

(1982) 03 RAJ CK 0015
In the Rajasthan High Court
Case No : Civil Appeal No. 41 of 1971

Union of India (UOI)

APPELLANT

Vs

J.P. Sharma and Others

RESPONDENT

Date of Decision : 23-03-1982

Acts Referred:

Arbitration Act, 1940 — Section 14, 16, 30

Citation : AIR 1982 Raj 245 : (1982) RLW 216 : (1982) WLN 105

Hon'ble Judges : M.B. Sharma, J; Dwarka Prasad, J

Bench : Division Bench

Advocate : A.K. Mathur, for the Appellant; M.M. Vyas, for the Respondent

Final Decision : Dismissed

Judgement

Sharma, J.—The Union of India has filed this appeal u/s 39 of the Arbitration Act (hereinafter referred to as "the Act") against the judgment and decree of the learned District Judge, Bikaner, Dt. Sept. 7, 1970, whereby the learned Judge, while dismissing the objections u/s 30 of the Act filed by the appellant Union of India, accepted the award made by the Arbitrator and made it a rule of the court passing a decree for Rs. 4,26,828.90 P. in favour of M/s. J.P. Sharma and Sons and against the appellant Union of India. The learned District Judge also directed that the Union of India shall pay interest @ 4% per annum on the principal sum from the date of the decree till realisation.

2. Respondents M/s. J.P. Sharma and Sons were engaged as goods-handling contractor by the Northern Railway for the purpose of performing all the work of portorage of geeds at the various railway stations and goods sheds falling in zone No. 2 of the Bikaner Division of the Novihem Railway. The agreement came into force on April 1, 1957 and was terminable on Mar. 31, 1960. The terms and conditions of the contract were contained in an indenture Dt. April 3, 1957. Two Schedules "A" and "B" appended to the said agreement provided for the rates payable to the contractor for the various jobs to be done by it. According to the Schedules, the remuneration of the contractor was to be on the basis of per

thousand maunds of goods handled or per vehicle or per man-hour according to the nature of the works. So far as the handling work not specified in the agreement was concerned, it was agreed that for such work, the contractor shall be entitled for such rates which were to be mutually agreed upon by the railway administration and the contractor. The contract was, however, terminated in Aug. 1959 by the railway administration alleging that the contractor has failed to carry out the terms and provisions of the agreement and the security deposit amounting to Rs. 5,000/- was also forfeited under the provisions of Clause 30 of the agreement. The contractor, after serving a notice u/s 80 of the Civil P. C. on the Union of India, filed a suit against it for recovery of a sum of Rs. 3,17,728.81 p. in the court of District Judge, Bikaner, on Sept. 21, 1959. However, the Union of India, invoking Clause 33 of the agreement which provided for arbitration in the matters of all disputes between it and the contractor, filed an application u/s 34 of the Arbitration Act before the District Judge who accepted the application and stayed the suit directing that the parties were free to get the matter adjudicated upon by an arbitrator as provided in Clause 33 of the agreement. The General Manager, Northern Railway, by his order Dt. Sept. 21, 1962, appointed Shri S. P. Lal, Senior Deputy General Manager, Northern Railway, to act as Arbitrator in the dispute between the Railway Administration and the contractor as he himself, owing to his previous heavy engagements and pressure of official work, could not act as an Arbitrator. The aforesaid Arbitrator entered into arbitration and called upon the parties to submit their respective claim petitions giving full details of the claim together with all relevant documents. The respondent contractor filed a claim petition on Sept. 10, 1962 and the Railway Administration besides filing reply to the claim of the contractor, also made a counter-claim. After a procedure had been mutually agreed to, the Arbitrator laid down the procedure and the parties came forward with a list of ten issues which they wanted to be decided upon. The said issues are reproduced below,--

1. Whether the rate in respect of handling of TR/CR Vans under item 18 of the Rate Schedule "A" is applicable at all the stations, if not, at what stations?
2. Whether the petitioner is entitled to payment for handling of TR/CR Vans, both on inward as well as outward basis at repacking stations as per item 18 of the Rate Schedule, if not on what basis?
3. Whether the petitioner is entitled to special goods rate as per item 5 of the Rate Schedule "A" in respect of TR/CR Vans containing special goods. If not, what rate is applicable?
4. Whether loose wool and loose cotton in boras can be classified as special goods?
5. Whether the rate in items 3 and 4 of Schedule A1 in respect of F.P. Cotton bales is applicable to PP wool bales. If not, what rate is applicable?
6. Who is responsible for submission and preparation of bills in respect of the handling work at the stations?

7. Whether the contract has been wrongly terminated by the Railway Administration and if so, is the petitioner entitled to renewal of the contract?
8. Whether the petitioner is entitled to the interest as claimed?
9. To what amount, if any, the Railway Administration is entitled to recover from the petitioner?
10. Relief?

The Arbitrator thereafter gave his award on Feb. 12, 1963 under which, he awarded the contractor a total amount of Rs. 4,26,828.90 P- (Rupees four lacs twenty-six thousand eight hundred twenty-eight and paise ninety only) by the Railway Administration in full and final settlement of all the claims of the parties. The parties were directed to bear their own costs. The award was filed in the court of learned District Judge, Bikaner, by the Arbitrator on Feb. 25, 1963. The Union of India filed objections against the award u/s 30 of the Arbitration Act on Mar. 28, 1963. The District Judge framed issues and, thereafter, after hearing the parties, dismissed the objections of the Union of India and accepted the award and made it rule of the court. The Union of India filed an appeal in this Court u/s 39 of the Arbitration Act which was registered as D.B. Civil Misc. Appeal No. 15 of 1964. This Court, under its judgment Dt. May 12, 1967, allowed the appeal of the Union of India, set aside the judgment and decree of the learned Sessions Judge, Bikaner on Oct. 28, 1963 and remanded the case to him with the direction that he shall remit the award to the Arbitrator and ask him to decide the issues left undecided by him and then decide what amount would be payable by one party to the other. The learned District Judge, in pursuance of the aforesaid order of this Court, remitted the award to the Arbitrator Shri S.P. Lal, Shri S.P. Lal, it appears, had retired by then. Shri S.P. Lal re-entered into arbitration and pronounced his award on July 4, 1968 under which, he directed that M/s. J.P. Sharma & Sons, handling contractors, be paid a sum of Rupees 4,26,828.90 p. (Rupees four lacs twenty-six thousand eight hundred twenty-eight and paise ninety only) by the Railway Administration in full and final settlement of all the claims of the parties. Thus, the Arbitrator, under its award, awarded the same amount to the contractor as was awarded by him under his award Dt. Feb. 12, 1963. The Arbitrator filed his award in the court of District Judge, Bikaner and the Union of India filed objections u/s 30 of the Act on Aug. 24, 1968. The objections, inter alia, were that the Arbitrator has misconducted himself and the proceedings after the award had been remitted to him; it failed to discharge his duties by not allowing the Union of India to produce oral as well as documentary evidence after the award had been remitted to him; that the Arbitrator acted with the bias that to change his previous decision, would tell upon his prestige; that the amount of fees which both the parties had to pay in advance, were both exorbitant and unreasonable; that the Arbitrator still left important matters referred to in the order of this Court undecided and has failed to decide all the disputed rates. It appears that later on, the objections were amended wherein more details were given and the learned District Judge,

Bikaner, framed only one issue,--

"Whether the Arbitrator was not given the power to adjudicate upon and order the return of security amount to the contractor? If not, what is its effect on the award?"

Both the parties admitted para 30 of the agreement and did not adduce any evidence. The learned District Judge, Bikaner under his judgment Dt. Sept. 7, 1970, dismissed the objection petition of the Union of India u/s 30 of the Arbitration Act, accepted the award Dt. July 4, 1968 and made it rule of the Court and passed a decree in favour of the contractor M/s. J.P. Sharma and Sons and against the Union of India. As already observed above, the District Judge also awarded interest @ 4% per annum from the date of the decree till realisation of the decretal amount.

3. The Union of India has preferred this appeal in this Court against the judgment and decree of the learned District Judge, Bikaner. The contractor M/s. J.P. Sharma and Sons on June 26, 1971 preferred cross-objections claiming interest @ 6% per annum on the principal sum from Oct. 29, 1963 to Nov., 1964 and on Rs. 1,80,828.00 from 1-1-65, till the date of the decree of the learned District Judge.

4. We have heard Shri A.K. Mathur, learned counsel for the Union of India and Shri M.M. Vyas for the respondent M/s. J.P. Sharma and Sons.

5. The first contention of Mr. A.K. Mathur, learned advocate for the appellant is that once the award is remitted to the Arbitrator, the parties have a right of leading evidence and the Arbitrator, Shri S.P. Lal, in spite of a request to that effect on behalf of Union of India to him, did not grant an opportunity to it to lead evidence. As such, the Arbitrator has committed a judicial misconduct.

6. An award can only be set aside on one of the grounds contained in Section 30 of the Act. The three grounds on which the award can be set aside, are contained in sub-sections, (a), (b) and (c) of Section 30 of the Act. We are presently concerned only with Clause (a) of Section 30 of the Act so as to see as to whether the Arbitrator has misconducted himself and the proceedings. The strict rules of evidence contained in the Evidence Act which are followed by the courts, are not applicable to arbitration proceedings. The arbitrator, who is a judge of the choice of the parties, is free to choose his own procedure but it must be in consonance with the principles of natural justice. The parties must be given a fair opportunity to produce their evidence before the Arbitrator. Whether taking of evidence on behalf of the parties is necessary, will naturally depend on the particular circumstances in every case. If the reference be such that the Arbitrator cannot decide the dispute without hearing the evidence then refusal to hear evidence will amount to judicial misconduct. Once an award is remitted to the Arbitrator u/s 16(1) of the Act, all his original powers, including the power to take evidence, so far as it does not affect the order remitting the award or the provisions of the Act, are revived. Russell on Arbitration in his XIXth Edition at p. 490 under the

head "Effect of Remission or Setting Aside", has dealt with the powers and duties of the Arbitrator. When an award is remitted to the Arbitrator, all his original powers, so, far as they are not affected by the order remitting the award, or the provisions of the Act, are, it would seem, revived. But his powers and duties cannot exceed those which are necessary to give effect to the order of the court. Again, at p. 491 under the heading "Hearing of Fresh Evidence", It has been observed:

"The duty of the arbitrator as to hearing fresh evidence must depend entirely upon the order remitting the matter to him. The court has very wide powers, but, as already mentioned...."

Thus, though the Arbitrator has power to take evidence on remission of the award to him for fresh consideration, the parties by their conduct, can waive their right to lead evidence. The same author has observed at page 285:

"The objections to a decision of the arbitrator as to whether or not to admit evidence may be waived, like other objections to the manner in which the proceedings are conducted.

A party to an arbitration cannot be allowed to lie by and then, if the award is unfavourable, seek to set it aside on the ground that during the proceedings the arbitrator gave a ruling or decision contrary to the rules of evidence which the party during the proceedings took no steps to question."*

This statement of law was referred to by their Lordships of the Supreme Court in Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. Vs. Union of India (UOI) and Others, and it was held on the facts of that case that the arbitrator cannot be said to have misconducted himself in the matter of his award. In the question of privilege, as shall be presently shown, the order of this Court remitting the award to the arbitrator clearly laid down that the only dispute between the parties was about the rates applicable to different items and so far as the work done by the contractor is concerned, there was no dispute between the parties. This Court in its judgment dt. May 12, 1967, under which the award was remitted to the arbitrator, observed,--

"...Issues Nos. 2, 3, 4 and 5 clearly show that the controversy between the parties was about the rates only. The difference set down by them was whether the plaintiff was entitled to have the rate claimed by it, >f not, what rate was applicable. This clearly implies that it was for the arbitrator to determine what rate was to be applied for each item of work. We may mention that there does not appear to have been any controversy between the parties about the quantum of work or the job done by the plaintiff respondent. The only controversy was as to at what rate the remuneration payable to the plaintiff was to be computed for the work or the job done by it. In other words, once the question of rate was adjudicated upon the only thing that was to be done was to have arithmetical calculations. What amount would be payable was not so much the subject matter of dispute, as the question of the application of the correct rate to the several

items of work done by the plaintiff respondent..."

(pp. 53-54 of the Paper Book) Again, at p. 54 of the Paper Book, this court said,--

"... Thus, in our view the real dispute between the parties what was referred to the arbitrator was about the applicability of the correct rate for the job done by the plaintiff respondent..."

At pp. 61-62, this Court said.-

"..... Indeed there was no serious dispute between them regarding the actual amount that may be payable once the question of rate was adjudicated upon. The award does not show that decision the arbitrator has given regarding the rate that was to be applied to the various items of work..." Thus, holding that under issues Nos. 2 to 5, the arbitrator was called upon to decide as to what rate was applicable for the job done by the contractor about which there was no difference between the parties and as the arbitrator did not decide the rates applicable to several jobs done by the contractor the District Judge was directed to remit the award to the arbitrator as he had not decided all the disputes referred to him. This Court, while remitting the award, did not set aside the award u/s 30 of the Arbitration Act. In view of what has been observed by this Court while remitting the award so far as the quantum of job is concerned it was no longer in dispute and the award was only remitted to the arbitrator to adjudicate as to what was the correct rate applicable for the various jobs done by the contractor,

7. The statement of law as contained at p. 490 of "Russel on Arbitration" (19th Edn.) that when an award is remitted to the arbitrator all his original powers so far as they are not affected by the order remitting the award or the provisions of the Arbitration Act, are, it would seem, revived, but his power and duties cannot exceed those which are necessary to give effect to the order of the Court, can hardly be disputed. Their Lordships of the Supreme Court in Rikhabdas Vs. Ballabhdas and Others, have observed that when an award is remitted to the arbitrator for reconsideration, it necessarily imports fresh consideration of matters already considered by them. Thus, in a proper case, in case an award is remitted to the arbitrator for reconsideration, it is within the powers of the arbitrator to take evidence of the parties, if such powers are not in any way affected by the order of the court remitting the award to the arbitrator. Whether the arbitrator should or should not hear evidence of the parties, must depend on the particular circumstances in every case and the arbitrator must exercise its discretion in a judicial manner. We shall presently refer to the minutes of the proceedings before the arbitrator after the award had been remitted to him.

8. The learned District Judge, Bikaner, remitted the award to the arbitrator for reconsideration under its letter No. 81/ Civil/68 dated February 6, 1968. We have already referred earlier that Shri S.P. Lal, the arbitrator, by the time the award was remitted to him, had retired from service. The aforesaid arbitrator called upon the parties under its letter dated February 21, 1968 to appear in person or

through a duly authorised representative to submit their respective claims and file document on which they want to place reliance. He fixed March 7, 1968 as the date for the appearance of the parties. So far as the contractor is concerned, in reply to the notice of the arbitrator, it informed the arbitrator under its letter dated March 5, 1968 that he had submitted all the documents and its claim earlier. The arguments also had been heard fully and neither it was necessary, nor permissible, to file fresh documents. A perusal of the minutes dated March 7, 1968 before the arbitrator will show that even the Union of India through its representative submitted that no further evidence will be led by it. Para 6 of the minutes is as follows,--

"The Rly rep. submitted that no further evidence will be led by him and all the document etc. are already on the file. But they would address the arbitrator as and when necessity may arise."

On the same day, the arbitrator wanted to lay down the procedure in compliance with the directions of the District Court but the parties desired that a fresh date should be fixed on the subject or procedure that is to be followed. On April 6, 1968, an application by Harichand, advocate for the Union of India, was filed before the arbitrator wherein a right to produce evidence on remission of the award was claimed. This letter was marked by the Arbitrator as "D". The arbitrator laid down the procedure. A reference to the minutes of the proceedings dated April 6, 1968 is necessary. In para 9, the arbitrator laid down the procedure by mutual discussion. Paras 9, 10 and 11 & 12 are to the following effect,--

"9. After mutual discussion with the parties the following procedure for the conduct of these proceedings has been decided,--

(a) The Union of India represented by the Rly will furnish to the arbitrator a certified copy of the judgment of the High Court

(b) According to the directive of the District Judge as conveyed to the arbitrator vide his letter No. 87-Civil 68 dated 6th February, 1968 in which he has given the operative portion of the abstract from the judgment of the Hon-ourab'e High Court the arbitrator has to decide;--

(i) the issues left undecided. (ii) what amount will be payable by one party to the other.

10. On perusal of the above it was mutually agreed that the representative of the contractor shall give brief written arguments on each of the ten issues which have been enumerated in the judgment of the High Court. These arguments should be furnished to the arbitrator with a copy to the advocate representing the Union of India by 20th April, 1968. The Union of India represented by their counsel will give the reply to the above by 6th May, 1968 with, a copy to the contractor's counsel.

11. After this a date will be fixed by the arbitrator for personal hearing of the

parties and contractor's counsel will be free to submit a counter-reply. Tentative date will be 7 June and 8 June 68.

12. No decision on annexure "D" has been pressed for."

It will be clear that the procedure for the conduct of the arbitration proceedings was decided by the arbitrator after mutual discussion with the parties and the railway administration did not insist that it was necessary to lead evidence or it wanted to lead any evidence on any of the issues which needed consideration on remission of the award. That apart, it has also been stated earlier that the letter dated 6-4-1968 was marked "D" by the arbitrator. The document "D" was of the same date when the proceedings took place before the arbitrator on April 6, 1968. It is clearly mentioned in the minutes drawn by the arbitrator that "No decision on Anx. "D" has been pressed". Thus, it is clear that the representative of the railway administration did not press before the arbitrator that it was necessary to lead any evidence on its behalf. After the procedure had been decided both the parties filed their written arguments and copy were furnished to each of them. In the written arguments, a right to produce evidence on some of the issues was only reserved unless the same was dispensed with either by the contractor's admission or its genuineness was accepted on its face value by the contractor. In its written argument dated 6-5-1968. (p. 88 of the file of the arbitration proceedings--internal p. 21 of the written arguments) it was prayed that the Union of India may be allowed to lead evidence on each of the issues where the arbitrator was not satisfied about the genuineness of the pleas taken by the Union of India. In the alternative, the Union of India prayed for proof by affidavits as substitution for evidence if the arbitrator chose to disapprove with recording evidence. It appears that affidavits were filed on behalf of the Union of India and in the minutes dated 7-6-1968, the arbitrator noted the objection of the contractor that by introducing the affidavits, the Union of India wants to reopen the evidence and wanted to back out from its admission for not producing any evidence. The arbitrator, in his proceedings dated June 9, 1968, referring to the submission made on behalf of the Union of India that on grounds of equity it prays that the affidavits produced be admitted in evidence, ordered that the affidavits produced are no affidavits in the eye of law and it is an attempt to introduce new piece of evidence, hence rejected. We have perused the affidavits and they are not affidavits in the eye of law. They are not sworn before the authority competent to verify them and are not verified in a proper manner. Thus, it will be clear that on remission of the award for re-consideration, the Union of India clearly gave out that it does not want to lead any evidence. When the procedure to conduct the proceedings was settled by mutual consultation with the parties, it was not insisted on behalf of Union of India that it should be given opportunity to produce evidence, rather on that date, the Union of India did not press its application dated April 6, 1968 wherein an opportunity to lead evidence was sought. Later on, it wanted to produce evidence by affidavits but the affidavits were no affidavits in the eye of law. It can, therefore, be said that the Union of India has not been able to make out a case entitling it to impeach

the award of the arbitrator on the ground that the arbitrator improperly refused to take the evidence. It never tendered any witnesses to the arbitrator and we are, therefore, of the opinion that it cannot be said that the arbitrator refused to take evidence which the Union of India wanted to produce. We will also like to observe that on the earlier occasion, when the proceedings took place before the arbitrator, that is, before the remission of the award to him, the parties did not lead any evidence. No opportunity to produce evidence was sought. As already stated earlier, there was no dispute between the parties so far as the job done by the contractor is concerned and the parties filed a joint statement Ex. A 5. The only dispute was with regard to the correct rates applicable. The rates are given in schedules A and B to the agreement. Thus, we do not find any merit in the submission of the learned counsel for the appellant that the arbitrator did not grant an opportunity of leading evidence to the Union of India and, therefore has committed legal misconduct and the award should be set aside.

9. The next contention of Mr. Mathur, learned counsel for the Union of India is that the fees charged by the arbitrator are excessive and exorbitant and therefore, the arbitrator has misconducted and the award should be set aside. The material facts so far as this submission is concerned, are that after the giving of his award on February 12, 1963 and when the matter was earlier pending in this appeal, Shri S.P. Lal, the arbitrator had retired from service. When the District Judge, Bikaner, under the order of this Court, remitted the award to the arbitrator for reconsideration, Shri S.P. Lal, the arbitrator, was no longer in service. On receiving an intimation from the District Judge that the award is being remitted to him, the arbitrator under his letter dated February 21, 1968 while calling upon the parties to submit their claims and documents and to appear before him on March 7, 1968, called upon each of the parties to deposit a sum of Rupees 2,000/- (Rupees two thousand) as interim fee for the arbitration and another sum of Rs. 200/- (Rupees two hundred) for clerkage and miscellaneous expenses as well as of typing charges. They were called upon to deposit the amount on or before March 7, 1968. It appears that on March 7, 1968, the Northern Railway gave a cheque No. 003470/1737464 dated March 4, 1968 for a sum of Rupees 2,200/- and the contractor gave in cash a sum of Rs. 2,200/- in compliance to the demand of the arbitrator in his letter dated February 21, 1968. No objection was taken either by the Union of India Or the Contractor that the amount of remuneration or the fees or other charges demanded by the arbitrator were excessive. Throughout the proceedings before the arbitrator also no such objection was raised that the amount of fees demanded by the arbitrator is excessive or exorbitant. It was for the first time in the objections u/s 30 of the Act that an objection to this effect was taken. The learned District Judge has not considered any of the objection and has only observed that so far as the misconduct of the arbitrator is concerned, this point has been decided by the judgment of this Court dated March 12, 1967. After the award is remitted, if thereafter the umpire has misconducted himself or the proceedings, an objection can be raised u/s 30(a) of the Act, and it will be

necessary for the court to see as to whether the arbitrator has misconducted himself or the proceedings. But in the instant case, we shall presently show the amount of fees claimed by the arbitrator does not appear to be excessive or exorbitant. Apart from the fact that the Union of India, on demand by the arbitrator, not only paid the sum of Rs. 2,000/- towards the fee of the arbitrator and Rs. 2,00/-towards the costs of the clerkage etc., but also did not raise any objection throughout the arbitration proceedings before the arbitrator that the amount asked and deposited by it before the arbitrator was excessive or exorbitant. The relevant law with regard to the remuneration or the fee of the arbitrator is contained in the First Schedule Clause 8 of the Act as well as in Section 14(2) of the aforesaid Act. Under Clause 8 of the First Schedule, the cost of the reference in award shall be in the discretion of the arbitrator who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client. Thus, the costs of the reference and award which also includes the remuneration or fee of the arbitrator is within the discretion of the arbitrator and like all discretions, the fees of the arbitrator and costs have to be reasonable and cannot be exorbitant or excessive. Under subsection (1) of Section 14 of the Act, after the arbitrator has made an award, he has to sign it and give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. Under subsection (2) of Section 14 of the Act, upon payment of the fee and charges due in respect of the arbitration and award and the costs and charges of the same, at the request of any of the parties to the arbitration agreement, the arbitrator has to file the award in the court. The dispute as to the arbitrator's remuneration or costs are to be decided by the court u/s 38 on an application of any of the parties. No application was filed on behalf of the Union of India either u/s 38(1) of the Act before the District Judge nor it was prayed even in the objections that the court should fix reasonable remuneration of the arbitrator. The law is settled that in case the arbitrator demands and charges fees which are excessive and exorbitant, then it will amount to misconduct on his behalf and the Court, in a fit case, may set aside the award on that count. -In "Russel on Arbitration", 19th Edition, p. 465, under the caption "Overcharge", the author has observed,--

"It would seem that the fixing by an umpire or arbitrator in his award of excessive charges for his own services or (in the case of an umpire) for the arbitrator's services may amount to misconduct."

Such conduct may be technical leading to the remission or it may be more serious in which case, the award would be set aside. Receipt of the fees in advance by the arbitrator does not amount to misconduct unless, of course, the demand is extravagant. If the arbitrator, with the consent of the parties, accepts remuneration for the work done by him, the award cannot be rendered illegal. The matter will be different if the arbitrator takes money from one of the parties

or anything else before making his award and in that case, the court will set aside the award, but if he receives the fee from both the parties, by mutual agreement between them, he does not commit any misconduct. In *Shambhu Dayal and Others Vs. Pt. Basdeo Sahai*, it has been observed that the arbitrator is not precluded from demanding an amount in excess of what has been fixed nor is the court precluded from ordering payment of a fee in excess of what has been fixed even though there may be nothing to expressly indicate that the fixation was only of a tentative nature. It has also been observed that in determining what would be the reasonable fee of the arbitrator the court will take into account what fee, if any, has been previously fixed but it has the power to order payment of such higher fee as it considers reasonable. It has further been observed that generally, there should be written agreement for the payment of a particular fee to the arbitrator and if, after the fixation of the fee by the court the Parties choose to proceed with the arbitration and the arbitrator enters upon it, the agreement between the parties and the arbitrator is implied in their conduct. In *Ardeskar Irani Vs. The State of M.P.*, in a case where the arbitrator was a Government servant (Superintending Engineer) who, under the rules, could have only accepted such fees as have been fixed by the court but not only fixed in one case his remuneration to the extent of Rs. 10,000/-but also accepted from one party in a case where the award ultimately was less than Rs. one lac, it was held that the arbitrator charged exorbitant fee and as such, misconducted himself. In *Jeevan Industries (P) Ltd. Vs. Haji Bashiruddin Madhusudan Dayal*, after considering several authorities, it was observed (at p. 219) -

"As a result of the analysis of the provisions of law and the relevant authorities, our conclusion is that there is nothing illegal or improper in the demand made before the award by the arbitrator or umpire of fees and expenses from the parties provided they are fair and reasonable and are not extravagant or excessive and they are made on both the parties equitably within the knowledge of both the parties. It would not be illegal and improper if on the failure of one of the parties to make the payment, he either stays the proceedings or directs the other party to pay the whole amount pending the decision of the dispute by arbitration."

It was also observed that the provisions of the Act do not militate against the voluntary payments made by the Parties so long as they are reasonable and have not caused any bias in favour or against any party.

10. We are, therefore, of the opinion that though generally, it will be better if there is an agreement in writing for the payment of the fees of the arbitrator but the parties can voluntarily agree to make payment to the arbitrator and if the fees of the arbitrator are not excessive and exorbitant and they are taken from both the parties, then there is nothing illegal in it. But if the fees are exorbitant and excessive or the arbitrator takes only- from one of the parties, then it will amount to misconduct and the court will, set aside the award u/s 30(a) of the Act.

11. We have already given the relevant facts with regard to the payment of fees to the Arbitrator by the parties. In the instant case, it will appear that the claim of the contractor was for a sum of Rs. 9,57,708.97 p. and there was also a counter-claim of the Railway. On remission of the award, the Arbitrator was required to decide all the issues afresh and more particularly as to what rate was applicable to the job done by the contractor, the doing of which was not disputed. The Arbitrator demanded an equal sum of fees from both the parties and both the parties, on the very first day of hearing, paid the fees to the Arbitrator, without any objection. No objection was raised throughout the proceedings. Thus in the instant case, it cannot be said "hat looking to the nature of the claim, the remuneration demanded by the Arbitrator and the amount demanded for clerkage etc. was exorbitant or excessive.

12. The last contention of Mr. Mathur, learned counsel for the appellant that counter-claim of the Railway has not been decided and, therefore, the Arbitrator has left some of the issues undecided and the award is not complete, is not well founded. We have already reproduced, in the earlier part of our judgment, the ten issues framed by the Arbitrator. It appears that a joint statement Ex. A5 was filed by the parties wherein the claim and counter-claim of both of them were contained. That is the basis of the decision of the Arbitrator. We have been taken through Ex. A5 and we are unable to agree with the learned advocate for the Union of India that the Arbitrator has left undecided the counter-claim of the Railway Administration. Under issue No. 5, which relates to the counter-claim of the Railway Administration, the Arbitrator has clearly mentioned that the claim of the Railway Administration is shown in para 3 (c) of the award and is not under dispute. Thus, the Arbitrator has decided the counter-claim of the Railway.

13. Taking the cross-objection of the contractor, we may state that the Arbitrator has clearly decided that the contractor was not entitled to any interest. Issue No. 8 was framed by the Arbitrator with regard to interest and there is a clear decision of the Arbitrator that the contractor is not entitled to any interest and no interest was granted to the contractor.

14. Before parting with the appeal, it is necessary to make a reference to office objection dated Aug. 7, 1971 that the cross-objection has not been properly stamped and it is deficit by a court-fee of Rs. 98/-. The Arbitrator, Shri S.P. Lal, gave his award on July 4, 1968. The Rajasthan Court-fees and Suits Valuation Act, 1961 (for short, "the Act of 1961" hereinafter) was in force when the Arbitrator filed his award in the court of District Judge, Bikaner. Under Schedule II of the Act of 1961, Article 4, on a memorandum of appeal u/s 39 of the Arbitration Act, 1940, where the valuation for jurisdiction exceeds Rs. 5,000/-, the proper fee is Rs. 100/-. The valuation of the cross-objection exceeded Rs. 5,000/-and as such, the proper fee would be Rs. 100/-. The cross-objections have been filed only on a court-fee of Rs. 2/-. Thus, the office objection is sustained and the respondent M/s. J.P. Sharma and Sons is directed to pay Rs. 98/- deficit court-fee within a period of two months.

15. In the result, we hereby dismiss the appeal as well as the cross-objection but we leave the parties to bear their own costs. The respondent firm M/s. J.P. Sharma & Sons shall make good the deficit court-fee of Rs. 98/- within two months.