

(2010) 08 CAL CK 0044

In the Calcutta High Court

Case No : A.P.O. No. 55 of 2010 and A.P. No. 284 of 2003

Union of India (UOI)

APPELLANT

Vs

A.D. Chakraborty and Co.

RESPONDENT

Date of Decision : 25-08-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 12(3), 16(2), 2
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Interest Act, 1978 — Section 3

Citation : (2010) 3 CALLT 542

Hon'ble Judges : Prabhat Kumar Dey, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Soumendranath Das and S. Chatterjee, for the Appellant; Sumita Mukherjee and Kumkum Das, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of the Union of India and is directed against an order dated 3rd July, 2009 passed by a learned Single Judge of this Court by which the learned judge dismissed an application u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) filed by the present appellant for setting an Award published on 21st July, 2003 by the Arbitrator in connection with the dispute that had arisen between the parties in connection with the Contract No. 42M/90-91 dated 14th February, 1990 for consideration of a Second Class Waiting Hall, Booking Office and other ancillary works at the Durgapur Station under the Divisional Engineer-II, Asansol, of the Eastern Railway.

2. Pursuant to a tender-notice issued by the Eastern Railway, the respondent submitted his tender, which was accepted and consequently, a formal agreement was executed between the parties on 14th December, 1990. The total value of the contract was Rs. 6,23,651.50p and in terms of the contract, the required work was to be concluded within six months from the date of issue of the letter of acceptance. The time for completion of the contract-work however, was, extended at least on 11 occasions and the contract was ultimately satisfactorily

completed after about 43 months.

3. According to the appellant, the final bill was prepared and given to it on 8th January, 1996, and the respondent signed the bill and accepted payment. However, by a letter dated 2nd January, 1997, written through its learned Advocate, the respondent claimed Rs. 17,12,771/- on account of, inter alia, escalation.

4. As the appellant did not respond to the request of the respondent to refer the dispute to arbitration, the respondent made an application u/s 11(6) of the Act requesting the Hon"ble Chief Justice to appoint an independent Arbitrator.

5. By an order dated 7th March, 1997, the Hon"ble Chief Justice appointed Sri Kalyan Kumar Basu, a retired District Judge, as the sole Arbitrator. The respondent claimed Rs. 17,12,771/- before the Arbitrator. The parties filed their pleadings and issues were framed. The issues suggested by the respective parties have been referred to in the award impugned and it appears that the arbitrability of the claim was not in issue. By the award impugned, the Arbitrator awarded Rs. 4,37,320/- in favour of the respondent along with interest at the rate of 12% per annum from 1st October, 1995 till the date of the award and also awarded costs of Rs. 1,00,000/-.

6. The appellant before us filed an application u/s 34 of the Act for setting aside the award thereby principally alleging the following points:

(i) In terms of the arbitration agreement, only a Gazetted Officer of the Railways could be appointed as Arbitrator and as such, the award passed by a retired District Judge was without jurisdiction and on that ground alone, the award was liable to be set aside.

(ii) The respondent having issued a no-claim certificate in favour of the Railways, in view of the existence of Clause 43(2) of the General Conditions of Contract, 1969, the further claim was not maintainable which was raised for the first time in 1996 about eight months after the receipt of full and final settlement of the claim.

(iii) In view of Clause 16(2) of the General Conditions of Contract, no interest should be payable upon the earnest money or the security deposit or the amount payable to the contractor under the contract and as such, the award of interest passed by the Arbitrator was without jurisdiction.

7. The learned Single Judge has turned down all the aforesaid contentions raised by the appellant and consequently, dismissed the application u/s 34 of the Act.

8. Being dissatisfied, the Union of India has come up with the present appeal and in this appeal Mr. Das, the learned advocate appearing on behalf of the appellant, has reiterated the aforesaid three points before us and some additional points.

9. Therefore, the first question that arises for determination in this appeal is whether the award passed by the Arbitrator was liable to be set aside on the

ground that the arbitrator was not a Gazetted Officer of the Railways, as indicated in the contract.

10. Mr. Das has, in this connection, relied upon Clause 63(3)(a)(iii) of the General Conditions Contract which points out that no person other than the Gazetted Railway Officer appointed by the General Manager should act as an Arbitrator/Umpire and if for any reason that is not possible, the matter is not to be referred to arbitration at all. By strongly relying upon the aforesaid provision, Mr. Das contended that the award should be set aside on the aforesaid ground alone.

11. Mr. Das next relies upon Clause 43(2) of the GCC, which was amended by corrigendum slip No. 30 by Board's letter No. 84/W1/CT/12 - P dated 30th August, 1985 which is quoted below:

Clause 43(2) - The contractor shall not be entitled to make any claim whatsoever against the railway under or by virtue of or arising out of this contract, nor shall the railway entertain or consider any such claim, if made by the contractor, after he shall have signed a "no claim certificate" in favour of the railways, in such form as shall be debarred from disputing the correctness of the item covered by "no claim certificate" or demanding a reference to arbitration in respect thereof.

12. By relying upon the aforesaid provision, Mr. Das contends that in this case, the respondent specifically signed a no-claim certificate in favour of the Railways and accepted money and eight months thereafter, he lodged the claim. According to Mr. Das, the Arbitrator should have disallowed the claim of the respondent on the aforesaid ground.

13. Mr. Das further submitted that the award of interest by the Arbitrator was not permissible within the scope of agreement between the parties.

14. Apart from the aforesaid three points, Mr. Das further contended that the claim on account of compensation for delay in execution of the work cannot be a ground for arbitration in view of Clauses 17(2) and 17(3) of the GCC whereby extensions were made at the request of the respondent and such compensation also comes under the excepted matters. Mr. Das further contends that the Arbitrator has also not assigned any reason or adjudicated as to why Rs. 2,15,000/- to be paid as against Rs. 9,20,400/-. He further submits that the Arbitrator has passed an award of Rs. 1,93,800/- towards cost of alleged claim of de-watering although there is no such claim made by the respondent on such head in the statement of claim. He has further referred to paragraph 33 of the award and contended that the Arbitrator had dealt with a claim on account of cost of piling and load testing although, there is no such claim of cost of piling and load testing in the statement of claim. Mr. Das further submits that in paragraph 34 of the award, the Arbitrator has dealt with the claim of the respondent on account of supplying and fixing glasses and a sum of Rs. 13,760/- has been awarded whereas the claimant has made claim of Rs. 16,677/- on such account at serial No. 5 of the statement of claim. Mr. Das complains that the

Arbitrator allowed the claim of Rs. 13,760/- on account of additional work, although, there is no adjudication as to how the Arbitrator has come to such figure. Mr. Das, therefore, prays for setting aside the order passed by the learned Single Judge and allowing the application u/s 34 of the Act by setting aside the award.

15. Mrs. Mukherjee, the learned advocate appearing on behalf of the respondent, on the other hand, has opposed all the aforesaid contentions advanced by Mr. Das.

16. As regards the first point regarding capability of the Arbitrator appointed, Mrs. Mukherjee contends that in this case the Arbitrator was appointed by the Hon'ble Chief Justice in exercise of power u/s 11(6) of the Act and such order was not challenged by the appellant and, thus, the appellant is precluded from disputing the correctness of the order passed by the Hon'ble Chief Justice in a proceeding u/s 34 of the Act.

17. Mrs. Mukherjee next contends that even assuming for the sake of argument but not admitting, if the learned Arbitrator was not a Gazetted Railway Officer, the appellant having participated in the proceeding without any complaint till 38th sitting and have raised objection before 39th sitting of the arbitration, it is precluded from raising such dispute. Mrs. Mukherjee further contends that the question raised above by the appellant does not come within the purview of Section 16(2) of the Act as it relates to qualification of the Arbitrator. By referring to the provision contained in Section 12(3)(b) of the Act, Mrs. Mukherjee contends that the qualification could be challenged under the aforesaid provision within a period of 15 days and the appellant having failed to avail of such opportunity cannot raise such dispute at a latter stage. Mrs. Mukherjee further contends that the appellant had waived its right to challenge the qualification of the Arbitrator.

18. Mrs. Mukherjee next refers to addendum/corrigendum to General Conditions of Contract (GCC), which is ineffective as GCC, as according to her, in the year 1990, when the contract was concluded such clause was not there.

19. As regards the second point advanced by Mr. Das, Mrs. Mukherjee contends that a no-claim certificate could not act as an estoppel or waiver as it was given under duress, coercion and under compelling circumstances.

20. Regarding the allegation of Mr. Das for grant of various amounts mentioned above, Mrs. Mukherjee contends that her client in Annexure "B" and "BB" of the SOF had annexed all those extra works undertaken upon instruction and in detail, those were given in Annexure "B" at pages 76-77 of the Paper Book.

21. Regarding the last point as to whether the interest could be granted, Mrs. Mukherjee relies upon the decision of the Supreme Court in the case of The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, Mrs. Mukherjee further relies upon the Supreme Court decisions in the case of

Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, and the case of State of U.P. Vs. Harish Chandra and Others, . Mrs. Mukherjee, therefore, prays for dismissal of the appeal.

22. Therefore, the first question that arises for determination in this appeal is whether the appointment of a retired District Judge instead of a Gazetted Railway Officer made the authority of the Arbitrator without jurisdiction and was hit by the principle of quorum non juris.

23. After hearing the learned Counsel for the parties and after going through the Clause 63(3) (a)(iii), we find that a Gazetted Railway Officer appointed by the General Manager should act by arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all. In that sense, the appointment of a retired judicial officer is no doubt not in conformity with the said provision.

24. In this case, the Arbitrator was appointed by virtue of a judicial order passed by the Hon"ble Chief Justice in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 and the Union of India has accepted that order by not preferring any appeal against such order. The plea that a retired District Judge could not be lawfully appointed in terms of the clause of arbitration was very much available to the Union of India at the stage of appointment u/s 11 of the Act. It is now settled law that even if any wrong order is passed by virtue of a judicial order and the parties aggrieved does not challenge such order before the higher forum, such party is precluded from disputing the correctness of such order at the subsequent stages of the proceedings. Moreover, it appears from record that up to 38th sitting of the arbitrator, the Union of India even did not raise before the Arbitrator such question and only on 39th sitting raised such point.

25. In view of such fact, we are of the opinion that the question of legality for appointment of the Arbitrator by virtue of a judicial order on the ground that the Arbitrator appointed was not qualified to be appointed in terms of the agreement is no longer open to the parties in a proceeding u/s 34 of the Act.

26. We, therefore, answer the first question against the appellant.

27. The next question is whether the respondent was entitled to claim arbitration after putting signature on a receipt admitting full and final payment. The law on the aforesaid question is now well settled. When the parties have concluded the contract or transaction by recording satisfaction by the mutual right and obligation or by receiving the final payment without objection the matter is not arbitrable. However, the law is equally settled that when there is allegation of fraud or coercion or undue influence practised by the other parties in obtaining the discharge of contract by an agreement or voucher, it can be rendered void and cannot be acted upon if it is ultimately established that such document is really vitiated.

28. In the case before us, the claimant had received final payment on 8th January, 1996 upon discharging "no claim" certificate. The arbitration clause was invoked almost one year thereafter on 2nd January, 1997. It appears from the order appointing the arbitrator in terms of the order of the Hon''ble Chief Justice that no such point was taken and the Hon''ble Chief Justice did not keep this question open for decision for arbitrator. In such circumstances, such plea was not practically available to the Union of India even before the Arbitrator.

29. At this stage, we may profitably refer to the following observations of the Apex Court in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., that such type of plea is required to be raised at the time of hearing of an application u/s 11 of the Act:

23. It is clear from the scheme of the Act as explained by this Court in SBP and Co. (2005) 8 SCC 61813, that in regard to issues falling under the second category, if raised in any application u/s 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

24. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings u/s 11 of the Act or by the Arbitral Tribunal as directed by the order u/s 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.

(Emphasis supplied by us)

30. In the case before us, it appears from the order of the Hon''ble Chief Justice appointing the Arbitrator that no such point was taken before His Lordship by the Union of India resisting the arbitrability of dispute and as such, His Lordship neither decided the said point or did His Lordship delegate the issue to the Arbitrator for deciding on evidence. Thus, such point is not even available before the Arbitrator or in proceedings u/s 34 of the Act being barred by the principle of constructive res judicata. We, therefore, find that the abovementioned plea taken by the appellant is not available before us in proceedings u/s 34 of the Act.

31. Similarly, as regards the other contentions that finding of the learned Arbitrator on the question of some of the items, those findings being based on appreciation of evidence, in our view, the learned Single Judge rightly overruled those objections and there is no scope of interference with such findings of fact based on appreciation of evidence in a proceeding u/s 34 of the Act.

32. The last question is whether the Arbitrator was entitled to grant interest pendente lite at the rate of 12% per annum in view of Clause 16(2) of the conditions, which is quoted below-

2. Interest on amounts. -No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract.

(Emphasis supplied by us)

33. In the case of Secretary, Irrigation Department, Government of Orissa v. G.C. Roy reported in AIR 1992 SC 732 a Constitutional Bench of the Supreme Court had the occasion to consider the circumstances where an Arbitrator can grant pendente lite interest. In that context, the Supreme Court made it clear that where the terms of agreement prohibits grant of interest, the Arbitrator has no authority to grant any pendente lite interest.

34. According to the provision of the Interest Act, 1978, the word "Court" as defined in Section 2 of the Act includes Arbitrator, which was not there in the old Interest Act. Section 3 of the said Act provides that the power of the Court, which includes an Arbitrator, to grant interest as provided therein will have no application if the agreement between the parties out of which the debt arises prohibits grant of interest. The provision contained in Section 3 of the Act is quoted below:

Power of court to allow interest.-(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in Sub-section (1),-

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,

then, the power conferred by that Sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,-

(a) shall apply in relation to-

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall effect-

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of Rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the court to award interest upon interest.

(Emphasis supplied by us)

35. In the case before us, Cause 16(2) of the agreement specifically prohibits grant of interest on the amounts payable to the contractor under the contract and in such a situation, in our view, there was no scope of grant of any pendente lite interest.

36. At this stage, it will be apposite to refer to an unreported Division Bench decision of this Court in the case of Union of India v. Singh Verma and Ors. in APO No. 473 of 1998 disposed of on March 25, 1999 where the said Division Bench while considering exactly the same clause prohibiting grant of interest on the amounts payable to the contractor held that the Arbitrator was not justified in granting pendente lite interest. The following observations of the Division Bench in the case of Singh Verma are relevant and quoted below:

The other claim which was allowed is claim No. 15. No reasons whatsoever have

been given by the arbitrators for awarding interest on the awarded amount. Apart from this, the arbitrators also violated the clause in the contract by awarding interest. In Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, a Five Judge Bench held that the arbitrator had power to award interest pendente lite only

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator

This view was affirmed in The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, although in that case the award of interest was upheld because the clause read that "no claim for interest will be entertained by the Commissioner". According to the Supreme Court:

Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite.

In this case the clause in the agreement between the parties specifically forbade the grant of interest on security deposit and earnest money. Clause 8.3 of the Instruction to tenderers which formed part of contract, said:

No interest will be payable upon earnest money or security deposit or any other amount payable to the contractors under the contract.

The Learned Judge has not indicated as what statute provided for payment of interest which overrode the clause in the agreement.

37. We, therefore, find that the view we propose to take is in conformity with the one taken by a Division Bench of this Court while dealing with exactly the same clause in the agreement prohibiting payment of interest on the amount payable to the contractor under the agreement.

38. Mrs. Mukherjee, the learned Counsel appearing on behalf of the respondent, on the other hand, relied upon a Division Bench decision of Andhra Pradesh High Court in the case of N.G. Gumani v. the Union of India reported in 1996 (supp) Arb. L.R 566 where the said Division Bench while interpreting a similar clause as involved herein held that the interest pendente lite was permissible. In arriving at such conclusion, the said Division Bench relied upon the above quoted observations of the Apex Court in the case of Board of Trustee for the Port Trust of Calcutta v. Engineers-de-Space-Age reported in AIR 1996 SC 2853 which has been distinguished by the Division Bench of our Court in the case of Singh Verma and Ors. (supra) where the relevant clause provided that "no claim for interest

will be entertained by the Commissioner".

39. In the case before us, the clause prohibits grant of interest on the amounts payable to the contractor under the contract and not by any particular authority as was the agreement in the case of Board of Trustees (*supra*), and therefore, the said decision does not apply to the facts of the case in hand. With great respect to the learned Judges of the Andhra Pradesh High Court, we are unable to subscribe to the view taken by Their Lordships.

40. Mrs. Mukherjee also relied upon a decision of a Division Bench of this Court in the case of *Union of India v. Pam Development Pvt. Ltd.* reported in AIR 2005 Cal 332 in support of her contention that the said Division Bench having relied upon the decision of the Andhra Pradesh High Court in the case of *N.G. Gumani* (*supra*), we should also follow the same.

41. In the said case, the said Division Bench in arriving at the conclusion that the 1996 Act gives special power as provided in Section 31(7) of the Act to the Arbitrator to pass interest in a case like the present one where there was prohibition of grant of interest on the claim of a contractor did not take notice of the earlier Division Bench decision of this Court in the case of *Union of India v. Singh Verma* (*supra*).

42. The provision of Section 31(7) of the Act is quoted below:

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(Emphasis supplied by us).

43. The phrase, "unless otherwise agreed by the parties", appearing at the beginning of the said Sub-section, specifically bars grant of pendent lite interest in the award if parties agreed while entering into the agreement that no interest will be payable upon earnest money or security deposit or any other amount payable to the contractors under the contract.

44. The said Division Bench, however, held that in order to denude an Arbitrator of his power to award interest for the post-reference period, such prohibition must be incorporated in the "Arbitration contract" itself which is often referred to as arbitration clause in legal parlance. The said Division Bench while laying down such a law relied upon the decision of a Division Bench of this Court in the case of *Board of Trustees for the Port of Calcutta v. Mahalakshmi Constructions* 2002

(1) Arbi LR 656. The following observations of the Division Bench in the case of Pam Development (supra), are quoted below:

In our opinion, in order to decide as to whether an Arbitrator has been divested of his jurisdiction to award interest for the post-reference period by an agreement, we would have to analyse the manner in which the terms have been agreed upon. In the case of The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, interest prohibition clause ran as follows (para 2 of AIR):

No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.

This clause was held to be binding on the Commissioners, but not on the Arbitrator. In the case of N.G. Gunani Vs. The Union of India (UOI) and Another, , a similar clause was construed by the Hon"ble Court of Andhra Pradesh, and such a clause was held to be a bar on the departmental officers to allow interest, but such a provision, it was held, did not restrict the power of the Arbitrator to award interest.

On this point, we are of the view that in the event the parties to an agreement intend to denude the Arbitrator of his power to award interest for the post-reference period, such prohibition must be incorporated in the "Arbitration contract" itself which is often referred to as arbitration clause in legal parlance. The decision of an Hon"ble Division Bench of this Court in the case of Board of Trustees for the Port of Calcutta v. Mahalakshmi Constructions 2002 (1) Arbi LR 656 (supra), while considering legality of an award to which ACA 1996 was applicable held that unless the arbitration-agreement itself excepted payments under certain heads, the Arbitrator could not be fettered by an agreement between the parties.

We are in agreement with the ratio of the judgments of this Court in the case of Board of Trustees for the Port of Calcutta v. Mahalakshmi Constructions (supra) and that of the Hon"ble High Court of Andhra Pradesh in the case of N.G. Gunani Vs. The Union of India (UOI) and Another, . In the present case, the interest prohibition clause admittedly was incorporated in the GCC, but not in the Arbitration Clause forming the Arbitration Contract. In our opinion, a plain reading of the contract does not reflect intention of the parties to denude the power of the Arbitrator to award interest. Clause 16(2) of the GCC has not been included in the list of excepted matters in Clause 63 thereof. It has also not been argued before us the issue of award of interest came within excepted matters. Accordingly, we are of the view that the interest exclusion clause should be held in the present case to be an embargo on the power of the appellant or its officers to award interest, but the Arbitrator's power to award interest has not been curbed in the agreement.

We accordingly hold that no illegality was committed by the Arbitrator in awarding interest in the present case.

45. In the case of Mahalakshmi Construction (supra), relied upon by the Division Bench in the case of Pam Development (supra), the contract contained a clause prohibiting payment of escalation of price hike excepting only for the price-rise of steel. According to the Port Trust Authority, the Arbitrator being a creature of the contract and the contract having prohibited payment on account of escalation, the Arbitrator acted without jurisdiction in passing the award.

46. In the aforesaid background, the Division Bench in Mahalakshmi Construction (supra), made the following observations:

If a commercial contract with prohibitory clauses like escalation prohibition were to become subject matter of a suit, before an ordinary Court of law, nobody would dream of arguing that a decree passed allowing escalation is a decree without jurisdiction. Such a decree might be wrong and might be upset in appeal. But jurisdiction of Court has, and such possession of jurisdiction also entails the power of the Court to go wrong. The Court will interpret the contract considering all the clauses. The Court will consider the entirety of the surrounding circumstances. The Court will consider the complicated law of contract. The Court will consider the evidence given by the different parties and on this basis if the Court thinks that it is just and legal to grant escalation it will grant escalation even if there should be one clause in a big contract appearing to prohibit such grant.

The jurisdiction of the Court is not derived from the commercial contract but is derived from the general law of the land. The jurisdiction of the Arbitrator is not derived from the commercial contract but it is derived from the general law of the land and the separate contract which is the forum choosing contract agreed upon by and between the parties. Exactly like a Court of law the Arbitrator can also award escalation amounts, even if there should be one clause in the contract prohibiting such grant.

47. Ultimately, the said Division Bench held as follows:

It might be that the commercial contract has to be looked into to demonstrate that the proposition of law contained in the award is wrong. It can be looked into only when the commercial contract or the required material part of it forms a part of the face of the award, otherwise, even if the error of law might be demonstrable with reference to it, the award is not vitiated.

....

Thus, one cannot even look at the commercial contractual clause prohibiting grant of escalation, and thus come to the conclusion that the Arbitrator has erred in law, unless that prohibition clause is apparent on the face of the award itself.

48. We, however, find that the aforesaid view of the Division Bench in the case of

Mahalakshmi Construction (supra), is totally contrary to the decisions of Apex Court in the case of Associated Engineering Co. v. Government of Andhra Pradesh and Anr. reported in AIR 1992 SC 232 where the Apex Court made the following observations by distinguishing a case of the Arbitrator travelling beyond the jurisdiction from the case of an ordinary award when such award was challenged on the ground of error apparent on the face of record:

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

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

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

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

If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdiction error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. [See Alop Parshad and Sons Ltd. Vs. Union of India (UOI), Alop Parshad and Sons Ltd. Vs. Union of India (UOI),

Christopher Brown Ltd. v. Genossenschaft Oesterreichischer (1954) 1 QB 8; Rex v. Fulham (1951) 2 KB 1; Falkingham v. Victorian Railways Commission (1900) AC 452; Rex v. All Saints, Southampton (1828) 7 B&C 785; Laing, Sons and Co. Ltd. v. Eastcheap Dried Fruit Co. (1961) 1 Lloyd's Rep 142; Dalmia Dairy Industries Ltd. v. National Bank of Pakistan (1978) 2 Lloyd's Rep 223 (CA); Heyman v. Darwins Ltd. (1942) AC 356 ; The Union of India Vs. Kishorilal Gupta and Bros., ; Renusagar Power Co. Ltd. Vs. General Electric Company and Another, ; Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, Gobardhan Das Vs. Lachhmi Ram and Others, ; Seth Thawardas Pherumal Vs. The Union of India (UOI), ; AIR 1934 185 (Privy Council) F.R. Absalom Ltd. v. Great Western (London) Garden Village. Society Limited (1933) AC 592 (HL) and M. Golodetz v. Schrier (1947) 80 Lloyd's Rep 647.

In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. See the principles stated in Anisminic Ltd.v.Foreign Compensation Commission (1969) 2 AC 147; Pearlman v. Keepers and Governors of Harrow School (1979) 1 QB 56; Lee v. Showmen's Guild of Great Britain (1952) 2 QB 329 ; Shri M.L. Sethi Vs. Shri R.P. Kapur, ; The Managing Director, J. and K. Handicrafts, Jammu Vs. M/s. Good Luck Carpets, State of Andhra Pradesh and another, etc. Vs. R.V. Rayanim etc., . See also Mustill and Boyd's Commercial Arbitration, Second Edition; Halsbury's Laws of England, Fourth Edition, Vol. 2].

49. It appears that the Division Bench took note of the aforesaid decision and other decisions of the Supreme Court taking similar view but bypassed those decisions by holding that there are also contrary views of the Apex Court on the aforesaid question by relying upon the following two decisions:

- a) N. Challeppan v. Secretary, Kerala State Electricity Board reported in AIR 1975 SC 230;
- b) Sudersan Trading v. Government of Kerala reported in AIR 1989 SC 890.

50. After recording those two decisions, the Division Bench held that in case of conflict of decisions of the Apex Court, it was free to choose any of those decisions and relied upon the decision of the Privy Council in the case of Champsay Bhara reported in AIR 1923 PC 66. The Division Bench totally overlooked that the cases of N. Challappan and of M/s. Sudarshan Trading (supra), related to a simple case of award where the allegation was that the same was vitiated with the error apparent on the face of record but those did not involve the question of excess jurisdiction, as is the case here.

51. With great respect to the Hon"ble Judges of the Division Bench in the case of Union of India v. Pam Development (supra), we are unable to subscribe to the view taken by Their Lordships that even if it is specifically provided in the agreement between the parties that no interest would be payable on the amount payable to the contractor under the agreement, the Arbitrator would be vested with the authority to grant pendente lite interest in his award simply because the clause prohibiting payment of interest was not included in the list of exceptions attached to the Arbitration Clause. It appears that in the Arbitration Clause of the agreement, some of the clauses of the agreements have been kept out of the purview of arbitration, meaning thereby, that the Arbitrator would have no authority to take into consideration those clauses. The Clause 16(2) prohibiting payment of interest has not been brought within such list and it necessarily follows that the said Clause has been kept alive for the arbitration and therefore, the Arbitrator while adjudicating disputes was bound to take into consideration the said clause.

52. At this stage, we may profitably refer to the following observations of the Supreme Court in the case of W.B. State Warehousing Corporation and Anr. v. Sushil Kumar Kayan and Ors. reported in AIR 2002 SC 2185 where the Apex Court reiterated the guidelines to decide whether the Arbitrator acted without jurisdiction:

In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether claimant can raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit to the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction.

53. We, therefore, find that the aforesaid Division Bench of this Court as also the Division Bench of the Andhra Pradesh High Court did not properly construe the implication of non-mentioning of the Clause like 16(2) in the list of exceptions attached to the Arbitration Clause. Similarly, the Division Bench of this Court in the case of Mahalakshmi Construction (supra), in our view, ought to have followed the well-accepted view taken by the Supreme Court that when an award has been challenged as in excess of jurisdiction, the Court is entitled to take into consideration the documents not mentioned in the award as evidence to find out the terms of the contract between the parties and is not required to restrict its scrutiny to the award itself.

54. The view we have taken in this decision finds support from a very recent decision of the Supreme Court in the case of State of Haryana and Others Vs. S.L. Arora and Company, where the Supreme Court made the following observation:

24.2. The authority of the Arbitral Tribunals to award interest u/s 31(7)(a) is subject to the contract between the parties and the contract will prevail over the

provisions of Section 31(7)(a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the Arbitral Tribunal will have to grant or refuse interest, strictly in accordance with the contract. The Arbitral Tribunals cannot ignore the contract between the parties, while dealing with or awarding pre-award interest....

55. Now, the next question is what should be our duty in the facts of the present case where (1) a co-ordinate Bench of equal strength has taken a view contrary to the one taken by the Supreme Court after taking note of those decisions of the Supreme Court and (2) where a Division Bench in ignorance of the earlier decision of a Bench of equal strength taking a contrary view has relied upon the decision of the Andhra Pradesh High Court and another decision of a Division Bench of this Court which is in conflict with the decisions of the Supreme Court .

56. A contrary view taken in ignorance of the decision of the Bench of equal strength makes the Judgment per incuriam but a view taken in spite of noticing a binding decision and holding the same as not binding cannot be said to be Judgment per incuriam and therefore, if we disagree with such decisions, it is our duty to refer the matter to the Hon''ble Chief Justice to constitute a Larger Bench for resolving the dispute.

57. Notwithstanding the latest view of the Supreme Court in the case of State of Haryana and Ors. v. S.L. Arora and Co. (supra) we propose to refer the matter because in the said decision of the two-Judges-Bench of the Supreme Court, various earlier decisions of the Supreme Court referred to in the Division Bench decision in the case of Union of India v. Pam Development (supra) had not been taken note of.

58. We, therefore, refer the following points to the Hon''ble Chief Justice for decision by constituting a Larger Bench:

a) If the terms of contract prohibits payment of interest on the amount payable to the contractor under the agreement, whether an Arbitrator can grant pendente lite interest on the amount payable?

b) Whether Clause 16(2) of the agreement between the parties can be construed to be a prohibition applicable only to the department but not the Arbitrator simply because the said Clause is not kept within the exceptions mentioned in Arbitration Clause?

c) Whether in order to challenge an award as in excess of jurisdiction, it is necessary that such defect must appear on the face of award and that no evidence, not even the term of the contract which excludes the jurisdiction of the Arbitrator, is admissible to demonstrate such fact?

59. We make it clear that apart from the question of grant of pendente lite

interest, which according to us is not permissible within the terms of the agreement, we have affirmed the other findings of the learned Single Judge appealed before us.

60. Our decision on the question of interest pendente lite is, however, subject to the decision of the Larger Bench. In the facts and circumstances, there will be, however, no order as to costs.

Prabhat Kumar Dey, J.

61. I agree.