
(2007) 10 CAL CK 0022
In the Calcutta High Court
Case No : A.P.O. No. 397 of 2007

Union of India (UOI)

APPELLANT

Vs

Ajabul Biswas

RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Arbitration Act, 1940 — Section 29, 33
Arbitration and Conciliation Act, 1996 — Section 13(5), 16(6), 31, 34, 34(2)
Contract Act, 1872 — Section 73, 74

Citation : (2008) 2 ARBLR 209 : (2007) 3 CALLT 634 : (2008) 1 CHN 16

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : N.C. Roy Chowdhury and I.P. Mukherjee, for the Appellant; Shibdas Banerjee Ambar Majumdar and K.R. Das, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Facts:

1. The appellant entrusted the respondent to construct guardwall to protect erosion of the river Ganga near Farakka. The job was to be completed within 90 days commencing from May 1, 1982. Site was, however, not handed over to the respondent admittedly on May 1, 1982 when they were supposed to start the work. According to the respondent there had been delay of 40 days in handing over the site. The appellant, however, contended that it was handed over on May 6, 1982 i.e. after 5 days. The Arbitrator found that such delay was for 21 days. The Arbitrator observed that nobody could produce any documentary evidence wherefrom the exact date of handing over could be found.

The work was completed after about six months. Running bills were paid from time to time. The final bill was, however, kept pending for a long time. Apart from the cost of work the respondent raised various claims on account of idle labour charges, extra cost borne by them, cost of materials not allowed by the appellant as well as for refund of earnest money. The appellant made a counter

claim on account of non employment of a graduate engineer as per Clause 36 of the agreement, non-return of surplus materials as well as compound interest. Both the claims and cross claims were referred to arbitration of a retired engineer of the appellant. The Arbitrator examined each and every claim and ultimately awarded a sum of Rs. 22.46 lacs in favour of the respondent and Rs. 0.06 lacs in favour of the appellant. Appellant moved the learned single Judge, inter alia, praying for setting aside of the award on various grounds mentioned in the said application. The learned single Judge by His Lordship's Judgment and order impugned in this appeal rejected most of the contentions of the appellant, however, reduced the rate of interest on awarded sum from 18% to 10%.

Analysis of the Judgment impugned:

2. Analysis of the Judgment of the learned single Judge reveals as follows:

(i) Since the final bill remained pending till the disputes were referred to arbitration the claim of the respondent was not barred by limitation as erroneously contended by the appellant.

(ii) The challenge to the second claim of the respondent was of substance as the Arbitrator did not apply the provision of Section 73 of the Contract Act applicable therefor. The Arbitrator awarded a sum of Rs. 3.00 lacs on that count. It was set aside by the learned single Judge relying on the principles laid down by the Apex Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

(iii) Challenge to the awarding of interest was not tenable in view of a decision of the learned single Judge reported in 2004(2), Arbitration Law Reporter, Page 480. Learned Judge observed that the said single Bench decision considered all the relevant Apex Court decisions on the issue. His Lordship relying on the said decision rejected such contention.

(iv) His Lordship, however, reduced the rate of further interest from 18% to 10%.

(v) The application was partly allowed. The award was modified by setting aside the award in respect of the second claim and reducing the rate of interest for post award stage from 18% to 10%.

This Appeal:

Being aggrieved by and dissatisfied with the Judgment and award of the learned single Judge, appellant preferred the instant appeal. The respondent, however, accepted His Lordship's decision and did not file any cross appeal or cross objection on that score.

Contention of the appellant:

3. Mr. N.C. Roy Chowdhury, learned senior counsel being ably assisted by Mr. I.P. Mukherjee, learned Counsel appearing for the appellant contended as follows:

(i) The entire claim of the respondent was hopelessly barred by the laws of limitation. The arbitrator erroneously rejected such contention. Learned single

Judge did not feel it inclined to interfere on that score.

(ii) A substantial part of the claim on account of idle labour charges was not contemporaneously raised. The learned Arbitrator even then considered the same and allowed substantially. Learned single Judge did not consider this aspect.

(iii) The first claim raised by the respondent and allowed by the Arbitrator was clearly barred under the excepted provisions of the contract which was overlooked by the Arbitrator and not considered by the learned single Judge.

(iv) The arbitration clause specifically barred the Arbitration from awarding any interest. Such negative covenant was not considered by the Arbitrator. Learned single Judge relying on a single Bench decision which was not a good law, allowed such claim.

4. Elaborating his submissions Mr. Roy Chowdhury drew our attention to the exception clause being Clause 25 set out in page 3 to 5 of the application wherein we find that the contractor's claim, if any, must not bear any interest and Arbitrator would not award any interest pendente lite from the date of the award or any other type of interest on the amount, if any awarded. Mr. Roy Chowdhury also drew our attention to page 99 of the Paper Book being Clause 5.33 wherein the Engineer-in-Charge was debarred from giving any permission to make the contractor entitled for claim for interest on arrear payment. Relying on these two clauses Mr. Roy Chowdhury contended that the Arbitrator was not at all empowered to award any interest. Mr. Roy Chowdhury also drew our attention to Section 31 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act of 1996") which empowers the Arbitrator to award interest @ 18% per annum subject to any contract to the contrary. Mr. Roy Chowdhury contended that because of such explicit negative covenant the Arbitrator was not entitled to award interest u/s 31 of the said Act of 1996.

5. On the issue of limitation Mr. Roy Chowdhury contended that the entire payment being the contract value barring an insignificant part was paid long before the matter was referred to arbitration. In arbitration, period of limitation stopped as and when matter was referred to arbitration. In the instant case the work was completed in 1982. The payments were made contemporaneously. The respondent, however, made their claim in 1991 as appears from page 141. Hence, the claim was hopelessly barred by laws of limitation.

6. On the first claim Mr. Roy Chowdhury contended that the reason for allowing such claim as assigned by the Arbitrator in the award was ex-facie perverse in view of Clause 40.10 where 15% deduction was stipulated which was disallowed by the Arbitrator.

7. With regard to the 10th claim Mr. Roy Chowdhury contended that in the letter of demand appearing at page 141 the claimant did not make any such claim on idle labour charges in 1991. Hence, his claim for such idle labour charge was nothing but an after thought and was subsequently incorporated to inflate

their claim. In this regard Mr. Roy Chowdhury further contended that under Clause 19D of the agreement the claimant was obliged to inform the appellant from time to time with regard to engagement of labour. The respondent never complied with such condition. Moreover from a letter appearing at page 177 it would appear that on May 10, 1982 the respondent categorically wrote to the appellant that as on that date no question arose with regard to the employment of labour as the site was not handed over to the respondent for commencement of work. Since the respondent contemporaneously contended that no labour was engaged at least on May 10, 1982 the 10th claim on idle labour charges for 40 days (Arbitrator allowed for 21 days) was not at all tenable.

8. In support of his contention Mr. Roy Chowdhury relied upon the following decisions:

- (i) Union of India (UOI) Vs. A.L. Rallia Ram, .
- (ii) Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy,
- (iii) Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., .
- (iv) Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

Contention of the respondent:

9. Mr. Shibdas Banerjee, learned senior counsel appearing for the respondent contended as follows:

- (i) Since the final bill was under process as appears from page 336 the claim of the respondent was not barred by limitation.
- (ii) The clause relied upon by the appellant appearing at page 3-5 was contrary to the identical clause appearing at page 234 wherein provision debarring the arbitrator to award interest was conspicuously absent. Hence, the plea of bar in awarding interest was not available to the appellant.
- (iii) The restrictive clause appearing at page 99 was a fetter on the engineer of the appellant and not on the Arbitrator, hence such clause could not be applied debarring the Arbitrator to award interest.
- (iv) On the first claim the Arbitrator assigned his reason which was not available for the Court to be examined afresh sitting on appeal over it unless it was called to be perverse.
- (v) On the 10th claim it was contended that admittedly there had been delay in handing over the site. The work was to be completed within a very short span, being 90 days. Hence, the respondent mobilised work force since after issuance of the work order. Once the handing over the site was delayed the respondent was entitled to claim damage on idle labour charges which was allowed by the Arbitrator and not interfered by the learned single Judge.

(vi) Assuming the 10th claim was raised belatedly there was no impediment on the part of the appellant to raise such plea contemporaneously. Having not done so either before the Arbitrator or before the learned single Judge the appellant was precluded to raise this issue for the first time in appeal.

(vii) On the exception clause and the issue of authority of the Arbitrator to award interest no contemporaneous application was made before the Arbitrator u/s 16. Hence, jurisdiction of the Arbitrator could not be challenged in an application for setting aside as it stood waived in view of provision of Section 4.

10. In support of his contentions Mr. Banerjee relied on the following decisions:

- (i) Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority,
- (ii) The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age,
- (iii) State of U.P. Vs. Harish Chandra and Others, .

My view:

Limitation.

11. The plea of limitation is not tenable as on the own showing of the appellant the final bill was not processed as appears from page 146 of the Paper Book. Once the final bill was not made final and payment was not made the period of limitation could not be counted. In the case of Major (Retd) Inder Singh Rekhi (supra) the Apex Court observed, it is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by the claimant is the accrual of the cause of action. Hence, the plea of limitation is not tenable and as such is rejected.

First Claim?

12. This claim was sought to be resisted by the appellant on the ground that it was hit by the exception clause which debarred the claimant to make any such claim. The first claim was made barring payment of 15% of the cost of the bolder which was deducted by the appellant relying on Clause 4.10. The learned Arbitrator assigned reasons while allowing this claim. The learned Arbitrator having the technical expertise considered such claim and ultimately held that Clause 4.10 was not applicable as the method of measurement required to be adopted under Clause 4.10 was not followed. That finding was not available to the learned Judge for judicial review. The learned Judge did not entertain such objection of the appellant, in our view, rightly. Hence the plea of the appellant on that score is rejected.

Second Claim:

13. Second claim was made for damage in view of delay in handling over of the site. The claimant made a claim of Rs. 8,00,000,00. The Arbitrator awarded Rs. 3,00,000.00. The learned single Judge found substance in the objection of the

appellant on that score and as such relying on the decision of the Apex Court in ONGC (supra) set aside this part of the claim. No cross appeal or cross objection was filed by the respondent on that score. Hence, we do not deal with the same.

Interest.

14. The Arbitrator awarded 18% interest on the awarded sum. The learned single Judge reduced the rate of interest from 18% to 10%. The respondent/claimant also did not make any grievance on that score. The appellant, however, questioned the authority of the Arbitrator to award interest at all relying on Clause 25 of the agreement. Clause 25 was set out in paragraph 3 of the said application. The part of the said Clause as relied upon by the appellant is quoted below:

It is also a term of the contract that if the Contractor(S) does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Government that the bill is ready for payment the claim of the contractor(s) will be deemed to have been waived and absolutely barred and Government shall be discharged and released of all liabilities under the contract in respect of these claims. The Arbitrator(s) may, from time to time with consents of the parties, enlarge the time for taking and publishing the award and it is also a term of the contract that the claim if any of the contractor shall not bear any interest and the Arbitrator making the award shall not award in favour of the contractor any interest pendente lite from the date of award or any other type or nature of interest on the amount, if any awarded. The decision of the Superintending Engineer regarding quantum of reduction as well as sub-standard work which may be decided to be accepted will be final and would not be open to Arbitration.

15. This clause was supposedly quoted from the conditions of contract entered into by and between the parties. On a comparison of the xerox copy of the contract appearing at page 221-297 (Clause 25 is at page 234) it appears that the red coloured and underlined portion of the extract quoted (supra) was conspicuously absent in the xerox copy annexed by the appellant. The original agreement could not be produced before the Arbitrator or before us. A certified copy was produced containing the Clause 25 which included the red inked portion. However, which version is correct, is not known to us as the learned Counsel appearing for the parties could not throw much light on the same. Hence, in our view, benefit should go in favour of the respondent/ claimant. We thus proceed with this clause without the red inked portion. Reliance was thereafter placed at page 99 where we find at Clause 5.33 a restriction was imposed on the Engineer-in-Charge not to permit payment of interest on delayed outstanding. This, in our view, was a fetter on the engineer and not on the Arbitrator. Reliance was placed on the Apex Court decision which in our view rather supports the claim of the respondent/claimant. In this regard the Apex Court decision in the case of Budharaj (supra) may be relied. In paragraphs 47 and 48 of the decision the Apex Court considered the situation that in a claim if a

party files a civil Court he would be entitled to interest on delayed payment whereas the Arbitrator while deciding the identical claim would not be in a position to award interest. Such contention was totally illogical. A party to avoid cumbersome procedure in law Courts as well as to avoid delay and expenses agrees to have his disputes amicably settled in a domestic forum before the Arbitrator. It should not debar him to claim for interest-on his outstanding dues which he could have claimed before a Civil Court. The Apex Court observed as long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the Arbitrator to consider and award interest in respect of all period subject only is Section 29 of the Arbitration Act, 1940 and that too the powers of the Court thereunder has to be upheld. In the instant case there is neither any express fetter on the Arbitrator to award interest (disregarding the red inked portion of the extract quoted (supra)) nor was there any impediment on the part of the claimant to claim such interest under the contract. Hence, the Arbitrator, in our view, was entitled to award interest. Under the new Act of 1996 Section 31 specifically provides for payment of interest @18% per annum unless the award otherwise directs and unless otherwise agreed by the parties. In the instant case there was no such agreement, at least not proved before the Arbitrator or shown to us which debarred the claimant to claim any interest or debarred the Arbitrator to award the same. The learned single Judge observed, "if the Arbitrator ultimately found that a sum was due to one party and had been wrongfully withheld, the jurisdiction to award interest remained, the terms of the agreement to the contrary notwithstanding". The learned Judge, however, reduced the rate of interest as the rate fixed by the Arbitrator was found much higher than the prevalent contemporaneous rate. We do not find any scope of interference on this score. The plea taken by the appellant in this regard is thus rejected.

10th Claim:

16. The above leaves us with the sole question whether the 10th claim was properly considered by the Arbitrator while awarding the same in favour of the respondent/claimant. In the 10th claim, the claimant claimed idle labour charges for 40 days. The Arbitrator found that such claim was not fully justified as he was of the view that the claimant was at best entitled to idle labour charges for 21 days and not 40 days. Hence, he partly allowed the said claim for a sum of Rs. 9.76 lacs.

17. Relevant extract from the award is set out below:

Item No. 10 Idle Labour claim or 40 days lost between 16.04.82 to 30.4.82 and 1.5.82 to 29.5.82 (except 2.5.82, 9.5.82, 16.5.82 and 23.5.82) due to delay in handing over of work sites (claim amount Rs. 18.36 lacs)

The claimant has presented before the Court two No. Registers of Employees

engaged on daily wages basis for the period of work at his work site. The Respondent has contested the authenticity of the Contractor Registers as they did not bear signature of any departmental supervising staff in proof of having been checked by the Deptt and therefore, he stated that he was not in a position to confirm whether the register bearing daily attendance of the stated employees were related to the worksite of SPUR construction or not.

The claimant has also presented before the Court vouchers of payment made to individual labours on monthly basis (total 775 nos.). The Respondent stated in this regard that since he has doubted the authenticity of the record of attendance of labour itself, he is not able to satisfy himself about the authenticity of the vouchers of payment presented by the claimant also.

In face of the doubts raised by the Respondent about the authenticity of the daily wage registers and paid up vouchers as of the claimant, I consider it fit to examine the claims in context of circumstantial evidences before the Court. The protracted correspondences between the claimant and the F.B.P. reveal that, work sites were made available for work not in one "go", but in 3 instalments reason being that there were standing crops in the acquired land of work site. While discussing the claim item Nos. 2, 3, 4 and 5 above it became clear that the worksite was not handed over to the claimant on the date of commencement of work on 01.05.1982. As such the contract remained frustrated due to non performance of obligation by the other party (Respondent) between 01.05.1982 to 21.05.1982 until the worksite was made available finally on 22.05.1982 to the first party (claimant).

There are numerous Judgments of Supreme Court which has held that failure to give possession of the site to the contractor is a breach of contract on the part of the employer. Also any breach of a contract by one party to the other gives the other party an immediate cause of action and a right to damages as compensation for loss flowing from the breach.

The following extracts from "Law Relating to Building and Engineering contracts in India, 3rd Edition by G.T. Gajria is also relevant to the case-

Since a sufficient degree of possession of the site is clearly a necessary pre-condition of the contractors performance of the obligation, there must be an implied terms that the site will be handed over to the contractor within a reasonable time of signing of the contract and in most cases a sufficient degree of uninterrupted and exclusive possession to permit the contractor to carry out his work unimpeded and in the manner of his choice. This must particularly be so when a date for completion is specified in the contract documents.

Hence in my view the claimant is entitled to payment of idle charges for the period from 01.05.1982 to 21.05.1982 during which the contract remained frustrated due to delay in hand over of site to him and as such his claim on the account is limited to 21 days only. His statement of having deployed 775 Nos. labours on daily basis is also accepted considering the quantities of earthwork

and boulder work involved as also the extent of area available for working at site. The claimed amount of Rs. 18.36 lakh will now get reduced to Rs. 9.76 lakhs (775 labours X 21 days @ Rs. 60.00 per day only and is as such an award of Rs. 9.76 lakhs against claimed amount of Rs. 18.36 lakhs is given.

18. The Arbitrator came to a finding that on the basis of the available records there had been 21 days delay. The claimants' claim was based upon vouchers in support of their payments to labourers numbering about 775. No concrete evidence was produced before the Arbitrator in support of such claim. The doubt raised by the respondent about the authenticity of such paid up vouchers, Attendance Register was not properly dispelled. At page 177 we find that the respondent on 10th May, 1982 wrote to the appellant that employment of labour at that stage did not arise. Such letter was written, might be on a different context but it certainly raises a doubt in the mind of any prudent man while deciding the issue. We, however, do not find any detailed discussion on that score made by the learned single Judge. His Lordship was of the opinion that the Arbitrator had given adequate reasons and had proceeded to arrive at such conclusion on the basis of the materials available before him and on his interpretation of facts. Since there was no grave error of law committed by the Arbitrator the mere fact that the Court could have reached a separate conclusion on the same facts did not permit the Court to upset the award. Learned single Judge relied on the Saw Pipes case (supra) while arriving at such conclusion.

Before we proceed to examine the issue on merits let us examine the law on the subject.

19. Prior to 1996 Act coming into force award of the Arbitrator was available for judicial review u/s 33 of the Arbitration Act, 1940 on the grounds mentioned therein. The scope of challenge was much wider than what is now restricted in Section 34 of the Act of 1996. On the 1996 Act coming into force the Courts of law were searching in vein to find out their power to examine an award u/s 34 on merits. The Legislature in their wisdom restricted the grounds of challenge. This was possibly to honour the agreement between the parties to have their disputes resolved in a domestic forum and to give finality to the same. The General Assembly of the United Nations had recommended that all countries should give due consideration to the model law adopted on International Commercial Arbitration and Conciliation Rules. In deference to the desire of the United Nations the Legislature of our country enacted the new law of arbitration by clubbing not only the Arbitration Act of 1940 but also the other two laws on the subject being Arbitration (Protocol and Convention) Act 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. The principal reason behind the restrictions put u/s 34 on the grounds of challenge is to give a finality to the decision arrived at by the Arbitral Tribunal where parties agree to have their disputes resolved. This situation prevailed upto 2003 when the Apex Court opened a window wherefrom light could be thrown on the issue to have an appropriate interpretation of Section 34. The Apex Court gave a new dimension

on the issue. The Apex Court extended the scope of challenge, by giving a wider meaning to Sub-section 2(b) where the Court is empowered to set aside an arbitral award which according to the Court, is in conflict with the public policy of India. After having a detailed discussion on the issue the Apex Court in Paragraph 74 of the said decision gave its conclusion which is quoted below:

74. In the result, it is held that:

(A)(1) The Court can set aside the arbitral award u/s 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The Court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties.

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) if the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India that is to say if it is contrary to:

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

(4) It could be challenged:

- (a) as provided u/s 13(5); and
- (b) Section 16(6) of the Act

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

20. The Apex Court observed that the award could be set aside if it is contrary to justice or morality or if it is patently illegal. Being encouraged by such observation of the Apex Court we now venture to examine the view taken by the learned Judge.

21. The contract was for setting up guardwall to stop erosion of embankment of river. The work was to be completed within 90 days. The contractor was not only to supply materials but also to execute the work with the help of the labour force to be provided by him. For the entire job he was to get Rs. 30 lacs. Hence, we can safely presume that Rs. 30.00 lacs would include not only the cost of

material but also his technical expertise and cost of the labour force and obviously his profit at the end of the day. Keeping this, in view, a claim for Rs. 18.36 lacs made by the claimant only on account of idle labour for 46 days, is something which is difficult for any prudent man to conceive. The Arbitrator while examining such claim put emphasis on the number of days and not on the number of work force actually kept idle according to the claimant. In paragraphs 16-22 of the Judgment in Saw Pipes case the Apex Court observed that the words "public policy of India" occurring in Section 34(2)(b) was not defined in the Act. The concept "public policy" is considered to be vague susceptible to narrow or wider meaning depending upon the context in which it is used. Hence, it should be given a meaning in the context and also considering the purpose of the section and scheme of the Act. The Apex Court also observed that in case where validity of the award is challenged there is no necessity of giving a narrower meaning to the terms "public policy". On the contrary wider meaning is required to be given so that patently illegal award passed by the arbitral tribunal could be set aside. If an award is patently perverse the same, in our view, is open for review u/s 34 by giving wider meaning of the phrase "public policy". The word "perverse" is meant by contrary to that is accepted or expected against the weight of evidence. "Which is expected" is a relative term. In common parlance it means what a prudent man thinks keeping in view the fact as discussed above. Our conscience pricks as to how we can put our approval to a part of the award which was based on no evidence on the number of work force and the rate at which they had been paid. The Apex Court observed that an award could be set aside by the Court of law if it offends justice and morality. Our conscience pricks to give approval to this part of the award without having a proper clarification on that score from the Arbitrator. Hence, we take recourse to Section 34(4) of the said Act which empowers the Court to refer the matter, rather to give an opportunity to the Arbitral Tribunal to eliminate grounds for setting aside of the award. The Learned Judge could do so. We exercise the same power in this appeal being an extension of the original proceeding.

Order:

22. The order of the learned single Judge to the extent discussed above except the 10th claim is upheld. The award is upheld except the 10th claim. The award is remanded back to the Arbitrator so that he can eliminate the ground taken by the appellant for setting aside the 10th claim so awarded by the Arbitrator. Parties would, however, act in terms of the rest of the award and the appellant would be obliged to make payment of the awarded sum except the 10th claim to the respondent in terms of the award.

23. So far as the 10th claim is concerned the Arbitrator is directed to reconsider his award and give his reasoned award on the same by eliminating the grounds for setting aside the said part of the award so highlighted in this Judgment. The arbitrator would complete the process within a period of four weeks from the date of communication of this order. The Arbitrator would send his reconsidered

award on the issue to the Registrar of this Court in its Original Side with copies to the parties. The Registrar, Original Side would in turn place the same before the learned single Judge for His Lordship's consideration and for that matter the application for setting aside filed by the appellant before His Lordship is revived to such limited extent.

24. The learned single Judge upon the said revised award being placed before His Lordship would hear the parties afresh on the limited issue and would dispose of the said application in the manner as His Lordship thinks fit and proper.

The appeal is disposed of accordingly without any order as to costs.

Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

25. I agree.