SUPREME COURT OF INDIA

Shetty'S Construction

Vs.

Konkan Railway Corpn. Ltd.

(S Majmudar and S Phukan JJ.)

07.10.1999

ORDER

S.B. MAJMUDAR, J.

1. Leave granted in all these appeals.

2. By consent of parties, these appeals were heard together as they arise out of a common judgment passed by the Division Bench of the High Court in original side appeals as well as out of identical orders passed in review petitions arising from the same common judgment. A few relevant facts leading to these appeals are required to be noted at the outset.

BACKGROUND FACTS:

3. The common appellant is a contractor and common respondents are the Konkan Railway Corporation and its officers. The contractor entered into four contracts for executing the work of the respondent No. 1 corporation, which had issued an advertisement inviting tenders for the construction of the "Mangalore-Udupi New Broad Gauge Railway Line Earthwork" and for other ancillary works. Four different contracts were entered into by the appellant-contractor with the respondent-corporation in connection with the laying of the aforesaid broad gauge railway line. It is not in dispute between the parties that the contractor did proceed with the work for some time, but ultimately all the four contracts giving rise to these appeals were terminated by the respondent-authorities. We are not concerned with the merits of demerits of the said exercise undertaken by the respondent-authorities in the present proceedings at this stage. All these contracts were terminated in the first half of the year 1992. It has to be noted at this stage that these contracts were entered into by the appellant-contractor with the respondent-authorities in the closing months of the year 1990.

After the said termination of contracts and handing over the incomplete work of the contracts by the respondent-authorities to other contractors, the appellant-contractor raised certain disputes arising out of the working of the said contracts in the closing months of the year 1994. It has also to be noted that, by that time, no final bills were prepared by the respondent-authorities in connection with the work actually done by the appellant-contractor under these four contracts. It is the case of the appellant-contractor that despite the raising of these disputes which were not favourably responded to by the respondent-authorities, when the appellant-contractor demanded reference to arbitration pursuant to the terms of the contractual agreement, the respondent-authorities did not comply with the said demand and, on the contrary, wrongly rejected the claims put forward by the appellant-contractor and did not refer the disputes for adjudication by the arbitrators as laid down by the terms of the contracts. As the respondent-authorities did not comply with the procedure for appointment of arbitrators for resolving these disputes, the appellant-contractor moved the High Court of Bombay on its original side under Section 8 read with Section 20 of the Indian Arbitration Act, 1940 (hereinafter referred to as the Act'). After hearing the parties, the learned Single Judge of the High Court directed the respondent-authorities to comply with the procedure of appointment of arbitrators as per the contracts agreed to between the parties. However, the learned Judge did not accept the further prayer of the appellant-contractor that arbitration should be entrusted to independent arbitrators as the respondent-authorities had failed to carry out their contractual obligations under the contracts by appointing arbitrators as per the said provisions. Identical directions issued in all the four suits by the learned Single Judge to the respondent-authorities to refer the disputes for appointment of arbitrators as per the term of the contract after following the machinery provided therein, were accepted by the respondent-authorities by not challenging the said Orders partially granting the prayers of the appellant. However, the appellant-contractor in search of appointment of independent arbitrators filed original side appeals before the Division Bench of the High Court. The Division Bench of the High Court, mainly relying on additional affidavit filed by the respondent-authorities in appeals, took the view that the appellant-contractor had not followed the gamut of the procedure regarding raising of demand for reference to arbitration as per Clause 63.1.1 of the contract and, therefore, it could not be said that the respondent-authorities have forfeited their right to refer the disputes to the arbitrators as laid down by the relevant clauses of the said contracts and, hence, the directions issued by the learned Single Judge for referring the disputes and differences which are arbitrable under the arbitration agreement for adjudication and consequently directing the Chairman-cum-Managing Director of the respondent-authorities to nominate arbitrators within six weeks as per the relevant clause of the contracts, were confirmed by the Division Bench of the High Court and the appeals of the appellant-contractor were dismissed. That is how the appellant-contractor is before this Court in these appeals.

RIVAL CONTENTIONS:

4. Learned senior counsel for the appellant-contractor, Shri Dave, vehemently contended that on the facts of the present four cases, the High Court ought to have held that the appellant-contractor had followed the procedure laid down by Clause 62 read with Clause 63.1.1 of the contract and had raised appropriate demands with the respondent-authorities for referring the disputes to arbitration and as the respondent-authorities, instead of responding to the said demands and following the procedure laid down by the contractual terms, have rejected the claims on merits, there was no option left for the appellant-contractor but to approach the Court under Section 8 read with Section 20 of the Act. That as the respondent-authorities have failed to comply with the procedure laid down for resolution of disputes through arbitration as per the contract, it was open to the Court to appoint independent arbitrators as requested by the appellant-contractor. Instead, the Court wrongly

relegated the appellant-contractor to the procedure of arbitration under the contracts. That the respondent-authorities, in this connection, had missed the bus and it was not open to them to once again fall back upon the machinery of arbitration under the contract, having earlier failed to, discharge their contractual obligations in this connection at the relevant time. The appellant-contractor was driven to file proceedings in the Court for no fault of his. It was, therefore, submitted that the Court may appoint a retired Chief Justice or retired Judge of the Supreme Court stationed at Bombay to adjudicate the disputes in these present cases. That the appellant-contractor will have no objection to the respondent-authorities appointing two arbitrators as per the terms of the contract, but the retired Chief Justice or retired Judge of the Supreme Court may be appointed as Chairman of the arbitration board, thus comprising of three arbitratOrs. In support of these contentions, various decisions were pressed in service.

5. Shri Dave, learned senior counsel for the appellant-contractor, also pointed out that when the appellant-contractor filed suit before the High Court invoking Section 8 and Section 20 of the Act, it was clearly averred in the plaints in all the four cases that the appellant-contractor had followed the procedure laid down by Clauses 62 & 63 of the contract and as the respondent-authorities have failed to comply with his demand for appointment of arbitrators as laid down therein, independent arbitrators had to be appointed by the Court. That in their written statements no grounds were raised by the respondent-authorities before the Trial Court, to the effect that the appellant-contractor had failed to follow the procedure of Clause 63.1.1 of the contract and, therefore, there was no occasion for the respondent-authorities to comply with the procedure laid down by the said clause on their part. Hence, it was not open to the respondent-authorities, for the first time in appeal by way of further affidavits, to make a somersault and to raise such a new point which was accepted by the Division Bench and that too without giving any opportunity to the appellant-contractor to file an affidavit in reply in this connection. That the objection regarding the alleged non-compliance with the time schedule by the appellant-contractor as per Clause 63.1.1 of the contract was clearly waived by the respondent-authorities. Under these circumstances, the Division Bench was in error in dismissing the appeals on this ground. Shri Dave, learned senior counsel for the appellant-contractor, however, fairly stated that as the disputes are lingering since years, it is high time that these disputes are resolved at the earliest by the arbitrators and, therefore, he does not press for any remand to the High Court and that this Court may decide his grievance regarding non-appointment of independent arbitrators in the present proceedings in the light of the admitted well established facts emerging from the documentary evidence on record and may pass appropriate orders in this connection.

6. Dr. Singhvi, learned senior counsel for the respondent-authorities, on the other hand, submitted that the correspondence between the parties which has been brought on record and which is tabled by him by way of a chart in connection with all these four cases, and on which there is no dispute between the parties, clearly indicates that the appellant-contractor had not followed the procedure laid down by Clause 63.1.1 of the contracts and consequently, there was no occasion for the appellant-contractor to contend with any emphasis that the respondent-authorities, in their own turn, had failed to comply with their statutory obligations under the said clauses and as the respondent-authorities have already accepted the Order of the learned Single Judge for referring the disputes to arbitration by following the machinery provided in the contracts, it is too late in the day for the appellant-contractor to contend that the respondent-authorities were guilty of breach of the machinery provisions regarding appointment of arbitrators as laid down in the contracts and, therefore, it was open to the Court to appoint independent arbitrators for resolving these disputes between the parties. He also submitted that in the light of the arbitration agreement binding between

the parties Section 8(1) of the Act did not apply, as arbitrators were not to be appointed by consent of parties but were to be appointed by the Chairman-cum-Managing Director after following the procedure laid down in the contracts and equally there was no occasion for the Court to exercise powers under Section 20(4) of the Act as it could not be said that the respondent-authorities, on the facts of these cases, have failed to discharge their obligations under the clauses pertaining to appointment of arbitrators, and hence, all that could be directed by the High Court is to call upon the respondent-authorities to appoint arbitrators as laid down under the relevant clauses of the contract governing the procedure for appointment of arbitratOrs. That such directions are given by the High Court and which are acceptable to the respondent-authorities.

7. We may now refer to decisions of this Court on which reliance was placed by senior counsel for the respective parties. Shri Dave, learned senior counsel for the appellant-contractor invited our attention to decisions in Union of India v. Prafulla Kumar Sanyal ,Nandyal Coop. Spinning Mills Ltd. v. K.V. Mohan Rao, and G. Ramachandra Reddy & Co. v. Chief Engineer, Madras Zone, Military Engineering Service, and submitted that if one of the contracting parties does not carry out its obligations regarding appointment of arbitrator, the other party can request the Court in proceedings under Section 8 read with Section 20(4) of the Act to appoint an independent arbitrator for resolving the disputes. Dr. Singhvi, learned Counsel for the respondent-authorities, on the other hand, invited our attention to decisions of this Court in S. Rajan v. State of Kerala and Anr. , Secretary to Government, Transport Dept., Madras v. Munuswamy Mudaliar and Anr. 1988 (Supp.) SCC 651), Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. and Ors. and Bhupinder Singh Bindra v. Union of India and Anr. , and submitted that Section 8 Sub-section (1) Clause (a) of the Act does not apply to the facts of the present case as arbitrators under the clauses in the present contracts are not to be appointed by consent of the parties but only by a third party i.e. the Chairman-cum-Managing Director and that too under Section 4 of the Act. He further submitted that Section 20 Sub-section (4) of the Act, on the facts of the present case, would also not get attracted as the evidence on record shows that in none of the four contracts the appellant-contractor, on his part, had complied with the procedural requirements of Clause 63.1.1 of the contracts laying down the procedure for raising demand for appointment of arbitrators for adjudication of disputes. In our view, it is not necessary to consider the aforesaid decisions of this Court on the facts of the present case, as will be seen hereinafter, once it is found that the appellant-contractor had not carried out his part of the contractual obligation invoking the arbitration clauses as per Clause 63.1.1 and it is not shown that the respondent-authorities have failed to appoint arbitrators as per the relevant clauses and, therefore, have forfeited their right of insisting on the appellant-contractor to be bound by the procedure of appointment of arbitrators as per the relevant clauses of the contract, question of appointment of independent arbitrators by the Court will not survive. Even assuming that Section 8(1)(a) does not apply, there would then remain no occasion for the Court to appoint independent arbitrators by exercise of its powers under Section 20(4) of the Act. We, therefore, need not dilate on the aforesaid decisions relied upon by senior counsel for the respective parties.

8. In the light of the aforesaid rival contentions, the following points arise for our determination:-

1. Whether the appellant-contractor had followed the procedure laid down by Clause 63.1.1 of the contracts in connection with the demand for appointing arbitrators for resolving the disputes between the parties,

2. Whether the respondent-authorities have filed to carry out their contractual obligations under the

very same relevant clauses of the contracts governing the controversy;

3. If the answer to the first point is in the affirmative and the answer to the second point is in the negative, whether it was open to the High Court in proceedings under Section 8 read with Section 20 of the Act to appoint independent arbitrator or arbitrators instead of relegating the appellant-contractor to the procedure of appointment of arbitrators as per the terms of the contracts; and

4. What final order?

9. We shall now proceed to deal with these points in seriatim.

POINT NO. 1:

10. So far as this point is concerned, it would be appropriate to note the relevant clauses of all the four contracts which are identical in nature and which deal with settlement of disputes between the parties in connection with the contract work in question. The relevant Clauses are 62,63.1.1,63.1.2 and 63.1.3, which read as under:-

62. All disputes or differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Corporation and the Corporation shall within a reasonable time after the receipt of the Contractors' representation make and notify decisions therein in writing. The decisions, directions and certificates given and made by the Corporation or by the Engineer on behalf of the Corporation, with respect to any matters, decision of which, is specially provided for by Clauses 17, 21.5, 37, 43(a), 53.2, 60.2 and 61.1(b) of these conditions (which matters are referred to hereinafter as "expected matters") shall be final and binding on the Contractor, provided further that "expected matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

DEMAND FOR ARBITRATION

63.1.1 In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Corporation of any certificate to which the Contractor may claim to be entitled to or if the Corporation fails to make a decision within a reasonable time, then and in any such case, save the except matters referred to in Clause 62 of these conditions, the Contractor after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

63.1.2 The demand for arbitration shall specify the matters which are in question, dispute or difference. Only such disputes or differences in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

63.1.3 If the Contractor does not prefer his specific and final claims in writing, within a period of 90 days of receiving the intimation from the Corporation that the final bill is ready for payment, he will be deemed to have waived his claims and the Corporation shall be discharged and released of all liabilities under the contract in respect of these claims.

11. It is not in dispute between the parties that if it is found on facts that the appellant-contractor had followed the gamut of the aforesaid clauses and had carried out his part of the contractual obligations and if the respondent-authorities have not responded to the demand for arbitration raised by the appellant-contractor after following the aforesaid procedure, then there would remain no occasion for the respondent-authorities for submitting that the procedure of arbitration and appointment of arbitrators and umpire as laid down by the remaining Clauses 63.3(a), 63.3(b) and other clauses up to 63.3 (g) should remain binding between the parties. Then it would be open to the Court to pass appropriate orders regarding appointment of independent arbitrators for resolving the disputes raised by the appellant-contractor even dehors the machinery laid down by Clauses 63.3(a) to 63.3(g) dealing with the procedure of arbitration. On the other hand, if it is found that the appellant-contractor had not followed the procedure of Clause 63.1.1 and not raised appropriate demand within the time schedule laid down therein, then the respondent-authorities can not be treated to have committed breach of the said provisions so as to leave an open field for the Court to appoint independent arbitrators for resolving the disputes between the parties.

12. Before dealing with this main question, we may clear two preliminary matters. By an earlier Order of this Court dated 2nd April, 1998, it has been held in all these four appeals, after hearing the parties, that the present controversy will have to be resolved in the light of the Arbitration Act, 1940 and not as per the new Arbitration & Conciliation Act of 1996. So far as the second preliminary point is concerned, Shri Dave, learned senior counsel for the appellant-contractor, submitted that the alleged non-compliance of the time schedule, as laid down in Clause 63.1.1 by the appellant-contractor, cannot survive for consideration for the simple reason that in the suits filed by the appellant-contractor before the learned Single Judge, it was clearly averred in paragraph 10 of each of the plaints, amongst others, that the plaintiff had requested the defendants by a letter dated 6th March, 1995 to appoint arbitrator and after receipt of the above letter, the defendants have not chosen to appoint any arbitrator till date. Thus a vacancy had arisen which related to appointment of arbitrator. In view of the above vacancy the Hon'ble Court was having ample powers to appoint any third party as arbitrator and complete the arbitration proceedings and that the suit has been filed not only under Section 20(4) of the Act but also under Section 8 of the Act. Shri Dave submitted that the respondent-authorities in their written statements, for reasons best known to them, did not challenge these averments nor did they take up the contention that the appellant-plaintiff had not followed the gamut of time schedule as laid down by Clause 63.1.1 and, therefore, the said contention raised for the first time in appeals could not have been permitted to be raised by the Appellate Court and should be treated to have been waived by the respondent-authorities.

13. Learned senior counsel for the respondent-authorities, Dr. Singhvi, on the other hand, submitted that in paragraph 13 of the written statements in each of the suits with further reference to paragraph 10 of the plaint, it was averred as unden:-

It is denied that defendants have not chosen to appoint any arbitrator till date. It is rather preposterous on the part of the plaintiff to state that vacancy has arisen which require appointment of an arbitrator. The defendants state that the present suit is neither maintainable under Section 20 of the Arbitration Act nor has it got anything to do with the provision of Section 8 of the Act. The scheme of the aforesaid provision have no bearing on the present suit inasmuch as the present suit lacks the essentials of the aforesaid provision.

14. Now, it becomes at once clear that excepting general denial there is no specific denial on the part

of the respondent-authorities in the written statements that the plaintiff had not complied with the time schedule and the gamut laid down by Clause 63.1.1 and hence there was no occasion for the respondent-authorities to appoint arbitrators under the relevant clauses of the contracts. However, that is not the end of the matter. The learned Trial Judge, without expressly referring to this aspect of the matter, ultimately held in favour of the respondent-authorities to the limited extent by granting partial relief to the appellant-contractor, namely, that the respondent-authorities were called upon to appoint arbitrators as per the terms of the contracts. Implicit in the said direction was the finding that the respondent-authorities were not guilty of any breach of the procedural provisions of Clause 63.1.1. It was also implicit in the said direction that the appellant-contractor had not made out a case for subjecting the respondent-authorities to the procedure of independent arbitration dehors Clause 63.1.1 and the rest of the relevant clauses. It was also implicit in the said direction that the plaintiff had not followed the time schedule and not raised proper demand for arbitration as per Clause 63.1.1. But, what was implicit in the finding resulting in the ultimate direction by the Trial Judge was made explicit by the Division Bench in appeal. It is true that detailed affidavit raising this contention was filed by the respondent-authorities before the Appellate Court. It is also true that the Appellate Court was required to give sufficient time to the appellant-contractor to file his response by filing his affidavit in reply. That no such time was given to the appellant-contractor. But this grievance becomes academic as the appellant's learned senior counsel did not claim any remand on this ground and wanted us to decide the main controversies between the parties on the basis of evidence on record. It has also to be kept in view that the learned Judges of the Division Bench heard the parties on merits of this controversy regarding compliance with the procedure of Clause 63.1.1 and thereafter agreeing with the respondent-authorities, dismissed the appeals. It must, therefore, be held that the question regarding compliance or non-compliance of the time schedule laid down by Clause 63.1.1 by either side is a live controversy which has to be resolved on merits in the light of evidence on record. Under these circumstances, the objection regarding waiver of this contention by the respondent-authorities on the peculiar facts of these cases, does not survive.

15. Having cleared these preliminary objections and points in controversy, now the stage is reached for addressing ourselves to the main question as to whether the appellant-contractor is justified in demanding reference to arbitration by independent arbitrators or not.

16. For deciding this controversy and finding out as to whether the appellant-contractor has complied with the time frame laid down by Clause 63.1.1, it becomes necessary to look at the relevant facts which are well established on record as emerging from the documentary evidence exchanged between the parties in connection with all these four contracts. It would, therefore, be convenient to deal with the factual data in connection with the appeal arising out of each of these four SLP's dealing with all the four different contracts between the parties.

1. Factual data leading to civil appeals arising out of SLP (C) Nos. 1238-39 dealing with construction of the "Mangalore-Udupi New Broad Gauge Railway Line" Reach VIII.

17. The appellant-contractor submitted a claim letter to the respondent-authorities on 28th November, 1994. It is at pages 40-64 of Volume-I. It is addressed to the Chief Engineer, Konkan Railway Corporation Ltd., Udupi (Dist. South Kanara) dealing with Construction of Mangalore-Udupi New Broad Gauge Railway Line. It had also reference to agreement dated 9.11.1990. Having mentioned the various causes for the delay in completing the work, various claims were raised for consideration by the respondent-authorities. They are listed as Claim Nos. 1 to 16 and then follows the pertinent recital in the last paragraph, which reads as under:-

Finally we request you to kindly settle all the above said claims (from 1 to 16) within a reasonable period from the date of receipt of this letter as per Clause 62 of the General Conditions of Contract failing which, we intend to refer all the claims stated above to Arbitration under the provisions of Clause 63 of the General Conditions of Contract.

It is obvious that this letter does mention 16 types of claims raised by the appellant-contractor for consideration of the respondent-authorities. They squarely fall within Clause 62 of the general conditions of the contract referred to earlier. It has to be kept in view that under the relevant clauses pertaining to settlement of disputes, two types of disputes or differences are contemplated between the parties. They are:

1. Disputes or differences in connection with the contract when the contract work is in progress.

2. Disputes or differences after the completion of the contract or its recession when the stage of final bill is reached and the disputes pertaining to the claims arising from such final bill.

The first type of disputes are covered by Clauses 62 and 63.1.1 while the second type of disputes, after the final bills are prepared and made available and served on the contractor, would be covered by the contingency envisaged by Clause 63.1.3. In both these disputes or differences between the parties, the procedural gamut and the requirements of Clauses 63.1.1 and 63.1.2 would be equally applicable. It is not in dispute between the parties that final bills in all these four cases were never prepared by the respondent-authorities and furnished to the appellant-contractor before he filed proceedings in the Court on 24.8.1995. It must, therefore, be held that when the appellant-contractor wrote a letter dated 28.11.1994, he had complied with the requirements of Clause 62 and which could also attract first part of Clause 63.1.1 and as, according to the appellant-contractor, the disputes raised by him in the said letter did not refer to excepted matters as mentioned in Clause 62, it could be said that the appellant-contractor had submitted his final claim qua these 16 items mentioned in the said letter. In the light of this letter, Shri Dave, learned senior counsel for the appellant-contractor, submitted that on expiry of 90 days after 28.11.1994, that is after 28th February, 1995, the appellant-contractor did raise a demand in writing that the disputes mentioned in the claim letter of 28.11.1994 should be referred to arbitration. That was exactly what was done by him on 6.3.1995. That 6.3.1995 letter was after 90 days of 28.11.1994 and before 180 days of 28.11.1994 which would have expired by 28th May, 1995 and consequently, he could be said to have complied with the time frame and time schedule laid down by Clause 63.1.1. And thereafter, the respondent-authorities, within reasonable time, had not appointed arbitrators as laid down by the procedural provisions of Clause 63.3(a) onwards, the respondent-authorities missed the bus, as by their reply letter dated 3.7.1995, the respondent-authorities rejected the appellant's claim on merits and, therefore, it was open to the appellant-contractor to move the Court thereafter on 24.8.1995 seeking appointment of independent arbitrators on the ground that the respondent-authorities, being given ample opportunity to comply with the procedure of arbitration as laid down by the relevant clauses, have failed to discharge their part of the obligation.

18. Shri Dave, learned senior counsel for the appellant-contractor, would have been perfectly justified in his contention, if on 6-3-1995 the appellant-contractor had reiterated his claims raised on 28.11.1994 in connection with the 16 claims and in continuation thereof had demanded arbitration. In that eventuality, claims of 28-11-1994 would have been considered to be final claims on disputed matters as envisaged by Clause 63.1.1 and the time schedule laid down therein would have been

fully complied with by the appellant-contractor Unfortunately, the appellant-contractor, for reasons best known to him, had second thoughts. Be did not treat the claims raised earlier on 28.11.1994 as final claims and put forward new claims partly reiterating the earlier claims computing them in money terms and partly introducing new claims by changing the rates earlier claimed for damages. We have, therefore, to see what the appellant-contractor himself did by submitting another claim letter dated 6th March, 1995. It is interesting to note that in the said second letter dated 6-3-1995, the appellant-contractor requested for arbitration into the disputes and differences in the work of construction of "Mangalore-Udupi New Board Gauge Railway Line" and made reference to the agreement of 9-11-1990. But curiously enough, there is no reference to the earlier claim letter dated 28-11-1994. Thus the appellant, on his own, did not think it proper to rely upon the earlier claim letter of 28-11-1994 and raised entirely fresh final claims on 6-3-1995. When we turn to the claims mentioned in the letter of 6-3-1995, we find that there are 16 claims mentioned wherein various amounts have been computed; what is already received by the claimant is deducted and balance amounts are claimed to be due. The chart submitted by learned senior counsel for the respondent-authorities, in this connection, showing the variation between the claims put forward on 28-11-1994 and on 6-3-1995, and which could not be controverted by learned senior counsel for the appellant-contractor, clearly shows that the claims put forward on 6-3-1995 are entirely on a different basis and can be treated to be the final claims pertaining to the disputes raised by the appellant-contractor under diverse heads. Take one example in the statement of claims of 28-11-1994. On Claim No. 5 pertaining to payment of equitable rates for execution of excess quantity over 125% of tender quantity at Serial No. 8 is found construction of RCC slab with CC M-20 above 5 Metres and the equitable rate claimed is Rs. 1,930.00 Cum. This rate is completely changed in the claim letter of 6.3.1995 at page 81, wherein for this very item equitable rate is Rs. 2,390.00 Cum. This is only one illustration. Similarly, in the letter of 28-11-1994, there is no computation about Claim Nos. 6 and 7 while in the letter of 6-3-1995 crystallised amounts computed on these claims. We may extract at this stage the variation between the claims put forward on 28-11-1994 under different heads and the claims put forward on 6-3-1995 as reflected in the chart submitted by learned senior counsel for the respondent-authorities.

VARIATION

28.11.1994 06.03.1995

Revision

of Claims P-52-rate claimed Rs. 1930/Lacs P-81 Rs. 2930/Lacs P-53-No computation (Claim 6) P-82 Computed

P-54 No computation (Claim 7) P-84 Computed

P-85 Computed

P-54-No computation (Claim 8) P-86 Computed

P-56-(Claim 8)Different Comp. P-88 Computed

P-57-Different computations P-93 Computed

P-60-Not computed (Claim 12) P-93 Computed

P-61-Not computed (Claim 13) P-98 Computed

P-63-Not computed (Claim 14) P-99 Computed

P-64-Not computed (Claim 15)(Interest)

19. It must, therefore, be held that the second claim letter of 6-3-1995 is not in continuation of the earlier letter of 28-11-1994, but it is entirely a new claim letter, which appears to be submitting final claims for consideration of the respondent-authorities. Once this conclusion is reached, the next question arises as to what are the steps next taken by the appellant-contractor as required by Clause 63.1.1. The said provision, as noted earlier, lays down that the appellant-contractor, after presenting his final claim no disputed matters, has to demand in writing that the disputes or differences qua those matters indicated in the final claim statement should be referred to the arbitration by the respondent-authorities. It is interesting to note that after 6-3-1995, which has to be treated to be the final claim statement by the contractor, he never raised any demand in writing for consideration of the respondent-authorities for referring the disputes or claims mentioned in the letter of 6.3.1995 for adjudication by reference to arbitration as per the requirements of the relevant clauses. It is not possible to agree with the submission of learned senior counsel for the appellant-contractor, Shri Dave, that the word 'final' as found in Clause 63.1.1 should be treated either as a surplusage or may be read in the light of the contingencies contemplated by Clause 63.1.3. It is difficult to appreciate how the word 'final' can be treated to be a surplusage. Shri Dave, learned senior counsel for the appellant-contractor, in this connection, vehemently relied upon the observations of 'Russell of Arbitration Twenty-First-Edition' for submitting that contents of notice requiring arbitration should not require too much technicality. He also invited our attention to 'The Law and Practice of Commercial Arbitration in England' Second Edition by Sir Michael J. Mustill & Stewart C. Boyd, wherein it was observed as follows:-

Most disputes storm from claims. But the existence of a formulated claims is neither necessary not sufficient to create a dispute.

20. It is difficult to appreciate how these observations can be of any avail to him for interpreting the word 'final claims' on disputed matters as envisaged by Clause 63.1.1. In the context of the said clause, it must be held that 'final claims' envisaged therein must be crystallised and complete claims on disputed matters to be lodged with the authorities by the contractor who wants the authorities to decide upon these claims and to consider whether they are worth granting wholly or in part or worth rejecting and that play would be available to the respondent-authorities for a period of 90 days from lodging of such final claims on disputed matters by the contractor for the consideration of the authorities. This locus paenitentiae of 90 days is essential for the authorities to consider whether the final and crystallised claims on disputed matters either during the pendency of the contract or after its termination or even after the final bills get prepared are required to be granted wholly or partly or not at all and once the authorities do not respond favourably during these 90 days after the lodging of final claims, then it would be open to the contractor raising those claims to demand arbitration in writing in connection with these final claims within further three months, that is within the upper limit of six months from the date of raising of such final claims. It is also hot possible to agree with learned senior counsel for the appellant-contractor, Shri Dave, that 'final claims' mentioned in Clause 63.1.3 have to be read into the phraseology of the term 'final claims' as mentioned in Clause

63.1.1. It is easy to visualise that 'final claims' on disputed matters may arise during the pendency of contract as laid down by Clause 62 or may arise at the end of the contract when final bills are submitted as contemplated by Clause 63.1.3. In both these cases, which broadly are governed by Clause 62, after lodging of final claims the time schedule laid down by Clause 63.1.1 would obviously apply to cover both these types of final claims. In short, the final claims must be definite, certain and crystallised under diverse heads either flowing from the final bill or even earlier arising out of the working of the contract even when the final bill is still not prepared by the authorities. Therefore, instead of reading down the term 'final claims' on disputed matters as found in Clause 63.1.1 to mean only 'final claims' arising out of final bills, it must be held that the term 'final claims' on disputed matters as employed by Clause 63.1.1 would cover final claims on disputed matters either lodged during the currency or even after its termination or even after preparation and submission of final bills by the authorities. In all these cases, the final claims on disputed matters contemplated by Clause 63.1.1 must be crystallised and firm final claims which are required to be considered by the authorities for giving their response. In other words, the claims should not be in a fluid state and the appellant-contractor should not consider them to be not final but tentative to be revised or reconsidered at his end in future for raising ultimate claims on the relevant heads of dispute. If the appellant-contractor himself treats these claims at an, earlier stage to be in a fluid state and not final, neither he can expect the authorities to respond thereto nor can he treat the authorities to have failed to respond thereto so as to lose the benefit of the procedure of arbitration binding between the parties as per the contractual terms.

21. It is interesting to note that, after the final claims regarding disputed items as mentioned in the letter dated 6.3.1995 were lodged, when the Corporation in its reply dated 3-7-1995 turned them down, 90 days after lodging the final claims on 6-3-1995 were already over. Therefore, when the respondent-authorities rejected these claims on 3-7-1995 and, when the appellant-contractor naturally was aggrieved, thereby a stage was reached for him as required by Clause 63.1.1 to have demanded in writing reference to arbitration for adjudication of all the final claims mentioned in the letter of 6-3-1995. He was required to do so within 180 days of raising of the final claims of 6.3.1995. Meaning thereby, he could legitimately demand in writing from the respondent-authorities that they should prefer disputed claims referred to in the letter of 6-3-1995 for adjudication to the arbitrators as per the provisions of the relevant clause. He could have, therefore, followed the procedure as laid down by Clause 63.1.1 and raised demanded in writing for arbitration on or before 6th September, 1995. Instead of doing so, he rushed to the Court on 24-8-1995 on the assumption that the respondent-authorities had not complied with the requirements of Clause 63.1.1 and had not responded to the demand in writing as per the said provisions and, therefore, had lost the benefit of the said provisions and had committed breach of the relevant terms of the clauses of the arbitration agreement regarding the procedure for arbitration and, therefore, it was open to the Court to appoint independent arbitratOrs. For the present purpose, we will assume that in the application under Section 20(4) read with Section 8 of the Act, the Court had jurisdiction to appoint independent arbitrators if it was shown that the respondent-authorities have not complied with their contractual obligations under the relevant clauses of the contracts pertaining to arbitration. But even on that assumption which would not require us to consider various decisions pressed in service by senior counsel for the parties in connection with the Court's power, in such cases, we find that on the facts of these cases, the appellant's claim for appointment of independent arbitrators is rightly rejected by the High Court. The aforesaid conclusion, in the light of the documentary evidence on record as seen by us earlier, requires us to hold that the appellant-contractor had not complied with the procedure to be followed within the time schedule laid down by Clause 63.1.1 for raising demand for reference to arbitrators by the authorities and had not demanded in writing that the disputes

mentioned in the final claim dated 6.3.1995 should be referred to arbitration by the respondent-authorities. Hence, it could not be said that the respondent-authorities have failed to carry out their corresponding contractual obligation under the very same clause and, therefore, had forfeited their right to resort to the machinery of arbitration under the terms of the contract and, consequently, it was open to the Court to appoint independent arbitratOrs.

2. Factual data regarding civil appeals arising out of SLP(C) Nos. 1240-41 of 1997 Reach VI Pages 1-48 in Volume-II.

22. In these cases, the appellant's claim letter is dated 5-1-1995. The appellant-contractor raised various claims being Nos. 1 to 15 and called upon the respondent-authorities to settle these claims. On the expiry of 3 months i.e. 90 days, that is after 5.4.1995, the appellant-contractor by a letter dated 24.4.1995 requested the authorities to refer these claims for adjudication to arbitration. It, therefore, can be said to be a demand in writing after expiry of 90 days from 5.1.1995 for reference to arbitration as required by Clause 63.1.1. Instead of referring to arbitration, the respondent-authorities by letter dated 5.7.1995, rejected the claims on merits. If the matter has stood thus, learned senior counsel for the appellant-contractor, Shri Dave, would have been perfectly justified in submitting that at least in this case the appellant-contractor had strictly complied with the provisions of Clause 63.1.1 and the default was on the part of the respondent authorities and, therefore, the Court could, on his request, appoint independent arbitrators in the proceedings lodged on 24.8.1995. However, unfortunately for the reasons best known to the appellant-contractor, the said original claim of 5-1-1995 which was wholly reiterated by the letter of 24.4.1995 was again treated as not final claim by the appellant-contractor himself and he addressed a revised claim letter on 10th August, 1995. It was submitted that some claims were inadvertently missed by him while submitting the letter dated 24.4.1995. He also submitted that additional claims amounting to Rs. 15,35,2027 - were raised and for Claim No. 8 was revised from Rs. 15.00 lacs to Rs. 28.5 lacs and for Claim No. 6 instead of Rs. 2,05,02,510/-, Rs. 2,18,27,865.00 had to be read. Shri Dave, learned senior counsel for the appellant-contractor submitted that, on the given heads of claims, further revision could be done even before the arbitrator. That may be so, but here we are concerned with lodging of crystallised definite final claims on disputed items for consideration of the authorities as envisaged by the time schedule agreed to between the parties as per Clause 63.1.1 The appellant's letter dated 10.8.1995, therefore, clearly shows that what were earlier final claims, according to him, were not final but were still in a fluid state and were required to be raised upwards even till 10.8.1995. Once that conclusion is reached, the appellant-contractor's claims would get reconfirmed to square one under Clause 63.1.1 and he had again to wait for 90 days for the consideration of these revised claims by the respondent-authorities and thereafter within further 90 days he had to make a fresh demand for reference and thereafter if the respondent-authorities have failed to comply with such a demand, the Court could have been approached seeking relief for appointment of independent arbitratOrs. The appellant-contractor could have raised such fresh demand for arbitration after 9.11.1995 and before 9.2.1996. Instead of doing that, the appellant-contractor filed the suit on 24-8-1995. That amounted to cutting across the procedure in the light of the time schedule laid down by Clause 63.1.1. It is this last letter of 10.8.1995 that put the appellant-contractor out of the Court so far as his prayer for independent arbitrators was concerned.

3. Factual data dealing with Civil appeals arising out of SLP (C) Nos. 1242-43 regarding contract Reach XI.

23. Factual data regarding these appeals is almost parallel to the one found in the first case. The

appellant's first claim letter is dated 30-11-1994. The respondent-authorities, on 2.1.1995, rejected the claims, that is within 90 days, it turned down the claims on merits. Then arose the occasion for the appellant-contractor to raise a written demand for arbitration in the light of the claim letter of 30-11-1994. This he could have done on 6-3-1995 i.e. after 28-2-1994 when 90 days expired after 30-11-1994. But instead of sticking to the earlier claim letter of 30-11-1994, curiously enough, the appellant-contractor, by his letter dated 6.3.1995, raised further claims. Meaning thereby, treating the earlier claims not to be final. In the chart submitted by learned senior counsel for the respondent-authorities, the variation between the claims submitted on 30-11-1994 and 6.3.1995 have been pointed out in detail. They read as under:-

VARIATION

30.11.1994 06.03.1995

Revision of P-9 Claim 1 - Not computed P-38 Computed Claim P-11 Claim 2 - Not computed P-40 Computed

P-17 Claim 6 - Not computed P-47-48 Computed

P-19 Claim 6A Not found

P-24-26 Claim 13 Amount changed P-59-61 Claim 20

In the claim letter of 30-11-1994, 16 claims have been put forward while in the letter of 6-3-1995, 20 claims have been put forward, one of them being damages suffered owing to termination of contract, which is entirely a new claim. That apart, there are diverse variations as listed in the chart given by learned senior counsel for the respondent-authorities, as noted earlier. It is also interesting to note that in the claim letter of 6.3.1995, there is no reference to the earlier claim letter of 30-11-1994 and, therefore, according to the appellant-contractor himself, it is entirely a new substituted claim statement which can be treated to be a final claim statement on disputed items listed in the letter of 6.3.1995. Thereafter, as required by Clause 63.1.1, the respondent-authorities should have been given time of 90 days up to 5th June, 1995 to give response. Ultimately, the respondent-authorities rejected these claims on merits by a communication dated 25.7.1995. Thereafter, as per Clause 63.1.1., the appellant-contractor could have raised demand for arbitration regarding claims put up on 6.3.1995 as 180 days from 6.3.1995 would have expired on 5-9-1995. He did not do so. Instead, rushed to the Court on 24.8.1995. Even prior to 24.8.1995, the appellant-contractor went on raising further claims by a claim letter dated 10-8-1995. Again he was relegated to square one, so far as the time schedule under Clause 63.1.1 was concerned, but even taking the most charitable view of the matter and treating the final claim as envisaged by letter of 6.3.1995, the appellant-contractor should have lodged a demand in writing for reference to these disputes mentioned in the letter of 6-3-1995 before the expiry date as per Clause 63.1.1, that is on or before 5th September, 1995, as seen earlier. He did not do so. As seen above, his raising of further claims on 10-8-1995 shows the fluid state of claims envisaged by the appellant-contractor himself. He was not sure as to what were his clear final crystallised claims on disputed items for consideration of the respondent-authorities till 10-8-1995. If that was so, there was no occasion for treating the respondent-authorities to have committed breach of the relevant provisions of Clause 63.1.1 or to have forfeited their right to insist on complying with the arbitration machinery envisaged by the relevant clauses of the contracts. It must, therefore, be held that it was the appellant-contractor who was guilty of the

breach of the procedure envisaged by the time schedule laid down by Clause 63.1.1 and for his breach, he cannot make the respondent-authorities liable and successfully urge that the respondent-authorities having committed breach of their own allegations under the contractual terms, it was open to the appellant-contractor to claim for independent arbitrators without himself following the procedure of arbitration laid down under the contract.

4. Factual data dealing with civil appeals arising out of SLP(C)Nos. 1244-45 regarding contract Reach XI.

VARIATION

30.12.1994 15.03.1995

Revision of P-11 Claim 1 - reduced days P-50 Claim 1 Claim P-13 Claim 1 - Amount changed P-52 Claim 1

P-15 Claim 4 - not computed P-55 computed

P-16 Claim 5 - not computed P-56 computed

P-21 Claim 11 - not computed P-64 computed

24. In these appeals, the situation does not get improved for the appellant-contractor. He lodged his first claim on 30.12.1994. Instead of sticking to the same, on 15.3.1995 he raised further claims which can be treated to be final claims. In the meantime, the respondent-authorities on 24.1.1995, rejected the claims raised by the first letter of 30.12.1994. Therefore, after 24.1.1995, the appellant-contractor could have lodged a demand for reference of the disputes raised in his letter of 30.12.1994. Instead of doing so, the appellant-contractor raised further claims and also a fresh claim on 15.3.1995. Even treating this as a final claim as per Clause 63.1.1, after expiry of 3 months from 15.3.1995, that is after 15.6.1995, the appellant-contractor did not lodge a demand in writing for reference of the disputed claims mentioned in the letter of 15.3.1995 for adjudication by arbitration under the contract. Not only that but the appellant-contractor again raised revised claims on 10.8.1995 and, thereafter, without waiting for 180 days for completing the time gamut as laid down by Clause 63.1.1, filed suit on 24.8.1995 cutting across the scheme of arbitration laid down by Clause 63.1.1. The reply of the Corporation of 11.9.1995, pending suit, would pale into insignificance as the suit itself, in so far as it demanded independent arbitration, became completely misconceived and premature. The conclusion, therefore, is inevitable that in all these four appeals, the appellant-contractor must be held to have himself not complied with the procedural time schedule of Clause 63.1.1 of the contract binding on him, he as a man with commercial sense and worldly wisdom, had signed the contract terms before entering into the contracts with the respondent-authorities. It was for him to comply with these terms before finding fault with the other contracting party. Point No. 1, therefore, has to be answered in the negative against the appellant-contractor and in favour of the respondent-authorities.

POINT NO. 2:

25. The discussion on point No. 1 and the conclusion reached thereon would automatically result in answering this point in the negative in favour of the respondent-authorities and against the

appellant-contractor. As the appellant-contractor is shown to have failed to carry out his contractual obligations under Clause 63.1.1, there would remain no occasion for the respondent-authorities to be dubbed as having failed to comply with their corresponding obligations under the very same clause.

POINT NO. 3:

26. In view of our findings on point Nos. 1 and 2, there would remain no occasion for the Court to permit either party to get out of the contractual obligations regarding resolution of disputes by arbitration dehors the scheme of arbitration envisaged by the contractual terms. In other words, it could not be said that the respondent-authorities have failed to carry out their contractual obligations of appointing arbitrators under the agreement even though validly called upon by the appellant-contractor to do so and, therefore, had missed the bus and consequently the Court could appoint independent arbitrators, if it thought fit. That occasion never arose for consideration by the Court in the light of the aforesaid findings of fact on the relevant points as discussed by us. Consequently, it must be held that in the present four cases, the High Court was perfectly justified in relegating both the parties to the procedure of arbitration as laid down under the contracts binding on them. The final Orders passed by the learned Single Judge in all the four suits and as confirmed by the Division Bench remain well sustained on record.

27. However, before parting with these appeals, we must note that rightly or wrongly the appellant-contractor has a simmering grievance since 1992 when his four contracts were terminated giving rise to diverse claims which, though rejected by the respondent-authorities, were required to be adjudicated upon by the arbitrators as envisaged by the parties under the contracts. As years have rolled by, it would be appropriate to direct the respondent-authorities to comply with the Orders passed the learned Single Judge as confirmed by the Division Bench and also by us at the earliest. The procedure laid down by Clause 63.3.2 read with Clause 63.3 (b) shall be carried out by the respondent-authorities within four weeks of the receipt of copy of this Order at their end and thereafter the appellant-contractor shall also carry out his obligations under the relevant clauses and the two arbitrators, to be appointed by the Chairman-cum-Managing Director, shall see to it that the arbitration proceedings are completed at the earliest and not later than four months from the date on which they enter upon the reference. Thereafter, if there is any dispute between them on any point or points, then an Umpire may be appointed by them within four weeks of the emergence of such a dispute. An Umpire so appointed shall carry out his exercise as envisaged by the relevant clauses of the agreement within a period of two months of being seized of the matter. Thus, latest within eight months or so, both sides may come to know where they stand in connection with the disputes in question. Subject to the aforesaid directions, all these four appeals stand dismissed with no order as to costs in each one of them.