
(1978) 05 KL CK 0003

In the High Court Of Kerala

Case No : A.S. No. 796/74 and M.F.A. 3 of 1975

Travancore Cochin Chemicals Ltd.

APPELLANT

Vs

Mulraj G. Dungarsay and Co., (P) Ltd.

RESPONDENT

Date of Decision : 25-05-1978

Acts Referred:

Arbitration Act, 1940 — Section 17, 20, 20(4), 30, 8
Civil Procedure Code Amendment Act, 1976 — Order 41 Rule 22
Companies Act, 1956 — Section 46, 46(1)

Citation : (1978) 05 KL CK 0003

Hon'ble Judges : Narendran, J; Balakrishna Eradi, J

Bench : Division Bench

Advocate : Menon and Pai, for the Appellant; P. Sukumaran Nair and A.K. Chinnan, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Eradi, J.—These two appeals arise out of connected proceedings instituted in the court below under Sections 17 and 30 of the Arbitration Act, 1940 (hereinafter referred to as the Act) in respect of the award made by an Umpire in a dispute that had arisen between the parties to these appeals. The Appellant in these appeals is the Travancore-Cochin Chemicals Ltd. which is a Government owned company. On 11th May, 1967 the Appellant company had entered into a contract with the Respondent in these appeals whereunder the Respondent had agreed to supply 50,000 metric tonnes of common salt to the Appellant during the period of one year ending with May, 1968. Ext. P-4 is a copy of the purchase order which admittedly contains the terms of the agreement between the parties. In Clause 20 of Ext. P-4 it was stipulated that in case any dispute arose between the parties in regard to the execution, interpretation etc., of the said agreement the said dispute or disputes shall be referred to arbitration under the Indian Arbitration Act. It was further provided in that clause that each party should appoint its own arbitrator and, if the arbitrators are unable to agree, the decision of an umpire selected by them before the commencement of hearing

would be final between the parties. The Respondent could not supply the stipulated quantities of salt according to the time schedule agreed for delivery and on account of the said default the Appellant had to procure the salt required for working its factory from other sources incurring very heavy cost. On this basis the Appellant gave notice to the Respondent on 13th December, 1968, claiming damages amounting to Rs. 6,63,709. In reply thereto, the Respondent sent the communication Ext. D-35 repudiating liability or responsibility to pay any amount to the Appellant by way of damages or compensation. Thereafter, on 25th August, 1969, the Appellant gave notice to the Respondent that the dispute should be decided by arbitration in accordance with Clause 20 of the agreement and that it had appointed Sri P.M.G. Menon, Retired Subordinate Judge, as the arbitrator nominated by it. By the said notice the Appellant also called upon the Respondent to name and appoint its arbitrator as required by Clause 20. The Appellant intimated the Respondent on 16th September 1969 that since the Respondent had failed to appoint its arbitrator within the prescribed time in spite of the notice given by the Appellant, the Appellant had appointed Sri P.M.G. Menon to function as sole arbitrator u/s 9 of the Act. On 18 October, 1969, Sri P.M.G. Menon purporting to function as the sole arbitrator issued a notice to the Respondent calling upon the latter to appear before him in the arbitration proceedings which he proposed to conduct. There upon, the Respondent filed Arbitration O.P. No. 10 of 1969 in the court below under the proviso to Section 9 of the Act praying that the appointment of Sri P.M.G. Menon as the sole arbitrator should be set aside and that Sri Kalathil Velayudhan Nair who was the arbitrator nominated by the Respondent-company should be allowed to participate in the arbitration along with Sri P.M.G. Menon, the arbitrator of the Appellant, and to proceed to decide the reference jointly. The lower court by its order dated 24th March, 1970, allowed Arbitration O.P. No. 10 of 1969 filed by the Respondent, set aside the appointment of Sri P.M.G. Menon as the sole arbitrator and directed that the arbitration proceedings may be conducted jointly by Sri P.M.G. Menon, arbitrator of the Appellant, and Sri Kalathil Velayudhan Nair, arbitrator appointed by the Respondent. Pursuant to the said order passed by the court below, the two arbitrators, subsequently jointly entered on the reference. At their very first sitting held on 25th May, 1970, they chose Sri G. Kumara Pillai, Retired Judge of this High Court, as the Umpire and this appointment was made with the consent of both parties. Sri Kumara Pillai accepted the said appointment by his letter dated 4th June, 1970. Both parties actively and unreservedly participated in the proceedings before the joint arbitrators. There were in all 48 sittings held by the arbitrators between 25th May, 1970, and 15th July, 1971, including a sitting held at Bombay in the last week of January, 1971, at the request made by the Respondent as per an application dated 11th December, 1970. At the culmination of the hearing the two arbitrators differed and passed divergent awards. By letter dated 19th August, 1971, the two arbitrators informed the Umpire that they could not agree on the award to be made in the case and requested the Umpire to enter on the reference and finally decide the matter. Accordingly the Umpire Sri G. Kumara Pillai entered on the reference on 28th August, 1971, and issued

notices to the parties and their advocates informing them that he would hold his first sitting as Umpire on 9th September, 1971. At the sitting held on 9th September, 1971, the parties and their advocates agreed that no further evidence was necessary and that they would argue the matter before the Umpire on the evidence already recorded by the arbitrators. Before the Umpire also, both parties fully participated in the whole proceedings and the arguments were confined only to the merits of the rival claims advanced by the contending parties. The Umpire after a detailed consideration of the various points urged before him by both sides, passed his award dated 3rd December, 1971, allowing the Appellant to recover from the Respondent a sum of Rs. 5,28,106.43 by way of damages on account of breach of contract. There were also incidental directions regarding the stamp duty payable on the award and the costs of the arbitration. The Appellant-company thereafter filed into the court below the award passed by the Umpire together with the proceedings, records and all other papers concerning the arbitration proceedings and prayed to the court below that notice of filing the award be issued to the Respondent and that after hearing the Respondent a decree may be passed in its favour in terms of the award. The said petition filed by the Appellant in the court below was numbered as O.P. (Arbitration) No. 39 of 1971. After notice of the said application was served on the Respondent, the Respondent filed Arbitration O.P. No. 7 of 1972 in the Court below on 5th February, 1972, u/s 30 of the Act praying that the award passed by the Umpire may be set aside on the grounds of total lack of initial jurisdiction, misconduct and errors of law and fact apparent on its face. The lower court allowed the Respondent's application to set aside the award holding that even though the grounds of misconduct and errors of law put forward in the petition were not established the proceedings before the arbitrators and the Umpire were completely devoid of jurisdiction since there was no joint reference of the dispute by both the parties either before the arbitrators or before the Umpire and there was also no valid arbitration agreement between the parties in conformity with the provisions of Section 46(1) of the Companies Act. In the light of the aforesaid finding the lower court dismissed Arbitration O.P. No. 39 of 1971 filed by the Appellant and allowed O.P. No. 7 of 1972 filed by the Respondent. A.S. No. 796 of 1974 has been filed against the order allowing O.P. No. 7 of 1972 and M.F.A. No. 3 of 1975 has been filed by the Appellant-company against the order dismissing its application -- O.P. No. 39 of 1971.

2. Counsel for the Appellant vehemently challenged the correctness of the findings entered by the court below that the entire arbitration proceedings were devoid of jurisdiction since there was no joint reference of the dispute either before the arbitrators or before the Umpire and that since the agreement Ext. P-4 was not executed in conformity with Section 46 of the Companies Act there was no valid contract between, the parties containing an arbitration clause. He pointed out that it was the admitted case of both sides before the arbitrators that a contract had been validly entered into between them which contained an arbitration clause and that it was specifically on the basis of an order obtained by

the Respondent from the court below under the proviso to Section 9 of the Act in O.P. No. 10 of 1969 that the two arbitrators jointly entered on the reference and contended that in such circumstances it was not open to the Respondent to urge before the court in an application u/s 30 of the Act that there was no valid arbitration agreement and that the proceedings conducted by the arbitrators and the Umpire were without jurisdiction. Counsel for the Appellant argued that there is nothing in Section 46 of the Companies Act which precludes a company from entering into a contract by calling for tenders and accepting the offer of a tenderer by correspondence and that the Appellant-company having accepted the tender of the Respondent and issued the purchase order Ext. P-4 incorporating all the terms of the contract and those terms having been assented to by the Respondent whose authorised representatives countersigned in Ext. P-4 signifying such acceptance on their part, a legally valid and binding contract had come into existence as between the Appellant-company and the Respondent. Clause 20 of Ext. P-4 contained an agreement to submit all future differences arising out of or in relation to the contract to arbitration in accordance with the procedure indicated therein. Counsel contended that such being the facts of the case the court below was wholly in error in holding that there was no valid arbitration agreement entered into between the parties. It was further urged on behalf of the Appellant that the view taken by the lower court that the proceedings before the arbitrators were without jurisdiction because there was no joint reference by both the parties acting together is based on a misapprehension of the legal position. Counsel submitted that the arbitration clause contained in Ext. P-4 is a composite agreement which lays down also the procedure to be followed for referring the dispute before the arbitrator, namely, that the reference shall be to two arbitrators, one to be appointed by each party, and that the arbitrators so appointed should nominate an Umpire. Counsel pointed out that in a case governed by such an agreement the law does not contemplate a further joint reference by both the parties after the disputes have actually arisen and what is required is only that the party desirous of having a dispute determined by arbitration should appoint its arbitrator and give notice of the said fact to the other party and call upon the latter to nominate its arbitrator in accordance with the terms of the arbitration clause. Counsel submitted that Section 9 of the Act specifically deals with an arbitration clause of this type and clearly states that the procedure to be adopted is the one indicated above and that no joint reference as such is contemplated. The Appellant's learned advocate pointed out that in the present case the Appellant had strictly followed the procedure laid down in Section 9 and called upon the Respondent by the registered notice dated 25th August, 1969, to appoint its arbitrator under intimation to the Appellant. Since, within the period of 15 days prescribed by the Act, the Respondent did not appoint its arbitrator the Appellant by letter dated 16th September 1969 informed the Respondent that the Appellant had appointed its arbitrator Sri P.M.G. Menon as sole arbitrator in the reference. Thereupon the Respondent moved the court below by filing O.P. No. 10 of 1969 to set aside the appointment of Sri P.M.G. Menon as sole arbitrator and to allow Sri Kalathil

Velayudhan Nair, the arbitrator nominated by the Respondent, to participate in the arbitration jointly with Sri P.M.G. Menon as joint arbitrators. That application was allowed by the court below by its order dated 24th March, 1970, and it was pursuant thereto that the two arbitrators jointly entered on the reference. Counsel for the Appellant submitted that after having moved the court and obtained an order directing that the arbitration proceeding should be conducted jointly by the arbitrators nominated by both sides and after having fully participated in the arbitration proceedings before the two arbitrators and before the Umpire and taken the chance of obtaining a decision in its favour, it was not legally open or permissible to the Respondent to put forward a plea in the proceeding initiated u/s 30 of the Act that there was no valid reference of the dispute to the arbitrator. The Appellant therefore contended that inasmuch as the court below has specifically found that the allegation of misconduct levelled against the arbitrator by the Respondent is baseless and untenable and that the award is also not vitiated by any error of law apparent on its face, the court below ought to have dismissed the petition filed by the Respondent and the interference made by the lower court with the award of the Umpire was wholly without jurisdiction and justification.

3. Counsel for the Respondent reiterated before us the contentions urged by his client before the court below. He submitted that in all cases where the arbitration agreement does not specifically name the arbitrators to whom future disputes are to be referred it is mandatory under law that there should be a joint reference to named arbitrators by both the parties to the dispute and that the cases covered by Section 9 are not outside the scope of the said rule. Counsel for the Appellant also strongly supported the view taken by the lower court that without a document formally executed in the manner indicated in Section 46 of the Companies Act no contract binding on a company can be created and that inasmuch as the agreement Ext. P-4 containing the arbitration clause does not satisfy the said legal requirement there was no valid contract between the parties providing for a reference of the dispute to arbitration. The findings recorded by the lower court that no misconduct had been committed by the Umpire and that the award made by the Umpire was not vitiated by any error of law or fact apparent on its face were attacked by the counsel for the Respondent as incorrect and unsustainable. Incorporating these grounds of attack against the findings aforementioned recorded against the Respondent by the lower court the Respondent has filed a memorandum of cross-objection in A.S. No. 796 of 1974.

4. After giving our anxious consideration to all aspects of the case in the light of the arguments addressed on both sides we have unhesitatingly come to the conclusion that the contentions put forward by the Appellant in A.S. No. 796 of 1974 have to be upheld and that the said appeal has to be allowed.

5. The first point that falls to be considered is whether the court below was right in holding that there was no valid arbitration agreement entered into between the parties. The facts relating to this aspect of the case are not in dispute. The

Appellant-company (hereinafter called the company) required large quantities of common salt for the manufacture of its main products. In 1967 the company invited tenders for the supply of its requirements of common salt by tender notice No. 24-A/1966-67. In response thereto the Respondent submitted a tender, dated 17th April, 1967. The tender so submitted by the Respondent was accepted by the company and the fact of such acceptance was communicated to the Respondent by the Company as per the purchase order Ext. P-4, dated 11th May, 1967. All the terms and conditions of the contract were set out in Ext. P-4 and the Respondent was requested to confirm its acceptance of those terms and conditions by countersigning the said document. Accordingly Ext. P-4 was countersigned by the authorised representatives of the Respondent and the original of the document so countersigned was returned to the Company (see Ext. P-5). It cannot admit of doubt that it is legally open to a company to enter into contracts by the process of calling for and acceptance of tenders by correspondence signed by persons acting under its authority. In fact, as a matter of commercial practice, most of the contracts are entered into by companies by following this procedure. There is nothing in Section 46 of the Companies Act, 1956, which precludes a contract being entered into by a company by correspondence evidencing offer by one party and acceptance of the same by the other so long as such correspondence is effected on behalf of the company by a person acting under its authority. In the present case, Ext.p-4 was signed by the Managing Director of the Company who was admittedly competent to enter into contracts on its behalf. Ext. P-4 was also signed by a Director of the Respondent thereby confirming that the Respondent had fully assented to all the terms and conditions incorporated in the said purchase order. Such being the facts of the case it has to be held that a valid and binding contract had been concluded between the parties the terms of which are incorporated in the purchase order Ext. P-4. Inasmuch as there is a clear provision for arbitration contained in Clause 20 of Ext. P-4 it cannot be said that there was no valid agreement between the parties to refer the disputes to arbitration. The contrary finding entered by the lower court is hereby set aside.

6. It is significant that at no time prior to the filing of the petition u/s 30 of the Act for setting aside the award of the Umpire, did the Respondent have a case that no valid contract had been entered into between the company and the Respondent. On the other hand, in all the correspondence that passed between the parties both sides had specifically referred to and relied on the terms of the contract on the basis that there was a valid and subsisting agreement binding on both of them which contained also a clause for determination of disputes by arbitration. In fact, the Respondent itself had sought the assistance of the court below by filing the petition O.P. No. 10 of 1969 under the proviso to Section 9 of the Act relying on the arbitration agreement and praying that the appointment of Sri. P.M.G. Menon as sole arbitrator purported to be made by the Company should be set aside and that Sri Kalathil Velayudhan Nair, whom the Respondent had nominated as its arbitrator, should also be allowed to function along with Sri

P.M.G. Menon as joint arbitrators. In the petition O.P. No. 10 of 1969 the Respondent has asserted that there was a valid contract between the parties which contained an arbitration clause and the relief sought in the petition was on the strength of the said arbitration agreement contained in Clause 20 of Ext. P-4. The lower court allowed that petition and directed that the arbitration proceedings shall be conducted jointly by Sri P.M.G. Menon and Sri. Velayudhan Nair and it was pursuant thereto that the arbitrators jointly entered on the reference. The Respondent fully participated in the proceedings before the arbitrators as well as before the Umpire without raising any objection to their jurisdiction and it was only when the award passed by the Umpire turned out to be adverse to it that the Respondent has for the first time raised a plea in the petition filed u/s 30 of the Act that there was no valid arbitration agreement nor a valid reference of the dispute to the arbitrators jointly by both parties. After having itself got the matter referred for adjudication jointly by the two arbitrators by moving the court and obtaining an order to that effect in O.P. No. 10 of 1969 we do not think that it was legally open to the Respondent to put forward in the proceedings u/s 30 a plea that there was no valid arbitration agreement nor a proper reference of the dispute to the two arbitrators.

7. The second ground stated by the lower court for setting aside the award and holding that the arbitration proceedings were without jurisdiction is that there was no joint reference of the dispute by both the parties either to the arbitrators or to the Umpire. In our opinion, this finding is based on a misapprehension of the legal position obtaining under the Act in respect of arbitration agreements such as the one contained in Clause 20 of Ext. P-4. Clause 20 reads:

In case any dispute arises between the parties in regard to the execution, interpretation or any other terms of this Purchase Order, such dispute or disputes shall be referred to arbitration under the Indian Arbitration Act. Each party should appoint their own Arbitrator or if they are unable to agree, the decision of an Umpire selected by them before commencement of hearing will be final between the parties.

This is a composite provision containing not merely a general stipulation that disputes arising between the parties in regard to the execution, interpretation, etc., of the agreement shall be decided by arbitration, but also a clear specification of the mode of appointment of the arbitrators and a further provision for nomination of an Umpire whose decision was to be final. In the case of such a composite agreement wherein the parties have agreed in advance about the mode of appointment of the arbitrators by stipulating that the arbitration shall be conducted jointly by two arbitrators, one to be appointed by each party, the law does not require that after a dispute has actually arisen between the parties there should be a further joint reference of the disputes by both the parties acting together. Arbitration agreements of this type fall directly within the scope of the provision contained in Section 9 of the Act which is in the following terms:

Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,

(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party, of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under Clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation: The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of Section 8 and this section.

The provisions of this section conclusively indicate that in a case of the present type where the arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, there is no necessity for a further joint reference of the dispute by both parties acting together and that what is required is only to strictly follow the procedure laid down in the section. It is no doubt true that the jurisdiction of the arbitrators is ordinarily derived from the consent of the parties and is in that sense consensual in nature. There cannot, therefore, be a unilateral reference of a dispute to arbitration at the instance of one party alone. The law, however, permits agreements being entered into by parties providing for adjudication of disputes that may arise between them in future by reference to arbitration. Sometimes such an agreement may contain only a bare stipulation that disputes between the parties shall be decided by resort to arbitration without giving any further indication as to who the arbitrators shall be or the procedure to be followed in the matter of appointment of the arbitrators and the making of a reference of the dispute to them. Clearly distinguishable from this type of bare agreement to refer disputes to arbitration is the composite type of arbitration clause wherein the parties agree not merely that future disputes shall be decided by arbitration but also as to the procedure to be followed in the matter of appointment of arbitrators to whom the dispute is to be referred. In agreements falling within the first category aforementioned the parties have agreed only to resort to the procedure of arbitration in substitution

of other remedies for adjudication of disputes. They have not consented to have the dispute decided by named arbitrators nor agreed about any particular mode of appointment of the arbitrators to whom the reference is to be made. In the case of such an agreement it is no doubt necessary that as and when a dispute arises between the parties and it is sought to be referred for arbitration the parties should either come to a further agreement as to the choice of the arbitrators or make a joint reference to one or more arbitrators agreed upon between them. This requirement does not, however, apply to the second category of cases indicated above wherein the parties have already agreed in advance not merely to resort to the process of arbitration but also about the mode of appointment of arbitrators and the procedure to be followed in making the reference. In such cases, on the basis of the consent of parties given in advance at the time of entering into agreement, the arbitrators can be appointed in accordance with the procedure indicated in the agreement and an appointment and a reference so made cannot be regarded as unilateral in character. The lower court has relied very strongly on certain observations of a learned single Judge of the Allahabad High Court in *Jagannath Kapoor and Another Vs. Premier Credit and Instalment Corporation (P) Ltd.*, . In that case the arbitration agreement provided that all disputes, differences, etc., shall be referred to the sole arbitration of one Mangal Sen Tandon or his nominee or in the event of his refusal one Shri Ram Narain Mehrotra at Lucknow under the provisions of the Arbitration Act, 1940 and that the award of the arbitrator shall be final and binding on all the parties concerned. A dispute arose between the parties and thereupon the Plaintiff company referred the matter to Sri Tandon. After a number of postings of the case with notice to both the parties the arbitrator finally made an ex parte award in favour of the Plaintiff since the Defendants who had originally put in appearance and filed their objections later withdrew from the arbitration proceedings. At the instance of the Plaintiff the arbitrator filed his award into the court of the Civil Judge, Lucknow. The Defendants thereupon filed an application u/s 30 of the Act praying for setting aside the award on various grounds, one of which was that the reference made to the arbitrator unilaterally by the Plaintiff-company alone was illegal and conferred no jurisdiction on the arbitrator to proceed with arbitration and make an award. The Civil Judge rejected the contentions raised by the Defendants and made the award a rule of the court except to the extent that future interest at the rate of 12 per cent per annum granted by the arbitrator was set aside. The appeal filed by the Defendants before the High Court of Allahabad was allowed by a learned single Judge upholding the contention that the arbitration proceedings were illegal and without jurisdiction since there was no joint reference of the dispute by both the parties. In coming to that conclusion the learned Judge has relied on certain observations of Bose, J. in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, as lending support to his view that a joint reference of the dispute by both the parties is mandatory even in cases where the arbitration agreement provides specifically for reference of future disputes to a named arbitrator. The question that arose before the Supreme Court for its consideration in *Seth Thawardas*

Pherumal Vs. The Union of India (UOI), was only whether the opinion expressed by an arbitrator on a point of law while deciding a case referred for adjudication is immune from challenge before the Civil Court in an application u/s 30 of the Act on the ground that the parties had consensually agreed to be bound by the decision of the arbitrator in regard to all the matters pertaining to the dispute referred to him. The Supreme Court held that a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material in order to decide the question actually referred. Their Lordships observed:

If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he has decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature.

* * *

An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He 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 Courts provided his error appears on the face of the award. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter.

* * *

If, therefore, no specific question of law is referred, either by agreement or by compulsion, the decision of the arbitrator on that is not final however much it may be within his jurisdiction, and indeed essential, for him to decide the question incidentally.

Dealing with the contention advanced by the Appellant that in the statement of claim filed by the contractor (Appellant) before the arbitrator the arbitrator had been requested to give his decision on the point of law and that hence the question of law also could be said to have been validly referred specifically to the arbitrator the Supreme Court made the following further observations:

We are of opinion that this is not the kind of specific reference on a point of law that the law of arbitration requires. In the first place, what was shown to us is no reference at all. It is only an incidental matter introduced by the Dominion Government to repel the claim made by the contractor in general terms under claim No. 5. In the next place, this was the submission of the contractor alone.

A reference requires the assent of "both" sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them

that it should be referred, then recourse must be had to the Court u/s 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4).

In the absence of either, agreement by "both" side about the terms of reference, or an order of the court u/s 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction.

Therefore, when a question of a law is the point at issue, unless "both" sides "specifically" agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted.

It is to be noticed that these observations of the Supreme Court when properly understood with reference to their context mean only that from the mere fact that the parties have consented to refer to arbitration a dispute which may incidentally involve determination of certain points on law it will not be correct to infer that the parties have agreed to be bound by the decision of the arbitrator on those points of law so as to confer on him exclusive jurisdiction to decide the said questions and thereby exclude the jurisdiction of the court to set the matter right in the event of there being an error apparent on the face of the award. The Supreme Court has pointed out that a consensual reference would ordinarily confer on the arbitrator jurisdiction only to decide the dispute according to law and if he does not follow and apply the law correctly he can be set right by the courts provided his error appears on the face of the award. The single exception to this is when the parties have specifically chosen to refer to the arbitrator a question of law as a separate and distinct matter. In the case before the Supreme Court there was admittedly a valid reference of the dispute to the arbitrator and the only question that arose for consideration was whether exclusive jurisdiction had been conferred on the arbitrator by the parties to decide finally the questions of law which incidentally arose for determination in the course of the adjudication of dispute. The observations extracted by the learned single Judge of the Allahabad High Court from the judgment of Vivian Bose, J., were intended, in the context, only to mean that in order that the arbitrator should be clothed with exclusive jurisdiction to decide questions of law it is not sufficient that the parties had agreed to refer the entirety of a dispute to arbitration but it must also be shown that both parties had specifically agreed to refer for the decision of the arbitrator a question of law as a separate and distinct matter. We do not think it will be right to understand those observations of the Supreme Court as laying down that even in cases where there is a comprehensive arbitration agreement providing either for a reference of a dispute to a named arbitrator or specifying the manner in which the arbitrators are to be appointed and the reference of future disputes is to be made to them, there should be a further joint reference to the arbitrators by both parties acting together after the disputes have actually arisen. With respect we find ourselves unable to agree with the dictum laid down in Jagannath Kapoor and Another Vs.

8. The correct position, in our opinion is, that in cases of composite arbitration agreements where the parties have either named the arbitrators or agreed that each party may appoint one arbitrator with notice to the other and that the reference should be decided by both the arbitrators functioning jointly, it is not necessary that after a dispute has actually arisen (when the parties may have fallen out) a further joint reference of the dispute should be made to the arbitrators by both parties acting together. Where, as in the present case, the agreement is that the reference is to be made to two arbitrators, one to be appointed by each party, the proper procedure to be followed is that indicated in Section 9 of the Act. Clause 20 of Ext. P-4 contains not merely a bare agreement to resort to arbitration but also a specific provision that disputes shall be referred to two arbitrators one to be appointed by each party and that in the event of difference of opinion between the arbitrators the matter shall be finally decided by an Umpire who is to be nominated by the arbitrators after their entering on the reference and before the commencement of the actual hearing of the case. Such a case is directly governed by the provisions of Section 9 of the Act and all that we have to see is whether the terms of that section have been duly complied with by the Company. After it became clear from the correspondence that passed between the parties evidenced by Exts. D-34 and D-35 that the parties were in no position to settle their differences between themselves without the intervention of an adjudicator, the Company by registered notice dated 25th August 1969 intimated the Respondent that the dispute was referred by it for arbitration in terms of the provisions contained in the contract to Sri P.M.G. Menon. Retired Sub Judge, who was appointed arbitrator of the Company and the Respondent was called upon by the said notice to appoint its arbitrator and intimate the said fact to the Company. On the ground that the Respondent had failed to appoint its arbitrator within the statutory period of fifteen days the Company subsequently sent a notice to the Respondent stating that it had appointed Sri P.M.G. Menon as sole arbitrator. Thereupon the Respondent moved the Sub Court, Parur, by filing O.P. No. 10 of 1969 under the proviso to Section 9 of the Act praying that the appointment of Sri P.M.G. Menon as sole arbitrator may be set aside and that Sri Kalathil Velayudhan Nair whom the Respondent had appointed as its arbitrator may be allowed to participate in the arbitration along with Sri P.M.G. Menon and proceed with the reference jointly. By order dated 24th March 1970 the lower court allowed O.P. No. 10 of 1969, set aside the appointment of P.M.G. Menon as sole arbitrator and ordered that arbitration shall be conducted jointly by Sri P.M.G. Menon and Sri Kalathil Velayudhan Nair. The terms of Section 9 of the Act had, therefore, been complied with in the present case. It was pursuant to the order passed by the lower court at the instance of the Respondent that the two arbitrators were directed to proceed with the arbitration jointly. After having obtained such an order from the court and fully participated in the proceedings before the two arbitrators and also before the Umpire the Respondent had no right and ought not to have been permitted

by the court below to put forward a plea that there was no joint reference of the dispute to the two arbitrators or to the Umbire. The finding entered by the court below that the arbitration proceedings conducted by the two arbitrators and by the Umpire were without jurisdiction because of the lack of a joint reference by both the parties is manifestly unsustainable and it is hereby set aside.

9. The conclusion that emerges from the foregoing discussion is that all the grounds stated by the court below for setting aside the award passed by the Umpire Sri G. Kumara Pillai are incorrect and unsustainable in law.

10. It now only remains for us to consider the contentions put forward by the Respondent in the memorandum of cross-objections filed by it in A.S. No. 796 of 1974. Since the decision of the lower court was entirely in favour of the Respondent no appeal would have been maintainable at the instance of the Respondent. In such circumstances a memorandum of cross-objections will not lie under Order 41, Rule 22 of the Code of Civil Procedure. Counsel for the Respondent frankly stated before us that it was not possible for him to sustain the maintainability of the memorandum of cross-objections. He, however, contended that it was open to the Respondent to challenge the finding entered against it by the court below in order to support the conclusion reached by the lower court rejecting the Company's claim. The present case is governed by the provisions of Order 41, Rule 22, CPC as they stood prior to the enactment of the CPC (Amendment) Act, 1976. Under Clause (1) of Rule 22 it is open to the Respondent to support the decision of the court below on any of the grounds decided against it by the lower court. We have, therefore, heard the counsel for the Respondent on the various points raised by him in the memorandum of cross-objections, even though the cross-objections as such are not maintainable.

11. It was firstly contended by the counsel for the Respondent that the court below was in error in holding that the Umpire had not misconducted himself or the proceedings. We see no merit in this contention. The first ground of misconduct alleged against the Umpire is that he had given the go-by to the issues settled by the arbitrators and formulated fresh points for consideration and decision and that this procedure has caused great prejudice to the Respondent since point No. 8 formulated by the Umpire did not arise out of the pleadings of the parties and the Respondent had no opportunity to adduce any evidence or arguments relating to the said aspect. As rightly pointed out by the court below what the Umpire had done was not to frame fresh issues but only to set down the points that arose for consideration and decision by him in the light of the arguments advanced before him by both sides. It is significant that the points were formulated by the Umpire in the presence of both sides on the date of last hearing of the case. No objection of any kind was then raised by either of the parties against the correctness or appropriateness of the points formulated for consideration by the Umpire. There is also no substance in the argument advanced on the side of the Respondent that point No. 8 did not arise out of the pleadings of the parties before the arbitrators. It is an aspect that directly arose

for consideration while deciding issue No. 10 framed by the arbitrators which read as follows:

What was the quantity of salt the supplier was bound to supply under the contract?

In determining the said issue it was absolutely necessary to go into the question whether the description "plus or minus upto 10 per cent while mentioning the quantity of salt to be supplied contained in the contract dated 11th May 1967 held good after the parties had agreed upon revised terms regarding supply and delivery while granting extension of time for performance of the contract. Even from the evidence of P.W.3, the Managing Director of the Respondent-company, it is clear that the contention put forward by the Respondent that it had no opportunity to place its evidence before the arbitrators or the Umpire in respect of the aspect covered by point No. 8 is devoid of any factual foundation. The Subordinate Judge was, in our opinion, perfectly right in holding that no substantial prejudice of any kind was caused to the Respondent by reason of the action of the Umpire in raising point No. 8 as one of the questions arising for consideration in the case and that no misconduct was involved in the said action.

12. The next ground of misconduct urged on behalf of the Respondent against the Umpire is that the Umpire had made private enquiries and collected materials and used such materials in arriving at his decision in the case without disclosing the said material to the parties. In substantiation of this allegation it was said that the Umpire had called for and obtained a copy of the report of an enquiry conducted by Sri Raman Kutty, then 1st Member of the Board of Revenue, into some allegations of irregularities in the working of the Company including certain transactions of purchase, sale, etc. The Umpire has given evidence as P.W.1 and he has sworn that he had not seen the report of Sri Raman Kutty at any time prior to the making of the award and that it was only long thereafter and in connection with some other assignment he had been called upon to perform that he saw the said report for the first time. We agree with the court below that in the light of the said uncontradicted testimony of the Umpire the aforesaid charge of misconduct levelled against him by the Respondent is totally baseless.

13. Another allegation of misconduct levelled against the Umpire is that the divergent awards passed by Sri P.M.G. Menon and Sri Kalathil Velayudhan Nair had both been handed over to the Umpire and there is reason to think that his mind would have been considerably influenced by the award passed by Sri P.M.G. Menon in favour of the Company. In regard to this matter also we have the categorical sworn statement of the Umpire that even though counsel appearing on both sides had referred extensively to the awards passed by the two arbitrators he had never been influenced by reading those awards and that it was only on the basis of his independent application of mind that he had come to his own conclusions and incorporated them in his award. We have no hesitation to accept the said statement of the Umpire. We agree with the court below that this ground of misconduct alleged by the Respondent has also not been established.

14. The next point raised by the Respondent is that the award passed by the Umpire is vitiated by an error of law in as much as he has applied a wrong principle for assessing damages. It is contended that the quantification of damages ought to have been made by the Umpire by finding out the market value of common salt obtaining at the time when purchases were made by the Appellant-Company from other sources and ascertaining the difference between the market price and the contract price which alone would, according to the Respondent, truly represent the damages suffered by the Company. A mere reference to paragraph (xii) of the award passed by the Umpire is sufficient to show that the assumption made by the Respondent that the aforesaid principle has not been applied by the Umpire in the matter of quantification of damages is incorrect and baseless. The Umpire has found that "the prices paid by the A-Party for these purchases were the lowest at which the necessary stock was available at the time". The plea of the Respondent that the award of the Umpire is vitiated by the aforesaid error of law cannot therefore be upheld.

15. The last point urged was that the contract itself contained in Clause 19 a stipulation for payment of liquidated damages in the event of its breach and that the Umpire has committed an error of law in ignoring the said fact and awarding damages in excess of what is stipulated in the aforesaid clause. Clause 19 relied on by the Respondent provides only for the furnishing of a Bank guarantee by the Respondent-company for the due fulfillment of the contract. It does not contain any stipulation for payment of liquidated damages and the existence of a provision for the furnishing of a guarantee for due performance of the contract will not operate to limit the extent of liability for damages in the event of a breach of the contract. It will also not fetter the jurisdiction of a court or an arbitrator in the matter of quantifying and awarding damages in accordance with the established principles of law. Hence this contention raised by the Respondent is also devoid of merit.

16. In the result, we allow A.S. No. 796 of 1974, set aside the order of the court below and dismiss O.P. No. 7 of 1972 filed by the Respondent-company for setting aside the award passed by Sri G. Kumara Pillai. The award passed by the Umpire is made a rule of court and the Company (Appellant) is granted a decree against the Respondent in terms of the said award with interest on the amount awarded at 6 per cent per annum from this date.

17. In the light of the conclusion reached by us in A.S. No. 796 of 1974 it is not necessary for us to consider the question of maintainability of M.F.A. No. 3 of 1975 filed by the Company against the order passed in O.P. No. 39 of 1971. That appeal will stand disposed of as infructuous.

18. In A.S. No. 796 of 1974 we direct the Respondent to pay the costs of the Appellant-Company. The parties will bear their respective costs in M.F.A. No. 3 of 1975.