

(1993) 03 BOM CK 0004

In the Bombay High Court

Case No : Arbitration Petition No. 181 in Award No. 40 of 1992

Tata Industitute of Social Sciences

APPELLANT

Vs

Krishna Kamal Builders and Another

RESPONDENT

Date of Decision : 30-03-1993

Acts Referred:

Arbitration Act, 1940 — Section 30, 31, 37(3)

Citation : (1994) 1 BomCR 47 : (1993) 95 BOMLR 183

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : P. Shankaramakrishnan and N.M. Mithani, for the Appellant; S.C. Gupte and N.G. Thakker, instructed by V.L. Punjwani, for the Respondent

Final Decision : Dismissed

Judgement

S.M. Jhunjhunwala, J.—By this petition, the petitioner seek to set aside the award dated 29th March 1990 made by the Jamshed Burjor Aga the sole arbitrator which has been filed in this Court and numbered as Award No. 40 of 1992. The petition is finally heard at the stage of its admission.

2. The petitioners had entrusted the work of construction of a guest- house, extension of additional teaching block and extension of teachers" quarters at Deonar, Bombay 400088 (for short "the said Work") on the terms and condition mentioned in the articles of agreement executed at Bombay on 25th September, 1984 (hereinafter referred to as the "the said Contract"). It was inter alia agreed by and between the petitioners and the respondents at the time of entering into the said Contract that the General Conditions of Contract annexed to the said articles of agreement would form apart of the said Contract and as such would be binding on the petitioner and the respondents. The time limit specified for completion of the said Work under the said Contract was 18 months. Accordingly, the said Work was stipulated to be completed by 24th March, 1986. However, the performance of the said Contract was dependent on the prior performance of the various reciprocal obligations by the petitioners and the architects. According to

the petitioners, the respondents committed defaults in carrying out the said Work inasmuch as the respondents did not carry out the said Work in accordance with the terms of the said Contract as to the time, quality and quantity thereof and thereby caused inconvenience and loss to the petitioners. According to the respondents, the apparent slow progress of the said Work was not due to any default on the part of the respondents but was only due to the various delays and hindrances caused from time to time by the petitioners and their architects in execution thereof. The respondents denied that the materials used by them for carrying out of the said Work were sub-standard quality or that the workmanship was defective. According to the respondents, changes and/or rectification required by the petitioners and their architects were attended to by the respondents to the satisfaction of the petitioners and/or their architects and thereafter the Work executed by the respondents was measured and paid for by petitioners under various running account bills. The respondent denied that the respondents caused any inconvenience or loss to the petitioners.

3. By their letter dated 26th October 1985, addressed to the respondents, the petitioners terminated the said Contract and the balance Work thereunder was taken away by the petitioners from the respondents. By their Advocate letter dated 20th August, 1987, addressed to the respondents, the petitioners alleged that the respondents had carried out the Work to the extent of Rs.12,06,928.64 and had forwarded to the petitioners a bill for Rs 4,77,218.25 after adjusting the amount already received by the respondents and that after receipt of the bill, the petitioners had ascertained that the amount payable to the respondents worked out to only Rs. 2,61,196.30. In the said letter the petitioners further alleged that the petitioners had to pay a sum of Rs. 5,15,493.56 over and above and in excess of the contracted amount for getting the said Work completed by one Satish Raut & Co. and demanded pay of Rs.2,55,297.26 from the respondents as and by way of damages for breach of the said Contract alleged to have been committed by the respondents. By their letter dated 14th September, 1987, addressed to the Advocate for the petitioners, the respondents replied to the said letter dated 20th August, 1987 and inter alia denied their liability to pay the sum of Rs.2,55,297.26 or any other amount to the petitioners. By the said letter the respondents denied that the respondents had committed breach of said Contract or that the petitioners suffered any damages as a result of any breach of the said Contract alleged to have been committed by the respondents. In the said letter, the respondents inter alia contended that the purported termination of the said Contract by the petitioner was uncalled for and unjustified as the respondents had not committed breach of the terms and condition thereof. The respondents denied that only sum of Rs. 2,60,196.30 was due by the petitioners to the respondents in respect of the Work done by the respondents in pursuance of the said Contract. While denying liability in respect of balance of the said Work get carried out by the petitioners through the said third party, the respondent in the said letter stated that the sum of Rs. 4,77,218.25 was due by the petitioners to the respondents for the Work and that the respondents were also entitled to

various other claims for compensation under the said Contract. By their letter dated 27th September, 1988, addressed to the architects of the petitioners and copy endorsed in favour of the petitioners, the respondents communicated to the petitioners the amounts which the petitioners had become liable to pay to the respondents on various accounts under the said Contract and demanded payment in respect thereof from the petitioners. By the said letter, the respondent called upon the architects of the petitioners to certify the claims of the respondents listed therein and to ensure that the petitioners pay the same to the respondents within the period stipulated therein. The respondents by the said letter informed the architects of the petitioners that in the event of the architects of the petitioners not certifying the claims of the respondents listed there in, the respondents would take that disputes and differences had arisen between the respondents and the petitioners and in that event, the respondents would proceed further to get the disputes and differences settled in accordance with arbitration agreement entered into by and between the petitioners and the respondents as contained or incorporated in Clause 56 of the said General Condition of Contract forming part of the said Contract and ultimately by arbitration as contemplated in the said arbitration agreement. In reply to the said letter dated 29th September, 1988, the architects of the petitioners addressed a letter dated 6th October, 1988 to the respondents by which they alleged that number of statements made by the respondents in the said letter dated 29th September 1988 being vague, no action in respect thereof could be taken by them. The respondents replied to the said letter dated 6th October, 1988 vide their letter dated 8th October, 1988 addressed to the architects of the petitioners and inter alia communicated to them that the statements made by respondents in their said letter dated 27th September, 1988 were neither vague nor devoid of any particulars. By the said letter, the respondents informed that the claims of the respondents were not certified by the architects of the petitioners even though the period stipulated in the said letter dated 27th September, 1988. had expired and as the disputes and differences had arisen between the petitioners and the respondents, the same were to be settled as per the provisions contained in the said Contract. In accordance with the said Clause 56 of the General Conditions of Contract, the respondents referred the disputes and differences which had arisen between the petitioners and the respondents due to non-settlement and non-payment of their claims listed in the said letter dated 27th September, 1988 to the architects of the petitioners for decision in writing and called upon the architects of the petitioners to give their decision in respect thereof in writing within 10 days from the date of receipt thereof by them. By them said letter dated 8th October, 1988 the respondents gave notice that in the event of the architects of the petitioners failing to proceed in the matter as contemplated by the said Clause 56, the disputes and differences could be settled by arbitration as per the procedure laid down in the said Clause 56. A copy of the said letter dated 6th October, 1988 was endorsed in favour of the petitioners. The architects of the petitioners did not decide the claims of the respondents. Disputes and differences thus arose by and between the petitioners

and the respondents out of or in relation to or anywise pertaining to the said contract.

4. Clause 56 of the General Conditions of Contract forming part of the said Contract reads as under;-

" 56. All dispute and differences of any kind arising out of or in connection with the Contractor or the carrying out of the Works (whether during the progress of the Works or after their completion and whether before or after determination, abandonment or breach of the Contract) shall be referred to and settled by the Architect who shall state his decision in writing. Such decision may be in form of a Final Certificate or otherwise. The decision of the Architect with respect of any of the expected matters shall be final and without appeal. But if either the Owner or the Contractor be dissatisfied with the decision of the Architect or any matter, question or dispute of any kind (except any of the expected matters) or as to the withholding by the Architect of any Certificate to which the Contractor may claim to be entitled then and in any such case either party (the Owner or the Contractor) may within 28 days after receiving notice of such decision give a written notice to the other party through the Architect requiring that such matters in dispute be arbitrated upon. such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred the Arbitration and final decision of a single Arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator to the Arbitration of two Arbitrators both being fellows of the Indian Institute of Architects one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators or the Umpire as the case may be shall have power to open up review and revise any certificate, opinion, decision, requisition or notice save in regard to the excepted matters referred to in Clause 55 and to determine all matters in dispute which shall be submitted to him of them and of which notice shall have been given as aforesaid.

Upon every or any such reference the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitrator or Arbitrators or the Umpire as the case may be who may determine the amount thereof or direct the same to be taxed as between Attorneys and Client or as between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid This submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration Act, 1940 or any modification thereof for the time being in force. The Award of the Arbitrator or Arbitrators or the Umpire as the case may be shall be final and binding on the parties Such reference except as to the withholding by the Architect of any Certificates under Clause 49 to which the Contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion

of the Works or until after the practical cessation of the Works arising from any cause unless with the written consent of the Owner and the Contractor. Provided always that the Owner shall not withhold the payment of an Interim Certificate nor the Contractor except with the consent in writing of the Architect in any way delay the carrying out of the Works by reason of any such matters, question or dispute being referred to Arbitration but shall proceed with the Work with all due diligence and shall, until the decision of the Arbitrator or Arbitrators or the Umpire as the case may be, given, abide by the decision of the Architect and no Award of the Arbitrator or the Arbitrators or the Umpire as the case may be shall relieve the Contractor of his obligations to adhere strictly to the Architects instructions with regard to the actual carrying out of the Works. The Owner and the Contractor hereby also agree that Arbitration under this clause shall be a condition precedent to any right of action under the Contract."

5. In accordance with the arbitration agreement between the petitioners and the respondents as contained in the said Clause 56 incorporated in the said Contract, the respondents by their letter dated 21st October, 1988 addressed to the petitioners and served through the Architects petitioners, of the gave notice to the petitioners for reference to arbitration in respect of the claims of the respondents against the petitioners and appointed the said J ,B Aga a Fellow of Indian Institute of Architects and former President thereof as arbitrator and called upon the petitioners to agree upon the said J.B. Aga acting as agreed sole arbitrator. The petitioners were further intimated that if the petitioners were not agreeable to the said J.B. Aga acting as sole arbitrator in the matter, the petitioners might appoint another arbitrator from their side to act along with him within 15 days of the receipt thereof by the petitioners. By the said letter dated 21st October 1988, the petitioners were given notice that in the event of the petitioners not agreeing to said J. B. Aga acting as the sole arbitrator and further in the event of the petitioners, failing to appoint their arbitrator within a period of 15 days from the receipt thereof by the petitioners, the respondent would appoint the said J.B. Aga as a sole arbitrator in the matter u/s 9 of the Arbitration Act, 1940. The respondents thus invoked arbitrator in the matter by their letter dated 21st October, 1988. The petitioners neither agreed to the said J. B. Aga acting as agreed sole arbitrator nor appointed any person to act as an arbitrator from their side though the period of 15 days mentioned in the letter dated 21st October, 1988 expired. The respondents therefore appointed the said J. B. Aga as sole arbitrator in the matter of disputes and differences which had arisen between the petitioners and the respondents in accordance with the provisions of section 9 of the said Act intimated the petitioners about the same vide their letter dated 8th November, 1988 addressed to the petitioners, copy whereof was endorsed in favour of the said J.B. Aga for intimation with a request to issue necessary directions for the parties before him to file statement of claims, reply and counter-claim, if any before him.

6. Since according to the petitioners the respondents were liable to pay to the petitioners a sum of Rs. 2,55,297.26 on account of damages allegedly caused to

or suffered by the petitioners due to breach of the said Contract alleged to have been committed by the respondents, the petitioners filed a suit, being Suit No. 1929 of 1988 in this Court for recovery of the said amount and interest thereon from the respondents. The respondents took out a Notice of Motion in the said suit for stay thereof under the provision of section 34 of the said Act. In view of existence of valid, legal and binding arbitration agreement between the petitioners and the respondents refer the disputes and difference to arising out of or in relation to the said Contract to arbitration as provided therein, as per the order passed by this Court on 5th April, 1991 on the said notice of motion taken out by the respondents in the said suit, the further proceedings of the said suit were stayed under provisions of section 34 of the said Act.

7. By his letter dated 17th November, 1988 the arbitrator directed the respondents to submit their statement of claims by 19th November, 1988. The petitioners were directed to file their reply to the statement of claims by 19th January, 1989 and the respondents were directed to file their rejoinder there to by 31st January, 1989. Along with their letter dated 12th December, 1988, the respondent submitted their statement of claims with annexures and exhibits thereto and forwarded a copy thereof to the petitioners. The petitioners did not file any reply to the statement of claims of the respondents. A preliminary hearing in the matter was fixed by the arbitrator on 16th May, 1989 after due notice to the petitioners and respondents at which the respondents' partner was present. Nobody on behalf of the petitioners had remained present. The arbitrator fixed another meeting which was held on 14th June, 1989, notice whereof was given both to the petitioners and the respondents. At the hearing held on 14th June, 1989, the respondents were represented by their Advocates. However, the petitioners remained absent. With a view to give another opportunity to the petitioners to remain present before the arbitrator, the arbitrator fixed another meeting for hearing of the reference on 15th September, 1989 after due notice to the petitioner and respondents. Since neither party could remain present before the arbitrator in the meeting fixed on 15th September, 1989, the arbitrator fixed another meeting for hearing of the reference before him on 18th May, 1989. At the meeting held on 18th October, 1989, the respondents' partner along with their Advocates remained present. Again nobody on behalf of the petitioner remained present before the arbitrator at the meeting held on 18th October, 1989. To give another opportunity to the petitioners to remain present before the arbitrator, the arbitrator fixed another meeting on 10th November, 1989. Due notice was served by the arbitrator both upon the petitioners and the respondents. Both the petitioners and the respondents were informed by the arbitrators that if they or either of them would same in absent, the arbitrator would proceed ex-parte in the matter. In the meeting held on 10th November, 1989 the respondents partner and their Advocate remained present. The petitioners again remained absent despite due notice thereof. Though the respondent desired to proceed ex-parte against the petitioners in view of the petitioners not availing of ample opportunity given to them to remain present

before the arbitrator, the arbitrator desired to give one more opportunity as and by way of final opportunity to the petitioners to submit their reply to the statement of claims of the respondents and to participate in the proceedings before him and accordingly adjourned the hearing to 1st December, 1989. Due notice of the hearing fixed before the arbitrator on 1st December, 1989 was served upon the petitioners and the respondents along with the notes of the meeting held on 10th November, 1989. The arbitrator gave notice to the petitioners that if despite the final opportunity having been given to the petitioners, the petitioners would not file their counter-statement to the statement of claims of the respondents on or before the hearing of the reference on the December 1989, the arbitrator would enter upon the reference and proceed ex-parte with the hearing of the reference. At the meeting held before the arbitrator on 1st December, 1989. The respondents' partner alongwith their Advocate were present. The petitioners did not remain present despite due notice. No counter statement was filed by the petitioners. The arbitrator in the meeting held on 1st December, 1989 entered upon the reference proceeded ex-parte with the hearing of the reference. Since the hearing was not concluded on 1st December, 1989, further hearing of the reference was fixed on 18th December, 1989 due notice whereof was given to the petitioners and the respondents alongwith copies of the notes in respect of the meeting held on 1st December, 1989. The hearing fixed on 18th December, 1989 however could not be held and as such the next hearing before the arbitrator was fixed on 15th January, 1990, due notice in respect whereof was served both upon the petitioners and the respondents. The various claims of the respondents were further considered by the arbitrator at the said meeting where at also the petitioner chose to remain absent. Further hearings of the reference before the arbitrator were held on 7th February, 1990, 8th February, 1990, 20th February 1990 6th March, 1990, 7th March, 1990, 8th March 1990, 20th March, 1990 and 21st March, 1990, due notices, were of were given both to the petitioners and the respondents. At all these meetings the respondents and their Advocate remained present and various claims of the respondents against the petitioners were considered by the arbitrator on their merits. The petitioners chose to remain absent at all these meetings fixed before the arbitrator. The arbitrator closed the reference for award on 21st March, 1990. The notes of the meetings held before the arbitrator were furnished both to the petitioners and the respondents.

8. After considering the statement of claims of the respondents, voluminous correspondence submitted by the respondents as exhibits before the arbitrator, the break up particulars and details of various claims of the respondents submitted by the respondent before the arbitrator as annexures and also after considering the arguments advanced by the Advocate for the respondents, the arbitrator made his said award dated 29th March, 1990 directing the petitioners to pay to the respondents a sum of Rs. 8,46,539/- together with interest thereon to be calculated at the rate of 15% per annum from the date of the said award

till the date of decree on the said award or date of payment of the award amount and interest, whichever is earlier. Each party was directed to bear its own costs. The said award has been filed in this Court on 27th May, 1992 and notice of filing thereof has been served on the petitioners on 29th June 1992. The petitioners have filed the present petition to have the said Award set aside.

9. Mr. Shankarnarayan, an the learned Counsel appearing for the petitioners, has submitted that the said Award is liable to be set aside on the following grounds :-

i) the arbitrator had no jurisdiction to arbitrate upon the claims of the respondents against the petitioners since the claims of the respondents pertained to "excepted matters" covered under Clause 55 of the General Conditions of Contract and as such not arbitrable by the arbitrator;

ii) the arbitrator has awarded damages to the respondents without evidence proving the same and as such the arbitrator has legally misconducted himself and the award in the circumstances is liable to be set aside;

iii) since on termination of the said Contract by the petitioners, the respondents had handed over the site, no "dispute" by and between the petitioners and the respondents remained outstanding to be arbitrated upon and as such the arbitrator had no jurisdiction in the matter;

iv) that the reference to arbitration made by the respondents in respect of their claim against the petitioners was made after expiration of period of limitation and as such the arbitrator could neither entertain such claims of the respondents against the petitioners nor award the same to the respondents, and

v) that the impugned award has been made beyond the statutory period of four months after entering upon the reference without extension of time for making the same.

No other ground had been canvassed on behalf of the petitioners to set aside the said award.

10. It is not in dispute that General Conditions of Contract constitute and/or form part of the terms and conditions of the said Contract admittedly entered into by and between the petitioners and the respondents. The petitioners and the respondents, as such were bound by Clauses 55 and 56 along with other clauses of the said General Conditions of Contract. Clause 56 of the said General Conditions of Contract constituted arbitration agreement by and between the petitioners and the respondents for making reference of all disputes and differences of any kind whatsoever arising out of or in connection with the Contract or carrying out of the said Work (whether during the progress of the Works or their completion and whether before or after the termination, abandonment or breach of the Contract to arbitration) as provided therein under the said arbitration agreement such disputes and differences were required to be referred to and settled by the arbitrator who was required to state his decision in writing. The decision of the architect with respect to any of the "excepted

matters" was to be final and without appeal. However, if the petitioners or the respondents were dis-satisfied with the decision of the architect on any matter, the question or dispute of any kind (except any of the excepted matters) or as to the withholding by the architect of any certificate to which the respondents claim to be entitled, then the petitioners or the respondents as the case may be, could within 28 days after receiving notice of such decision give a written notice to the other party through architect requiring that such matters in dispute be arbitrated upon. Upon giving such notice reference in respect of such disputes and differences was to stand made to arbitration as provided therein. Clause 55 of the said General Conditions of Contract pertaining to excepted matters reads as under :

"55. The decision, opinion, direction, certificate (except for payment) with respect to all or any of the matters under Clauses 5,9,19,25,28,36,40, (1,2,4,7, and 8) and 48 hereof (which matters are herein referred to as the excepted matters) shall be final and conclusive and binding on the parties hereto and shall be without appeal. Any other decision, opinion, direction, certificate or valuation of the Architect or any refusal of the Architect to give any of the same shall be subject to any right of Arbitration and review in the matter way in all respect (including the provision as to opening the reference) as if it were a decision of the Architect under the following clause."

11. Under Clause 55, the decision, opinion, direction, certificate (except for payment) with respect to all or any of the matters under Clauses 5, 9, 19, 25, 26, 36, 40,(1, 2, 4, 7, and 8) and 48, of the said General Conditions of Contract, which matters are referred as "excepted matters" in the said General Conditions of Contract, were to be final and conclusive and binding on the petitioners and the respondents. Clauses 5, 9, 19, 25, 26, 36, 40, (1, 2, 4, 7 and 8) and 48 of the said General Conditions of Contract pertain to contract drawings, Architects, instructions, respondents" field organisation and equipment, assignment or sub-letting of the said Contract by the respondents, awarding of sub-contract by the respondents, materials required to be used by the respondents and workmanship of the respondents extension of the period of the said Contract and determination of the said Contract by the petitioners respectively. The claims of the respondents listed in the letter dated 27th September 1988 addressed by the respondents to the architects of the petitioners in respect whereof the respondents ultimately invoked arbitration pursuant to the said arbitration agreement, did not pertain to matters under the said Clauses 5, 9, 19, 25, 26, 36, 40 (1, 2, 4, 7 and 8) and 48 of the said General Conditions of Contract and as such, were not excepted matters". The architects of the petitioners did not certify the said claims to ensure payment in respect thereof by the petitioners to the respondents within the notice period of ten days specified in the said letter dated 27th September, 1986. Even though the respondents vide their said letter dated 8th October, 1988 addressed to the architects of the petitioners did refer their said claims to the Architects of the petitioners for their decisions in writing as per the Clause 56 of the said General Conditions of Contract, the architects of

the petitioners did not decide the same. Hence, the question of decision, opinion, direction, certificate of the architects of the petitioners with respect to the said claims of the respondents becoming final or conclusive did not arise. All the claims of the respondents against the petitioners listed in the said letter dated 27th September, 1988 and referred to arbitration have been "money claims" and none, in the facts of the case, fall under the category of "excepted matters" as defined under Clause 55 of the said General Conditions of Contract. Moreover, by their said letter dated 21st October, 1988 addressed to the petitioners, the respondents gave the requisite notice to the petitioners through the architects of the petitioners for reference of their said claims listed in the said letter dated 27th September, 1988 to arbitration and appointed the said J.B. Aga as arbitrator in the matter. By their advocate's letter dated 5th November, 1988 addressed to the respondents, the petitioners informed the respondents that in respect of amount allegedly due by the respondents to the petitioners, the petitioners had already filed a suit against the respondents and while denying that any amount was due or payable by the petitioners to the respondents, informed the respondents that the question of making reference to arbitration did not arise. The respondents replied to the said letter of 5th November, 1988 by their letter dated 16th November, 1988 addressed to the petitioners and inter alia informed the petitioners that the respondents had already taken out a Notice of Motion u/s 34 of the said Act for stay of the suit filed by the petitioners and that in view of existence of legal valid and binding arbitration agreement between the petitioners and the respondents, the disputes and differences which arose between them were referable to arbitration and as such, referred to arbitration. In the said correspondence, the petitioners nowhere denied that the said claims of the respondents were not referable to arbitration in view of the same allegedly pertaining to "excepted matters". No written reply or counter-statement to the statement of claims of the respondents was filed by the petitioners before the arbitrator. The petitioners did not remain present before the arbitrator. In the circumstances, the petitioners have waived or deemed to have waived their right to challenge the jurisdiction of the arbitrator on the ground that the claims of the respondents against the petitioners referred to arbitration pertained to "excepted matters" and as such, the arbitrator had no jurisdiction to arbitrate in respect thereof. Further, in view of the said claims of the respondents-referred to arbitration, the arbitrator was called upon to decide the effect of the said Contract and as such, to decide a question of law i.e. of interpreting the said Contract, and hence, his decision is not open to challenge as question of construction of contract or terms thereof being question of law, the arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion. Hence, I hold that the arbitrator had the jurisdiction to arbitrate upon the disputes referred to his arbitration.

12. Though the site, on termination of the said Contract by the petitioners, was handed over by the respondents, there is no merit in the submission made on behalf of the petitioners that no dispute remained outstanding by and between

the petitioners and the respondents to be arbitrated upon by the arbitrator. Admittedly, the respondents had submitted their Running Account Bill for Rs. 4,77,218.25 for the work done alone after adjusting the amount already received by them which was disputed by the petitioners as according to the petitioners only the sum of Rs. 2,60,196.30 was payable by the petitioners. According to the petitioners, the petitioners had to pay a sum of Rs. 5,15,493.56 over and above and in excess of the contracted amount for getting the said Work completed and after adjusting the sum of Rs 2,60,196.30, the petitioners claimed a sum of Rs. 2,55,297.26 from the respondents as damages for breach of the said contract allegedly committed by the respondents, the liability in respect whereof has been denied by the respondents. The suit filed by the petitioners to recover the said sum of Rs. 2,55,297.26 from the respondents has been stayed u/s 34 of the said Act as there existed a valid, legal and binding arbitration agreement by and between the petitioners and the respondents for reference of the disputes and differences arising out of or in relation to the said contract as provided in the said Clause 56. The respondents disputed the right of the petitioners to terminate the said contract in purported exercise of powers under Clause 48-1(D) of the said General Conditions of Contract as, according to the respondents, since the respondents had not assigned the said contract to somebody or sub-let any portion of the said Work, the question of petitioner taking action against the respondents under the said Clause 48.1 (D) did not arise. Even by their letter dated 14th September, 1987 addressed to the advocate for the petitioners, the respondents had recorded that the said Work was wrongfully taken away by the petitioners from them and though, as desired by the petitioners vide their letter dated 26th October 1985, the respondents had handed over the site to the petitioners, the respondents were entitled to be compensated for the loss and damages suffered by the respondents as a consequence of wrongful action taken by petitioners. Hence, it is not correct to say that no dispute remained outstanding by and between the petitioners and the respondents on the site being handed over by the respondents on termination of the said Contract.

13. Numerous meetings were held before the arbitrator for hearing of the reference after due notices both to the petitioners and the respondents whereat the petitioners remained absent. The arbitrator entered upon the reference on 1st December, 1989 as recorded by him in the notes of the meeting held before him on that day. Voluminous documentary evidence in support of the claims of the respondents against the petitioners was tendered on behalf of the respondents before the arbitrator and though the proceedings before the arbitrator proceeded ex-parte against the petitioner, the hearings to consider the claims of the respondents on merits were held on 1st December, 1989, 15th January, 1990, 7th February, 1990, 8th February, 1990, 20th February, 1990, 1st March, 1990, 7th March, 1990, 8th March, 1990, 20th March, 1990 and 21st March, 1990 after due notice to the petitioners. The arbitrator, after considering the statements of claims of the respondents; the voluminous documentary evidence, break-up, particulars and details tendered before him in support of the

claims of the respondents against the petitioners and the arguments advanced by the learned Advocate appearing for the respondents, made his said Award, which is a no-speaking award. As no reasons are given by the arbitrators, it is not open to this Court to speculate as to what impelled the arbitrator to arrive at his conclusion. The arbitrator was the sole judge of the quality as well as the quantity of evidence and it will not be for this Court to take upon itself the task of being a judge on the evidence before the arbitrator. The adjudication of claims by the arbitrator has been on their respective merits and demerits and it is now not open to the petitioners to challenge the said Award on the ground that the decision of the arbitrator on facts and law referred to him is erroneous. The Court has no jurisdiction to investigate into the merits of the case and to examine the evidence for the purpose of finding out whether or not the arbitrator had committed an error of law or fact. It is also not necessary for the Court to examine the merits of the said Award with reference to materials produced before the arbitrator as this Court is not sitting in appeal over the views of the arbitrator by re-examining and re-assessing the material produced before the arbitrator. There is no dispute as to the said Contract between the parties. That is the interpretation of the said Contract is a matter for the arbitrator on which the Court can not substitute its own decision. In facts of the case, it is not correct to say that there was no evidence before the arbitrator to award damages to the respondents as has been done by him. The arbitrator has not misconducted himself in awarding the amount awarded to the respondents. On the facts of the case, the decision in the case of *Bajranglal Laduram v. Ganesh Commercial Co. Ltd.*, reported in AIR 1961 Cal.78 relied upon by Mr. Shankarnarayanan has no applicability. In deciding the quantum of damages awarded to the respondents, the arbitrator has not accepted the view of any other person.

14. The petitioners had terminated the said Contract by the said letter dated 26th October, 1985. By their said letter dated 27th September, 1988 addressed to the architects of the petitioners, the respondents made various claims against the petitioners as listed therein and had called upon the architects of the petitioners to certify the said claims to ensure that the petitioners make payment thereof to the respondents within a period of ten days of the receipt thereof by them. By the said letter, the respondents gave notice that on failure on the part of the Architects of the petitioners to certify the said claims of the respondents within the said period, the respondents would proceed to get the disputes and differences settled as per procedure laid down in the said Clause 56 and ultimately by arbitration as contemplated therein. Since the Architects of the petitioners did not certify the said claims of the respondents, by their letter dated 8th October, 1988 addressed to the Architects of the petitioners, the respondents informed the petitioners that the disputes and differences had arisen between the petitioners and the respondents in respect of the said claims of the respondents against the petitioners which were required to be settled as per provisions of the said Contract. By the said letter, the respondents referred the said disputes and differences to the Architects of the petitioners as per the said

Clause 56 for their decisions in writing. Since the Architects of the petitioners did not give their decision in writing, by their letter dated 21st October, 1988 addressed to the petitioners, the respondents made reference of the disputes and differences which arose by and between the petitioners and the respondents to arbitration as per arbitration agreement contained in the said Clause 56 incorporated in the said Contract and appointed arbitrator and called upon the petitioners to agree upon the arbitrator appointed by the respondents to act as agreed sole arbitrator. In case the petitioners were not agreeable to the arbitrator appointed by the respondents acting as sole-arbitrator, the petitioners were called upon to appoint their arbitrator to act alongwith the arbitrator appointed by the respondents. Copies of the said letters was endorsed in favour of the Architects of the petitioners as also to the arbitrator. Hence, under provisions of section 37(3) of the said Act, the arbitration had deemed to commence on service of the said notice upon the petitioners which was served on 21st October, 1988. Hence, the reference to arbitration was made within the period of limitation prescribed under The Limitation Act, 1963 and the arbitrator had the jurisdiction to entertain the claims of the respondents against the petitioners referred to him for adjudication.

15. The resume of events indicates that no effective step was taken by the arbitrator till hearing of the disputes and differences referred to him commenced on 1st December, 1989. Hence, the arbitrator entered upon the reference on 1st December, 1989 and the said award having been made on 29th March, 1990, is within statutory period of four months after entering upon the reference. In this view of mine, I am supported by the judgment of the Division Bench of this Court in the case of Jolly Steel Industries Pvt. Ltd., Poona Vs. Union of India and Another, .

16. An award is not vulnerable to any challenge thereto. As regards the award of an arbitrator under the said Act, the law is well settled that the arbitrator's adjudication is generally considered binding between the parties for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in section 30 of the said Act. Under Clause (c) of section 30, the Court can set aside an award which suffers from an error of law on the face thereof. No ground within section 30 has been made to set aside the said Award. The arbitrator had neither misconducted himself nor the proceedings before him. There is no error of law on the face of the said Award.

In the result, the petition is dismissed with no order as to costs.

Issuance of certified copy hereof on application being made, is expedited.