

(2000) 02 BOM CK 0085

In the Bombay High Court

Case No : Appeal under Arbitration Act No's. 2 and 3 of 1996

Union of India and Another

APPELLANT

Vs

M/s. Shyama Charan Agarwala and Sons

RESPONDENT

Date of Decision : 29-02-2000

Acts Referred:

Arbitration Act, 1940 — Section 14, 2, 30, 33, 34

Evidence Act, 1872 — Section 115

Interest Act, 1978 — Section 3

Citation : (2000) 3 BomCR 44

Hon'ble Judges : R.M.S. Khandeparkar, J; R.K. Batta, J

Bench : Division Bench

Advocate : M.S. Usgaonkar, Addl. Solicitor General, of India and E.P. Badrinarayan, for the Appellant; B. Zaiwala and S.G. Bhobe, for the Respondent

Judgement

R. K. Batta, J.—Both these appeals give rise to common questions and as such, arguments in the appeals were heard together. Therefore, it is proposed to dispose of the same by common judgment.

2. In Appeal No. 3 of 1996, the respondent had entered into a contract agreement No. CECZ/GOA-12 of 1990-91 for provision of married accommodation for 80 MCPOs/CPOs/80 POs and 16 sailors (180 units in all) at Varunapuri, Mangor Hill, Vasco-da-Gama, Goa Naval area (excluding INS Mandovi) and the Work Order was placed vide Letter No. 8319/43/E-8 dated 20-7-1990 for Rs. 2,62,44,057-94. The date of commencement of work was 16-8-1990 and the work was to be completed by 15-11-1991. The last date was extended from time to time till 29-2-1996. During the currency of the contract certain disputes/differences arose.

3. In Appeal No. 2 of 1996, the respondent had entered into a contract agreement No. CECZ/GOA/40 of 1991-92 for provision of married accommodation for MCOs/CPOs and JCOs at Goa (excluding INS Mandovi). The Work Order was placed vide Letter No. 8305/88/E-8 dated 5-2-1992. The date of

commencement of work was 24-2-1992 and the work was to be completed by 23-2-1994. However, before the work could be completed, certain disputes/differences arose during the currency of the contract,

4. According to Clause 70 of the General Conditions of Contract (Indian Army Forum for Works, "IAFW" for short), all disputes (other than those for which the decision of the CWE (Commander Works Engineer) or any other persons is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to sole Arbitration of an Engineer Officer to be appointed by an Authority mentioned in the tender document. It also provides that unless both parties agree in writing, such reference, shall not take place until and unless after completion or alleged completion of work or termination or determination of contract under conditions 55, 56 and 57 thereof. The respondent sought appointment in both the contract agreements listing the claims alleging that though the Chief Engineer is competent to decide the claims, yet he has not decided the same. The appellants agreed in writing for appointment of Arbitrator during the currency of the contract agreement without prejudice to the rights of the Government under the contract. The Chief Engineer (Navy), Naval Base Post, Cochin, vide letter dated 23rd December, 1993 to the Surveyor of Works Directorate, Engineers-in-Chief Branch, Army Headquarters, New Delhi, requested the appointment of Arbitrator for conducting interim arbitration proceedings. It was stated in the said letter that the appellants are concurring to the appointment of arbitrator except in respect of disputes for which the decision of CWE or any other person is by the contract expressed to be final and binding and without prejudice to Government's rights to raise all legal objections regarding the claims of the contract. The Engineer-in-Chief vide letter dated 30th December, 1993 referred the claims made by the respondent to the Arbitrator Shri M.V.S. Rao, Chief Engineer (Air Force), Bangalore. In this letter of appointment, the arbitrator was requested to enter on the reference and publish his findings and Award in respect of the disputes listed at Appendix "A" to the said letter so far as they are referable to the arbitration in accordance with the said agreement. It is strange that the appointing Authority did not separate the claims which could be referred to the arbitrator from those which could not be referred and referred the entire claims made by the respondent to the arbitrator.

5. The claims which are subject-matter of Arbitration Appeal No. 3 of 1996, which were referred to the arbitrator, are:---

Sr. No Brief description of Claims/ Items Amount in Rupees (Approximately)

1. 2. 3.

1.

Reimbursement of additional Costs in the procurement of stone aggregate from crushers of Belgaum, Hubli, etc. in lieu of local sources of Goa

Rs. 8,00,000-00

2.

Reimbursement of additional costs in excavation encountering rock other than soft/disintegrated rock/ laterite rock

Rs. 14, 00, 000-00

3.

Reimbursement of additional costs due to working in restricted area in lieu of unrestricted area

Rs. 25, 00, 000-00

4. Interest on Serial Nos. 1, 2, 3 above Not indicated

5. Costs of reference Rs. 50,000-00

6. In Arbitration Appeal No. 2 of 1996, the claims which were referred to arbitration are :---

Claim of Union of India

1. Costs of reference Not indicated

Sr. No. Brief description of Claims/Items Amount in Rupees (approximately)

1. 2. 3.

1. costs in the procurement of stone aggregate from crushers of Belgaum, Hubli, etc. in lieu of local sources of Goa Rs. 36,00,000-00

2. Reimbursement of additional costs in excavation encountering rock other than soft/disintegrated rock/ laterite rock Rs. 12,00,000-00

3. Reimbursement of additional costs due to working in restricted area in lieu of unrestricted area Rs. 30,00,000-00

4. Interest on Serial Nos. 1,2, 3 above Not indicated

5. Costs of reference Rs. 50,000-00

Claim of Union of India

1. Costs of reference Not indicated.

7. Thus, though the amount of claim differs in both the contract agreements, yet the nature of dispute in both is same.

8. The arbitrator had rejected claim at Serial No. 5 and the claim of Union of India in both the matters.

9. The Award made by the Arbitrator, which is subject-matter of Arbitration Appeal No. 3 of 1996 in terms of money is as under :---

Reference made to the Arbitrator Award given by the Arbitrator

CLAIM NO. 1

Reimbursement of additional cost in procurement of stone aggregate from crushers of Belgaum, Hubli etc. in Lieu of Local sources of Goa. Rs. 8,00,000/-.

13.10 Union of India shall reimburse for the increase in rates to the contractor M/s. Shyama Charan Agarwala & Sons as under:----

i)

For the quantity of stone aggregate already brought after Aug. 92 and upto 24-1-94

20 mm/12.5 mm - 2268cm @ Rs. 250/- per cm Rs. 5,67,000/-

40 MM-100CM @ Rs. 230/- per cm Rs. 23,000/ -

Rs. 5,90,000/ -

(ii)

For the quantities of stone aggregate brought after 24-1-94, reimbursement for increase in rates shall be made at the rate of- Rs. 250/- per cm for 20mm/ 12.5mm, Rs. 350/- per cm for 40mm/ and Rs. 225/- per cm for 63-40mm. This reimbursement shall be made in each RAR for the actual quantity brought at site.

(iii)

Reimbursement/ refund on variation in prices of material/fuel and labour wages, as per conditions 18 and 19 of special condition on pages 111 to 116 of the contract shall also be paid in RARs for the stone aggregates stone metal stone chipping brought after 24- 1-94 as per the said conditions, excepting that the value of WO as in condition 18(a) for stone aggregate stone metal /stone chipping shall be taken as on 24-1-94 or any date immediately after 24-1-94 as published by the Economic Adviser, Govt, of India.

CLAIM NO. 2

Reimbursement of additional cost in excavation encountering rock other than soft/ disintegrated rock Laterite rock, Rs, 14,00,000/-

14.7 Union of India shall pay to the contractors M/s. Shyama Charan Agarwala & Sons as per details given below: -

(i)

Additional payment. For works already executed using chisels.

(a) Excavation (Schedule A, Part 1

3930 cm @ Rs. 118.70 per cm Rs. 3,83,594.80

(b)

Surface excavation (as in Item 1, Schedule A, Part V)

50 SM @ 12.41 per SM Rs. 620.50

TOTAL Rs. 3,84,215.30

(ii) For excavation works yet to be executed using Chisels :

(a)

Additional payment for Schedule A Part I for excavation @ Rs. 118.76 per cm.

(b)

Net payment for item 1 Schedule A Part V @ Rs. 18.33 per SM.

(c)

Net payment for item 2 Schedule A Part VI @ Rs. 165.69 per cm.

(d)

Net payment for item 1 Schedule A Part VII @ Rs. 18.33 per SM.

(e)

Net payment for item 2 Schedule A Part VII @Rs. 120.12 per cm.

(f)

Net payment for item 3 Schedule O Part VII @ Rs. 129.15 per cm.

(g)

Net payment for item 6 Schedule A Part VII @ Rs. 165.69 per cm.

(h)

Net payment for item 2(a) Schedule A Part VIII @ Rs. 189.36 per cm.

(i)

Net payment for item 2(b) Schedule A Part VIII @ Rs. 199.68 per cm.

(j)

Extra over rate for item 26 Schedule A part IX @ Rs. 294.03 each.

(k)

Extra over rate for item 27 Schedule A part IX @ Rs. 441.05 each.

(iii)

Reimbursement on variation of prices as per conditions 18 and 19 of special condition of CA shall be paid as under:?

(a)

Rs. 38,635/- shall be paid on Rs. 3,84,215.30 as in (i) above for works already executed.

(b)

Further, reimbursement/refund for works done in future as in (ii) above shall be worked out as per conditions 18 and 19 of special condition of CA and shall be paid in the RARs as per CA.

CLAIM NO. 3

Reimbursement of additional cost due to working in restricted area in lieu of unrestricted area. Rs. 25,00,000/-

15.5 AWARD

(i)

It has been brought out that the amount of work done including material collected upto 24-1-94 is Rs. 2,03,00,000/-. Considering 9% on Rs. 2,03,00,000/- a sum of Rs. 18,27,000/- is allowed on this account, which should be paid to the contractor by the Union of India.

(ii)

The respondent, Union of India shall also pay 9% extra on this account for the works carried out including material collected beyond Rs. 2,03,00,000/- to the contractor in each RAR, till such time the work is completed.

(iii)

As regards contractor claim of reimbursement/refund on variation of prices, as per conditions 18 and 19 of special condition of CA, this should also be paid, as the value of work done is increased on account of this factor, I award as under: -

(a)

A sum of Rs. 1,83,718/- towards reimbursement on variation of prices as per conditions 18 and 19 of special condition of CA for the works done upto 24-01-94 which is Rs. 2,03,00,000/- as above should be paid to the contractor by the Union of India.

(b)

Reimbursement/refund on variation of prices for works done beyond 24-01-94 shall also be made on the principle that the value of work done including material collected, as assessed in the normal manner, shall be increased by 9% to cater for the restriction and reimbursement/refund shall be worked out on this increased value of work done including material collected as per conditions 18 and 19 of the special condition of CA and paid to the contractor by the Union

of India in RAR as per condition 18 and 19 ibid.

CLAIM NO. 4

Interest in SL 1 to 3 above.

Interest on claim No. 1 to 3 (Past, Pendente lite and future)

Amount not indicated

(i)

Past interest -I allow a sum of Rs. 7,75,920/- for post interest on claim No. I(i), 2(i) and 3(i).

(ii)

Pendente lite Interest - There is no delay. I have been appointed arbitrator on 30-12-93 and had entered upon the reference on 21-01-94 and the award has also been finalised. Therefore, claim of Pendente lite Interest is rejected.

(iii)

Future interest - This is allowed. The Union of India shall pay interest @ 18% per annum if the amount of award as in item (i) of claim No. (iii) (a) of claim No. 3 is not paid within 30 day 1, item (i) and (ii) (a) of Claim No. 2 and item (i) and s from the date of Award, till payment of the award or decree from the Court, which ever is earlier. If the award is not paid within 30 days as above, interest will be calculated from the date of award to the date of payment or decree from the Court whichever is earlier.

CLAIM NO. 5

Cost of reference Rs. 50,000/- This claim is rejected.

CLAIM OF UNION OF INDIA

Cost of reference Not indicated. This claim is rejected.

10. The Award made by the Arbitrator, which is subject-matter of Arbitration Appeal No. 2 of 1996 in terms of money is as under:---

Reference made to the Arbitrator Award given by the Arbitrator

CLAIM NO. 1

Reimbursement of additional cost in procurement of stone aggregate from crushers of Belgaum, Hubli etc. in Lieu of Local sources of Goa. Rs. 36,00,000/-.

Union of India shall reimburse for the increase in rates to the contractor M/s. Shyama Charan Agarwala & as under :-

(i)

For the quantity of stone aggregate already brought after Aug 92 and upto

24-1-94

20 mm-3934 cm @ Rs. 250/- per cm = Rs. 9,83,500/-

40 mm - 662 cm @ Rs. 230/-per cm = Rs. 1,52,260/-

Rs. 11,35,760/-

(ii)

For the quantities of stone aggregate brought after 24-1-94, reimbursement for increase in rates shall be made at the rate of - Rs. 250/- per cm for 20mm, Rs. 230/- per cm for 40mm. This reimbursement shall be made in each RAR for the actual quantity brought at site.

(iii)

Reimbursement/ refund on variation in prices of material/fuel and labour wages, as per conditions I8 and 19 of special condition on pages 95A, 96 to 99 of the contract shall also be paid in RARs for the stone aggregate brought after 24-01-94 as per the said conditions, excepting that the value of WO as in condition 18(a) for stone aggregate shall be taken as on 24-1-94 or any date immediately after 24- 1 -94 as published by the Economic Adviser, Govt. of India.

CLAIM NO. 2

Reimbursement of additional cost in excavation encountering rock other than soft/ disintegrated rock Laterite rock Rs. 12,00,000/-.

14.7 Union of India shall pay to the contractor M/s. Shyama Charan Agarwala & Sons as per details given below : ?

(i)

Additional Payment. For works already executed using chisels.

(a) Excavation in trenches (Sch. A, Part.I)

3870 cm @ Rs. 138.41 per cm - Rs. 5,35,646.70

(b) Excavation in column pits

640 cm @ Rs. 138.41 per cm - Rs. 88,582.40

(c)

Excavation over areas (Schedule A part V item i)

150 cm @ Rs. 260. 14 per cm - Rs. 39,021.00

TOTAL Rs. 6,63,250.10

(ii)

For works yet to be executed using Chisels :

(a)

Additional payment for Schedule A Part I for excavation at applicable rates as in (i) above.

(b)

Net payment (extra over) for item 7 Schedule A Part HI @ Rs. 197. 12 each earthing over and above the rate given in item 7 of Schedule A Part III.

(c)

Net payment for item (i) Schedule A Part V @ Rs. 260.14 per cm.

(iii)

Reimbursement on variation of prices as per conditions 18 and 19 of special condition of CA shall be paid as under:?

(a)

Rs. 41,367.51 shall be paid on Rs. 6,63,250. 10 as in (i) above for works already executed.

(b)

Further, reimbursement/ refund for works done in future as in (ii) above shall be worked out as per conditions 18 and 19 of special condition of CA and shall be paid in the RARs as per CA.

CLAIM NO. 3

Reimbursement of additional cost due to working in restricted area in lieu of unrestricted area. Rs. 30,00,000/-

15.5 AWARD

(i)

It has been brought out that the amount of work done including material collected upto 24-1-94 is Rs. 1,25,00,000/-. Considering 9% on Rs. 1,25,00,000/- a sum of Rs. 11,25,00,000/- is allowed on this account, which should be paid to the contractor by the Union of India.

(ii)

The respondent, Union of India shall also pay 9% extra on this account for the works carried out including material collected beyond Rs. 1,25,00,000/- to the contractor in each RAR, till such time the work is completed.

(iii)

As regards contractor claim of reimbursement refund on variation of prices, as per conditions 18 and 19 of special condition of CA, this should also be paid, as

the value of work done is increased on account of this factor, I award as under: ?

(a)

A sum of Rs. 70,167/- towards reimbursement on variation of prices as per conditions 18 and 19 of special condition of CA for the works done upto 24-1-94 which is Rs: 1,25,00,000/- as above should be paid to the contractor by the Union of India.

(b)

Reimbursement/ refund on variation of prices for works done beyond 24- 1-94 shall also be made on the principle that the value of work done including material collected as assessed in the normal manner, shall be increased by 9% to cater for the restriction and re-imbursement/refund shall be worked out on this increased value of work done including material collected as per conditions 18 and 19 of the special condition of CA and paid to the contractor by the Union of India in RAR as per conditions 18 and 19 *ibid*.

CLAIM NO.4

Interest in SL 1 to 3 above, Amount not indicated.

Interest on claim No. 1 to 3 (Past, Pendente lite and future)

16.2 AWARD.

(i)

Past interest - I allow a sum of Rs. 4,14, 761/- for past interest on claim No. 1(i), 2(i) and 3(i) vide pages 13, 19 & 21 respectively herein before.

(ii)

Pendente lite Interest - There is no delay. I have been appointed Arbitrator on 30-12-93 and had entered upon the reference on 21-1-94 and the award has also been finalised. Therefore, claim of Pendente lite Interest is rejected.

(iii)

Future interest - This is allowed. The Union of India shall pay interest @ 18% per annum simple interest if the amount of award as in item (i) of claim No. 1 , item (i) and (iii) (a) of claim No. 2 and item (i) and (iii) (a) of claim No. 3 is not paid within 30 days from the date of Award, till payment of the award or decree from the Court, whichever is earlier. If the award is not paid within 30 days as above, interest will be calculated from the date of award to the date of payment or decree from the Court whichever is earlier.

CLAIM NO. 5

Cost of reference Rs. 50,000/- This claim is rejected

CLAIM OF UNION OF INDIA.

Cost of reference Not indicated. This claim is rejected

11. The respondent filed petition u/s 14 of the Arbitration Act praying therein to direct the Arbitrator to file in the Court the final Award dated 28-2-1994 with all records so that the Award could be made Rule of the Court with 24% interest per annum from the date of decree till payment. Notice of the petition was given to the appellants who filed an application under sections 30 and 33 of the Arbitration Act. The objections filed by the appellants were rejected vide judgment dated 8th April 1996 of Civil Judge, Senior Division, Vasco-da-Gama. The Award dated 28-2-1994 of the Arbitrator was made Rule of the Court with further direction to the appellants to pay to the respondent simple interest at the rate of 18% per annum on the principal sum adjudged in the Award from the date of the decree till the date of final payment. These orders are subject-matter of the appeals under consideration. At the time of admission of Appeals a sum of Rs. 56,09,895/- was deposited by the appellants in accordance with the Court Order in Appeal No. 3 of 1996. Likewise, a sum of Rs. 66,18,300/- was deposited by the ap appellants as per Order of the Court in Appeal No. 2 of 1996. The appellants had filed an application to invest the said amount whereas the respondent sought to withdraw the same on furnishing Bank guarantee. The request of the appellants was allowed, but the request of the respondent was rejected.

12. Learned Senior Counsel appearing on behalf of the parties argued the matter at length and they have placed reliance on a number of authorities in support of their arguments. Basically, the arguments have centered around the claims allowed by the Arbitrator and we shall deal with the same separately, one by one. However, before we start the said exercise, it is necessary to first deal with certain submissions made by learned Advocate for the appellants pellants as to the jurisdiction of the Arbitrator to adjudicate the claims in question. Learned Senior Counsel for the appellants urged that claims No. 1, 2 and 3 fall within the excepted matters, which are required to be decided under the contract by the designated Authority as a result of which the Arbitrator had no jurisdiction to adjudicate on claims No. 1, 2 and 3. The argument in relation to claim No. 1 proceeds on the basis of condition No. 63 of General Conditions of Contracts for Lump Sum Contracts (IAFW-2519), which reads as under :---

"63. Reimbursement/refund on variation in price.---If during the progress of the Works the price of any materials required to be incorporated in the Works (not being a material supplied from the G.E."s stores in accordance with Condition 10 hereof and/or wages of labour increases as a direct result of the coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such increase exceeds ten per cent of the price and/or wages prevailing at the time of acceptance of the tender for the Work and the Contractor thereupon necessarily and properly pays, in respect of that material (incorporated in the Works) such increased price and/or in respect of labour required for and engaged on the execution of the work such increased wages,

then the amount of contract shall accordingly be varied protanto, provided always that any increase so payable is not in the opinion of the C.W.E. (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contractor.

Provided, however, no re-imbursement shall be made if the increase is not more than 10% of the said prices/wages and if so, the re-imbursements shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract or extended date of completion of the work in question.

If during the progress of the Works, the price of any material incorporated in the Works (not being a material supplied from the G.E.'s stores in accordance with Condition 10 hereof) and/or wages of labour is decreased as a result of coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such decrease exceeds ten per cent of the prices and/or wages prevailing at the time of acceptance of the tender for the Work, Government shall in respect of materials incorporated in the Works (not being materials supplied from the G.E.'s stores in accordance with Condition 10 hereof) and/or labour engaged on the execution of the Work after the date of coming into force of such law, statutory rule or order be entitled to deduct from the dues of the Contractor such amount as shall be equivalent to difference between the prices of materials and/or wages as they prevailed at the time of acceptance of tender for the Work minus ten per cent, thereof and the prices of materials and/or wages of labour on the coming into force of such law, statutory rule or order.

The Contractor shall, for the purpose of this condition keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorised representative of Government, and further shall, at the request of the Garrison Engineer furnish, verified in such a manner as the Garrison Engineer may require, any documents so kept and such other information as the G.E. may require.

The Contractor shall within a reasonable time of his becoming aware of any alteration to the prices of any such material, and/or wages of labour, give written notice thereof to the G.E. stating that the same is given pursuant to the condition together with all information relating thereto which he may be in a position, to supply."

13. The argument in respect of Claim No. 2 proceeds on the basis of Clause 3.1.10 of Military Engineer Services Standard Schedule of Rates, Part II, which reads as under :---

" 3.1.10 In case of any dispute with regards to the classification of various strata and their depth the decision of G.E. will be final and binding."

14. In respect of Claim No. 3, it is urged that the said claim, as considered by

the Arbitrator, falls outside the contract. It is, therefore, urged that whereas Claims Nos. 1 and 2 fall outside the jurisdiction of the Arbitrator, being not arbitrable by the Arbitrator and as regards the Claim No. 3 as understood by the Arbitrator himself, it falls outside the scope of the arbitration. As such, it is argued that the Award in relation to the said claims and consequently in respect of Claim No. 4 has to be set aside. It is further urged that the jurisdiction of the Arbitrator is confined to the terms of reference made to him and the Arbitrator derives the jurisdiction from the terms of the agreement and cannot travel beyond the contract/ agreement. It is further urged on the basis of rulings of the Apex Court and of this Court that when the question is relating to the jurisdiction of the Arbitrator and referable to arbitrability of the dispute, the participation of the party to the dispute in arbitration proceedings does not amount to acquiescence and the aggrieved party will not be estopped from challenging the same before the Court. It is also submitted that the forum to decide finally the issue about the arbitrability is the Court u/s 33 of the Arbitration Act and not section 40 as a result of which the objection to the jurisdiction of Arbitrator need not be raised before the Arbitrator since he has no jurisdiction to decide the same.

15. In this respect the learned Senior Advocate for the respondents submitted that the question of arbitrability of disputes cannot be agitated by the appellants as they have by their conduct and acquiescence waived off such objections, if at all tenable, and they are now estopped from doing so. It is urged that the nature of disputes was stated by the respondents in their initial demand for arbitration, which was routed through the appellants and the appellants vide their letter dated 23-12-1993 specifically agreed to refer the matter to arbitration and the Engineer-in-Chief vide his letter dated 30-12-1993 had specifically referred the said disputes to the Arbitrator as listed by the Engineer-in-chief in Appendix "A" to the said letter. The appellants never objected or raised any objection before the Arbitrator objecting to his jurisdiction for deciding any claim or part of any claim and, on the contrary, had submitted in their reply to the respondents' claim that the Arbitrator had been appointed to adjudicate three disputes listed in Appendix "A" to the letter of Engineer-in-chief. After placing reliance on Constitutional Bench judgment of the Apex Court in *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, ; *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, ; *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, and a number of other rulings, it is urged that the belated objection to the jurisdiction of the Arbitrator raised in the Court is liable to be rejected.

16. The Arbitration was sought by the respondents during the currency of the contract in terms of para 2 of Clause 70 of General Conditions of Contract for Lump Sum Contracts (I.A.F.W. -2159). The relevant part of Clause 70 reads as under :---

"70. Arbitration.---All disputes, between the parties to the Contract (other than

those for which the decision of the C.W.E. or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof....."

The reference in question was not possible unless both the parties agreed in writing for such reference. The parties did agree for such reference of claims put forward by the respondent. The Appointing Authority did refer the claims to the Arbitrator. In case under the contract or under any provision connected therewith, the claims put forward by the respondent were not arbitrable, the Appointing Authority instead of appointing an Arbitrator should have referred the same to the prescribed Authority under the terms of the contract or provisions connected therewith. Before the Arbitrator, no objection whatsoever was raised by the appellants that the claims in question were of the nature of excepted category and could not be adjudicated upon by the Arbitrator, but on the contrary, the appellants contested the claims on merits and after having lost the battle, have turned around to say that the claims could not be referred or adjudicated by the Arbitrator since the same were required to be adjudicated by the Authority designated under the contract agreement or provisions connected therewith. Whether such approach, attitude or stand of the appellants is to be countenanced is the question which requires to be examined further. Moreover, respondent's letter seeking reference on specific claims and the appellants' letter concurring to refer the said specific claims to arbitration itself constitutes an arbitration agreement in terms of section 2(a) of the Arbitration Act, 1940.

17. The Apex Court in *Waverley Jute Mills Co. Pvt. Ltd. v. Raymond & Co. (India) Pvt. Ltd.* (supra), has laid down that the agreement for arbitration is the very foundation on which the jurisdiction of the Arbitrator to act rests and where that is not in existence, the proceedings must be held to be wholly without jurisdiction. Such defect is not curable by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction. However, it is pointed out by the Apex Court in such a case there is nothing to prevent parties from entering into fresh agreement to refer the dispute for arbitration even while it is pending adjudication before the Arbitrator and in that event, the proceedings thereafter before them might be upheld as referable to that agreement and the Award will not be open to attack without jurisdiction. In the case under consideration, the parties had agreed for referring the claims of the respondent for arbitration and this agreement by itself can be treated as arbitration agreement as defined u/s 2(a) of the Arbitration Act. Therefore, proceedings consequent thereto cannot be challenged on the ground of lack of jurisdiction.

18. The Apex Court in *Prasun Roy v. The Calcutta Metropolitan Authority & another* (supra), has laid down that the principle is that a party should not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in proceedings preclude such a party from contending that the proceedings were without jurisdiction.

19. The Apex Court in *The Hindustan Construction Co. Ltd. v. Governor of Orissa and others* (supra) has laid down :---

"... It is an admitted position that the State Government had not at any stage questioned before the special tribunal the jurisdiction thereof to adjudicate the said dispute. The State Government itself by statutory notification having constituted the Special Tribunal and referred the dispute to Special Tribunal, we fail to appreciate as to how for the first time this stand was taken before the High Court by the State Government that the Special Tribunal had no jurisdiction to adjudicate the dispute or to make the award. According to us, in the facts and circumstances of the case, the High Court ought not to have permitted the State Government to raise such a contention after it had submitted to the jurisdiction of the Special Tribunal merely because the award went against it. It hardly behoves the State Government to question the jurisdiction of the Special Tribunal at such a belated stage merely because the award was not to its liking. The State Government cannot be permitted to behave like an ordinary dishonest litigant who takes an off chance hoping to succeed and if the outcome is not his liking to turn back and question the Special Tribunal Jurisdiction. The High Court should not have permitted such a somersault. We, therefore, set aside the High Court's finding on the issue for the above reason."

20. In these circumstances, we hold that it is too late for the appellants to harp on lack of jurisdiction of the Arbitrator and the objection taken in this respect is overruled.

21. Before proceeding to take up the merits of the claims, it may be pointed out that the Arbitrator is the final arbiter and sole Judge of the quality as well as quantity of evidence and it is not for the Appellate Court to take upon itself the task of judging the evidence taken before the Arbitrator. The Court cannot substitute its own evaluation of the conclusion of law or fact, to come to the conclusion that the Arbitrator has acted contrary to the bargain between the parties. If in view of the contract, the decision of the Arbitrator on certain amounts is the possible view though perhaps not the only correct view, the Award cannot be examined by the Court on the ground that alternate view is possible. The arbitrator's decision cannot be set aside only because the Court would have come to a different conclusion. However, if it appears on the face of the Award that the Arbitrator has proceeded illegally, say for instance, on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the Award. In order to set aside the Award, there must be wrong proposition of law laid down in the Award as the basis of the Award. Only if the Arbitrator sets out line of interpretation in the

Award and that is found erroneous, the Court can interfere with the same. The modern tendency in commercial arbitrations is to endeavour to uphold awards of skilled persons that the parties themselves have decided to settle issues in dispute between them. The jurisdiction of the Court is limited and the Court cannot sit as if it is sitting in appeal against arbitration award.

22. We shall now come to the merits of the claims referred to the Arbitrator, one by one. We shall first start Claim No. 1, which relates to reimbursement of additional costs in procurement of stone aggregate from crushers of Belgaum, Hubli, etc. in lieu of local sources of Goa. Notice of tender (forming part of contract) provides that copies of the drawings and other documents pertaining to work (signed for the purpose of identification by the Accepting Officer or his accredited representatives) and samples of materials and stones to be supplied by the contractor will be open for inspection by the tenderer at the office. It is urged on behalf of the appellants that the respondents have been harping on the supposition that the stone aggregate from the crushers was from local sources of Goa, but neither in the tender documents nor in the samples kept for inspection nor in the contract the source that the stone aggregate was to be procured from local sources of Goa is specified. There is no dispute that before the Arbitrator the appellants had confirmed that the samples of stone aggregate which were kept for inspection in terms of tender notice were from local crushers. Secondly, it is urged that there is no evidence to support the increase in the price given by the Arbitrator and thirdly, it is submitted that in terms of Clause 18 of the Special Conditions, irrespective of actual variation of prices, payment is to be done only in terms of formula prescribed under Clause 18. Admittedly, when the tender was filed there was no scarcity of stone aggregate from local sources of Goa. However, it appears that on account of the restriction imposed by Goa Government on the use of explosives, the local production of stone aggregate in Goa fell down to about 10% of the total production from somewhere in the month of August 1992 onwards. Due to acute scarcity of stone aggregate in Goa the respondents, like many others, had to bring stone aggregate from Hubli and Belgaum. In view of this situation, it appears that the Chief Engineer of Works was considering grant of additional amount for stone aggregate to the respondents. Naturally, when a tender is made the availability of material, local conditions are taken into consideration. The respondents had sought correspondence with Engineer-in-Chief on the subject, which the appellants agreed to produce subject to that the same be not made available to the respondents as the correspondence was produced before the Arbitrator, which revealed that the contractors had to pay Rs. 450 cum in place of Rs. 270 cum for obtaining material on account of closure of stone quarries due to Government Notification and since 12000 cum of stone aggregate was to be used, the Chief Engineer (Navy) had recommended that the matter be sympathetically considered and ex gratia payment to the tune of approximately 25 lakhs be paid to the respondents in a contract of 312 lakhs. It was also revealed in this correspondence that the stone aggregate was to be brought from places like

Belgaum, Hubli in Karnataka State, which is about 120 Kms. of the work site, at a very high cost. In this connection, the Chief Engineer (Navy) had referred to material in support of his recommendation a statement in respect of total aggregate required in both the contract agreements. Quantity procured from outside Goa as well as locally was shown therein as well as the total financial effect of procuring material aggregate from Hubli, Belgaum, etc. It is in these circumstances that the Arbitrator has taken a very fair and reasonable view of the matter. It is no doubt true that it was a case of lump sum contract but lump sum contracts are based upon specifications of material and in case of escalation of price of material especially in the circumstances, it is but reasonable that the additional claim from August 1992 when the actual shortage started till the date of final settlement of claim was considered by the Arbitrator on the basis of the quantities and the rates specified by the appellants in their statement in defence before the Arbitrator. Though, it has been urged by the appellants that the Award in this respect could not go beyond the date of reference, that is to say, 30-12-1993, yet we find that on this count it is not necessary to interfere when the Arbitrator considered the claim upto 24-1-1994 when the statement of claims was filed before him by the parties. Of Course, the Award in respect of Claim No. 1 beyond 24-1-1994 did not form part of the terms of reference and even though the respondents had filed claim in respect of future stone aggregate to be brought, yet the same was objected to by the appellants as can be seen from pleadings in defence of appellants in Para 12 wherein with reference to the entire Para 4.1.9 it was stated that the same does not deserve scrutiny of the Arbitrator and is liable to be rejected. Besides this, the future claim in respect of the stone aggregate would be subject to various factors including market conditions and whether the shortage continued. Under the circumstances, the Arbitrator could not have granted relief relating to future claim of the respondents with reference to stone aggregate. Therefore, while sustaining Claim No. 1 in both the appeals for the quantity of stone aggregate already brought after August 1992 upto 24-1-1994, and Award of Rs. 11,35,760/- in Arbitration Appeal No. 2 of 1996 and Rs. 5,90,000/- in Arbitration Appeal No. 3 of 1996, the remaining part of order on Claim No. 1 is set aside.

23. Coming to Claim No. 2. In this respect, the learned Senior Counsel for the appellants has drawn our attention to Clauses 3.3.2, 3.3.3. and 3.3.4 of the of the particular specifications. The said Clauses read as under :---

"3.3.2 Excavation for the works under Schedule "A" Part I shall be carried out in soft/disintegrated rock laterite rock except for surface excavation specified above.

3.3.3. Contractor shall specifically note that the excavation in any type of laterite rock as met with at site shall enter for excavation by any means including use of mechanical plant or by chiselling, wedging or any other agreed method except blasting. Blasting for purpose of excavation in rocks is not permitted.

3.3.4 In the event of deviations if any, excavation in any type of laterite rock executed in the manner as specified above, shall be treated as excavation in

"soft/disintegrated rock".

According to the learned Senior Counsel for the appellants, all the three Clauses have to be read together and it is clear from Clause 3.3.3. that the excavation contemplated is in any type of laterite rock which includes soft as well as hard rock. It also includes excavation done by mechanical plant, chiselling, etc. except blasting. It emphasises that in terms of Clause 3.3.4, in the event of deviations, excavation in any type of rock has to be treated as excavation in "soft/disintegrated rock". In terms of Clause 2 of the Particular Specifications the same will have precedence over any other rules. It is also urged that even otherwise measurement of excavation would come into play only in case of item rate contract and not in case of lump sum contract. Moreover, this item relates to increase in labour and falls squarely under Clause 19 of Special Conditions where formula is given for working out the increase and that as per Note 6 thereunder, the decision of the Accepting Officer is final. It is further urged that the work in respect of the first contract was commenced on 16-8-1990 (Arbitration Appeal No. 3/96) and the tender in the second contract (Arbitration Appeal No. 2/96) was opened on 15-3-1999, which means that the contractor was fully aware of not only the strata in loco and was fully aware of Clauses 3.3.3. and 3.3.4 and had quoted the rates accordingly. Therefore, according to the learned Senior Counsel for the appellants, there was absolutely no case for enhancement and the Arbitrator has totally misinterpreted the relevant provisions relating to classification of the strata due to which the entire claim has to be rejected.

24. On the other hand, learned Senior Counsel for the respondents had placed reliance on Clause 3.2.1 of S.S.R. Part I, which provides that material to be excavated shall be classified under various categories and that the strata in which the respondents had to work has to be classified as hard rock, but since hard rock blasting has been prohibited, the excavation had to be carried out by chiselling as a result of which the expenses on labour had increased considerably and the respondents are entitled to the claim put forward in both the contract agreements.

25. Clause 3.3.2 of Particular Specifications provides that excavation for the works under Schedule "A" Part I shall be carried out in soft/disintegrated rock, laterite rock. Clause 3.3.3 provides that the contractor shall specifically note that the excavation in any type of laterite rock as met with at site shall cater for excavation by any means including use of mechanical plant or by chiselling or wedging or any other agreed method except blasting which is not permissible. The expression "any type of laterite rock" would certainly include soft or hard laterite rock. This clause, therefore, enjoins on the contractor that excavation work in case of any type of laterite rock as met at site shall be carried out by mechanical plant or by chiselling, wedging or any other method except blasting which is not permissible. Clause 3.3.4 which provides that in the event of deviations if any, excavation in any type of laterite rock executed in the manner as specified above, shall be treated as excavation in soft/disintegrated rock. This

makes the position crystal clear that excavation in any type of laterite rock, that is to say, soft or hard, shall be treated as excavation in soft/disintegrated rock. The Arbitrator has totally overlooked Clause 3.3.4 while coming to the conclusion on the basis of Clause 3.3.2 and 3.3.3 alone. The respondents had sought for test report on the question of classification of strata where excavation was done but it was objected to by the appellants. The Arbitrator conducted site inspection and came to the conclusion that crowbar/pickaxe was ineffective and chiselling and hammering was the only answer. In the circumstances, we are of the opinion that the Arbitrator had not only misinterpreted the relevant Clauses totally ignoring Clause 3.3.4 and took an undue interest in the matter in order to find out the classification of the strata which in fact, in view of Clause 3.3.4 would not have much relevance. The Arbitrator, in our opinion, has misconducted himself and the Award of Claim No. 2 is totally unwarranted and invalid. The view taken by the Arbitrator cannot be said to be a possible view on the interpretation of Clauses 3.3.2, 3.3.3 and 3.3.4 read together and, on the contrary, the line of interpretation set out in the Award is totally erroneous. We cannot agree with the learned Advocate for the respondents that the view taken by the Arbitrator is possible and reasonable view. In case of the second contract, the contractor respondent was fully aware of the strata at site and knowing fully well had quoted rates. The two sites in first and second contract are in the vicinity of each other. It is stated by the appellants that the strata of site may change from point to point and if that is so, there was absolutely no justification for passing order in respect of future claim which will depend upon the strata encountered at site. However, as we have already pointed out the type of strata would not make any difference in view of Clause 3.3.4 of the Particular Specifications.

26. For the aforesaid reasons, we are of the opinion that the Award under claim No. 2 in both the appeals cannot be sustained and is liable to be set aside.

27. Claim No. 3 relates to reimbursement of additional costs due to working in restricted area in lieu of unrestricted area. In this connection, learned Senior Counsel for the appellants submits that in accordance with Special Condition 21, the entire contract lies in unrestricted area. The said Clause reads as under :---

"The entire work covered under this contract lies in unrestricted area. However, thorough search of all persons and transport may be conducted by Military personnel at any time and any number of times at work sites for security reasons."

He further pointed out that thorough search of all persons and transport by the Military personnel at any time and at any number of times at work site for security reasons has been contemplated therein. He also drew our attention to Clauses 3.1, 3.2 and 3.3.3. of the Special Condition which provides for issuing of passes by the Engineer-in-Charge as per rules and regulations of the installation/ area in force to control the admission of the contractor, his agents, employees and work people to the site of work or any part thereof. It further provides that the contractor, his agents, employees and work people shall observe all rules

issued by the Authority controlling the installations/area in which the work is to be carried out, which includes search of person on entry and exit, keeping to specific routes, observing specified timings, etc. In respect of the second contract, it is submitted that the contractor was fully aware of the working conditions including restrictions referred to in Clauses 3.1, 3.2 and 3.3 and knowing the same, had submitted the tender. Our attention was also drawn to Clause 2 of Special Conditions, which contemplated inspection of site prior to the filing of tender so that the tenderer was familiar with the working conditions, accessibility to site of works and such other relevant conditions, which affect the execution and the completion of the work.

28. On the other hand, the learned Senior Counsel for the respondents has urged that the findings of the Arbitrator are neither tied down to any interpretation of the agreement nor they disclose error on the face of the record and the findings of the Arbitrator that the work was being executed in restricted area cannot be interfered with. It is further urged that the actual experience of the Arbitrator when he went to inspect the site and various passes issued to supervisors, managers and labourers show that the site in question is unrestricted area. Reliance is also placed on letter dated 21-12-1993 of the Commander Officer, Varunapuri to show that as far as possible the area is regulated as restricted area. According to the learned Senior Counsel for the respondents, on account of the work in the restricted area, the work had slowed down as the labourers had to wait to enter the site and the working hours were restricted between 6.00 a.m. to 9.00 p.m. only and the material could not be transported to the site and the site office had to be established far away from the actual site of work. It is also urged that the Arbitrator, being an expert person as Engineer-in-Chief knew fully well and was conversant with the restricted area and unrestricted area and as such, the factual finding arrived at by the skilled expert cannot be interfered with by the Court.

29. The Special Conditions under Clause 3 on Security and Passes, clearly postulated the restrictions under which the contractor had to work and knowing these conditions fully well, the respondent had filled tender and at the time of the second contract, the respondent was further fully aware of the actual working conditions on the site as the work in the first contract had already started. The enforcement of the said conditions cannot give rise to any inconvenience to the contractor, since the said Special Conditions are part of the contract. The enforcement of these restrictions will not, by itself, make the site area as restricted area. The restrictions contemplated were issue of passes, search of persons on entry and exit, keeping specific timings etc. in terms of Special Condition 3 "Security and Passes". It was specifically contemplated in Special Condition 3.3 that nothing extra shall be admissible for any man hours etc. lost on this account. The Arbitrator has totally ignored these conditions of the contract while coming to the conclusion that the area of the site was restricted area. The experience of the Arbitrator at the time of the site inspection is part of restriction in Special Condition 3.3. Letter dated 21st December, 1993 states that

it was necessary to declare the area as restricted area so as to regulate the work of construction by the contractors and that Varunapuri is marked as restricted area on completion of the present contract MES. It is stated in the said letter that Varunapuri area is not promulgated as restricted area for administrative purposes, but as far as possible, the area is regulated as restricted area. We have already referred to the restrictions contemplated in Special Condition 3 "Security and Passes" and the enforcement of the said restrictions cannot give rise to payment of additional amount claimed by the respondents especially when Special Condition 3.3 in clear terms contemplates that nothing extra shall be admissible for any man hours etc. lost on account of the restrictions referred to thereunder. As we have already pointed out, the respondents had filed the tender knowing fully well the said Special Conditions and as such, he could not later on complain about such restrictions leading to reduced output of labourers, restricted working hours, etc. The conclusions arrived at by the Arbitrator are contrary to relevant Special Conditions which are part of the contract and as such, the award of the claim under the said Award cannot be sustained.

30. Claim No. 4 relates to interest. The Arbitrator has not granted pendente lite interest, but has granted interest prior to the reference, from the date of Award till payment of Award or decree from the Court whichever is earlier. This is permissible in law. As can be seen from the pronouncement of the Apex Court in State of Orissa Vs. B.N. Agarwalla, etc., , it has been laid down therein that it is now well settled that the Arbitrator has jurisdiction to award preference interest in cases which arose after the Interest Act, 1978 became applicable and the power of the Arbitrator to award interest for the post-award period also exists, besides power to grant pendente lite interest. Therefore, interest awarded by the Arbitrator in relation to the claim for quantity of stone aggregate already brought after August, 1992 to 20-4-1994 cannot be interfered with. The pre-reference interest in respect of other items falls on account of rejection of Claims Nos. 2 and 3.

31. For the aforesaid reasons, the Appeals are partly allowed. The claim for quantity of stone aggregate already brought after August, 1992 upto 20-4-1994 in Arbitration Appeal No. 2 of 1996 and Arbitration Appeal No. 3 of 1996 to the tune of Rs. 11,35,760/- and Rs. 5,90,000/-, respectively, is sustained. The interest awarded on the said claim by the Arbitrator is also sustained. Except for this, the remaining claims granted by the Arbitrator are set aside. In the facts and circumstances, we shall leave the parties to bear their costs.

32. Appeal allowed partly.