SUPREME COURT OF INDIA

Arosan Enterprises Ltd.

Vs.

Union of India

(B.N.Kirpal and U C Banerjee JJ.)

16.09.1999

JUDGMENT:

BANERJEE,J.

These two Appeals by the grant of Special Leave and arising out of the Judgment of the Delhi High Court focus two singularly singular questions pertaining to (i) the time being the essence of the contract and (ii) authority of the High Court in the matter of interference with an Arbitral Award under the Repealed Act of 1940 (The Arbitration Act, 1940). For effectual disposal of these two questions, noticed above, reference to certain factual details in this judgment is inevitable and adverting thereto it appears that on October 4, 1989 Union of India floated an invitation to tender for purchase of sugar to meet the urgent requirement of anticipated scarcity in the Indian market during the Dussehra and Diwali festivals in November, 1989 which however, and without much of a factual narration, culminated in an Agreement dated 24th/25th October, 1989 with M/s. Arosan Enterprises, being the Appellants herein, for the supply of 58000 metric tonnes of sugar. The Contract as above inter alia contained the following terms: (a) That the claimant shall supply 58,000 M.T. of sugar (net weight plus minus 5% at sellers option). (b) That the claimant shall arrange shipment of entire quantity of the contracted sugar so as to reach Indian Ports not later than 31st October, 1989; shipment within the contracted delivery period was to be the essence of the contract. In case of delay the seller was to be deemed to be in contractual default with a right to the buyer to cancel the contract. The buyer could however extend the delivery period at a discount as may be mutually agreed between the buyer and the seller. (c) That price payable was to be U.S. Dollar 480 per metric tonne. (d) That the seller had to establish an unconditional irrevocable performance guarantee in favour of the buyer by any Indian Nationalised Bank at New Delhi for 10% of the total contract value of the maximum guaranteed quantity to be shipped, within 7 days of the contract. (e) That the payment was to be made to the seller by irrevocable letter of credit (L/C) covering 100%

value of the contract quantity. The L/C was to be established by the buyer within seven days of the receipt of an acceptable performance Bank Guarantee. (f) The performance Bank guarantee (PBG) was to be by any Indian Nationalised Bank at New Delhi and was to be kept valid for a minimum period of ninety days beyond the last date of contract shipment period." The factual score further depicts that on 24th October, 1989, itself the appellant did furnish a performance bank guarantee for $ 29,28,000 and upon bank guarantee being furnished, the Government of India assigned the contract to the Food Corporation of India (FCI) under clause 20 of the Agreement. FCI also in its turn opened a Letter of Credit for the full value of the contract though, however, as the records depict that while on 26th October, 1989, the Letter of Credit was opened by FCI but its authentication was not effected within the delivery date i.e. 31st October, 1989. Be it noted that in terms of the payment clause, the payment was to be made by the buyer by way of irrevocable letter of credit covering 100% of the contract quantity and letter of credit was to be established by the buyer within seven days from the receipt of performance bank guarantee and it is upon completion of the period of 7 days from the date of acceptance of the performance guarantee, the letter of credit should have been authenticated and that was to be effected by about 31st October, 1989. In the contextual facts the authenticated bank guarantee was effected only on 2nd November, 1989 i.e. after the expiry of the date of the delivery - It is on this score detailed submissions have been made by both Mr. Rohtagi appearing in support of the appeal and Mr. Dholakia appearing for FCI and Mr. Rawal, the learned Addl. Solicitor General for the Union of India and it is in K.N. of some assistance. this perspective certain further factual details would be The telex messages from Food Corporation of India dated 3rd, 7th and 8th November, 1989 go to show that in fact there was the anxiety of the buyer to obtain the goods and it is on these anxious inquiries, Mr. Rohtagi contended that the time for delivery obviously stands extended and the essence of the contract been given a go-by. The facts further depict that while the correspondence were had between the parties as regards the delivery schedule, Government of India by a letter dated 8th November transmitted an intimation which was despatched on 9th November, 1989, canceling the contract at the risk and cost of the appellant herein. Subsequently, however, on 11th November, 1989, the Government of India unilaterally by its letter withdrew the letter of cancellation and on 15th November, 1989 the appellant informed the FCI that by reason of the cancellation, the cargo arranged already, has gone out of control and that a new cargo was being arranged by reason wherefor FCI was asked to fix a new delivery date and consequently steps would be taken in regard thereto. Needless to refer here, that the letter of withdrawal of cancellation, however, did not contain any fixed date or new date of delivery. There was, however, as the records depict, total silence from FCI, and consequently, the appellants on 24th and 30th November, 1989 further reminded the cooperation to fix the delivery date and take necessary steps to effect the payment under the law of trading. Significantly, both FCI and Government of India maintained a total silence in regard thereto in spite thereof. On the factual matrix it further appears that subsequently a meeting was held between the claimants and the Union Minister for Food and Civil Supplies wherein it was agreed that on the claimants paying a sum of Rs.5 lacks towards the expenses incurred by the Government in opening the letter of credit and claimants giving up any claim for damages, the performance bank guarantee would be released - this aspect of the matter has however been very emphatically disputed by respondents and both the learned senior Advocates appearing on behalf of the respondents contended that the Court would not be justified in assessing this aspect of the matter to be of any relevance in the contextual facts. We shall refer to this aspect of the matter later more fully in this judgment, but to complete the factual score, it appears that on 25th January, 1990 the Government of India canceled the contract on the ground that the seller had failed to fulfill its contractual obligations within stipulated time which was mentioned to be on 31.10.89 and the performance bank guarantee of the claimants was also forfeited by FCI. It is by reason of such a forfeiture, however, that the matter was referred to

arbitration in terms of the arbitration clause in the agreement between the parties. There being however, no dispute, as regards the arbitration clause, we deem it convenient not to set out the same in extenso and suffice it would be further to note that Sri Justice S.N. Shankar, the former Chief Justice of the High Court of Orissa and Sri K. C. Diwan, an Advocate were appointed as Arbitrators in terms therewith and who in their turn made and published their award to the effect that the claimants were entitled to the refund of the performance bank guarantee amount of $ 29,28,000. The claim of the claimant-appellant herein, however, on account of interest was rejected. It is this Arbitral award which was challenged before High Court and the learned Single Judge found that FCI's letter dated 8th November, 1989 clearly depicted that they were still interested in taking delivery of the goods and therefore the claimant was justified in asking for fixation of a fresh delivery date. The learned Single Judge further found that the findings of the Arbitrators in regard to extention of the delivery period and failure to fix the fresh date has resulted in breach of the contract on the part of the Government and the same being purely based on appreciation of materials on record, question of interference therewith would not arise since by no stretch it can be termed to be an error apparent on the face of the record. The award, therefore, was sustained by the learned Single Judge. In an appeal therefrom however, the finding of the Single Judge was reversed and the Bench of the Delhi High Court dealing with the Appeal in question recorded that the buyer, being the Appellant herein, had in fact impliedly accepted 14/15th November, 1989 as the new date of delivery by which the seller was bound to deliver and the failure of the seller to supply by the said date constituted a breach of contract justifying the cancellation and thus set aside the judgment and order of the learned Single Judge as also the arbitral award. The Bench further ordered that the findings of the Arbitrators to the effect that the buyer was obliged to fix fresh dates of delivery was an error of law on the face of the record and as such there was a breach committed by the seller. It is against this order of the Division Bench of the High Court that a Special Leave Petition was filed before this Court and this Court by an order dated 4th September, 1995 granted special leave in pursuance whereof this matter has come up for final disposal before this Bench. Turning now on to the issues as noticed above namely, whether time was the essence of the contract or not, it would be convenient to note the relevant extracts of the Arbitral award pertaining to the issue in question. The Arbitrators, inter alia, found: "The withdrawal of the letter of cancellation (vide Ex.A.21) had the effect of reviving the original contract dated 24/25 October, 1989 with all its terms except that sugar had to be delivered by 31 October, 1989. Stipulation in clause 3 of the contract that shipment with contract delivery period is of the essence of the contract" also stood revived. Letter of Credit had been established on the basis of the original contract which stipulated a fixed time for delivery but as no time for delivery was fixed in the letter withdrawing the cancellation (Ex.A- 21), the claimants naturally felt concerned and repeatedly requested the respondent to do the needful.

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Evidence adduced thus clearly shows that the Respondents sent no reply whatever to the request of the claimants asking for specification of the delivery time and for the needful being done in regard to L/C in the changed circumstances after the withdrawal of the letter of cancellation. On the contrary, all of a sudden they canceled the contract again by the letter dated 25.1.1990 Ex.A36. In our view, this conduct of the respondents was unjustified and illegal in the facts of this case.

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Then again it would be seen that the ground of cancellation taken in the letter of second cancellation Ex.A36 is the same as had been taken earlier in letter Ex.A17, namely failure to fulfill the

contractual obligation within the stipulated time of 31st October, 1989. The respondents had already waived this ground. They were precluded from canceling the contract on the same ground again after its revival. The cancellation by Ex.A36 thus on a non-existent ground and illegal."

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The Arbitrators further held that

"We further find that L/C opened by the respondents was with reference to the contract which stipulated a fixed time for delivery (namely 31st October, 1989) but after revival of the contract the position had changed materially. The original contract had been canceled and this cancellation had been withdrawn and in the contract that stood after withdrawal of the cancellation no time for delivery was stipulated. It was incumbent on the respondents to apprise this position to the Bank and make suitable changes in the L/C. The claimants could receive from the Bank, the amount secured by L/C for their benefit only after satisfying the bank, that they had shipped the contracted sugar in accordance with the terms of the contract. There is nothing on the record to show that the respondents took any steps to inform the Bank of the changed position so that shipping documents presented by the claimants after 31st October, 1989 could be examined by the bank in the light of the new situation."

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The argument is without merits. If the contract was revived on the understanding why was not this fact communicated to the claimants in reply to their persistent queries about the date of delivery and why was the L/C not suitably modified and the bank issuing the L/C informed accordingly. In fact, there is no foundation in the pleadings for such a plan.

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Admittedly in spite of these requests of the claimant for extension of delivery period no fresh delivery date was notified by the respondents. Thus the extension of delivery period was never granted nor intimated to the supplier/claimant."

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The Arbitrators therefore came to a conclusion that there is a breach of the contract committed by the respondents herein and consequently forfeiture of the performance bank guarantee was illegal and not sustainable. The learned Single Judge in the application for setting aside the award was pleased to record: "The cancellation of the contract on 25.1.1990 on the basis of non-delivery of material by 31st October, 1989 was usually misconceived, untenable and illegal because 31st October, 1989 had admittedly ceased to be delivery date.....It appears that the argument that 14th November, 1989 or 15th November, 1989 were the fresh delivery dates is an after-thought. If the respondents believed that these were the delivery dates, nothing prevented them from saying so at the relevant time. The claimant repeatedly asked them to fix fresh delivery date. Respondents could reply that these were the dates."

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These show that the original delivery date of the contract had become part of the letter of credit. Unless the same was modified and the modified date had been notified to the banks, the banks would be paying under the credit at their own risk. No bank would be willing to take such a risk. The result that follows is that the payment to the supplier/claimant would have been in jeopardy unless the letter of credit was amended. The intention in the original contract was that the supplier should get immediate payment through irrevocable letter of credit. Without amendment of the letter of credit, the said intention of the contract could not be fulfilled. The supplier was justified in ensuring that he would get the payment for the material supplied by him before the supplies were made."

In the facts of the matter under consideration the learned Single Judge found that FCI by its letter dated 8th November, 1989 clearly depicted in no uncertain terms that they were still interested in taking delivery of the goods and which as a matter of fact according to the learned Single Judge changed the entire complexion of the matter. The other issue in which the learned Single Judge delved into is in regard to the Court's authority of interference vis--vis the award - this aspect of the matter would be dealt with later in this judgment alongwith the second issue, as such we refrain ourselves from making any comment thereon at this juncture. Turning attention on to the first issue, the Division Bench of the High Court proceeded mainly on certain presumptions to wit: (i) the telex message from the seller dated 8.11.89 was sent to the buyer after receipt of the cancellation and thus constituted a representation against the cancellation and it was pursuant to this representation that the buyer had issued the letter dated 11th November, 1989 withdrawing the letter of cancellation. (ii) the presumption of the High Court went also on to the effect that the buyer had therefore impliedly fixed 14th/15th November, 1989 as the new date of delivery by which time, the seller was bound to deliver and the failure of the seller to supply by the said date constituted the breach of contract justifying the cancellation in January, 1990 These presumptions of the High Court in our view are wholly unwarranted in the contextual facts for the reasons detailed below but before so doing it is to be noted that in the event the time is the essence of the contract, question of their being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The extension if there be any, should and ought to be categorical in nature rather than being vague or in the anvil of presumptions. In the event the parties knowingly give a go by to the stipulation as regards the time - the same may have two several effects: (a) parties name a future specific date for delivery and (b) parties may also agree to the abandonment of the contract - as regards (a) above, there must be a specific date within which delivery has to be effected and in the event there is no such specific date available in the course of conduct of the parties, then and in that event, the courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go by to the original term of the contract as regards the time being the essence of the contract. Be it recorded that in the event the contract comes within the ambit of Section 55, the remedy is also provided ther ein. For convenience sake Section 55 reads as below: "55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that

agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

Incidentally the law is well settled on this score on which no further dilation is required in this judgment to the effect that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first paragraph of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise. In Pollock & Mulla's Indian Contract & Specific Relief Acts, three several cases have been very lucidly discussed, where time can be termed to be the essence of contract: "1. Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with. 2. Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with and 3. Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring contract to be performed within reasonable time and what is reasonable time is dependant on the nature of the transaction and on proper reading of the contract in its entirety." In the contextual facts, the Division Bench relied on the Telex messages of the seller, as noticed above, as a representation against cancellation but the fact remains that there was in fact a definite indication of expression of stand of the Government as regards the withdrawal of the letter of cancellation. The issue arises as to the true effect of the withdrawal of the cancellation. Incidentally on the factual score it appears that after withdrawal of the first letter of cancellation the Government again for the second time canceled the Agreement by a letter dated 25th January, 1990 to the following effect: 1. "Your attention is invited to the contract mentioned above for supply of 58000 MTs of imported sugar, Clause 3 whereof stipulates that the seller shall arrange shipment of the entire quantity so as to reach Indian ports, basis coast as per Clause 4(1) ibid not later than 31st October, 1989 2. As you have failed to fulfil the contractual obligation within stipulated time and the time being the essence of the contract, the contract is hereby cancelled at your risk and cost 3. The performance Bank Guarantee tendered with reference to the above contract is also forfeited for the reasons mentioned above." There is therefore, a cancellation of an agreement which once stood canceled and withdrawn: can it be termed to be an otherwise valid termination after recalling of the letter of cancellation in the month of November, 1989. The High Court has dealt with the entire correspondence in extenso between the parties during this interegnum and as such we refrain ourselves from dealing with the same in detail, suffice it to record that as a matter of fact from the date of recalling of the cancellation letter, there were consistent reminders about the dispatch instruction, about the arrival of vessels and as to the port of landing which were for the Respondents herein, to fix, in terms of the Agreement but there was a total silence from the Respondent's end. Admittedly and there cannot possibly be any doubt as regards the cancellation of Agreement on the expiry of the time if the time is treated to be the essence of the contract, but in the contextual facts when as a matter of fact, there was a letter of cancellation in terms of the contract and assuming by reason of failure to supply as per the Agreement between the parties - but that cancellation stands withdrawn. There is, therefore, a waiver of the breach if there be any, as regards non- performance of the contract and it is on this score that the High Court has gone wrong on the issue of duty to speak and it is on this score that the presumption of the High Court to the effect that the cancellation was on the representation of the seller, is totally unwarranted. Fixation of a future date of performance in the absence of any evidence by the Appellate Court, is not only unjustified but wholly untenable in law. Court cannot possibly fix a date on its own for performance of the contract. It is thus necessary to detail out

herein below the observations of the Appellate Court on this count. The Appellate Court in paragraph 29 of the judgment observed as below: "29. The delivery was to be effected by 31st October, 1989. On the representation of the seller as contained in their messages dated 8th and 9th November 1989 the cancellation was withdrawn. That is the only conclusion possible. Any other conclusion will be wholly erroneous. We therefore, cannot accept the submission that the withdrawal of cancellation was not on the representation of the seller. On this view the respondents were bound in law to accept delivery if effected by 14th/15th November, 1989. It is implicit that the buyers had consented to take delivery by 14th/15th November, 1989. The contention of learned counsel for the seller that the mention of 31st October, 1989 by the respondents in letter dated 25th January, 1990- also shows that the respondents did not treat 14th/15th November, 1989 as the extended delivery date cannot be accepted. Since delivery was not made at all, the mention of 31st October, 1989 in the letter of cancellation (25th January, 1990) by itself would not show that the buyer did not treat 14th/15th November, 1989 as delivery date. It thus cannot be said that the cancellation was on non-existent grounds. The contract also stipulates that the buyer may extend the delivery period at a discount as may be mutually agreed to between buyer and seller. In this state of affairs the further contention that the supply could not be made by 14th/15th November, 1989 on account of non amendment of the delivery period in the contract and non amendment of letter of credit cannot be accepted. This plea is clearly an after thought. Our attention has not been drawn to any legal proposition which casts an obligation, under these circumstances, on the buyer to fix a fresh date of delivery. The effect of accepting the contention of the seller would be that prior to 8th November, 1989, on the facts and circumstances of the present case, the breach was on the part of the seller but the buyer having withdrawn the cancellation and not having specified the fresh date of delivery, 31st October, 1989 having already passed, the breach would be on the part of the buyer. The contention on the face of it is fallicious. It has to be rejected."

In paragraph 30 of the judgment the Bench observed: "30. Apart from the urgent need for supply of sugar, otherwise too, in commercial transaction of this nature, in law, ordinarily time is of essence (See: M/s. China Cotton Exporters Vs. Beharilal Ramcharan Cotton Mills Ltd., AIR 1961 SC 1295). Further, in the present case, the contract itself stipulates that the supply within the contracted delivery period was to be the essence of the contract. In this view, the delivery of sugar firstly before 31st October, 1989 and later by 14th/15th November, 1989 was of essence and non supply within the aforesaid periods by the seller would show that the seller is in breach of the contract. The buyer having withdrawn the cancellation of the contract on seller's representation that the delivery will be made by 14th/15th November 1989 could not have refused to accept delivery within the said period. It is also not possible for us to accept the contention that the cancellation was not withdrawn on the representation of the seller. On account of non-supply of sugar upto 8th November, 1989 and even failure to supply the shipping particulars the contract was cancelled by the buyer. Thereupon the seller supplied the shipping particulars and made a representation that the supply would be made on or before 14th/15th November, 1989. Under these circumstances the cancellation of the contract was withdrawn. The letter dated 11th November, 1989 withdrawing the cancellation states that on reconsideration of the matter the cancellation is withdrawn. In the letter dated 11th November, 1989 the absence of specific reference to the representation of the seller that the delivery would be made by 14th/15th November, 1989. Under these circumstances, is of no consequence. As already noticed above, the letter dated 11th November, 1989 was personally handed over to the representative of the seller. On receipt of that letter the seller did not write to the buyer to specify the fresh date of delivery or to ask for amendment of the letter of credit. The next letter thereafter is dated 15th November, 1989. The seller did not say in this letter that pursuant to what had been stated by it in message dated 8th November, 1989 the Ships had entered Indian waters and as such the buyer

should incorporate fresh date of delivery and amend the letter of credit so that shipping documents could be furnished by seller to the buyer and that without these amendments the bank may not pay the amount covered by the letter of credit. On the other hand, the seller in the letter dated 15th November, 1989 stated that the cargo had gone out of its control and fresh cargo would be arranged which will be arriving at Indian port within a few days. The seller asked for minimum 15 days time to supply the cargo and requested for delivery period being extended upto 30th November, 1989 with consequential amendments in the letter of credit for acceptance of the documents. The buyer was not obliged in law to extend the delivery period. The silence on the part of the buyer by not sending reply to the letter dated 15th November, 1989 and also not sending any reply to the subsequent letters dated 20th November, 1989, 24th November, 1989, 4th December, 1989 and 20th December, 1989 only shows that the buyer was not willing to extend delivery period after 15th November, 1989. The sugar was required for the urgent need of Dussehra/Diwali festivals of November, 1989 and the supply not having been made till 14th/15th November, 1989 the buyer was jus tified in not extending the delivery period.

Turning now on to the issue of duty to speak, can it be said that silence on the part of the buyer in not replying to the letters dated 15th November, 1989, 20th November, 1989, 24th November, 1989, 4th December, 1989 and 20th December, 1989 only shows that the buyer was not willing to extend the delivery period after 15th November, 1989 - the answer cannot but be in the negative, more so by reason of the fact that fixation of a second delivery dated by the Appellate Bench of the High Court as noticed above, cannot be termed to be in accordance with the law. There was, in fact, a duty to speak and failure to speak would forfeit all the rights of the buyer in terms of the Agreement. Failure to speak would not, as a matter of fact, jeopardise the sellers interest neither the same would authorise the buyer to cancel the contract when there has been repeated requests for acting in terms of the agreement between the parties by the seller to that effect more so by reason of a definite anxiety expressed by the buyer as evidenced in the intimation dated 8th November, 1989 and as found by the Arbitrator as also the Learned Single Judge. As noticed above, the entire judgment of the Appellate Bench proceeds on the basis of certain presumptions, we are afraid however that reliance thereon cannot but be termed to be fallacious for inter alia the reasons mentioned herein below: (a) The first letter of cancellation of contract was received by the seller on 9th November, 1989 after issuance of both the seller's telex dated 8.11.89 and 9.11.89 to the buyer and therefore the same could not amount to representations against the cancellation as is being held by the Appellate Court. (b) The observation of the Appellate Bench pertaining to the amendment of the delivery date in the letter of credit (i.e. upto 29th January, 1990) does seem to be erroneous in the contextual facts of the matter under consideration. The date of delivery was specific in the letter of credit itself and in the event of non-delivery within the period, there might be some complications and as such request for extension of delivery date was made though however, without any response from the buyer's end, when, in fact, the conduct itself shows that the delivery date as mentioned in the letter of credit was not adhered to and the parties were ad-idem on the score of extension. (c) The letter of withdrawal of cancellation in any event does not refer to any representation and nor does it fix any date of delivery as has been so thought of by the High Court. The Appellate Court's presumption as to the fixation of the delivery date being 14th/15th November, 1989 in the normal course of event and had it been so, there would have been an express intimation from the buyer of such a specific extension. (d) Diverse intimations as noticed above from the seller's end to the buyer, went unattended and not one letter was sent in reply thereto recording therein that 14th/15th November, 1989 ought to be the fresh date of delivery. (e) When the contract was finally cancelled on 25th January, 1990, the Respondents stand was that the delivery date breached by the claimant was 31st October, 1989 and not 14th/15th November, 1989 as has now

been fixed by the Appellate Bench of the High Court. (f) The Appellate Bench, in fact, has not been able to appreciate the importance of the date of delivery in the letter of credit specially in an international commercial contract, since without the date of delivery being altered in the letter of credit itself and the bank being informed accordingly, question of release of any amount to the seller by their bank would not arise. (g) The Appellate Bench as a matter of fact has gravely erred in having an implied delivery date when the parties in fact did not stipulate at any point of time such a date. Let us now at this juncture consider this aspect of the matter in slightly greater detail. The irrevocable letter of credit was issued by the Indian Overseas Bank, Janpath favouring the Appellant herein for $ 27,840,000 drawn on applicants for credit at site for 100% invoice value covering shipment of 58000 million tonnes net weight, plus/minus 5% to be packed in Polylined jute bags of 50 kgs net weight `accompanied by the following documents". The letter of credit by itself records that the name of the Indian Port would be advised by the Government by means of an amendment to the credit and it further records that the credit is valid for negotiation upto three months from the date of letter of credit subject to negotiation within 21 days from the date of report of Independent/Joint Surveyor referred to in clause 5 of the documents. These documents include inter alia the following: (a) Beneficiary certificate to the effect that all the terms and conditions of the contract dated October, 24, 1989 and its annexures between beneficiary and the applicants for the credit, have been fully complied with - one original and two copies. (b) Certificates of inspection of quality, weight and packing in original and 5 copies; at the ports of discharge signed and issued by the applicants for the credit at the cost of the beneficiary, based on minimum 5 random sampling and 5 check weightment certifying (a) quality. (c) Photocopy of the signed contract between beneficiary and applicants for the credit (d) Documents with discrepency should not be negotiated without banks prior approval. Incidentally, be it noted that the contract itself envisaged appointment of a Surveyor. Clause 9 of the Agreement provides: "9. Inspection/survey at load port(s) The quality, quantity and packing at the load port(s) shall be supervised and certified by independent surveyors ominated by the Buyer at Sellers cost. The certificate of such nominated surveyors based on not less than 5 random sampling and 5 check weightment shall be final. The report of such surveyors shall, inter-alia, cover the following. "Load ports in Clause 9 above was subsequently amended to the port of discharge, the clause however, envisages the appointment of an independent Surveyor nominated by the buyer at the sellers cost and report of the surveyor is of considerable importance since the contract itself provides the far of activities of the Surveyors and the coverage under the Certificate and the same are: i) Cleanliness and fitness of the holds of vessel for receiving sugar prior to commencement of loading; ii) Quality and specifications; iii) Weight gross and net; iv) Packing v) Total number of bags; vi) Arkings vii) Date of commencement and completion of leading viii) Radioactivity-free certificate ix) Current crop of country of origin, mentioning crop years x) Load Rate xi) LOA/BEAM and xii) Arival Draft" Whilst on the subject of documentary evidence and the presumption of the Appellate Bench as regards the fixation of date of delivery, it would be convenient to note the Shipment as also Price Clause in the Agreement. The Shipment Clause reads as below: "3. Shipment Period: Sellers shall arrange shipment quantity so as to reach Indian Ports basis coast as per Clause 4(i) not later than 31st October, 1989. Date of tendering notice of readiness of the vessel as per clause 13(vii) here of shall be the date of delivery period. Shipment within contract delivery period is of the essence of this contract. In case of any delay in reaching the shipments before the delivery period at Indian Port, it is clearly understood that except for the reasons of force majeure, the seller will be deemed to be in contractual default/ and the buyer will have the absolute right to cancel the contract at the cost and risk and responsibility of the seller and claim for damages, costs, losses, expenses to from the seller. The Buyer, may however, extend the delivery period at a discount as may be mutually agree to between the Buyer and the Seller. Any cargo(es), under-loading/afloat on the date of this contract cannot be supplied." The Price Clause

reads as below: "4. Price I. In polylined jute bags, per metric tonne net weight, cost, insurance and freight, free out, one safe Indian port at Buyer's option. US 480.00 PMT (US DOLLARS FOUR HUNDRED EIGHTY ONLY) PER M.T. In case sugar is shipped in Polylined polypropylene bags, the above price will be subject to a discount of US 2.00 per metric tonne net weight of full cargo. The above price is based on discharge at one safe Indian port at Buyer's option, on the west Coast if the vessel carrying sugar is coming from the West of India, or on the East Coastal vessel carrying sugar is coming from the East of India for this purpose. Tuticorin will be considered as a West Coast Indian port. II. Opposite Coast Discharge The Buyer has the option to discharge the sugar at a port on the coast other than the basis coast as per Clause 4(1) above by paying additional charges @ US$ 1.50 on the net weight of the full cargo. III. Two Port Discharge Buyer has the option to discharge the sugar at two ports on any one coast for which the Buyer shall pay additional charges US $ 1.50 PMS on the net weight of full cargo. In case the second discharge port is Calcutta or Haldia, the Buyer shall pay additional charges US $ 2.00 PMS on the net weight of full cargo instead of US $ 1.50 PMS. For discharge at two ports on the coast other than the basis coast as per Clause No.4(1) above, the additional charges for two port discharge payable under this clause shall be over and above that payable under Clause No.4(ii) above." It needs to be noted here that the Clause as regards any cargo being under-loading/afloat on the date of the contract has been subsequently deleted. The contract term as regards the shipment period expressly provide thus that the Shipment should reach Indian ports not later than 31st October, 1989 but the issue is whether in the contextual facts time was the essence of the contract and in the event the answer is in the affirmative, then and in that event whether there was subsequent extension of time and what is the effect therefor. Herein before in this judgment we did refer to the effect of subsequent extension, but the issue as regards the factum of the time being the essence of the contract was left to be dealt with at the later stage and as such, it would be convenient to note the same at this juncture. Clause 3 of the Agreement namely the Shipment period expressly records that Shipment within contract delivery period was of the essence of the contract and it was clearly understood between the parties that except for reasons of force majeure the Seller would be deemed to be in default and buyer would have the absolute right to cancel the contract at the cost, risk and responsibility of the seller. This particular clause however itself provided that the buyer may however extend the delivery period at a discount to be mutually agreed to between the buyer and the seller: the contract therefore, envisaged specifically an extension of the period on a mutually agreed term. The Price Clause also is of some relevance in the matter of appreciation of the Agreement between the parties vis--vis the time. Clause 4 (ii) records that the buyer had the option to discharge the sugar at a port on the coast, other than the basic coast by paying additional charge and in terms of Clause 4(iii) the buyer had the option to discharge the sugar at two ports upon payment of additional charge. It is therefore, apparent that different rates have been provided for different ports and specific naming of the port is thus required before delivery is expected in the matter. On the wake of this factual detail as appears from the record and by reason of non-fulfilment of the buyers' obligations in terms of the agreement, can it be said that the time was the essence of the contract? In our view the answer to this all important question is in the negative. The contract itself provides reciprocal obligations and in the event of non-fulfilment of some such obligations and which have a direct bearing onto them - strict adherence of the time schedule or question of continuing with the notion of the time being the essence of the contract would not arise. The obligations are mutual and the terms of the agreement are inter-dependent on each other. Incidentally, paragraph 761 of Halsbury"s Laws of England (4th Ed: Vol.41) seems to be very apposite in this context. The passage reads as below: "761. Place of Delivery uncertain. Where the place of delivery is not indicated by the contract , and is within the option of the seller or of the buyer respectively, it is a condition precedent to the liability of the buyer or of the seller respectively to accept or to deliver the goods that he should receive notice of the place of delivery."

If any credence is to be given to the above noted passage in Halsbury's Laws of England being read with the terms of the contract, we do not find any justification for the Appellate Bench of the High Court to come to a conclusion that in fact time was the essence of the contract, since the condition precedent has not yet had taken place, neither the requirement of appointment of Surveyor has been complied with: the contract ought to be read with the time clause but subject however to certain other conditions. The essential point is that the seller must be instructed in accordance with the terms of the contract as to the way in which he can perform his duty in terms of the agreement and effect delivery upon the goods being put on board - In the event the Port of Discharge is not named - can the goods be put on board or can the seller be made responsible for his failure to put the goods on board? The answer cannot but be in the negative. In the contextual facts, the goods were on the high seas and to be diverted to the Ports of India, shortly, as such nomination of the port, was an essential requirement, in order to make the seller liable for breach and entitlement of the buyer to claim damages. In this context a passage from Benjamin's Sale of Goods Act (4th Edition) seems to be rather appropriate: Paragraph 20-040 reads as below: "The essential point is that the seller must be instructed, in accordance with any relevant terms of the contract, as to the way in which he can perform his duty to put the goods on board. If no shipping instructions are given, or if shipping instructions are not given within the time allowed by the contract, the seller is not liable in damages for non-delivery; and the buyer is liable in damages for non-acceptance."

Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the Agreement ought to be noticed in its proper perspective so as to assess the intent of the parties. The Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the instant case, the Port of Discharge has not been named neither the Surveyor is appointed - without whose certificate, question of any payment would not arise - can it still be said that time was the essence of the contract, in our view the answer cannot but be a positive `No'. Mr. Dholakia, the learned Senior Advocate as also Mr. Rawal, the learned Additional Solicitor General, appearing for FCI and Union of India respectively, strongly contended that the express words to the effect that the delivery ought to be effected by 31st October, 1989 ought to be taken with proper sanctity and the party be held responsible for not effecting delivery within the time stipulated in the Agreement and in this context strong reliance was placed on the decision of this Court in the case of China Cotton Exporters vs. Biharilal Ramcharan Cotton Mills Ltd. (AIR 1961 SC 1295). We are afraid however, that reliance on the decision of this Court in China Cotton Case (supra) is totally misplaced. This Court in the above noted decision was considering the true effect of the word "therefore", which is totally absent here. For convenience sake however, paragraph 6 of the judgment is noted herein below: "6. We find thus that whatever may have been said earlier in the printed portion of the contract the parties took care, after specifying "October/November, 1950" as the date of shipment to make a definite condition in the remarks column, on the important question whether the shipment date was being guaranteed or not and if so, to what extent. The words are: "This contract is subject to import licence, and therefore the shipment date is not guaranteed." Remembering, as we must, that in commercial contracts, time is ordinarily of the essence of the contract and giving the word "therefore" its natural, grammatical meaning, we must hold that what the parties intended was that to the extent that delay in shipment stands in the way of keeping to the shipment date October/November, 1950, this shipment date was not guaranteed; but with this exception shipment October/November, 1950, was guaranteed. It has been strenuously contended by the learned Attorney-General, that the parties were mentioning only

one of the many reasons which might cause delay in shipment and the conjunction "therefore" was used only to show the connection between one of the many reasons - by way of illustration and a general agreement that the shipment date was not guaranteed. We do not consider this explanation of the use of "therefore" acceptable. If the parties intended that quite apart from delay in obtaining import licence, shipment date was not guaranteed, the natural way of expressing such intention - an intention contrary to the usual intention in commercial contracts of treating time as the essence of the contract - would be to say: "This contract is subject to import licence and the shipment date is not guaranteed." There might be other ways of expressing the same intention, but it is only reasonable to expect that anybody following the ordinary rules of grammar would not use "therefore" in such a context except to mean that only to the extent that delay was due to delay in obtaining import licence shipment time was not guaranteed.

The decision in China Cotton Exporter's (supra) cannot possibly thus lend any assistance in the contextual facts of the matter in issue. The facts being, totally different and is thus clearly distinguishable. Further reliance was placed by the Respondent in the decision of this Court in the case of I.T.C. Ltd. vs. Debt Recovery Appellate Tribunal and Others (1998 (2) SCC 70) wherein this Court relying upon the decision in the case of U.P. Co- operative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd. (1988 (1) SCC 174) observed in paragraph 17 of the report as below: "17. It is now well settled that the question whether goods were supplied by the appellant or not is not for the Bank. This point has already been decided by the decision of this Court in U.P.Coop. Federation case referred to above. In that case it was stated (at p.193) by Jagannatha Shetty, J. as follows: (SCC para 45)

"The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of absolute independence. The courts held that if there has been `fraud in the transaction' the bank could dishonour beneficiary's demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else." (emphasis supplied)

It will be noticed from the italicised underlined portion in the above passage that there will be no cause of action in favour of the bank in cases where the seller has not shipped the goods or where the goods have not conformed to the requirements of the contract. The Bank, in the present case before us, could not, by merely stating that there was non-supply of goods by the appellant, use the words "fraud or misrepresentation" for purposes of coming under the exception. The dispute as to non-supply of goods was a matter between the seller and buyer and did not, as stated in the above decision, provide any cause of action for the Bank against the seller."

Reliance was also placed to the Law of Bankers' Commercial Credits by Gutteridge and Megrah wherein the authors stated that: "Banks issuing irrevocable credits subject to the Uniform Customs are not concerned with the sales contract or the goods; if it were otherwise credit business would be impossible. In law the credit contract stands by itself and is not to be interpreted to the point of amendment or augmentation by reference to the contract of sale or to any external document." The authors further laid emphasis on the General Provision c of the Uniform Customs which states that: "(c) Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."

Further emphasis was also laid by authors on Article 8(a) which provides that:: "(a) In documentary credit operations all parties concerned deal in documents and not in goods." Relying on the above, it was contended that the plea as raised by the Appellant that the amendment to the letter of credit is a requirement in order to obtain payment cannot but be termed to a myth and as such should not be relied upon - while it is true that the documents by themselves make and create a separate agreement with the Bank, and the Bank cannot possibly raise any dispute in regard thereto as to whether the goods are actually been supplied or not, but two factors ought to be kept in mind apart from what we have stated herein before in this judgment. The first being, to facilitate payment it is better to have the extended delivery date on the letter of credit itself by way of an amendment, so as to avoid any future complication. This is not a rule of law or a requirement of law but a matter of prudence. The second aspect is the counter guarantee of the Nova Scotia Bank. The counter guarantee also stipulates the delivery date and in the event of some queries raised in regard thereto, the party in whose favour such a letter of credit stands, would be put to unnecessary and frivolous litigation for no fault of the beneficiary. As noticed above it is not a requirement of law but a matter of prudence. No exception can possibly be taken to the views expressed by this Court in ITC's case or the statement in the Law of Bankers' Commercial Credits. Be it further noted that substance of both citations noticed above is the enforceability of the letter of credit by way of a separate transaction, in any event, that would mean and imply litigation in the event of there being any issue raised as regards the delivery period. Parties ought not to be allowed to be plunged into litigation, as such both the citations do not have any relevance apropos the submission made by the Appellants herein. Apart therefrom and in any event in the matter of compliance of the terms and conditions of letter of credit, reference of a delivery date is a requirement since the original contract stood incorporated in the letter of credit itself and the delivery date being shown therein as 31st October, 1989. The requirement of a certificate that original contract has been fully complied with, makes it necessary that the delivery for the purpose of the contract had to be extended since the original date by reason of efflux of time has lapsed. The learned Single Judge of the High Court looked at the matter from another point of view as well and he observed: "Looking at it from another angle, if amendment in the letter of credit was not necessary, the respondents should say so in reply to the various letters of the claimants in this connection...."

Whether the Respondents should have said it or not as observed by the learned Single Judge, but the fact remains that there was total silence and nothing prevented them from stating that such an endorsement either is or is not required but as noticed above, the Respondents herein has maintained delightful silence on that score. In the premises it would thus be safe to conclude that by reason of the non-fulfillment of the three conditions as noted above, question of time being the essence of the contract would not arise and as such delivery was to be expected within a reasonable time but before the expiry of the reasonable time, diverse letters were sent asking for details but the buyer maintained total silence when there was a duty to speak as noted above. The Appellate Court's finding that the contract stood extended upto 14th/15th October, 1989 does not have any factual support and as such totally unwarranted and thus cannot be sustained. For the self - same reason the finding of the Appellate Court as regards the issue of law, warranting intervention of the High Court vis--vis the award, cannot also be sustained. This is apart from the fact that it is a factual issue upon proper reading of the material documents on record. In any event upon coming to a conclusion that facts detail out in the judgment (under Appeal) unmistakably record that a new date of delivery is available on record - Question of the same being an issue of law does not arise in the facts of the matter under consideration. The letter of the Government of India dated 11.11.89 stated that the matter has since been reconsidered and the letter of cancellation stands withdrawn though however, without prejudice to rights and contentions of the Government but there was as a matter of fact,

reconsideration of the entire issue and it is only on that basis that the letter of cancellation was withdrawn. The facts depict that on 15th November, 1989, an intimation was sent by the Appellants to FCI stating that due to the cancellation, the cargo already arranged for, has gone out of control and a new cargo was being arranged. In the same letter the Appellant further asked for fixation of a new date of delivery and to make consequential amendment for acceptance of documents under the letter of credit by the Bank but no reply is sent. Letters of reminders have been sent again on 20th November, 1989, 24th November, 1989 but without any response whatsoever and subsequently the cancellation came in January, 1990 as noticed above, forfeiting the performance Bank Guarantee by FCI. In that view of the matter, question of the time being the essence would not arise in the contextual facts. More so by reason of the fact that the cargo was a cargo afloat on the High seas. Turning attention on to the other focal point, namely the interference of the court, be it noted that Section 30 of the Arbitration Act, 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The use of the expression `shall' in the main body of the Section makes it mandatory to the effect that the award of an arbitration shall not be set aside excepting for the grounds as mentioned therein to wit: (i) arbitrator or umpire has misconducted himself; (ii) award has been made after the supersession of the arbitration or the proceedings becoming invalid; and (iii) award has been improperly procured or otherwise invalid. The above noted three specific provisions under Section 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature obviously had in its mind that the Arbitrator being the judge chosen by the parties, the decision of the Arbitrator as such ought to be final between the parties.

Be it noted that by reason of a long catena of cases, it is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law: In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award. The common phraseology `error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record: The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined. In this context, reference may be made to one of the recent decision of this Court in the case of State of Rajasthan v. Puri Construction Co. Ltd. (1994 (6) SCC 485) wherein this court relying upon the decision of Sudarsan Trading Co.'s case (Sudarsan Trading Co. v. Government of Kerala and Anr. (1989 (2) SCC 38) observed in paragraph 31 of the Report as below:- "A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parts. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties and more

often than not a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aise by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject."

It is on the basis of this well settled proposition that the learned Single Judge came to a conclusion that the findings of the Arbitrators in regard to the extension of delivery period and failure to fix the fresh date has resulted in breach of the contract on the part of the Government and the same being purely based on appreciation of material on record by no stretch it can be termed to be an error apparent on the face of the record entitling the court to interfere. The Arbitrators have, in fact, come to a conclusion on a closer scrutiny of the evidence in the matter and re-appraisal of evidence by the court is unknown to a proceeding under Section 30 of the Arbitration Act. Re-appreciation of evidence is not permissible and as such we are not inclined to appraise the evidence ourselves save and except what is noticed herein before pertaining to the issue as the time being the essence of the contract. In this context, reference may be made to a decision of this Court in the case of M.

Chellappan vs. Secretary, Kerala State Electricity Board and Another (1975 (1) SCC 289). Mathew, J. speaking for the Three Judge Bench in paragraph 12 and 13 observed as below: "12. The High Court did not make any pronouncement upon this question in view of the fact that it remitted the whole case to the arbitrators for passing a fresh award by its order. We do not think that there is any substance in the contention of the Board. In the award, the umpire has referred to the claims under this head and the arguments of the Board for disallowing the claim and then awarded the amount without expressly adverting to or deciding the question of limitation. From the findings of the umpire under this head it is not seen that these claims were barred by limitation. No mistake of law appears on the face of the award. The umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact, that is no ground for challenging the validity of the award. It is only when a proposition of law is stated in the award and which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error of law apparent on the face of the record:

Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside.

The general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts. (see Russell on Arbitration, 17th ed., p.322).

13. An error of law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous (see Lord Dunedin in Champsey Ehara & Co. v. Jivraj Baloo Co.). In Union of India v. Bungo Steel Furniture Pvt. Ltd., this Court adopted the proposition laid down by the Privy Council and applied it. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law."

In any event, the issues raised in the matter on merits relate to default, time being the essence, quantum of damages - these are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem it fit - the Courts have no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has thus exceeded its jurisdiction warranting interference by this Court. As regards issues of fact as noticed above and the observations made herein above obtains support from a judgment of this Court in the case of Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors. (1999 (5) SCC 651) Before we conclude one significant feature ought to be noticed. Admittedly, a meeting was held between the claimants and the Minister of Food and Civil Supply and according to the claimant, it was agreed that on the claimants paying a sum of Rs.5 lakhs towards expenses incurred by the Government in opening the Letter of Credit and on the claimants giving up any claim for damages, the Performance Bank Guarantee would be released. While some discrepancy arise pertaining to the meeting in regard to the above subject but the subsequent evidence disclosed as appears from the record of the Arbitrators that the Appellants herein purchased a Bank Draft for Rs.5 lakhs from the State Bank of India and took it to the office of Government of India on 27th November, 1989 but it was not accepted. The Arbitrators as appears

summoned relevant file of the Government which was produced and the reasoned award contain the following: "During the cross examination of Shri S.K. Swamy the note made in this file by the Minister referred to by S. Santokh Singh was vertabim repeated in the question but to the witness Shri Swamy on 8th May, 1991. How the claimants got the verbatim text of this note, if the file was privileged, is not clear, but what we found was that the note of the Minister on the file was exactly in the same words as the question put to Mr. Swamy in his cross examination dated 8.5.91. All facts stated by S. Santokh Singh are mentioned in this note. This part of the statement of S. Santokh Singh is thus sufficiently corroborated by this note and S. Santokh Singh has also produced the draft for Rupees five lakh mentioned by him in his statement."

This aspect of the matter has also been totally overlooked by the Appellate Bench of the High Court. Needless to record that two Arbitrators Hon'ble Mr. Justice S.N. Shankar, a retired Chief Justice of the Orissa High Court and Shri K.C. Diwan, Senior Advocate upon appraisal of evidence and have considered the matter in its entirety and in proper perspective. As such, the question of interference with the Arbitral Award does not and cannot arise. In that view of the matter, these Appeals succeed. The order of the Appellate Bench of the High Court stand set aside and the order of the learned Single Judge of the Delhi High Court stands restored. Each party however to bear its own cost.