
(2012) 04 KL CK 0002
In the High Court Of Kerala
Case No : Arbitration A. No. 17 of 2010

Union of India

APPELLANT

Vs

Bharath Builders and Contractors

RESPONDENT

Date of Decision : 12-04-2012

Acts Referred:

Arbitration Act, 1940 — Section 13
Arbitration and Conciliation Act, 1996 — Section 16, 18, 24, 24(3), 26
Army Act, 1950 — Section 191, 192, 193, 193A

Citation : (2012) 4 ARBLR 448 : (2012) 2 KLJ 781

Hon'ble Judges : S.S. Satheesachandran, J; R. Basant, J

Bench : Division Bench

Advocate : S. Krishnamoorthy, CGSC, for the Appellant; Meijo Kurian Puvathingal, for the Respondent

Final Decision : Allowed

Judgement

S.S. Satheesachandran, J.—The appellant, Union of India, was the respondent in the arbitration proceedings emanating from the contract agreement, CA No. CECZ/CHN/34 of 1989-90: provision of an AED Hangar at INS Garuda, Naval Base, Kochi, in which a sole arbitrator was appointed as per the directions issued by this court in Writ Petition No. 10520 of 2004. The award passed by the arbitrator was challenged by the appellant u/s 34 of the Arbitration and Conciliation Act, 1996 (for short "the Act") on various grounds, before the court below, the 1st Additional District Judge, Ernakulam. The learned District Judge, repelling the challenges raised against the award, dismissed that application. Feeling aggrieved, the appellant has preferred this appeal. Short facts necessary for disposal of this appeal can be summed up thus:

The respondent/contractor was awarded the contract work, construction of an AED Hangar at INS Garuda, Naval Base, for a sum of Rs. 1,42,58,880. That contract work bearing CA No. CECZ/CHN/34/1989-90: provision of AED Hangar at INS Garuda, Kochi was entered into under the general conditions of contracts

of I.A.F.W.-2249, to which, military engineering service rules, regulations, conditions, etc. are applicable, including adherence to the Official Secrets Act by the employees engaged by the contractor to execute the work, even after its execution. While the contract work was in progress with nearly 86% of such work completed, the AED Hangar constructed collapsed down on 27.03.1992. Rehabilitation work was carried out by the same contractor/respondent without entering into any fresh contract, and, later, the work was completed within the extended period by 30.09.1999. After completion of the work, the respondent, who is hereinafter referred to as the claimant, raised various claims over the execution of the work and sought for resolving the disputes by reference to the arbitration as provided under the agreement. The claimant, later, filed a writ petition numbered as WP (C) No. 10520 of 2004 seeking a number of reliefs over the work executed. Pursuant to the directions issued by this court in the writ petition, a sole arbitrator (D.K. Sharma, Engineer-in-Chief, Army Head Quarters, New Delhi) was appointed invoking Clause 70 of I.A.F.W.-2249. The terms of reference for arbitration covered Claim Nos. 1 to 75 by the claimant, and Claim Nos. 1 to 7 by the Union of India. Award passed by the arbitrator was challenged by the appellant before the court below mainly on grounds u/s 34(2)(a)(iv) and u/s 34(2)(b)(ii) of the Act. The learned District Judge, as already indicated, turned down the challenges raised to the award; and, questioning the correctness of that decision as unsustainable under law and facts, the appeal is preferred.

2. Learned Central Government Standing Counsel Sri. S. Krishnamoorthy assailed the award passed by the arbitrator as wholly unsustainable, incorrect and illegal, contending that not only the arbitrator has embarked upon disputes which were not arbitrable, but, he has also decided the disputed issues flouting even principles of natural justice inasmuch as denying opportunity to the appellant to challenge the materials brought in evidence and relied to enter findings to base the award upholding the claims of the claimant. The appellant had raised a preliminary objection before the arbitrator that the case of "design fault" canvassed by the claimant as the cause for collapse of the hangar to sustain his claims was not at all arbitrable since he had taken the rehabilitation work unconditionally agreeing to complete the work on the same terms and conditions of the contract previously entered into, at his risk and cost. Changes in the design to facilitate the rehabilitation work was nothing but a deviation to the existing contract permitted by the terms and conditions of I.A.F.W.-2249 and, there was no novation of contract as contended by the claimant to base his claims that design fault resulted in the collapsing of the hangar, is the submission of learned Central Government Standing Counsel. The arbitrator by negating the preliminary objection that design fault is not arbitrable, has exceeded his jurisdiction and, the award passed by him is vitiated and unsustainable, submits the counsel. The next limb of attack to assail the award by the learned Central Government Standing Counsel was that there was denial of opportunity to the appellant to examine the expert who furnished the opinion that design fault

resulted in collapsing of the hangar. A specific request was made in writing to provide opportunity to cross-examine that expert, and the defence experts, who were involved in the preparation of the designs, to substantiate the contentions of the appellant. The arbitrator turned them down and even refused to furnish a copy of the report of the expert, which too was applied for, and, thus, there was flagrant violation of the provisions of sub-section (2) of Section 26 of the Act by the arbitrator. Disallowing of the request to examine the expert, and, the arbitration proceedings conducted denying opportunity to the appellant to challenge the report of the expert, tantamounts to flouting of the fundamental rules of procedure to be followed in decision making by any person under law, submits the counsel. The course so followed negating natural justice by the arbitrator is against the public policy of the land and, therefore, the award is vitiated on a ground covered u/s 34(2)(a)(v) of the Act, according to the learned Central Government Standing Counsel. The arbitrator, it is urged, has relied on inadmissible materials, to support his finding on disputed issues, is the further submission of the learned Central Government Standing Counsel. Reference to the report by Board of Inquiry over the collapsing of the hangar and advertence to the recommendation in such report in the award is unethical and improper, and totally uncalled for, submits the counsel. Such report was placed only for perusal, that too on orders passed by the arbitral tribunal, making it clear, and also with the reservation, that it is confidential. The Board of Inquiry constituted under Defence Regulations does not envisage of any finding but only of recommendation, which may or may not be acceptable to the competent authority, is the submission of the Central Government Standing Counsel to assert that the arbitrator has egregiously erred in adverting and referring to such recommendation in his award to enter finding that there was design fault over the roof truss and it led to the collapse of the hangar. The Board of Inquiry and recommendations over any matter covered by Defence Regulations by such Board are only part of an in-house mechanism, strictly applicable to Defence Services, which cannot form the basis nor even scrutiny at the instance of any third party, is the submission of the Central Government Standing Counsel to contend that the arbitrator has acted illegally in relying upon the recommendation of the Board discarding the objections raised thereto by the appellant.

3. Challenges raised before the court below to impeach the award as unsustainable on grounds that the claimant had received compensation from the insurance company over the loss arising from the collapsing of the hangar during the execution of the contract work and also that the interest fixed on the claims allowed at the rate of 10% by the arbitrator was excessive and unreasonable and it could have been fixed only at the rate of 6% per annum have also been canvassed by the learned Central Government Standing Counsel. However, those challenges were not pursued as no material from the record could be pointed out to differ from the view taken by the arbitrator and the learned District Judge showing that the claimant has received any compensation from the insurance

company, and, that the arbitrator had exercised his discretion improperly in awarding 10% interest per annum on the sum awarded to the claimant.

4. Learned counsel for the claimant, Sri Meijo Kurian, resisted the challenges to the award and also to the judgment passed by the learned District Judge, as unworthy of any merit. Over the challenge raised that design fault was not an arbitrable issue, the learned counsel submitted that any exception thereto required to be raised before filing the defence statement, but, it was advanced long after such statement was filed. Furthermore, very many disputes covered by the claims rested on the fulcrum of design fault which, according to the claimant, resulted in the collapse of the hangar. The appellant too requested to have the design checked by the arbitrator through an expert agency of his choice. Accordingly, acceding to the request of the appellant, both parties were directed to file panel of experts by the arbitrator, and one among those named in the panel of the appellant was chosen to check the design. The appellant having asked for checking the design by an expert has given up whatever objections raised that design fault was not arbitrable, and it cannot turn around and contend that the arbitrator has exceeded his jurisdiction in examining whether the design fault has caused collapsing of the hangar, submits the counsel. The claimant undertook that rehabilitation work without prejudice to his rights and claims and, further, the appellant had also supplied materials for such work treating that there was a novation of the contract, according to the counsel. So far as the denial of opportunity to the appellant to examine the expert and reliance placed on his report without providing an opportunity to challenge it, to assail the award, learned counsel contended that it has no merit as none of the parties to the proceedings had expressed any desire to have the expert examined when a request was made for the appointment of an expert. If at all such a requirement had been made at the time of making the request for appointment of expert, the arbitrator could have mentioned it when willingness of the expert was asked for, that he should appear and answer before the tribunal apart from giving detailed analysis report in writing. Without asking for the willingness of the expert to do so at a later stage after the report was filed by the expert, the arbitrator could not have asked him to face examination over his report, is the submission of the learned counsel. There was no infringement or violation of Section 26 of the Act by the non-summoning and examining of the expert, is the submission of the counsel pointing out that even the recommendation made by the Board of Inquiry constituted by the appellant would disclose that design fault of the roof truss contributed for collapse of the hangar. Recommendation made by the Board of Inquiry which has examined the cause for the collapse of the hangar cannot be brushed aside as of no value is the submission of the counsel pointing out that the learned arbitrator has not based his findings solely on such inquiry report but on other materials including the report of the expert to conclude that design fault contributed for the collapse of the hangar. Learned counsel adverting to the minutes recorded by the arbitrator over the deliberations of the arbitral proceedings held on 11th to 13th

of September, 2011 submitted that the appellant and his counsel had acknowledged under their signatures that they had full opportunity to present and argue their case and nothing further to add except the submissions made. Though the appellant had requested for examination of the expert, even by making a request in writing, it was not insisted upon nor any protest made before final arguments were over, is the submission of the counsel to contend that challenge canvassed on that score to assail the award is meritless. The award passed is proper, legal and correct, and it does not call for any interference, is the submission of the counsel.

5. On the submissions made by the counsel with reference to the facts presented in the case, we find the following questions emerge for consideration in the appeal:

1. Has the arbitral tribunal exceeded its authority in entertaining the dispute over design fault, and, is the award passed entering a decision on such dispute beyond the scope of arbitration, rendering it vitiated u/s 34(2)(a)(iv) of the Act ?

2. Whether the arbitral procedure followed by the tribunal in which the request of the appellant for a copy of expert's report and his examination was turned down, and a decision over the disputes was formed relying on such report, render the award vitiated and liable to be set aside on the grounds under Sections 34(2)(a) (v) and also 34(2)(b)(ii) of the Act ?

6. In the course of the hearing, we have entertained a doubt whether any challenge to the award is circumscribed by the Defence Services Regulations since the disputes covered by the arbitration proceedings pertained to the execution of a contract over the construction of a hangar in the Naval Base. We have taken note that in the Defence Services Regulations, certain procedures are laid down for arbitration in respect of military engineering contracts. Regulation No. 569 in Defence Services Regulations (Volume 1) spells out the particular procedure to be followed, as far as practicable, in giving an award under the arbitration clause embodied in the MES contract forms. Clause (k) of the above regulation which is of relevance reads thus:

(k) If any fees or expenses are payable to the arbitrator, he should give notice to the parties that his award is ready and will be declared on payment of such fees and expenses. He may refuse to publish his award until the required payment is made. Such an award is conclusively binding on both parties and will not be looked at on its merits by a court of law. The award can only be set aside by a court of law on proof of misconduct on the part of the arbitrator or that the award was improperly secured. If a point of law arises which the arbitrator is unable to decide, he can state a special case for the opinion of the court, under the provisions of Section 13 of the Arbitration Act, 1940 where this applies. The court will give its decision on the legal point and inform the arbitrator accordingly, but will still leave the final award for the arbitrator's decision.

(underlining supplied)

7. Perusing the revised edition of the Defence Services Regulations, 1987, and taking note of the preface thereunder issued by the Secretary of the Government of India, that the regulations are not statutory but are supplemented to the statutory provisions wherever they exist, we have requested the learned Central Government Standing Counsel to enlighten us whether the award passed in arbitral proceedings in MES contract is open to challenges on all or any of the grounds covered by the Act or within the narrow limits of the regulations only if the award is vitiated by the misconduct of the arbitrator or it has been improperly secured (sic procured). We have posed such a question to the learned Central Government Standing Counsel taking note of the provisions of Chapter XV of the Army Act, 1950 as well. The above chapter in the Army Act captioned "RULES" deals with the power of the Central Government to make rules and regulations for the purpose of giving effect to that Act and also the publication thereof mandating that such rules and regulations are to be laid before the Parliament.

Sections 192, 193 and 193A of the Army Act read thus:

192. Power to make regulations--The Central Government may make regulations for all or any of the purposes of this Act other than those specified in Section 191.

193. Publication of rules and regulations in Gazette--All rules and regulations made under this Act shall be published in the Official Gazette and, on such publication, shall have effect as if enacted in this Act.

193A. Rules and regulations to be laid before Parliament--Every rule and every regulation made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session, or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Section 193A is a new provision in the Army Act which has been brought in by amendment under Act 20 of 1983 with effect from 15.03.1984. Even before that amendment, the provision covered by Section 193 mandated the publication of the rules and regulations under the Act in the Official Gazette and once such publication is made they have effect as if enacted in the Act. (Similar provisions as in the Army Act, with slight modifications, and captioned as "Regulations" appear in Chapter X of the Navy Act, 1957. We mention it only because the contract work was executed in a naval base). In the above backdrop, we requested the Central Government Standing Counsel whether the subordinate legislation covered by the regulations is applicable to the contract covered by the

award challenged in this appeal, and if so, whether without a challenge to Regulation 569(k) referred to above is the award still assailable on the grounds raised u/s 34 of the Act. We felt the need to do so taking note of the observations of the Apex Court in *Hinsa Virodhak Sangh Vs. Mirzapur Moti Kuresh Jamat and Others*, wherein it has been observed thus:

A piece of delegated legislation is also statutory in character and the only limitation on it is that it should not violate the provisions of the parent statute or of the Constitution.....

We have recently held in *Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, that the court should exercise judicial restraint while judging the constitutional validity of statutes. In our opinion, the same principle also applies when judging the constitutional validity of delegated legislation and here also there should be judicial restraint. There is a presumption in favour of the constitutionality of statutes as well as delegated legislation, and it is only when there is a clear violation of a constitutional provision (or of the parent statute, in the case of delegated legislation) beyond reasonable doubt that the court should declare it to be unconstitutional.

That was a case where the vires of the delegated legislation were under question; but the principle laid thereunder has to be taken note of by the court in respecting and giving effect to such legislation wherever and whenever its applicability comes to its notice.

8. Learned Central Government Standing Counsel after getting necessary inputs from the concerned has reported that Defence Regulations does not form part of MES contract. It is also submitted that military engineering service is governed by the Regulations of Military Engineering Service (RMES) issued by the government which does not impose any restriction to challenge the arbitral award. The general conditions of MES contracts issued by the government are governed by the Indian Laws for the time being in force and the arbitrator is being appointed accordingly, and the arbitral proceedings and the award passed by such arbitrator is governed by the Act, is the stand of the Central Government Standing Counsel. Learned standing counsel has placed before us the queries addressed to and also the answers received thereto from the concerned as indicated above. Perusing such material, we notice that in a matter involving not only high stakes but even security cover of the defence establishment the queries of legal nature are answered by the Chief Engineer, through an officer on his behalf. We direct that the papers placed by the standing counsel [5 sheets (communication dated 21st March, 2012 with the accompaniments from Deputy Director (Contracts) for Chief Engineer and also the copy of the letter sent by Central Government Standing Counsel seeking answers to the queries)], be incorporated with the records of the case. Though we are not impressed by the answers given to the queries, in view of the stand taken by the appellant as above further probe with respect to the regulations referred to is found not necessary. We may also state that though the counsel for the claimant has also

been requested to examine and express his views on the applicability of Regulation 569(k) of the Defence Services Regulations referred to above to the contract the stand taken by the Central Government Standing Counsel is practically conceded to. That being so, we find, in the present appeal where both sides accept that the award is challengeable u/s 34 of the Act de hors Defence Regulation 569(k), no further dilation as to whether it has applicability or not is called for. However, we have adverted to the above aspect taking note that the Regulation 569 specifically mentions of MES contract and the procedure to be followed in the matter of arbitration arising out of such contracts, which has been captioned as "Procedure for making award under the arbitration clause in military engineering service contract forms". Furthermore, in the present scenario, where defence establishments spread over the country are also prone to threats from different corners, with regard to the execution of the contract work in such establishments like the one in the present case-construction of hangar in a naval base, is it advisable and more so prudent that the designs of such construction built within such security establishment, and also other materials connected with the work, without any inbuilt safeguards that they would not fall upon undesirable hands, which may cause a threat to the nation, are to be shuttled and transmitted from one court to another and subjected to scrutiny by various persons. That surely cannot be avoided if arbitration proceedings in respect of disputes over such work are allowed without adequate safeguards, and, further challenges to the award permitted without reasonable restriction imposed. Even in respect of a MES contract where the construction was within a naval base is not the applicability of the Regulation 569(k) desirable and more so necessary, is a matter that requires serious consideration by those who are at the helm of affairs of such work. We hope serious consideration thereof will be shared by those concerned taking note that the security of the nation is not a myth, but, very much depended upon eternal vigilance and preventive measures put in place to shield not only real and existing threats, but, perceived one as well.

9. The first question to be considered is whether the design fault attributed as the cause for collapse of the hangar by the claimant was not an arbitrable issue entertainable by the arbitrator. The arbitrator was incompetent to go into the question of design fault, and in doing so, discarding the preliminary objection raised by the appellant, he has exceeded his jurisdiction, and the award rendered by him is vitiated, is the challenge of the appellant. Fundamentally, such a challenge is built on the citadel that the claimant having agreed to do the rehabilitation work at his risk and cost was estopped from questioning the design on which the hangar was constructed earlier, but, collapsed down after almost major part of the execution of the work was over. We do not find any merit in the challenge canvassed by the appellant for more than one reason. First and foremost, the rehabilitation work was taken by the claimant stating in unmistakable terms that it was without prejudice to his rights and claims. That such work was taken at his risk and cost and perhaps even to avoid impairment to his reputation does not indicate that he had given up once and forever

whatever claims he had over the work already performed irrespective of the collapsing down of the hangar put up. If the hangar had actually collapsed down on account of the design fault, or at least that contributed even minimally for its collapse, the fact that he had taken the rehabilitation work at his risk and cost, that alone, would in no way preclude him to canvass such a case also to sustain his claims. The learned Central Government Standing Counsel has relied on Clause 48 in Chapter III dealing with Performance of Contracts in I.A.F.W-2249, which contains the general conditions of contract, to contend that when rehabilitation work on collapsing down of the hangar was taken by the claimant on his risk and costs it is not open to him to set up a case that the hangar collapsed down on account of the design fault. We do not find anything in Clause 48 in I.A.F.W-2249 precluding and interdicting the contractor/claimant in pointing out and pressing upon any default on the part of the other contracting party, the appellant, in relation to the contract work that had resulted in loss or damage to him. Clause 48 in I.A.F.W-2249 "General Conditions of Contract" does not insulate the appellant from all and every fault on its part, if that be so, in the execution of the contract work. Then also, looking into what all transpired during the arbitration proceedings it is evidently clear that the challenge set up that the arbitral tribunal exceeded its authority in deciding the dispute over design fault has no merit at all. Section 16 of the Act deals with the competence of the arbitral tribunal to rule on its jurisdiction. Sub-sections (2) and (3) of that section which have some relevance on the question posed read thus:

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

In examining the challenge canvassed by the appellant over the dispute relating to design fault, whether it is an arbitrable issue or not, it could be seen that it was not a question of competency of the jurisdiction of the arbitrator but one of exceeding the authority of the arbitrator under sub-section (3) referred to above, provided it is found so. We find no merit in the submission of the learned counsel for the claimant that such an issue could not have been raised by the appellant after filing of the statement of defence. In fact, even a challenge over jurisdiction can be entertained by the arbitrator after filing of the statement of defence, provided he considers that the delay thereof is justifiable. This is explicitly spelt out under sub-section (4) of Section 16 of the Act. If a plea is raised under sub-section (2) or (3), as the case may be, the arbitral tribunal shall decide it and in the event of rejection of such plea, it shall continue the arbitral proceedings and make an arbitral award. Sub-section (5) of Section 16 of the Act reserves the right of the aggrieved party, whose plea raised under sub-section (2) or (3) was

rejected, to make an application setting aside such an arbitral award u/s 34 of the Act. When such inbuilt provisions are made u/s 16 of the Act with respect to the jurisdiction of the arbitral tribunal and also his competency to arbitrate one or other matter when he has jurisdiction in respect of other matters covered by the proceedings, the question looms large whether the appellant, in the given facts of the case, is entitled to set up the plea canvassed under sub-section (3) that the arbitrator has exceeded his authority in deciding design fault as a ground to assail his award u/s 34 of the Act. True, the appellant has raised such a plea contending that the arbitrator has no authority to decide the dispute over design fault. However, we notice that in the very same preliminary objection canvassed the appellant has made a request for appointment of an expert to determine whether there was any defective design; and, the arbitrator, on such request, directed both parties to file panel of experts to choose one of them to furnish opinion. Once the panels were filed, National Institute of Technology, Trichi was chosen by the appellant, from the names given by the appellant though the name of the expert was not disclosed at that stage. The direction of the arbitrator to deposit the consultation charges of Rs. 1,50,000 to the expert in equal proportion by both parties has also been complied by the appellant. The aforesaid circumstances clearly demonstrate whatever challenge raised over the competency of the arbitrator to examine the dispute over the design fault as a preliminary objection by the appellant was nothing but one raised for namesake, and the appellant too desired the arbitrator to examine that issue appointing an expert to furnish opinion after having a study of the designs prepared and other materials, to consider whether design fault had resulted or contributed for collapse of the hangar. Such being the fact situation presented in the case, we do not find any merit in the challenge raised by the appellant that the arbitrator exceeded his authority in arbitrating over the disputes relating to design fault, to challenge the award passed by him.

10. The seminal and spinal issue to be resolved in this appeal on the contextual facts presented and grounds of attack raised against the award is whether the award passed by the arbitrator without supplying a copy of the expert and also denying opportunity to the appellant to examine the expert is opposed to public policy. Has the arbitrator flouted and transgressed the procedure to be followed in arbitral proceedings of providing equal opportunity to both parties is also to be considered. Facts are not in dispute that the appellant did apply for getting a copy of the report of the expert appointed by the arbitral tribunal, whose consultation charges were equally borne by it with the claimant, and that it had also requested for his examination of the defence experts who prepared the designs, on the basis of which the hangar was previously constructed, but, collapsed down. In the communication bearing No. 810230/Arbitration/876/E8 dated 31.08.2007 addressed to the arbitrator taking exception to the order of the arbitrator for not furnishing copy of the report of the expert to the parties to the arbitration, the appellant has specifically made a request for such report on the design check contending that it is absolutely essential to explain about the

design, the shortcomings, if any, after studying the design with the report of the expert. Paragraphs 4 to 6 of the aforesaid communication addressed to the arbitrator are worth reading:

4. It is submitted that the original design of the AED Hangar, which forms a part of the contract had been prepared by CE (Design and Consultancy), Pune during February-March 1998 and department wants to know whether design has been checked based on parameters based on prevailing IS during February 1988. Almost all such important designs were prepared for the MES by the office of the Chief Engineer, (Design and Consultancy), Pune and in several places, similar designs were adopted and the best example is the AED Hangar at Arkonam in Chennai. As the officials, who prepared the original design are essentially able to explain about their design, they have to be examined for any shortcomings if any, in the design, while comparing with the report of the expert agency. Besides that the design is being independently checked by the officials of expert agency. It is highly necessary that the officials of both the concern are examined as witnesses in the above case.

5. It is submitted that Section 26(1)(b) of the Arbitration and Conciliation Act, 1996 says that the experts have to furnish the relevant information to a party to the arbitration. They should be given access to the relevant document. Further, they can be examined u/s 26(2) of the Act. At least u/s 26(3), the expert on request of a party, should make available all the documents. Since the report of expert agency is in possession of the arbitrator, either he may place the same for perusal or through the expert. The denial is a clear violation of the provisions of Section 26 of the Arbitration and Conciliation Act and also the principles of natural justice.

6. Hence, it is prayed that the report of the expert agency on the design check may be furnished to the department for its perusal and for the deliberations, as a part of the arbitration proceedings. In this particular case, interest of justice required that the officials of the office of the Design and Consultancy, Pune as well as the expert who checked the design as per order of the arbitrator and the then GE & AGE who has executed the work before collapse of hangar, Shri C.A. Kurian, Surveyor (United India Assurance Co.), Challakkal, Old Station Road, Kochi -18 should be permitted to be examined as witness.

Still, the arbitrator declined the request for a copy, and refused permission to examine the expert and also the defence personnel involved in the preparation of the designs. In the award referring to the aforesaid communication made by the appellant, the arbitrator has stated thus:

After hearing both the parties and further perusing the written submissions made by them, it was decided by me that no further discussion/examination of witnesses was necessary on the report received from the expert agency as the expert advice on design of hangar structure was taken by appointing expert agency with clear and unconditional consent of both parties. Expert agency

chosen for analysis and study of design of collapsed hangar was in fact the one proposed by the Union of India themselves. Non-supply of copy of the expert's report to Union of India cannot be considered as denial of opportunity as alleged. Accordingly, the hearing was treated as complete in all respects while full opportunity having been given to both the parties to present and argue their case as also noted by them duly signed on 13th September, 2007 during final hearing of the case.

The report of the expert, copy of which was not supplied, with the examination of such expert also declined, it is seen, has been based and, in fact, it is the foundation on which the findings of the award are pivoted by the arbitrator. The arbitrator on the basis of the report of the expert has expressed thus:

The report clearly stated that the structure is safe in all aspects except in roof trusses. It is worth mentioning here that the roof structure comprising of trusses has collapsed during the construction of the hangar. Thus, it brings me to conclude, with regard to design aspect, that the design of roof trusses incorporated in tender was inadequate/unsafe for which responsibility rests with Union of India.

The arbitrator, perhaps, was totally oblivious of the conduct of procedure for arbitration proceedings covered by the Act. Section 18 of the Act mandates that not only the party shall be treated with equality but each of them shall be given full opportunity to present its case. The aforesaid section reads thus:

18. Equal treatment of parties--The party shall be treated with equality and each party shall be given a full opportunity to present his case.

It is not only impartiality and absence of bias from the part of the arbitrator that is postulated in the aforesaid section, but an inviolable binding obligation to conduct a fair trial in the arbitration proceedings. Fair trial requires something more than treating the parties with equality. It contemplates of providing each party reasonable opportunity to present his case also. Where a most crucial report which has decisive effect on the issues involved in the arbitration proceedings, and that too collected at the instance of the parties to the proceedings, was withheld from them, and, then, relied upon to pass the award by the arbitrator, it goes without saying that the procedure followed by him was clearly unethical and unsustainable. A party to the proceedings must know what is the evidence that has been given and he must also be given an opportunity to show why it is not to be used against him. In *B. Surinder Singh Kanda vs. Government of the Federation of Malaya*, (1962) AC 322 Lord Denning speaking for the Privy Council has said "If the right to be heard is to be a real right, which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them". Lord Macnaughten in *Lapointe vs. L'Association de Bienfaisance et de Retraite de la Police de Montreal*, (1906)

AC 535 has held that the rule is not confined only to conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with the authority to adjudicate matters involving civil consequences to individual. Lord Tucker, LJ in *Russell vs. Duke of Norfolk and others*, (1949) 1 All ER 109 (CA) has said thus:

Whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The Apex Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, has held that the rule of fair opportunity is sufficiently flexible to permit modifications and variations to suit exigencies of myriad situations, which may arise. The expressions "fair opportunity", "reasonable opportunity" or "proper hearing", etc. are not capable of any precise definition. However, whether it be before the court or before the arbitrator each party must have reasonable opportunity to present evidence. The Apex Court in *Union of India (UOI) Vs. T.R. Varma*, has said thus:

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.

(underlining supplied)

In any view of the matter, the non-supply of a copy of the report of expert to the appellant and also denying it an opportunity to examine that expert amounted to denial of equal opportunity to present its case.

11. In this context, Section 26 of the Act dealing with the appointment of expert by the arbitral tribunal is also quite relevant. Sub-section (2) of the above section which has some bearing on the question now under consideration reads thus:

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify the points at issue.

The above statutory provision not only safeguard the rights of the parties to the arbitration proceedings but empowers them to summon and examine the expert, who has been appointed by the arbitral tribunal to report on specific issues, and also to present expert witnesses to testify on the points at issue. What has been stated in the award by the arbitrator, and also submitted by the learned counsel for the claimant, that since examination of the expert who filed the report was

not insisted upon when his appointment was requested for, it cannot be allowed in the proceedings, is totally fallacious and, in fact, amounts to repudiation of the statutory mandate.

12. We may also point out that whether the arbitrator should hold oral hearing for the presentation of evidence, or for oral argument or whether the proceedings shall be conducted on the basis of documents and other materials, depends primarily upon the agreement of the parties, who seek resolving of their disputes by arbitration. The arbitrator has also to give sufficient advance notice of any hearing, and, in fact, even in respect of any meeting of the tribunal for the purpose of inspection of the documents, goods or other property. Statutory mandates binding upon the arbitrator to conduct the arbitration proceedings fairly are spelt out by sub-sections (1) and (2) of Section 24 of the Act. That section contains another mandatory provision in the conducting of arbitration proceedings by the tribunal. Sub-section (3) of Section 24 of the Act reads thus:

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(underlining supplied)

When that is the statutory safeguard ensuring fair opportunity to the parties to the arbitration proceedings to seek and look into all materials including expert report or evidentiary documents which the arbitral tribunal may rely in making his decision, the decision taken by the arbitrator that no copy of the expert's report collected in the proceedings need be given to the appellant and no opportunity to be provided for examination of the expert, is patently erroneous, unsustainable and illegal.

13. The recommendations of the Board of Inquiry constituted by the authorities of the Naval Force over the collapsing of the hangar resulting in the death of two workmen during the execution of its contract work, we find, are extensively referred to in the award by the learned arbitrator and, further, relied upon as well to base his decision. Objections raised by the appellant that the recommendations of the Board of Inquiry are confidential in nature, and, at the most, they are only recommendations not binding, and even its acceptability rests with the commanding officer, has been given scant respect by the arbitrator. Scanning through the provisions of the Army Act and also the Navy Act, the rules and regulations thereunder, we notice that even in respect of recommendations of Board of Inquiry or Board of Officials constituted in matters connected with and involving the interests of the Forces, there is statutory interdiction barring its admissibility in evidence. When that be the case, it is only to be stated that the arbitrator was not at all justified in referring to the recommendations of the Board of Inquiry, more so, in placing reliance on such recommendations to found his decision rendered in the award. The award so

rendered by him suffers from incurable legal infirmity.

14. The upshot of the discussion as above leaves no room for any doubt that the arbitrator in the conducting of the proceedings has followed a procedure opposed to public policy inasmuch as flouting the statutory mandates under the Act regulating the procedure for arbitration proceedings and also the law of the land, by denying opportunity to the parties to present their case. The arbitral award is liable to be set aside if arbitral procedure followed by the arbitrator was not in consonance with the provisions under Part I of the Act. Section 34(2)(a)(v) of the Act reads thus:

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part.

Parties to the arbitral proceedings in the present case have not agreed to a different procedure than what is contemplated under Part I of the Act. Even if such an agreement had been entered into if that was in conflict with any provision of the above Part, it cannot be given effect to as the parties cannot derogate any of the provisions under that Part in the conducting of the arbitration proceedings. However, it is open to them to adopt a procedure in terms of Part I of the Act so far as whether oral hearing to lead evidence is required or not or arguments alone on production of materials would suffice. Be that as it may, it goes without saying that none of the parties to the arbitration proceedings can adopt a procedure which is in conflict with any provision of Part I of the Act by way of agreement. Where the arbitrator has followed a procedure conflicting and violating the mandatory prescriptions in the conducting of the proceedings under Sections 18, 24(3) and 26(2) of the Act it is a clear case that the award passed by him in derogation of the provisions of Part I of the Act is vitiated and liable to be set aside. Similarly, as already taken note of, the procedure followed by the arbitrator in denying equal opportunity to the parties to the proceedings by withholding the report of the expert and declining his examination even after a demand was made by the appellant is in conflict with the Public Policy of India as the procedure followed thereof is against the fundamental principles of natural justice. The arbitral award so passed by arbitrator is in conflict with the Public Policy of India and, thus, on that ground is covered u/s 34(2)(b)(ii) of the Act as well it is unsustainable. The phrase "Public Policy of India" as covered under the aforesaid section has been considered by the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . The Apex Court dilating on the phrase has held thus (para 31, page 24 of Arb. LR):

The phrase "Public Policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time-to-time. However, the

award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice..... Award could be set aside if it is contrary to:

- (a) fundamental policy of Indian Law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks that conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

We have already found that the illegality over the conducting of the proceedings by the arbitrator is not of a trivial nature but something which goes to the root of the matter and when that be so, the irresistible conclusion has to follow that the award is against the public policy of the land.

15. Though the learned Central Government Standing Counsel submitted that the award so far as upholding the claims under Claim Nos. 8 to 75 are not seriously opposed and it need not be set aside, urging that the challenge to the award on the ground that it is opposed to public policy is against the awarding of claims under Claim Nos. 1 to 7, we are not impressed by that submission. When the award is found to be void as opposed to public policy no question of segregation of any part of the award would emerge for consideration. We may also state that the suggestion mooted as above has been objected to without reservation by the counsel for the claimant, who would state that if the award is fundamentally unsustainable, which is not conceded, it has to be set aside in toto and not in piecemeal. When the award is opposed to public policy it is void, and as such, there cannot be any question of upholding any part of the award in respect of certain claims alone, as adjudged by the arbitrator. Now that we have come to the conclusion that the award is void as it is opposed to public policy and is liable to be set aside, what next to be followed also require to be considered. The arbitrator, who passed the award, has already retired from service. After ascertaining from the parties whether on remission he can conduct the arbitration proceedings, it is reported that he is not available, and also not interested in the conducting of the arbitration proceedings over the dispute between the parties any more. No statutory provision is available for remission once the award is set aside on any of the grounds u/s 34 of the Act. However, we notice from the judicial pronouncements rendered by the Apex Court that on setting aside of the award remitting it to the same arbitrator is well recognised. Still, there is no enabling provision, nor any judicial pronouncement brought to our notice, empowering this court to appoint an arbitrator afresh to conduct the

arbitration proceedings once the award is set aside u/s 34 of the Act. But looking into Clause 70 of I.A.F.W-2249 "General Conditions of Contract" governing the contract work involved in the case, we find the imponderability presented in the appointment of an arbitrator afresh on setting aside of the award can be resolved. Clause 70 of I.A.F.W-2249 deals with the arbitration clause governing the contract work. That clause provides that disputes between the parties to the contract, following the procedure prescribed, are to be referred to arbitration mandating that a serving officer having the required qualification specified has to be appointed as the arbitrator by the authority mentioned in the tender documents. That clause also contains a safeguard to meet any contingency arising from the resignation, vacation of office or unwillingness to act by the arbitrator appointed, for any reason whatsoever. That part of Clause 70 reads thus:

If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new arbitrator to act in his place.

In view of the provision stated as above forming part of the contract, more so in the arbitration clause, we do not find any impediment to the competent authority mentioned in the tender documents to appoint an arbitrator afresh on setting aside of the award and remission of the case where the previous arbitrator has now retired from service.

In the result, we pass the following orders:

(i) Award challenged in the appeal is declared void and it is set aside; and the case is remitted for determination of the claims of both parties through arbitration afresh in accordance with law.

(ii) Competent authority named in the tender documents, Engineer-in-Chief, Army Head Quarters, New Delhi, shall appoint a sole arbitrator in terms of I.A.F.W-2249, within one month from the date of receipt of a copy of this judgment, to conduct the arbitration proceedings afresh, and to pass the award.

(iii) A copy of the judgment shall be sent to the Secretary (Defence), Union of India, to take note of the observations made in paragraph 9, and to examine whether statutory inbuilt safeguards have to be put in place over the execution of contract works in defence establishments restricting the scope of arbitration and limiting it in terms of the Defence Services Regulation 569(k), provided the same as of now is not applicable to such contract works. Copy of the judgment shall also be forwarded to the Engineer-in-Chief, Army Head Quarters, New Delhi, to appoint an arbitrator to conduct the arbitration proceedings, within the time limit fixed by this court.

(iv) The arbitrator to be appointed shall complete the arbitration proceedings as expeditiously as possible, at any rate, within six months from the date of assumption of his office as arbitrator.

(v) Whatever materials already placed in the arbitration proceedings by the parties shall form part of the records in the arbitration proceedings ordered to be commenced afresh on remission of the case by appointment of an arbitrator afresh.

Appeal is allowed as indicated above, directing both sides to suffer their costs.