compensation for the delays or hindrances to the work from any cause whatsoever shall lie except....." has to be understood in the context of entire clause. As already held by this clause is unreasonable. But, yet, when the clause protecting a defaulting party is contained in the agreement, the same has to be interpreted strictly. Admittedly, the clause restricts the right of the Contractor to claim compensation for the delays, defaults occurred for any cause whatsoever. The words "cause whatsoever" have to be assigned their proper meaning by correlating the words "unavoidable delays and beyond the control of the Contractor. The delays/defects of the department cannot be said to be unavoidable delays beyond the control of the Contractor. If these expressions are properly construed and understood in the wake of underlying principle in engrafting Clause 59, we are of the considered opinion that the defaults/ delays/ breaches of terms of contract on the part of the Department are not covered by

this so-called portative umbrella. Otherwise, it leads to a very anomalous results. For instance, if the period of contract is one year, this clause will enable the department to extend the period for ten years for its own defaults and breaches yet it cannot contend that no compensation is payable except granting extension of time. It is one thing to say that the Contractor could rescind the contract, but yet when the Contractor obliges the department to prefer the work during the extended period, it would be unjust and unconscionable to say that he cannot be compensated.

61. In this regard, the maxim *Nullus Commodum Capere Potest De Injuria Sua Propria*: No man can take advantage of his own wrong.

This maxim is based on elementary principle.

62. It is contrary to justice that a party should avoid his own contract by his own wrong. Accordingly, "in a long series of decisions the Courts have construed clauses of forfeiture in leases, declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees to mean that they shall be voidable only at the option of the lessors. The same rule of construction has been applied to other contracts, where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract", and it is applicable even where the Legislature has imposed the condition, unless the scope and purpose; of the enactment be so opposed to the rule that it ought not to prevail (See : *Davenport v. R.* 3 App. Cas. 115 at ps. 128 and 129).

63. It is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned.

A wrong doer ought not to be permitted to make a profit out of his own wrong.

64. Therefore, the latches and defaults on the part of the department cannot be said to be the causes beyond the control of the Contractor. Admittedly, in the instant case it has been found that the defaults were wholly attributable to the department and the department has breached the contract. Hence, if the extension of the time granted on the ground of defaults and breaches of the terms of the contract, it cannot be said to be cause beyond the control of the Contractor and thus Clause 59 would be wholly inapplicable.

65. Another distinguishing factor which we notice is that it is open for the Executive Engineer to grant reasonable extension of time and that reasonable extension is correlated to the following stipulation:

66. The Executive Engineer shall assess the period of delay or hindrance cause by any written instructions issued by him, at 25% in excess of the actual work period so lost. Therefore, what is permissible under the clause is Executive Engineer is empowered to grant time 25% in excess of the actual working period, which is considered to be reasonable extension of time. To illustrate, in a contract where 12 months time is fixed for completion, the reasonable extension that could be granted by the Executive Engineer on the ground that the cause was

beyond the control of the Contractor could only be three months and if the extension is granted beyond three months, Clause 59 becomes inapplicable, as the extension beyond 25% of the actual period becomes unreasonable extension and fully outside Clause 59.

67. Here also the reasons are obvious that the work is expected to be completed either within the fixed period or within the reasonable extended period. But, it cannot be extended for unimaginable or unreasonable period that would frustrate the contract. Obviously, in this case, the extensions were granted on the ground that the site could not be handed over within the time and that there were many obstacles such as Land Acquisition proceedings, change in the design and pattern and additional allotment of work of subways, non-removal of telephone lines, the place not being made available for construction as it was linked with the construction of other works etc. Even though the learned Arbitrator found that Clause 59 is not applicable as what was claimed was not the compensation, but the value for the work done for the extended period, but yet, we come to the conclusion that Clause 59 is not applicable on the basis of that the extension was not granted for the reasons beyond the control of the Contractor and that the extension of the time went beyond 25% of the actual working days. Thus, we record that Clause 59 is inapplicable where the extension was granted beyond 25% of actual working period.

68. It is held in *Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra*, that where in a contract between a State Government and a Contractor for construction of an aqueduct across a river within the stipulated period of 12 months, power was conferred upon the Executive Engineer to grant extension of time for completion of work on reasonable grounds and further provision was made for levying and recovering penalty compensation from the Contractor as specified rates for the unfinished work after the expiry of the fixed date, such provisions would excluded the inference that time was intended to be of the essence of contract. The rescission of such a contract on the part of the State Government without fixing any further period making time the essence and directing the Contractor to complete the work within such period, was clearly illegal and wrongful and, thereby, the State Government committed a breach of the contract with the result that the security deposit of the Contractor could not be forfeited.

69. It is also to be noted in this regard that the power to rescind the contract was available both with the Department and also the Contractor. The Department admittedly did not take the recourse to rescinding the contract, but on the other hand, granted extension fully realizing that the defaults were on the Government side. The Contractor standing on an unequal position has undertaken to continue the contract. Therefore, when once the time fixed under the contract has expired, normally the contract gets broken, but when once the extension is granted, which was agreed subject to certain rights of the Contractor, the contract gets resurrected. In the absence of conscious waiver of his rights by the

Contractor on fresh terms and conditions, the same terms and conditions will normally continue to govern the field. But, when resurrection takes place, the Contractor cannot be said to claim the same value as if the work was executed within the originally agreed period, when the work was done beyond the period of agreement he cannot be denied the claim for the value of the work done by him by way of compensation on the basis of the rates prevailing during the relevant period when the work was completed. It is settled principle that a party to a contract cannot be in a better position by reason of his default than if he had fulfilled his obligations under the contract. It amounts to rewarding the wrongdoer, which is not permissible. Thus, we come to the conclusion that Clause 59 is inapplicable in cases where the defaults are attributable to the Department and also in cases where the extensions are granted for an unreasonable period of time.

70. The decision of the Division Bench referred to in *State of A.P. v. Associated Engineering Enterprises, Hyderabad 1989 (2) ALT 372*, is distinguishable in many respects. In that case, the Contractor was fully aware that the site would be handed over subject to certain conditions. The Division Bench referred to those facts in paras 13 and 14 reads thus:

"Before proceeding further, it would be appropriate to refer to certain other relevant material. In his letter, dated 23-1-1970 the respondent-Contractor wrote to the Superintending Engineer, Eluru, stating inter alia: "12. We agreed that compensation need not be paid if the delay in handing over the site occupied by the Railway is not more than 3 months". It is clear that certain portions of the site which were to be handed over to the respondent were occupied by the Railway in connection with its own work; the agreement between the parties was that as soon as the Railway vacated its occupation, the site shall be handed over to the Contractor within three months. The next letter is dated 8-3-1970 from the Chief Engineer, PWD, Hyderabad, to the respondent, in which it was stated, inter alia, "12.(a) : In your letter reference (3) cited (reference is respondent's letter, dated 23-1-1970 referred to above), you have agreed for not claiming any compensation for the delay in handing over site at piers 14 to 21 on Kovvur side beyond middle of 71" if the delay is not more than 3 months. You are informed that the last 6 spans can be handed over in the beginning of 1972..... This letter is rather ambiguous. It speaks of delivery of piers 14 to 21 "beyond middle of 1971". Suffice it to note that as soon as the Railways delivered possession of the said sites, they were to be handed over to the Contractor within three months.

The third letter is dated 13-3-1970 from the respondent to the Chief Engineer. In this letter it was stated, inter alia, "12(a): We note that the site for piers 14 to 21 on Kovvur side will be handed over in the beginning of 1972. Since there is a delay of 6 months in handing over the site, the time of completion of the work on Kovvur side will have to be extended by 6 months....." This letter shows that the site for piers 14 to 21 on Kovvur side was to be delivered in the beginning of 1972, which meant a delay of six months over the time agreed earlier and in lieu

thereof it was agreed that the period of contract shall be extended by six months."

71. What was claimed by the Contractor in the said case was the amount which was worked out on the basis of the rising consumer price index and also on account of the establishment of overhead charges. But, in the instant case it is a case for claim for the work done on the basis of the SSR rates prevailing at the relevant time for the work done beyond the agreement period and that is fully covered by the decision of the Division Bench reported in *State of A.P. v. S. Shivaraj Reddy* 1988 (2) APLJ 465. Even the Division Bench while interpreting Section 55 observed as follows:

"According to this Section it was open to the respondent to avoid the contract on account of the Government's breach of promise to deliver the sites at a particular time; but, he did not choose to do so, and accepted the delivery of sites at a time other than what was agreed upon between them earlier. If so, he is precluded from claiming compensation for any loss occasioned by such delay, unless, of course, at the time of such delayed acceptance of the sites, he had given notice to the Government of his intention to claim compensation on that account. It must be remembered that this provision of law was specifically referred to, and relied upon in the counter filed by the Government to the respondent's claim before the Arbitrator. But, it is not brought to our notice that the Contractor had given such a notice (contemplated by the last sentence in Section 55). We must make it clear that we are not entering into the merits of the decision of the Arbitrator. What we are saying is that such a claim for compensation is barred by law, except in a particular specified situation-and inasmuch as such a particular specified situation is not present in this case, the claim for compensation is barred. It is well settled that an Arbitrator, while making his Award, has to act in accordance with law of the land, except in a case where a specific question of law is referred for his decision."

72. Admittedly, in the instant case when the extension was granted, it was made clear by the Contractor that he is accepting the extension reserving the right to claim for the losses. As can be seen from Ex.C-17 dated 24-7-1981 and Ex.C-26, dated 15.4.1982 and Ex.C-27 dated 23-5-1982 and Ex.C-46, dated 5-10-1984. Therefore, when it was made clear that the extension was accepted subject to the right of the Contractor to the claim losses or enhancement and it was open for the Department either to cancel or rescind the contract if they were not agreeable for such conditions, but having allowed the Contractor to complete the work during the extended period and without resorting to cancelling the contract, it would not be appropriate for the Department to contend that no compensation is payable. Further what was claimed is only the value of the work basing on the S.S.R. rates which was existing during the relevant period, instead of S.S.R rates which was existing as on the date of the concluding the agreement. Therefore, by this it is conclusively established that the Department has waived its right to pay the rates as existing at the time of execution of the agreement.

Integrity of the contract

73. Let us consider various judgments of this Court on Clause 59.

74. A Division Bench of this Court consisting of Justice B.P. Jeevan Reddy (as he then was) and Justice Neeladri Rao in AAO.677 of 1981 and CRP No. 385 of 1982, dated 19-4-1982 observed as follows:

"Coming to Clause 59 of the preliminary specifications of "APDSS" it provides that neither party to the Contractor shall claim compensation on account of delays or hindrances to work from any cause whatever." That the delays and hindrances contemplated by Clause 59 include the stoppage hindrances and delays on the part of the Department as well, is clear from the following sentence in this first part of the said clause, viz., "the Executive Engineer shall assess the period of delay or hindrances caused by any written instructions issued by him, at 25% in excess of the actual work period so lost". Indeed, the second para of the clause also contemplates delays and hindrances being caused on account of the failure of the Executive Engineer to issue necessary instructions. In such a case, the Contractor has a right to claim the assessment of such delay by the Superintending Engineer of the Circle, whose decision is declared to be final and binding on the parties. But, any such claim has to be lodged in writing to the executive Engineer within fourteen days of the commencement of such delay, or hindrances, as the case may be. We find it difficult, therefore, to say. that Clause 59 has no application to the present case. The words "from any cause whatever", occurring Clause 59, are wide enough to take in delays and hindrance of all types, caused by the Department, or arising from the other reasons, as the case may be. Thus, by virtue of Clause 59, the Contractor is precluded from claiming any compensation on account of delays or hindrances arising from any cause whatever, including those arising on account of the acts or omissions of the departmental authorities....."

75. In another case, the Division Bench of this Court reported in Chief Engineer, Panchayatraj Department v. B. Balaiah 1985 (1) APLJ 224, held that inasmuch as the contract between the parties does not provide for payment of escalation charges, awarding an amount on account of escalation charges is in excess of the Arbitrator's jurisdiction, and is void. But, however, in later decision of the another Division Bench of this Court in State of A.P. v. S. Shivaraj Reddy, 1988 (2) APLJ 465, took a different view holding that in cases pertaining to the work done beyond the contract period compensation can be claimed. The Division Bench held that the Contractor must be paid as per the standard specification rates, for the reason that the Government had defaulted in handing over the site at the time agreed and thus it held that the claim is not barred by Clause 59 of APDSS. In the said case, the decision of the earlier Division Bench in CMA No. 677/81 and CRP No. 385/82, dated 19.4.1982 distinguished the same holding that was a case where the claim was for compensation, whereas in the case before them the claim was for payment as per standard specification rates as the site was not handed over to the Contractor beyond time. The Division Bench

observed thus:

"In our view Section 59 has no application. It pertains to compensation. In the present case, we are concerned with the rates for the work done. The Contractor is not claiming any compensation for loss or damage or loss of profit which he would have made but for the delay committed by the Department. What is asked for here is that beyond the contractual date he must be paid as per the standard specification rates as the site was not handed over in time due to the fault of the Department itself. We do not think P.S. 59 has any application at all. The decision of the Division Bench referred to by the learned Government Pleader has as relevance in the present context. In this Division Bench case, the Contractor having agreed for reduction of rates and executing the final agreement, demanded escalation of rates complaining that the Department committed delays and defaults. The Government relied upon Clause 59 and Foot Note 7 of Schedule "A" which prohibited payment of rates at the enhanced rates even during the extended period. The Division Bench negated the claim of the Contractor on the ground that the Foot Note 7 is clear to the effect that the agreed rate should prevail even during the extended period of the agreement. The judgment of the Division Bench was more based on the specific prohibition contained in Foot Note 7 of Schedule "A" of the agreement therein. There is no such clause in the present agreement. It is not a case of escalation of rates. Here the major portion of the site was handed over beyond the period of agreement during which period the cost of labour and other materials have gone up. Without the site was impossible for the Contractor to complete the work and what the Arbitrators have done is only to permit the Contractor to claim the rates prevalent as per the S.S.Rs. in force. In our view, it is not prohibited either under the APDSS Rules or by any clause in the agreement....."

76. Again in *State of A.P. v. Associated Engineering Enterprises*, Hyderabad 1989 (2) ALT 372, the matter came up before another Division Bench consisting of Justice B.P. Jeevan Reddy (as he then was) and another learned Single Judge. Referring to the aforesaid decision the Division Bench observed that the decision in *Shivaraj Reddy's* case (*supra*) on facts it was distinguishable and it observed that :

"We must clarify that, so far as the case before us is concerned the claim of the respondent-Contractor is not for escalation of rates, nor is it a claim for payment of rates as per the standard specification rates in force for the period beyond the originally agreed contract period. If so, the decision in *State of A.P. v. S. Shivaraj Reddy* 1988 (2) APLJ 224, has no application herein. In the case before us, the claim is a pure and simple claim for compensation. The amount claimed has been worked out on the basis of the rise in consumer price-index, and also on account of establishment and overhead charges. It would, therefore, be a case squarely governed by the principle of the decision in AAO No. 677/81 and CRP No. 385/82, dated 19.4.1982."

The Division Bench finally held thus:

"Applying the principal of the above decision to the facts of the case before us, it must be held that Clause 59 bars a claim for compensation on account of any delays or hindrances caused by the Department. In such a case, the Contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for completing the work beyond the extended period of contract has been waived in this case). The contract was not avoided by the Contractor, but he chose to complete the work within the extended time. In such a case, the claim for compensation is clearly barred by Clause 59 of the APDSS which is, admittedly, a term of the agreement between the parties."

77. In Para 24 of the Division Bench judgment referred to the facts of the case and observed that the compensation claimed on the basis of the consumer's price index and establishment and overhead charges and a large portion of the claim pertains to the original period of contract itself. It further observed that it was not possible for them to apportion the amount awarded for the original period of contract and the amount awarded for the extended period, even assuming that the Arbitrator was competent to make such an award for the extended period of contract. Thus, Division Bench taking into facts of that particular case held that Clause 59 would apply and therefore, set aside the award of the Arbitrator.

78. The Division Bench of this Court had considered the effect of Clause 59 in *Superintending Engineer, Irrigation Department and Another Vs. Progressive Engineering Co. and Others*, , held that the claim for escalation of rates for the work done during the extended period of contract was maintainable, even though undertaking was given by the Contractor agreeing to do the work and the said undertaking is not a bar as the undertaking was found to have obtained by the Department by coercion. The Division Bench observed in Paras 12 and 13 as follows:

"Under Section 14 of the Contract Act, it is essential for the enforceability of an agreement that the consent should be free. The consent should not have been obtained by coercion, undue influence, fraud, misrepresentation or mistake. The term "coercion" corresponds to the concept of "duress" in English Law. "Coercion" according to Section 15 of the Contract Act "means and involves the committing or threatening to commit an act forbidden by the Indian Penal Code or the wrongful withholding of property belonging to another person, to the prejudice of that person or any person whatever, with the intention of inducing that person to enter into a contract."

In passing, we may mention that in the recent times, the concept of economic duress has come to be recognised in England. Chitty on Contracts (25th edition) summarises the said concept in the following words at page 486:

"In substance this amounts to recognising that certain threats or forms of pressure, not associated with threats to the person, nor limited to the seizure or

withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or the pressure."

Thus, refusal of extension of time despite there being valid reasons unless the Contractor offered to execute the work for old rates might amount to economic duress especially because the employer is in a position of dominance armed, as it were, with a printed form of contract with terms of his choice."

79. Referring to Progressive Engineer Company's case (supra), the Department tried to take the advantage on the case dealt with by the Supreme Court in Ramalinga Reddy v. Superintending Engineer 1994 (5) SCALE 67. This was also considered by the Division Bench. The Division Bench taking into consideration the judgments of the Supreme Court in Ramalinga Reddy's case (supra) and also the judgment of this Court in Shivaraji Reddy's case (supra) observed in Paras 23, 24, 25, 26, 31, 32, 33, 37 as follows:

"23. If we are called upon to decide on the validity of award from the stand point of Clause 59, we may have to answer several debatable and moot questions, as rightly pointed out by the learned Counsel for the petitioner. Such questions are: what is the true scope and effect of Clause 59? Does it altogether shut out the payment of extra rate for the work done beyond the agreement period irrespective of the circumstances in which the work had to be prolonged and irrespective of the breach of fundamental contractual obligations by the other party ? Whether the decision of the Supreme Court in Ramalinga Reddy's case 1994 (5) SCALE 67, is a complete answer to the respondent's claim for extra rate and that decision applies with equal force to the facts of the instant case? But, for reasons stated hereinafter, we need not record our definite views on these questions.

24. To digress a little, we must voice an irrepressible feeling at the back of our mind that it would result in grave injustice if the Contractor is called upon to execute the work at the old rate in spite of prolongation of the contract not merely for reasons beyond his control but on account of non-performance of a fundamental obligation that was expected to be performed by the employer. It cannot be denied that unless the water level is maintained by the Department at a congenial level, it becomes impracticable if not impossible to carry out the work. When during a major part of the contractual period, the requisite water level was not maintained by the Department, the Contractor cannot be expected to complete the work within the agreement period. To require him to do the work at the same old rates for years together would lead to palpable injustice, especially when we bear in mind that the State could have gained nothing by putting an end to the contract and entering into a fresh contract for the execution of the balance work. But, these considerations of justice and reasonableness may not be strictly relevant as it is often said that an Arbitrator is not a conciliator and he cannot go by his own notions of justice and equity regardless of the terms of the contract and the law of the land.

25. Before we proceed further, we take note of the argument of the learned Government Pleader that the respondent could have as well refused to perform and determined the contract after the expiry of the agreement period of the rates were not workable. Having agreed to proceed with the work without any assurance as to extra payment, it is argued that the Contractor cannot lay such claim subsequently. This argument, in our view, is nothing but simplification of the issue. The respondent having been allowed to do the work beyond the agreement period and the State having taken benefit of the work done is liable to pay the Contractor at the prevailing rates and thereby compensate him reasonably unless, of course, there is a contractual bar against such reimbursement. This is based on the principle of quantum meruit. The Contractor's claim cannot be repudiated on the mere ground that he has agreed to proceed with the work even beyond the agreement period without getting an assurance from the Government that extra rate will be paid for. We have to eschew from consideration the fact that the respondent undertook not to claim extra rate during the period of extension of contract work inasmuch as we have already held that such undertaking is not valid and binding on the respondent.

26. Coming back to Clause 59, we are relieved of the necessity to dilate upon its ambit and amplitude, effect and implications for one important reason which we have already adverted to. At the risk of repetition, we wish to point out that no plea was advanced in the counter/rebuttal statement filed by the Superintending Engineer. It was not even indicated in general terms that a claim for extra rates for the work done beyond the agreement period is prohibited under the contract or that the Contractor is bound under the contract to carry out the work at the same rates whatever be the extra cost involved. Obviously, no reliance was placed on the clause before the Arbitrators. We do not also find any reference in the award to Clause 59. The Arbitrators did not, therefore, have occasion to interpret Clause 59 and to consider the effect thereof. Clause 59 was relied upon for the first time in the objections filed before the Civil Court. When Clause 59 or an analogous term in the contract was never put in issue before the Arbitrators, it cannot be said that the award is vitiated by an error of law apparent on the face of it or that the Arbitrators committed a legal misconduct in not considering the same.

31. In Ch.Ramalinga Reddy's case, the same line of approach was adopted and it was held that the claim for payment of extra rate for the work done beyond the agreement period could not be entertained by the Arbitrator by reason of Clause 59 of A.P.D.S.S. After referring to the case of Sudarsan Trading Co. Vs. Government of Kerala and Another, , it was observed that:

"It was there observed that there are two different and distinct grounds involved in many cases concerning the setting aside of Arbitration Awards. One is that there is error apparent on the face of the award and the other is that the Arbitrator exceeded his jurisdiction. In the later case the Court can look into the arbitration agreement but in the former, it cannot. An award may be set aside on

the ground that the Arbitrator had exceeded his jurisdiction in making it. In the case before us, the Arbitrator was required to decide the claims referred to him having regard to the contract between the parties. His jurisdiction, therefore, is limited by the terms of the contract. Where the contract plainly barred the Appellant from making any claim, it was impermissible to make an award in respect thereof and the Court was entitled to intervene."

32. It was further observed that the Court should intervene when the Arbitrator has made an award in respect of a claim which is by the terms of the contract plainly barred.

33. It seems to us an enigma to reconcile the principle that an Arbitrator giving an award contrary to the terms of the contract commits an error of jurisdiction and the equally well settled principle that the construction or interpretation of the terms of the contract is an error within the jurisdiction of the Arbitrator. We can only say that the dividing line is thin and on which side of the line the conclusion of the Arbitrator falls is a matter not free from doubt. The only way to harmonise these two principles seems to be to see whether the particular term of the contract providing for or prohibiting the payment of extra amount for the work done in given circumstances is to patently clear that it means only one thing and one and only view is possible. If the relevant clause in the contract is ambiguous or does not necessarily speak out in one voice and more than one view is reasonably possible it could be said that the Arbitrator was within his jurisdiction to interpret the clause and reach his own conclusion. His conclusion in such an event cannot be faulted as it is not a conclusion reached by wandering outside his jurisdiction. His award will still be within his jurisdiction even if the interpretation placed by the Arbitrator either expressly or by necessary implication does not appeal to the Court. That is why in *Associated Engineering Co. Vs. Government of Andhra Pradesh and another*, , the phrase "manifest disregard of contract" is used. The observations at Paragraph 23 succinctly indicates the line of approach of the Supreme Court in *Associated Engineering Company's* case. At the risk of repetition, we quote that sentence "This conclusion is reached not by construction of the contract but by merely looking at the contract." As already noticed in that case, the Arbitrator applied a formula different from what was laid down in the contract for making reimbursement of extra wages thereby ignoring the contract virtually. If we understand the judgment in *Associated Engineering Company's* case in that light, there would be no difficulty in reconciling the two principles adverted to above. But, the observations in *Trustees of The Port of Madras Vs. Engineering Constructions Corporation Limited*, pose a further difficulty in harmonising the two principles. After referring to the principle laid down in *Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir*, , that the Court cannot interfere even if the interpretation placed by the Arbitrator on the relevant clauses of the contract is erroneous, their Lordship's observed as follows:

"The above principle, of course, is subject to the proposition aforestated, viz.,

that the Arbitrator being a creature of the contract must operate within the four corners of the contract and cannot travel beyond it either by mis-interpreting the terms of the contract or otherwise,

37. Coming to Ramalinga Reddy's case varying interpretations were not put forward before their Lordships. Both parties have taken it for granted that Clause 59 is an absolute bar against the payment of compensation in the form of extra rates for the work done beyond the agreement period. The circumstances under which the contract prolonged beyond the stipulated period are not spelt out in the judgment. It is reasonable to think that by reason of a particular fact situation in that case, the Contractor could not wriggle out of the parameters of Clause 59. The various possible interpretations which we indicated above, were not the subject-matter of consideration by the Supreme Court. Be that as it may even if we go by the broad observations that the claim for award of extra rates for the work done beyond the agreement period is "plainly barred" under Clause 59 and the Arbitrator therefore, acted in excess of jurisdiction in entertaining the claim, we do not think that Clause 59 becomes a stumbling-block to the Contractor, the reason being that it was never pressed into service by the appellants before the Arbitrator. It was only after the award was pronounced the plea based on Clause 59 was raised before the Civil Court."

Finally, the conclusion with regard to Clause 59 were summarised by the Division Bench as follows:

"Our conclusions in regard to Clause 59 of the contract are summarised as follows:

(1) Clause 59 was never pleaded before the Arbitrators to resist the Contractor's claim.

(2) Assuming that Clause 59 creates a jurisdictional bar to the entertainment of a claim for escalation in rates, it cannot be said that the award is the product of inherent or patent lack of jurisdiction insofar as it allows a claim contrary to and disregarding one of the terms of the contract. At best, it would be a case of latent lack of jurisdiction, as pointed out in *Tarapore and Co. Vs. State of M.P.*, . It would therefore, be relevant to consider the conduct on the part of Appellant in failing to put forward the objection based on a contractual term or the acquiescence of the Appellant to suffer a decision on merits and the resultant prejudice that might be caused to the opposite party if it is allowed to be raised in post-award, proceedings.

(3) Viewed from the above angle, it is not just and proper to allow the Appellant to raise that plea for the first time before the Civil Court, especially because the Contractor was denied the opportunity to prove that the claim falls within the exceptions contemplated by Clause 59 having regard to the factual situation obtaining in the present case. The Contractor could have also contended that on a just and reasonable construction of Clause 59, there is no room to apply the bar laid down in that clause to the facts of the instant case.

(4) In Ramalinga Reddy's case there was no finding that the execution of contract was prolonged on account of breach of a fundamental obligation on the part of employer. No argument was advanced on the various possible interpretations to be placed on Clause 59. On the other hand, it seems to be a common ground that the fact situation giving rise to the claim did not attract the defined exceptions.

(5) The decision in Ramalinga Reddy's case does not preclude an enquiry into the question of applicability of the bar contained in Clause 59 - if that is put in issue, on the basis of factual situation obtaining in a given case.

(6) The question whether Clause 59 bars the claim for escalation in rates where the execution of contract is prolonged beyond the originally agreed period on account of a fundamental breach on the part of the employer (Department) is at least a debatable point."

80. Yet, in another Division Bench in Gangareddy's case (supra) consisting of Justice P. Venkatarami Reddy (as he then was) and myself (GBJ), again considered the scope of Clause 59. The learned Government Pleader heavily stressed his contention with reference to Clause 59 basing on the judgment of this Court in M/s. Associated Engineering Enterprises's case (supra) and Ramalinga Reddy's case (supra) has observed as follows:

"Clause 59 was considered and applied by this Court in more than one case. In State of A.P. v. Associated Engineering Enterprises, Hyderabad, it was observed at Paragraph 26:

"Applying the principle of the above decision to the facts of the case before us, it must be held that Clause 59 bars a claim for compensation on account of any delays or hindrances caused by the Department. In such a case, the Contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for completing the work beyond the extended period of contract has been waived in this case). The contract was not avoided by the Contractor, but he chose to complete the work within the extended time. In such a case, the claim for compensation is clearly barred by Clause 59 of the A.P.D.S.S. which is admittedly, a term of the agreement between the parties."

It may be noticed that in the above case, Claim No. 1 which was turned down on the basis of Clause 59 was for compensation pertaining to the original period of contract as noted at Paragraph 31 of the judgment. Referring to the earlier Division Bench judgment rendered by Jeevan Reddy, J., (as he then was) and Bhaskar Rao J, the learned Judges posed the question and answered as follows:

"The question is whether any claim for compensation is permissible for the original period of contract ? It was held by a Bench of this Court of which one of us (Jeevan Reddy, J) was a member in - A.A.O. No. 786 of 1986 dated 1.12.1988, that such a claim is not permissible by virtue of Clause 59 of the

A.P.D.S.S."

In Prasad and Co. Vs. The Superintending Engineer and Others, the Division Bench of which one of us (Venkatarama Reddi, J.) was a member, held that escalation over and above the agreed rates during the currency of the agreement period was clearly barred by P.S.59 of A.P.D.S.S, In Ch. Ramalinga Reddy v. Superintending Engineer, (1994) 5 Scale 67, the Supreme Court had gone a step further and held that the claim for the payment of extra rate even for the work done beyond the agreement period was unsustainable in the light of the specific prohibition contained in Clause 59. However, it is not discernible from the judgment whether the prolongation of the contract was for reasons attributable to the Contractor or on account of breach of contractual obligations by the employer as in the instant case. Be that as it may, even assuming that Clause 59 would have in the normal course come in the way of the petitioner claiming escalation in rates for the work done beyond the contractual period, the special facts and circumstances of this case stand apart and do not attract the bar of Clause 59. We agree with the learned Counsel for the Contractor that the immunity conferred by the exclusionary Clause 59 must be deemed to have been waived and the Department is estopped from taking shelter under it."

81. In Ramachandra Reddy and Co. Vs. State of Andhra Pradesh and Others, , on an appeal against the judgment and decree of the Civil Court, confirming Item No. 1 by the Arbitrator, this Court set aside the same and remanded the same to the lower Court for fresh consideration. While affirming the said decision, the Supreme Court observed thus:

"The Arbitrator being a creature of the agreement either specifically or inferentially provides for a higher rate to be awarded for any additional or excess work done by the Contractor, it would not be permissible for the Arbitrator to award for the so-called additional work at a higher rate. While considering the scope of Clause 69, the Supreme Court observed that excavation of hard rock cannot be held to be a supplemental item and on the other hand, it is an item of work tendered and accepted, and, as such Clause 63 will have no application to claim Item 1".

82. The Supreme Court further observed that the question of granting a higher rate for any extra quantity of work executed by the Contractor would arise only when the contract provides for such escalated rate either expressly or by implication as in the case of S. Harcharan Singh Vs. Union of India, , where the competent authority had agreed for the same by correspondence. But, in the above case, when there is no such acceptance by the competent authority, and there is no provision in the contract, permitting such escalated rate for the additional quantity of excavation made, the conclusion is irresistible that the Contractor was not entitled to a higher rate.

83. It was further found that the grant of extension of time will not in any way make the Contractor eligible for any extra claim due to escalation in rates of

labour and material.

84. It has to be seen that Clause 59 was not the subject-matter which fell for consideration before the Supreme Court. Moreover, from the facts of the case, it is not clear as the work was carried beyond the contract period. Therefore, the judgment on facts is not applicable to the facts of this case.

85. Even otherwise also in Ramalinga Reddy's case (supra), where the judgment of the Division Bench of this Court in Associated Company's case (supra) was affirmed the observation of the Division Bench was that the Contractor did not indicate his intention to claim higher wages. In the absence of such indication, it was held that the Contractor was not entitled. In the instant case as observed by the Arbitrator, there is a clear indication that reserving his right to claim the loss or compensation.

86. It is also to be noticed that not only the designs were changed, but also the additional work was entrusted. Granting extension for an unreasonable long period and contending that the Contractor is only entitled for the S.S.R. rates of 1979, when the contract was prolonged till 1985 and when the deviation limits of time was beyond 25%, in the absence of any supplementary agreements, normally the Contractor would be entitled for the market value, but the Contractor restricted to the S.S.R. rates. Therefore, in such a situation, award of the Arbitrator cannot be said that he exceeded the limits or wandered beyond the contractual terms and conditions.

87. In Government of Andhra Pradesh and Others Vs. G. Kondala Pal, the Division Bench observed thus:

"In the instant case there was a breach of contractual obligation on the part of the Department in their failure to shift the electrical poles within a reasonable time. The Contractor was within his rights to demand a reasonable extra payment for the work that had to be done far beyond the stipulated period. But, according to the letter referred to in the award, the Contractor while seeking extension of the period of contract, undertook not to claim any compensation. This fact is recited in the award itself. Admittedly, it was on the basis of such letter that extensions of time were granted. In such circumstances, it was held that the Contractor was estopped from claiming extra amounts."

But, in the instant case, the facts are quite" different as already noticed, the Contractor has categorically stated reserving his right to claim losses.

88. In Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , which is an appeal arising out of the judgment of the Division Bench, the Supreme Court in Paras 26, 27, 28 and 29 observed as follows:

"26. The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted

without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

(27) An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

(28) A dispute as to the jurisdiction of the Arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or Arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. As stated by Lord Parmoor.

".....It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question, which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties."

Attorney General for Manitoba v. Kelly, (1922) 1 AC 268, 276.

Evidence of matters not appearing on the face of the award would be admissible to decide whether the Arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the Arbitrator is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the Award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself. *Bunge & Co. v. Dewar and Webb*. (1921) 8 Llo 436

29. If the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something, which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as

to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something, which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award."

But, in the instant case, taking into consideration the jurisdiction of the Arbitrator under Clause 73, the Arbitrator has interpreted the Clause 59 and held that Clause 59 has no application and such a finding cannot be beyond the jurisdiction of the Arbitrator and it cannot be said that the Arbitrator has wandered for outside the discriminated area.

89. In P.V. Subba Naidu and Others Vs. Government of A.P. and Others, , the High Court has set aside the non-speaking award of the Arbitrator on the ground that the subject-matter of the claims before the Arbitrators was beyond the terms and conditions of the Arbitrators. Against those findings, appeals and cross appeals were filed by the State as well as the Contractor. Referring to Clause 73, the Supreme Court observed in Para 4 as follows:

"The entire thrust of the judgment is on examining the terms of the contract and interpreting them. The terms of the arbitration clause, however, are very wide. The arbitration clause is not confined merely to any question of interpretation of the contract. It also covers any matter or thing arising thereunder. Therefore, all disputes which arise as a result of the contract would be covered by the arbitration clause. The last two lines of the arbitration clause also make it clear that the Arbitrator has power to open up, review and revise any certificate, opinion, decision, requisition or notice except in regard to those matters which are expressly excepted under the contract, and that the Arbitrator has jurisdiction to determine all matters in dispute which shall be submitted to the Arbitrator and of which notice shall have been given."

and thus set aside the judgment of the Division Bench. The Supreme Court further observed that Clause 73 of the contract which provides for arbitration is widely worded and that the High Court is not right in examining and interpreting the contract to see whether the claim was sustainable under the terms of the contract. The very same clause is forming part of the contract in the instant case.

90. The Supreme Court held that the award as passed by the Arbitrator was quite legal and valid and it was within his jurisdiction. The Supreme Court also referred to the cases of K.R. Raveendranathan Vs. State of Kerala and Another, and Sudarsan Trading Co. Vs. Government of Kerala and Another, held thus:

"In the case of K.R. Raveendranathan v. State of Kerala this Court, relying upon the decision in Hindustan Construction Co. Ltd. v. State of J&K has held that the Court by purporting to construe the contract cannot take upon itself the burden of saying that it was contrary to the contract and as such beyond jurisdiction. This is precisely what has been done in the present case. In the case of Sudarsan

Trading Co. v. Government of Kerala this Court has made a distinction between error apparent on the face of the award lack of jurisdiction. It has held that only in a speaking award can the Court look into the reasoning of the Arbitrator. It is not open to the Court to probe the mental processes of the Arbitrator, or speculate on what impelled an Arbitrator to arrive at his conclusion. An award can be set aside on the ground that the Arbitrator, in making it, had exceeded his jurisdiction. But by purporting to construe the contract, the Court could not take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. The same view has been reiterated in Hindustan Construction Company Limited v. State of J&K."

91. In this regard, reference also can be made to the case reported in National Fertilisers Limited v. Puran Chand Nangia AIR 2001 SC 53, wherein it has been held that the integrity of the contract cannot be interfered with in the guise of interpreting the clauses in the contract.

92. Thus, after prolonged peregrination of the issues in Clause 59, to APDSS, we record the following conclusions, in addition to the views expressed by the Division Bench of this Court in Ramalinga Reddy's case (supra)

(a) Clause 59 of the APDSS is not all pervasive weapon of the Department. It cannot be used a protective shield for the breaches committed by the Department.

(b) Even construing the validity of Clause 59, the Department cannot plead total immunity.

(c) The Contractor can claim appropriate compensation if he establishes the Clause 59 was not attracted.

(d) Plea of waiver/acquiescence is available to the both parties and it has to be pleaded and proved by sufficient reliable evidence.

(e) In case of delays/defaults/breaches solely attributable to the Department, Clause 59 protection is not available to the Department.

(f) In cases of unreasonable extensions or extension beyond 25% of the actual working period, Clause 59 cannot be involved by the Department.

(g) Mere acceptance of extension of time would not ipso facto be considered as waiver on the part of the Contractor. The preceding and attendant circumstances coupled with the conduct of the parties will have to be taken into consideration.

(h) In view of the wide wording in Clause 73 of APDSS the Arbitrator is empowered to interpret and decide the applicability of Clause 59.

(i) If the integrity of the contract is interfered by the parties, the party, who interfered cannot swim into any of the protective clauses in the contract including Clause 59.

(j) The power of rescinding the contract in cases of defaults is available to the

parties. However, non-cancellation or otherwise of the contract and the circumstances under which the power was not exercised is a relevant factor to be kept while deliberating the applicability of Clause 59.

(k) Clause 59 cannot be pressed into service as straightjacket formula. Facts and circumstances of each case have to be taken into consideration for arriving at a conclusion whether Clause 59 is applicable or not ?

Applying the conclusions recorded supra, let us consider the case on hand.

93. Clause 59 prima facie prohibits the claim for compensation by the Contractor on account of the delays and defaults or whatever reasons and that only reasonable extension of time is permissible. The learned Arbitrator considering this issue interpreted the same to mean the escalation of prices is not covered by Clause 59 and what is contemplated u/s 59 is only compensation for the delays committed and it never prohibited the Contractor from claiming the escalation charges. When once the term of the contract has been interpreted, which is always permissible for the Arbitrator under Clause 73, which is widely worded, the interpretation placed by the Arbitrator has to be accepted. Therefore, when once the Arbitrator is clothed with the jurisdiction by virtue of Clause 73, temporary injunction is always open for him to interpret and construe the terms of the contract. The Department having failed to handover the site properly in accordance with the terms and conditions of the contract and having disabled the Contractor from executing the work as per the schedule on account of the various obstacles created including the non-initiation of the Land Acquisition proceedings, can it be said that still Clause 59 can be successfully invoked by the Department. It is well settled law that a person, who breaches the contract or who violates the contract is liable for damages or consequences and this clause cannot be interpreted to mean that whatever the defaults or breaches committed by the Department, the Department becomes immune from consequences. Such stipulation in the contract is highly arbitrary and unreasonable and the Division Bench of this Court has already held such a stipulation, even though it was agreed by the parties, but at the same time, when it is patently one sided and suppressed the Contractor, it cannot be said to be valid contract. Such a contract can be said to be opposed to the public policy. Obviously, it goes to establish that the Department cannot interfere with the integrity of the contract. While at the same time the Contractor cannot be allowed to interfere with the integrity of the contract, the primary intentment of the Clause 59 is not to allow the Contractor to go for compensation. On the other hand, the Department is entitled to grant reasonable extension which implies that reasonable extension of time without disturbing the work schedule is permissible, but when unreasonable extension is granted, it cannot be said that the Clause 59 also covers the situation. In case of a contract, which is liable to be executed within 12 months, a reasonable extension of one or two months can be granted by the authorities in which event, the Contractor will not be liable to claim compensation. But, if the extension is granted for a wholly unreasonable period and left asking the Contractor not to

claim compensation is not contemplated u/s 59. The reasonable extension of time is sine qua non for invoking Clause 59, if the extension is unreasonable, Clause 59 will come into play. Admittedly, in the instant case, it was completed in 1985 and the work which was scheduled to be completed within 15 months has taken 5 years and which was accepted and the learned Arbitrator found that the delays were completely attributable to the Department. Therefore, even though extension was granted, since the extension is not a reasonable extension and in the guise of extending the time, the Contractor cannot be allowed to suffer the loss of escalation of the prices and connected liabilities.

94. The learned Government Pleader relied on the recent judgment of the Supreme Court reported in General Manager Northern Railways and Another Vs. Sarvesh Chopra, . The matter arose at the reference stage. The contract was entered between the Railways and the Contractor for the work of construction of bored piles 500 mm dia for widening and for raising of Pul Mitha. Disputes arose between the parties and the Contractor moved petition u/s 20 of the Arbitration Act praying for arbitration agreement being filed in the Court and referring six claims to the Arbitrator for settlement. The learned Single Judge of Delhi High Court original side directed two claims to be referred on the ground that the claims No. 3 to 6 fell within the excepted matters on interpreting Clause 63 of General Conditions of Contract which did not permit the reference to the arbitration. However, on an intra appeal filed, the Division Bench, set aside the Order of the learned Single Judge and held that the claims No. 3 to 6 were not covered by the excepted matters. On an appeal by a special leave, the Supreme Court set aside the judgment of the Division Bench on the ground that the claims No. 3 to 6 fell within the excepted matters. The Supreme Court observed that in an application u/s 20 or Section 17, the arbitrability of a claim may be determined at three stages namely (i) while making reference to arbitration, (Item Nos. 1 and 2) in the course of arbitral proceedings, and (iii) while making the award Rule of Court.

95. The Supreme Court also referred the cases in Ramalinga Reddy's case (supra) and also Associated Engineering's case (supra) which arose out of the judgment of the Division Benches of this Court. The Supreme Court in Paras 12 and 13 observed as follows:

"In Ch.Ramalinga Reddy v. Superintending Engineer and another, 1994 (5) Scale 67, claim was allowed by Arbitrator for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". Clause 59 of A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim was found to be outside the defined exceptions. When extensions of time were granted to the appellant to complete the work the respondents made it clear that no claim for compensation would lie. For both these reasons, this Court held that it was impermissible to award such claim because the Arbitrator was

required to decide the claims referred to him having regard to the contract between the parties and therefore, his jurisdiction was limited by the terms of the contract.

A Division Bench decision of High Court of Andhra Pradesh in State of Andhra Pradesh Vs. M/s. Associated Engineering Enterprises, Hyderabad, , is of relevance. Jeevan Reddy, J. (as His Lordship then was), speaking for the Division Bench, held that where Clause 59 of the standard terms and condition of the contract provided that neither party to the contract shall claim compensation "on account of delays or hindrances of work from any cause whatever", an award given by an Arbitrator ignoring such express terms of the contract was bad, We find ourselves in agreement with the view so taken."

96. Dealing with the "no damage" clause as interpreted under American Jurisprudence and Sections 55 and 56 of Indian Contract Act, the Supreme Court observed as follows:

"In Hudson's Building and Engineering Contracts there is reference to "no damage" clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined "delays" including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the Contractor and, whether expressly or by implication, that damages or compensation are not to be recoverable therefor. These "no damage" clause appear to have been primarily designed to protect the owner from late start or co-ordination claims due to other Contractor delays which would otherwise arise. Such clauses originated in Federal Government contracts but are now adopted by private owners and expanded to cover wider categories or breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American Jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result of positive acts of interference by the owner, and (iv) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and Commonwealth. Not dissimilar principles have enabled some commonwealth Courts to avoid the effect of "no damage" clauses. [See Hudson, *ibid*].

In our country question of delay in performance of contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the Contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts

(Twenty-Eighth Edition, 1999 at p.1106, Para 22-015) states "a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")." If, instead of avoiding the contract, the Contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e., the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties, whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the Contractor repudiates the contract exercising his right to do so u/s 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the Contractor in spite of delay and such notice by the Contractor putting the employer on terms."

97. The Supreme Court finally held that it may be open to prefer a claim touching apparently excepted the matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of the excepted matters. It has to be noted that the Supreme Court was dealing with the interpretation of Clause 63 of the General Conditions which reads thus;

"CLAUSE 63 of the General Conditions of the Contract provides as under:

"MATTERS finally determined by the Railway -All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after receipt of the Contractor's representation make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been/made in Clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1) (XII)(B)(e)(b) of the General conditions of Contract or in any clauses of the special conditions of the contract shall be deemed as excepted matters and decisions thereon shall be final and binding on the Contractor provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration."

The said clause clearly put the matters covered in Clause 18 etc., and also special conditions of the contract beyond the purview of arbitration. The special conditions inter alia are as follows:

"CLAUSES 9.2, 11.3 and 21.5 of Special Conditions of contract are as under:

"9.2. No material price variation or wages escalation on any account whatsoever and compensation for "Force Majeure" etc., shall be payable under this contract. 11.3. No claim whatsoever will be entertained by the Railway on account of any delay or hold up of the works arising out of delay in supply of drawings, changes, modifications, alterations, additions, omissions, omissions in the site layout plans or detailed drawings or designs and or late supply of such materials as are required to be arranged by the Railway or due to any other factor on Railway Accounts. 21.5. No claim for idle labour and/or idle machinery etc., on any account will be entertained. Similarly no claim shall be entertained for business loss or any such loss."

But, such a clause is not to be found in the APDSS particularly Clause 73 as already held, the Supreme Court has observed that Clause 73 is wide enough to cover all the disputes. It is also to be observed that none of the clauses in the agreement were referred as excepted clauses under Clause 73. The Supreme Court had categorically held that when the clauses are specifically excepted under Clause 63, they do not fall within the arbitrable zone and fall outside the scope. As observed in Ramalinga Reddy's case (supra), there was a specific condition imposed by the State while granting extension that the Contractor was not entitled for any escalation or compensation. But, in the instant case there is no such condition, but on the other hand, the Contractor had made it clear while accepting the extension of time, which was granted by the Department stating that he reserved the right to claim the compensation or loss. Even in Associated Engineer's case (supra), the Division Bench, apart from the other factual matters, observed that, inasmuch as, the Contractor had accepted the extension without making any protest or serving any notice that he would be entitled to claim the compensation. But, that situation is not present in the case on hand. The Contractor has specifically indicated his intention while accepting the extension. Further, another distinguishing feature that can be noticed in the case on hand is that the delay which is caused by the Department is a positive act of interference which totally disabled the Contractor from undertaking the work and completing the same within the time. What was claimed is neither the loss of profit nor the market rates, but since the extension was made at the instance of the Department on the ground that there were delays and defaults attributable to the Department and the value of the work done was claimed on the basis of the S.S.R. rates which were prevailing when the work was done beyond the period of agreement. Therefore, it cannot be said to be escalation of rate. But, it is only the S.S.R. rates which is notified by the Government during the particular year and what was claimed by the Contractor is the said rate and not the escalated rate namely the market rate. Thus, the judgment relied on by the

learned Government Pleader has no application to the facts of the case.

98. Thus, viewed from any angle, the contention of the learned Government Pleader seeking protection under Clause 59 is wholly unsustainable and we do not find any ground to interfere with the award passed by the learned Arbitrator in this regard. The claims were admittedly made for the compensation for the work done and idle labour which are consequences of unreasonable extension and admittedly the work was done beyond the agreement period and the rates which were quoted in 1978 cannot be said to be the same rates in 1984-85. Thus, the escalation of charges and other items basing on the S.S.R. rates of relevant period was quite justified and we do not find any grounds to interfere with. Thus, the C.R.P. and C.M.A. filed by the Department are dismissed.

99. Coming to the appeal filed by the Contractor, the Civil Court rejected the claim at Sl.No. 4, which was allowed by the Arbitrator. The Arbitrator allowed the claim on the ground that the Arbitrator after perusing the Books produced by the respondent, came to the conclusion that he is entitled for the amounts. But, the Civil Court holding that the said item was not covered by the terms and conditions of the agreement it held that the Contractor was not entitled for the amount awarded by the Arbitrator. We have to consider this contention. The learned Arbitrator discussed the issue in the following paragraphs:

"A perusal of the condition No. 10 of the agreement shows that the steel will be supplied in length, sizes and shape as received from the supplier by the respondents and any wastage arisen out of this shall be borne by the Contractor. Condition No. 12 says that the Contractor finished rates shall be based on the basic rates of supply of materials by the Department, labour for cutting steel rods and bending to the required shape including binding wire, lapping, welding, fabrication, etc. condition No. 10 speaks of the supply of steel whereas condition No. 12 speaks of the components for the calculation of rate. In condition No. 12 the material cost, the labour cost was included. On the other hand. Para 6 at page 90 of the agreement speaks of the calculation of rate for steel reinforcement for structures. The said Para 6 fully explains various operations involved in the steel reinforcements and structure and specifically states that the rate for reinforcement shall include cost of all steel consumed in this process. Further item 17 of the Schedule "A" described the work as involving the cost of steel and the conveyance of steel, bending rods, tying grills and placing the grills in the position as directed by the Department and including the cost of binding wire, etc. complete for all R.C.C. items and for retaining walls and Diaphragms.

A perusal of the above conditions and descriptions of the work shows that the rate for this item shall include cost of all steel except wastage. Since the respondents have measured the work and recorded the same in M.Books, they ought to have paid the cost of steel involved in the overlapping also.

Section 70 of the Indian Contract Act says that where a person lawfully does anything for another or delivers anything to him not intending to do so

gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former or to restore the things so done or delivered. Hence, the claimants are entitled to cost of steel involved in the overlapping.

But the claimant claimed at the rate of Rs. 5,000/- per M.T. as claimed under item No. 17 of schedule "A" attached to the contract. But, the said rate admittedly includes the labour involved in the work. Here the claim is only to the steel involved in the work of overlapping which is not disputed by the respondents. As per the agreement at page 101, the issue rates of materials to be supplied by the Department, steel rate was quoted at Rs. 2,235/- per M.T. Hence, I award an amount of Rs. 89,400/- under this claim calculated at the rate of Rs. 2,235/- per M.T. for 40 M.T."

100. The Civil Court while discussing this issue in Para 23 of the judgment observed as follows:

"Therefore, it is evident that the condition No. 10 which is referred above already that the Department has agreed to supply steel in length, sizes and shapes as received from the suppliers. Clause 6 referred above makes it clear that it include all charges including bending, placing, binding, fixing in position as shown in the drawings. It also includes the cost of all Devices for keeping reinforcement in approved position. Clause 4 at page No. 89 gives the detail of placing of reinforcement. Therefore, any work done by the Contractor in furtherance of this Clause No. 4, it is only part of the agreed work and he is not entitled as in the case of any work done in addition. The learned Arbitrator in his award at page 62 stated "since the respondents have measured the work and recorded the same in M-Books, they ought to have been paid cost of the steel involved in the overlapping." The learned Arbitrator also referred Section 17 of the Indian Contract Act and justified this claim. It is evident from the above referred clause that the work done by the Contractor was only in pursuance of the agreement which forms part of his job and the rate includes on all the work as contemplated under clause No. 6. Therefore, mere recording in M-Book does not entitled the Contractor to this claim. The M-Book is not available before me. I do not see any reason except the reasons mentioned", the respondents have measured the work and recorded the same in the M-Book" as stated by the learned Arbitrator. The said reason for allowing this claim is not tenable since it is against specific clause of the agreement which is referred already. Therefore, this claim allowed by the learned Arbitrator is rejected, as the Plaintiff is not entitled to the same."

101. We have considered this issue in extenso and in this regard condition Nos. 10 and 12 are relevant, which are extracted below:

"Condition No. 10: Steel will be supplied in lengths, sizes, and shape as received from the suppliers. Any wastage arising out of this shall be borne by the Contractor.

Condition No. 12: The Contractor's finished rates shall be based on the basic rates of supply of the materials by the Department, labour for cutting steel rods and bending to the required shape including binding wire (wastage in cutting will have to be borne by the Contractor), lapping, welding, fabrication etc. complete"

102. The rate of calculation of steel also provided in Para 6 of the agreement which reads thus:

"6. RATE: Rate for reinforcement shall include cost of all steel, its binding, placing, binding and fixing in position as shown as the drawings and as directed by the Engineer-in-Charge. It shall also include cost of all devices for keeping reinforcement in approved position, cost of joining as per approved method and all wastage, overlaps and spacer bars."

103. Taking into consideration conditions No. 10 and 12 with reference to the material available on record in respect of this issue, we hold that the Arbitrator has travelled beyond the jurisdiction. We are of the view that the Arbitrator has exceeded his jurisdiction in awarding the amount. Thus, we do not find any illegality in the judgment of the lower Court rejecting the claim as awarded by the Arbitrator.

104. In the result, CMA No. 1079 of 1994 and CRP No. 2726 of 1994 are dismissed and CMA No. 953 of 1994 is dismissed.