SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Ferro Concrete Construction

(R.V. Raveendran and Lokeshwar Singh Panta JJ.)

22.04.2009

JUDGMENT

R.V.RAVEENDRAN, J.

1. Leave granted. Heard learned counsel.

2. The appellants (also referred to as `employer') invited tenders for the manufacture, laying, testing and commissioning of water pipeline of a length of 37.41 km. under a water supply scheme in Ajmer District. Tenders were received from various tenderers including respondent (hereinafter referred to as the `contractor'). As different tenderers had stipulated different terms and conditions, the tenderers were invited for discussions, and common terms of reference (for short `CTR') were formulated on 22.2.1988 and the original tender conditions stood modified to the extent of the alterations in the CTR.

3. Thereafter the offer of the respondent was accepted and a work order dated 23.8.1988 was issued to him stipulating the period for completing the contract as two years from that date. There was an amendment to the work order on 8.11.1988. The employer and the contractor entered into an agreement dated 11.1.1989 enumerating and stipulating the documents which will form part of the contract and the modifications agreed in regard to certain terms. The value of the work as per the work order was Rs.9,91,94,602.50. Ten percent of the value of work (Rs.99.19 lakhs) which was agreed to be released as mobilization advance, was released to the contractor between 25.1.1989 and 5.5.1989. The contractor created an equitable mortgage over its plant by depositing its title deeds thereto as security for the mobilization advance. By letter dated 15.12.1990, the contractor confirmed that the original title deeds will remain in deposit with the employer till the entire amount of advance was repaid in full with interest.

4. The contract (clause 23 of General Conditions of Contract) provided for settlement of disputes by arbitration. By letter dated 18.6.1990 respondent invoked the provision for arbitration and sought

appointment of an arbitrator to decide its claims aggregating to Rs.2,01,66,547, arising on account of certain alleged omissions and commissions of the employer. Another dispute was raised in respect of the rate payable for work done subsequent to the due date of completion (22.8.1990). On 22.8.1990 the contractor stopped the work. By that date it had manufactured 15.26 km. of pipes and had laid 11.6 km. out of them and tested only 1.4 km. of pipeline as against the total contracted quantity of 37.41 km. On 13.9.1990 the employer notified the contractor that if he did not resume the work, the balance of the work would be got executed through an alternative agency in terms of the contract, by treating the contract as having been abandoned on 22.8.1990, and recover the excess cost from the contractor.

5. The respondent-contractor sent a reply dated 3.11.1990 stating its efforts to complete the work were rendered futile on account of the delays and breaches on the part of the employer; and it was necessary to enter into a fresh agreement as the tender was not accepted in the manner in which it ought to have been accepted. The contractor did not resume the work. The contractor's stand was that in the absence of an extension of time for completion by mutual consent before the stipulated date for completion, it was not liable to continue the work on the tendered rates. The employer on 30.3.1991 made a final demand calling upon the contractor to state whether it was ready to re-start and complete the remaining work and if so to submit a revised time schedule for such completion. As the contractor did not resume the work, the employer initiated steps to get the balance work executed through an alternative agency. In the meanwhile the contractor filed a suit against the appellant in the District Court, Ajmer and obtained a temporary injunction restraining the employer from imposing liquidated damages.

6. The contractor made an application to the District Court, Ajmer, under section 20 read with section 8 of the Arbitration Act, 1940 (Act for short) for filing the arbitration agreement into court and seeking appointment of an arbitrator. The District Court, Ajmer by order dated 27.4.1991 held that it had jurisdiction to appoint an arbitrator but deferred the actual appointment to a future date. The contractor revised its claim to Rs.5,51,90,306/- in the notice of appointment of arbitrator. The employer challenged the order of the District Judge and the High Court allowed the appeal on 9.8.1991 and set aside the order of the District Judge. The contractor in turn approached this Court. On 12.11.1991, this Court recorded the consent of parties for appointment of Mr. B L Mathur as sole arbitrator and directed the employer (Chief Engineer, Public Health Engineering Department, State of Rajasthan) to appoint him as the arbitrator. On being appointed, the arbitrator entered upon the reference and the contractor filed a claim statement before the arbitrator on 13.1.1992 making 43 claims aggregating to Rs.6,21,29,626/-.

7. The employer filed its reply to the claim statement, and also made five counter-claims aggregating for Rs.863,46,505/- before the arbitrator. In the meanwhile, the employer having concluded the arrangements to get the work completed through an alternative agency, on the contractor's failure to resume the work, awarded the work to M/s. Indian Hume Pipes Co. Ltd. on 10.8.1992. On the basis of the contract value in regard to the balance work, the employer revised its counter claim No. 2 relating to extra cost to Rs.6,66,62,000/-and consequently the total of the counter claims stood increased to Rs.11,55,98,388/-.

8. After considering the claims and counter claims, the learned arbitrator made an award dated 21.9.1994. He rejected claim nos. 4, 7,8,10, 14 21,22,23,26,36,36A, 37,38,39,40,41, 41A,42, 42A and 43 of the contractor. He awarded the following amounts to the contractor in regard to the remaining claims:

S. Claim No. Description of claim Amount Amount No. claimed awarded Rs. Rs.

1. 1 Loss of profitability due to late 83,49,913 33,06,500 release of mobilization advance

2. 2 16 Refund of excess sales tax 2,94,142 2,94,142 deducted

3. 3 15 5% amount withheld for testing 14,70,956 14,70,956 of pipeline

4. 5 18 Excess recovery of security 13,28,457 13,28,457 deposit

5. 6 17 Price escalation 58,83,854 43,47,520

6. 9 19 Refusal of employer for re- 10,11,354 6,95,910 designing pressure pipes from higher into lower.

7. 11 20 Slow progress due to reduction of 21,32,496 21,07,195 width of trench

8. 24 Refund of deduction for want of 4,31,926 4,31,926 BG renewal

9. 27 28 Gap pipes fitted 2,60,200 67,098

10. 29 Payment for 8 kg pipes but paid 1,17,150 1,12,294 for 6 kg pipes

11. 30 Refunds for paint of specials 9,759 9,759

12. 31 Deduction from running bill for 22,385 22,385 pipes

13. 32 Refund for deduction for 46,569 46,569 insufficient refilling

14. 33 Less measurement of pipe 1,15,738 1,15,738

15. 35 with Difference in final bill 1,47,00,000 23,74,458 25 Less payment re: sand bedding 7,31,676 34 Payment for excavation 2,50,740
16. 37A Idle charges for machinery, staff 12,072 per 12,072 per day etc. day from from date of 13.1.92 award, if the factory was not released from mortgage security within 30 days.

17. 12 13 Interest (pre-reference, pendente 18% per 18% per annum lite and future) annum

The arbitrator rejected counter claims 1, 2, 4 and 5 of the employer. In regard to counter-claim No. 3 (Rs.79,87,846/- towards refund of mobilization advance with interest), the arbitrator awarded a sum of Rs.59,42,275 with interest at 18% per annum from 18.9.1990 up to the date or decree or payment whichever was earlier.

9. The contractor made an application for making the award, a rule of the court. The employer challenged the award by filing objections under section 30 read with section 33 of the Act. By order dated 17.2.2003, the District Judge, Ajmer allowed the application of the contractor and made the award a rule of the court subject to a modification in regard to the award made on claim No.37A. In

place of the award made by the Arbitrator (direction to employer to pay Rs.12072/- per day from the date of award), the District Judge directed that the employer shall return the original title deeds to the contractor and pay the amounts awarded to the contractor after deducting the amount awarded by way of counter-claim (that is Rs.59,42,275/- towards refund of mobilization advance due with 18% interest) within 30 days from the date of decree, failing which, the employer shall pay Rs.12072 per day from the date of decree.

10. The employer filed an appeal (Civil Misc. Appeal No.872/2003) against the said judgment and decree contending that the award ought to have been set aside. The contractor also filed an appeal (Civil Misc. Appeal No. 910/2003) aggrieved by the modification by the Learned District Judge directing compensation of Rs.12,072/- per day only from the date of decree (instead of the date of award). The High court dismissed the appeal filed by the employer by judgment dated 5.2.2007. The High Court allowed the appeal filed by the contractor by judgment dated 30.5.2007 and restored the direction of the arbitrator that the payment of compensation at Rs.12,072/- per day should be from the date of the award itself (21.9.1994). The High Court also granted interest at 18% per annum from the date of the award. Thus the High Court upheld the award.

11. Feeling aggrieved the employer has filed these two appeals by special leave. The first of the appeals (arising out of SLP [C] No.10818/2007) is against the dismissal of its appeal on 5.2.2007. The second of the appeals (arising out of SLP(C)No.22565/2007) is against the judgment dated 30.5.2007 allowing the contractor's appeal. One of the contentions urged by the appellants before the court below was that the Arbitrator did not have jurisdiction to enter upon the reference and make an award, as the appointing authority under the arbitration clause had merely appointed the arbitrator, but had not referred any dispute to him for arbitration. The said contention was rejected by both courts on the ground that when the authority competent to appoint the arbitrator appointed the arbitrator, in pursuance of the agreement reached before this Court to have the pending disputes of both parties settled by arbitration, the employer could not be permitted to raise a technical plea that the arbitrator had no jurisdiction to proceed with the arbitration, in the absence of a further specific reference by the employer. Realising the unsoundness of the said contention, the appellants did not press it before us.

12. On the contentions urged, the question that arises for consideration is whether there is any legal misconduct or error apparent on the face of the award, in regard to the award of the Arbitrator in respect of (i) claims 1 and 37A; (ii) claims 12 13; (iii) claims 2 16, 3 15, 5 18, 6 17, 9 19, 11 20, 24, 27 28, 29, 30, 31, 32, 33, 35 (with claim nos. 25, 34); and (iv) counter claims 1, 2, 4 and 5.

13. Section 30 of the Act inter alia provides that an award can be set aside on the ground that an arbitrator had misconducted himself or the proceedings, or that the award had been improperly procured or is otherwise invalid. An error apparent on the face of the award, is a ground for setting aside the award under section 30 or for remitting the award to the Arbitrator under section 16(1)(c) of the Act. In Champsey Bhara Co. vs. Jivraj Balloo Spinning Weaving Co. Ltd. [AIR 1923 PC 66] the Privy Council explained the term `an error of law on the face of the award' thus : 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.

It was well settled that under the Arbitration Act, 1940, an award was not open to challenge on the

ground that the arbitrator has reached a wrong conclusion or failed to appreciate facts, as under the law, the arbitrator is made the final arbiter of the dispute between the parties. While considering the challenge to an award, the court will not sit in appeal over the award nor re-appreciate the evidence for the purpose of finding whether on the facts and circumstances, the award in question could have been made. When there is no allegation of moral misconduct against the arbitrator with reference to the award, and where the arbitration has not been superseded, there were only two grounds of attack. First was that there was legal misconduct on the part of the arbitrator in making the award. Second was that there was an error apparent on the face of the award. This Court explained the principles relating to interference with awards under the 1940 Act in State of Rajasthan v. Puri Construction Co. Ltd. [1994 (6) SCC 485] thus : 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 mis-appreciation 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 aside 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.

Keeping the said principles in mind let us examine the various claims. Re : Claim 1 :

14. The contractor claimed that the mobilization advance had to be released to it immediately on

entrustment of work, to enable it to set up the factory for manufacturing the pipes. It was contended that prompt release of mobilization advance was crucial and fundamental to the contract as manufacture of pipes depended upon setting up a factory for that purpose. Even assuming that the mobilization advance could be released in three instalments, as per modified terms and conditions, the contractor contended that there was inordinate delay on the part of the employer in releasing the instalments, that too, in five instalments. It was further contended that if the mobilization advance had been released immediately on award of the work, it would have set up a factory and commenced production within three months; that in view of the delay, it lost production for a period of eight months that is nearly one third of the contract period, and that as a consequence they were not able to execute the work of the value of Rs.5,56,66,086/- and the loss of profits and overheads on the said amount at a standard 15% was Rs.83,49,913/- and it was entitled to that amount as compensation for the breach by the employer. The calculation of the said loss of profit and overheads in claim no.(1) was as follows : Amount of Contract (with ZVV) Rs.9,91,94,602.00 Payment already received from the

Department Rs. 2,88,28,516.00 ----------

Balance Rs. 7,03,66,086.00 ----------

Amount due to contractor against work

Done Rs.1,47,00,000.00 ----------

Balance Rs. 5,56,66,086.00 ----------

Loss of Profitability overheads @ 15% Rs. 83,49,913.00 13

(0.15 x 5,56,66,086) ----------

15. The employer resisted the said claim contending that having regard to the relevant conditions in the work order and the contract agreement, the mobilization advance had to be released in three instalments against Bank Guarantees; that the second and third instalments had to be released only on production of the certificate of a chartered accountant on the utilization of the previously paid amount and on verification of the department of the progress; and that the mobilization advance was released in instalments in terms of contract and there was no delay no breach on their part.

16. We may refer to the relevant provisions of the contract in this behalf. Clause 8 of the Special Conditions relating to establishment of factory at site provided thus :

Establishment of factory at site :

The contractor, if he so desires, may establish the pipe factory at site to avoid transportation of pipes. All material and equipment and land required for the purpose shall be arranged by the contractor at his own cost. The department may assist him in acquisition of land. However, the work should not be delayed on this account. The firm should commence and continue to supply the pipes etc. from their existing set up till the factory at site is established. As already stated, the supply of pipes etc. should commence within 30 days, from the award of contract. The above clause was superseded by clause 3 of the Common Terms of Reference which is extracted below :

Mobilisation advance (for PSC Pipes only)

10% of the contract value shall be given against Bank Guarantee as mobilization advance at a simple interest rate of 18%. Recovery of mobilization advance shall be effected from 1st Running Bill on pro-rata basis in a way that complete mobilization advance is recovered by the time 75% work is complete. Interest shall also be recovered alongwith recovery of capital mobilization advance. The assets built by the contractor out of mobilization advance so made will be mortgaged to the department. In case work is left in-complete, liquidated damages will be imposed as per terms of the document and the assets built by the contractor for manufacturing pipe will become the property of the department. Such assets can be used by the department for the purpose of completing the remaining work.

In the subsequent work order issued on 23.8.1988, clause 5.1 relates to mobilization advance. While para (a) of clause 5.1 was a reproduction of clause (3) of the Common Terms of Reference, the following was added as para (b) in clause 5.1 of the work order :
The mobilization advance is being given for establishment of factory at site. In case the factory is not established in 3 months period the mobilization advance shall be recovered by way of the Bank Guarantee given in lieu of the mobilization advance.

By letter of amendment dated 8.11.1988 issued by the employer, several clauses of the work order including clause 5.1(b) were amended/replaced. Para 5.1(b) as replaced is extracted below :

The mobilization advance is being given for establishment of factory at site. The mobilization advance shall be paid in three instalments of which the second and third instalment shall be paid on production of the certificate of the Chartered Accountant about utilization of the previously paid amount and on verification by the department of the progress towards setting up of the factory.

This was followed by an agreement executed by both parties on 11.1.1989 and clause (7) thereof extracted below dealt with mobilization advance : Mobilisation advance:

10% of the contract value shall be given as mobilization advance @ 18% simple interest subject to production of Bank Guarantee from any of the Nationalised Bank equal to the amount of such advance. The recovery of such advance shall be effected from 1st running bill on prorate basis in such a way that recovery of this advance is made by the time when 75% of the work is completed. Amount of interest is recoverable along with the recovery of principal amount.

(b) The assets built by the contractor out of the mobilization advance shall be mortgaged with the Government. Such assets will not be mortgaged with any other agency for any purposes.

(c) In case contractor fails to complete the work in specified time, the contractor shall pay the compensation as liquidated damages as per the terms and conditions of the contract and the assets built by the contractor for manufacturing of pipes will be the property of the government and the department will have right to use it as government property for completion of remaining work. xxxxx

17. The arbitrator held that clause 8 of the special conditions of contract stood superseded by clause 3 of the Common Terms of Reference which required the mobilization advance to be released in one

instalment and not in three instalments. He held that clause 5(1)(b) inserted by the amendment to the work order dated 8.11.1988 was an unilateral incorporation by the employer and was not binding on the contractor. He further held that the employer ought to have released the mobilization advance along with the work order dated 23.8.1988, and the employer had abnormally delayed the release of mobilization advance by a total period of 8.5 months by releasing it in instalments. He held that there was a clear delay of about 8 months and during that period the contractor could have executed one third of the work of the value of Rs.330,64,867.50, and as the contractor was prevented from executing the said work on account of the delay, the contractor was entitled to 10% of the said amount, that is Rs.33,06,500/- as loss of profit. The said sum was therefore awarded to the contractor under claim (1).

18. There is no doubt that clause 8 of the special conditions of contract has to be read with clause 3 of the CTR. It is true that Clause 3 of CTR did not contemplate the mobilization advance being released in three instalments. But the CTR was followed by work order dated 23.8.1988 which was followed by amendment dated 8.11.1988 which specifically stated that the mobilization advance shall be paid in three instalments of which the second and third instalments shall be paid on production of a certificate of the Chartered Accountant about utilization of the previously paid amounts and on verification by the department towards progress of the factory. The arbitrator has held that the said clause was unilaterally introduced and therefore is not binding by the contractor. On the face of it this is erroneous. After the work order, the parties have executed a bilateral agreement dated 11.1.1989 which specifically states at para 2 and para 6 that the work order dated 23.8.1988 and subsequent amendment to the work order dated 8.11.1988 shall be deemed to be a part of the contract and will bind both the parties. The agreement dated 11.1.1989 itself contains a detailed clause (clause 7) relating to mobilization advance in addition to what was earlier agreed in regard to mobilization advance. Therefore obviously the clauses relating to mobilization advance in the amendment to work order dated 8.11.1988 and the agreement dated 11.1.1989 had to be read in addition to the earlier provision relating to mobilization advance contained in the CTR. Clause 5(1)(b) of the work order, as amended, specifically provided that the contractor had to provide a Bank guarantee for the mobilization advance. Sub-clause (b) of clause 7 of the agreement dated 11.1.1989 provided that assets built by the contractor by utilizing the mobilization advance should be mortgaged to the employer. Sub-clause (c) of clause 7 provided that if the contractor fails to complete the work, the assets built by the contractor would become the property of the employer and the department could use it as government property for completion of the remaining work. Sub-clause (d) of clause 7 provided that if the contractor failed to establish the factory within three months of payment the mobilization advance, the said advance would be recovered by enforcing the bank guarantee given in lieu of the mobilization advance. Thus it is evident that the mobilization advance had to be released only against a bank guarantee to be furnished by the contractor.

19. If according to the contractor, the mobilization advance had to be released in a single instalment and if the contractor wanted the entire mobilization money to be released in one lump sum instead of in three instalments, it ought to have given a single bank guarantee for the entire sum. But strangely the contractor did not give such a bank guarantee. It gave four bank guarantees for Rs.40 lacs on 21.5.1989, Rs.25 lacs on 1.2.1989, Rs.15 lacs on 17.2.1989 and Rs.25 lacs on 23.3.1989. It is thus evident that the contractor had also proceeded on the basis that the condition in clause 5(1)(b) of the work order amendment letter dated 8.11.1988 governed the payment of mobilization advance. We find that the mobilization amount corresponding to first bank guarantee was released within two days; mobilization amount corresponding to second guarantee was released in seven days; and mobilization amount corresponding to third guarantee, was partly released in 12 days and

the balance in two months. The amount corresponding to the second and third bank guarantees had to be released only after the contractor produced a certificate in regard to the utilization of the earlier advance. It is seen that in regard to the first mobilization advance the certificate was produced on 7.2.1989 and on the same day the second instalment was released. Insofar as third instalment, the certificate was only received on 4.4.1989. Therefore it cannot be said that there was delay or breach on the part of the employer in releasing the mobilization advance. If at all there was any delay, the delay was on the part of the contractor. The fact that release of mobilization advance was governed by clause 5(1)(b) of the work order (as amended on 8.11.1988) and clause 7 of the agreement dated 11.1.1989 was totally overlooked by the arbitrator by proceeding on the basis that mobilization advance was governed by the CTR alone. The Arbitrator committed a legal misconduct by ignoring the terms of contract, that is the agreement dated 11.1.1989,which specifically provided that in addition to the CTR, the work order and amendment to work order dated 8.11.1988 would also form part of the contract. The Arbitrator also overlooked the fact that additional provision regarding mobilization advance was introduced in the agreement itself. Therefore the mobilisation advance was governed by the terms in the CTR, the work order, the amendment to the work order dated 8.11.1988 and agreement dated 11.1.1989 read together. If so read, it was clear that there was no breach on the part of the employer and the contractor was itself responsible for the delay. If so, the question of compensating the contractor on that score does not arise.

20. There is yet another aspect. The contractor claimed compensation on the basis that he could not do work of the value of Rs.5,56,66,086/- in view of the delay and he was entitled to 15% thereof namely Rs.83,49,913/- as compensation. But the arbitrator made an award in respect of the claim on the ground that there was delay in releasing the mobilization advance and during that period of delay, one third of the contract work could have been done and the value of the work that could have been done was Rs.3,30,64,867, and 10% thereof was the loss of profit. Firstly, there was no such plea. Secondly, we have already held that the delay relating to mobilisation advance, was not on the part of the employer. Thirdly, even if there was delay, it was nobody's case that no work was done or that the contractor had suffered loss for non-execution of the work during the contract period. Therefore we are of the view that the award of compensation of Rs.33,03,500/- towards claim no.(1) is liable to be set aside.

Re : Claim 37A :

21. Claim No.37A was linked to mobilization advance. The contractor claimed that it had mortgaged its pipe manufacturing unit in favour of the employer by deposit of title deeds, as security for repayment of the mobilization advance; that the machinery installed in the said factory had not been released by the employer in its favour and as a consequence, it could not be shifted to another place to enable it to start the manufacturing process elsewhere; and that on account of the failure on the part of the employer to release the plant, it had to keep the machinery idle and the employer was therefore liable to reimburse to the contractor the loss of production from 13.1.1992 at the rate of Rs.12,072/- per day. The contractor contended that if it had been permitted to shift its plant and machinery, it would have produced 15 pipes per day valued at Rs.1,20,000/-, that out of which the overhead and profit element was 15% (that is Rs.18,000/- per day); that as there were 306 working days in a year, the loss of profits/overheads would be 18,000 x 306/365 = Rs.15,090/- per day; and that if 20% thereof (Rs.3,018/-) was deducted therefrom towards labour component, the loss of profit per day on account of non-availability of plant and machinery was Rs.12,072 per day. The employer resisted the claim by contending that there was no obligation to release the plant and its title deeds until the mobilization advance was repaid with interest; that the contractor had not

repaid the mobilization advance and interest thereon in spite of the award; and therefore the question of compensating any `daily loss' on that account did not arise. The employer also contested the correctness of the assumptions made for calculating the loss.

22. The contractor deposited the title deeds relating to the plant by way of mortgage of deposit of title deeds, in terms of the contract and specifically agreed that the original deeds will remain in deposit with the employer till the entire mobilization advance was repaid with interest. It is also not in dispute that though a mortgage security was created on the plant, it continued to be in the possession, enjoyment and control of the contractor, as the employer did not take over physical possession of the plant at any point of time.

23. The arbitrator considered Claim 37A with three other claims - (36, 36A and 37). The particulars of the said claims are: Claim 36 Compensation for idling machinery, labour, staff due to delay and wrong decisions (for the period up to 12.1.1992) Rs.48.21 lacs Claim 36 A Compensation for idling machinery, staff Labour etc. from 13.1.1992 Rs.6370 per day Claim 37 Compensation for loss of production in the Factory (for the period upto 12.1.1992) Rs.61.48 lacs Claim 37A Compensation for loss of production in the Factory from 13.1.1992 Rs.12,072 per day The arbitrator held that none of the four claims was maintainable as the factory built out of mobilization advance had been mortgaged in favour of the employer. As a consequence he did not award any amount in respect of the four claims. But strangely he directed payment of Rs.12,072 per day from the date of award not because he held that there was any loss of production as a consequence of any breach by the employer, but on the following reasoning:

After perusal of the arguments of the parties and the evidence on record, I come to the finding that it is a case of real hardship to the claimants for having been denied the use of the factory and machinery elsewhere in their business venture, but because of legalities involved, such as mortgage, the claimants cannot be given the benefit of any award. Had the assets of factory built out of mobilization advance not being mortgaged in favour of the respondent I would have considered making an award in favour of the claimants. In view of the fact that I have allowed counter claim No.3 of the respondent for balance amount of mobilization advance in full along with interest, there is no reason why the assets built out of mobilization advance should continue to remain mortgaged with the respondents. I therefore direct the respondent to release the documents relating to mortgage as mentioned above within a period of 30 days from the date of this award failing which the claimants shall be entitled to an award of Rs.12,072 per day from the date of this award till the date of release of mortgage. No award in favour of the claimants for the period I entered upon, reference to the date of the publication of the award. [emphasis supplied]

24. Thus we find that the award under claims 37A was not made on account of any finding of breach on the part of the employer. It was made because the Arbitrator had made an award against the contractor in favour of the employer for Rs.59,42,275 with interest. The Arbitrator was of the view that if that sum was adjusted against the amounts due by the employer, there was no need for the mortgage of the plant to continue and therefore the employer should release the documents of title deposited by way of equitable mortgage, within 30 days from the date of award; and that if the employer failed to do so, the employer should pay to the contractor Rs.12,072 per day from the date of the award till the date of release of the mortgage. Therefore, the said award under claim 37A was made, not on account of any breach committed by the employer, but in respect a breach if made in future after the date of the award. There was no such claim and the award was therefore beyond the reference. Further, the reasoning is very strange and is a classic case of an error apparent on the face

of the award and a legal misconduct. The arbitrator rejected the claim No.37A for payment of Rs.12,072/- as compensation for loss of production from 13.1.1992 (which was the subject matter of claim) on the ground that the plant had been mortgaged in favour of the employer and therefore there was no justification for the contractor to claim that it should be permitted to remove and take away the plant when the mortgage subsisted. Having rejected the claim, the Arbitrator evolved a strange reasoning that though there was a subsisting valid mortgage in respect of the mobilization advance with interest in favour of the employer, because he had made an award in favour of the employer for Rs.59,42,275 plus interest, the mortgage came to an end and the employer became liable to return the documents and if it failed to return the documents, the contractor was entitled to damages of Rs.12,072/- per day from the date of award.

25. The arbitrator noticed the fact that the plant and machinery was mortgaged by deposit of title deeds in favour of the employer and that the contract was that the original documents will remain in deposit with the employer till the amount of advance is repaid with full interest. The arbitrator in fact makes an award for return of Rs.59,42,276 in favour of the employer with interest at 18% per annum from 1.9.1990 to 17.9.1990 and interest at 18% per annum on Rs.59,42,275/- from 18.9.1990 till date of decree or payment, whichever was earlier. Therefore evidently until the amount of Rs.59,42,275/- with interest was paid by the contractor to the employer, the mortgage would continue. If the mortgage continued, there was no obligation on the part of the employer to return the documents; and if there was no obligation on the part of the employer to return the documents, the contractor could not complain that the documents were wrongly held by the employer nor could it claim loss of production as a result of employer wrongly withholding the documents.

26. It is of some interest to note that as per the award of the arbitrator, made under claim 37A, on a claim that was never made, the amount that would become due at Rs.12,072/- from 21.9.1994 to date will be approximately Rs.6,42,70,000/-. We have a strange situation where the arbitrator makes an award in favour of an employer directing the contractor to refund the employer Rs.59,42,275/- with interest at 18% per annum from 18.9.1990 upto date of decree/payment and then even though the said payment was not made, awards damages to the contractor which works out to Rs.6,42,70,000/- to the contractor. This to say the least is legal misconduct and an error apparent on the face of the award.

27. We may also refer to another aspect. A sum of Rs.12,072/- per day was claimed as damages by the contractor in a two line calculation without any supporting evidence or document. As noticed above, the claim was on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs.1,20,000/- and that the profit and overhead element out of it would have been 15% or Rs.18,000/- per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs.12,072/- per day. There is no evidence to show that the contractor was at any point of time manufacturing 15 pipes a day of the value of Rs.8000/- each or that he would have made a profit of 15% on the cost thereof. The claim is made on the ground that it is disabled from manufacturing that many number of pipes elsewhere. There is no evidence that it had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture 15 pipes per day. If the plant and machinery was of the value of say Rs.25 lakhs, or if the contractor could install another similar plant at a cost of Rs.25 lakhs, then the loss at best would be interest on Rs.25 lakhs and not

anything more. In fact even though there is no evidence, while making claim nos.36 and 37 the contractor has given value of the plant and machinery as Rs.36,84,161/-. Even assuming the said figure to be true, at best the blocked up investment was only Rs. 36,84,161/- and the loss would be around 1% thereon per month by way of interest which would be Rs.36,841/- per month. What is more strange is nowhere in the award the arbitrator considers the validity of the claim of Rs.12072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award. While the quantum of evidence required to accept a claim, may be a matter within the exclusive jurisdiction of the arbitrator to decide, 28
if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.

28. Learned counsel for the contractor submitted that though there was an award in favour of the employer for refund of mobilization advance of Rs.59,42,275/- with interest, there was a larger award in its favour aggregating to about Rs.1.67 crores and interest and it was legitimately entitled to adjust the sum of Rs.59,42,275/- with interest towards the amount due by the employer under the award namely Rs.1.67 crores with interest and therefore as on the date of the award the liability towards mobilization advance stood wiped out on account of the same being adjusted towards the amount claimed by him and therefore as on the date of the award, the liability to refund the mobilization advance ceased. This contention is not sound. The mobilization advance amount was an ascertained sum due to the employer from the contractor, with a specific provision for interest. There was a specific contract for continuation of the mortgage until the said amount was paid. On the other hand the amounts that allegedly became due 29
to the contractor under the award were mostly towards damages and escalation in prices validity of which were under challenge and there was no provision in the contract for payment of interest thereon. As noticed above at best the arbitrator could have directed return of the documents of title to the contractor and could not have directed payment of damages at the rate of Rs. 12072/- per day.

29. We therefore hold that viewed from any angle, awarding Rs.12,072/- per day as damages, from the date of award under Claim 37A cannot be sustained and the same is liable to be set aside.

Re : Claim Nos. 12 and 13 :

30. The contractor claimed pre-reference interest at 18% per annum on all its claims from the date of claim to date of arbitrator entering upon the reference (18.6.1990 to 15.12.1991), as also pendente lite interest from 16.12.1991 to 21.9.1994 and future interest from the date of award till date of payment or decree whichever was earlier. The Arbitrator awarded the following interest : (a) pre-reference interest on all sums awarded except claim no.(1), from 3.9.1990 (date of contractor's application under section 8 and 20 of the Act) to 15.12.1991 at 18% per annum; (b) pendente lite interest on all sums awarded including claim No. 1, from 16,12.1991 to 21.9.1994 at 18% per annum; and (c) future interest on all sums awarded from 22.9.1994 till date of decree or payment whichever is earlier at the rate of 18% per annum. The District Court did not award any post decretal interest, but the High Court, however, granted interest from the date of decree till date of payment at 18% per annum.

31. The appellants contend that there was no provision in the contract for payment of interest on any

of the amounts payable to the contractor and therefore no interest ought to be awarded. But this Court has held that in the absence of an express bar, the arbitrator has the jurisdiction and authority to award interest for all the three periods - pre reference, pendente lite and future (vide decisions of Constitution Bench in Secretary, Irrigation Department, Government of Orissa vs. G. C. Roy - 1992 (1) SCC 508, Executive Engineer, Dhenkanal Minor Irrigation Division vs. N. C. Budharaj - 2001 (2) SCC 721 and the subsequent decision in Bhagawati Oxygen vs. Hindustan Copper Ltd - 2005 (6) SCC 462). In this case as there was no express bar in the contract in regard to interest, the Arbitrator could award interest.

32. The appellant next contended that in regard to claims in the nature of damages, as contrasted from ascertained sums due, interest becomes payable only on quantification and therefore award of interest prior to the date of arbitrator's award was illegal. It is no doubt true that the position of law earlier was that in regard to award of damages, interest was not payable before quantification by a court. This was on the assumption that in so far as damages are concerned, there is no liability till determination of the quantum of damages. We may refer to a decision of the Bombay High Court in Iron Hardware (India) Co. v. Firm Shamlal Bros [AIR 1954 Bombay 423], where Chagla CJ, speaking for the Bench, stated the principle thus : In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.....As already stated the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

33. The legal position, however, underwent a change after the enactment of Interest Act, 1978. Sub-section (1) of section 3 of the said Act provided that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, if it thinks fit, allow interest to the person entitled to the debt or damages at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings; (b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings. Sub-section (3) of section 3 made it clear that nothing in that section shall apply to any debt or damages upon which interest is payable as of right, by virtue of any agreement; or to any debt or damages upon which payment of interest is barred, by virtue of an express agreement. The said sub-section also made it clear that nothing in that section shall empower the court to award interest upon interest. Section 5 of the said Act provides that nothing in the said Act shall affect the provisions of section 34 of Code of Civil Procedure 1908.

34. The position regarding award of interest after the Interest Act, 1978 came into force, can be stated thus :

(a) where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with the such contract.

(b) where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded. (c) where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of section 3 of Interest Act will apply in regard to the pre-suit or pre- reference period and consequently interest will be payable : (i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(d) payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of Interest Act, 1978 but by the provisions of section 34 of Code of Civil Procedure 1908 or the provisions of the law governing Arbitration as the case may be.

35. Therefore, even in regard to claims for damages, interest can be awarded for a prior to the date of ascertainment or quantification thereof if (a) the contract specifically provides for such payment from the date provided in the contract; or (b) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be due from the date when they became due. In this case, interest has been awarded only from 3.9.1990, the date of the petition under Section 20 of the Act for appointment of arbitrator. We find no reason to alter the date of commencement of interest.

36. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendente lite interest and future interest upto date of payment. Re: Claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27, and 28, 29, 30, 31, 32, 33, 35 (with 25 and 34) of the contractor.

37. Claims 9 19, 27 28, 29, 33, 35 (with 25 35) are for payment for work done by the contractor. Claims 2 16, 3 15, 5 18, 24, 30, 31 and 32 are for release/refund of amounts withheld or excess deductions. Claims 6 17 are for escalation in prices. Claims 11 20 are for compensation for slow progress due to reduction of width of trench. The arbitrator has awarded certain amounts against these claims by examining the material placed before him and the terms of contract. He has also

assigned reasons for awarding the amount against these claims. Courts can not sit in judgment over the award of the arbitrator, nor re-appreciate the evidence. The awards on these claims do not suffer from any infirmity which can be the basis for interference either under Section 30 or under Section 16 of the Arbitration Act, 1940. Neither want of jurisdiction, nor legal misconduct, nor any inconsistency nor error apparent on the face of the award are made out in regard to awards made in regard to these claims. The awards in regard to these claims are therefore upheld. Re : Claims 4, 7, 8, 10, 21, 14, 22, 23, 26, 38, 39, 40, 41 41A, 42 42A, 43 of the contractor

38. These claims of the contractor have been examined and rejected by the Arbitrator and upheld by the courts below. No ground is made out to interfere with the same.

Re: Counter claims of the employer

39. Out of the five counter-claims of the employer, the Arbitrator has allowed only counter-claim no.(3). Counter-claim no. (3) was for refund of mobilization advance (Rs.79,87,846) with interest and the Arbitrator has awarded Rs.59,42,275/- with interest at the contract rate of 18% per annum up to the date of decree/payment whichever was earlier. Counter-claims 1, 2, 4 and 5 made by the appellant against the contractor have been rejected. They are:

Counter Brief description of counter claim Amount of claim No. counter claim 1 Liquidated damages Rs.99,19,460/- 2 Extra cost in getting work completed through Rs.6,66,62,000/- another agency

4. Interest on payments made to the contractor Rs.2,17,42,168/- and not utilized

5. Costs Rs.2,50,000/- Counter-claims 1, 2, 4 have been considered by the arbitrator and rejected by the arbitrator on the ground that the delays/breaches were on the part of the appellant and therefore, the question of claiming these amounts does not arise. Rejection of counter-claim (5) is consequential. As noticed above, the court does not sit in appeal over the award of the arbitrator and cannot re- appreciate the evidence to arrive at a different conclusion. The award on these items do not attract any of the grounds on which award could be set aside. Therefore, rejection of these claims is also not open to interference.

40. We therefore allow these appeals in part and modify the judgments of the courts below as indicated above. Resultantly:

(A) The award of Arbitrator on claim no.(1) (Rs.33,06,500/-) and claim 37A (Rs.12,072/- per day from 21.9.1994 till date of payment) are set aside.

(B) The award of Arbitrator on claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27 and 28, 29, 30, 31, 32, 33, 35 (with 25 24) aggregating to Rs.1,34,24,407/- is upheld. (C) Interest shall be payable at 9% p.a. on Rs.1,34,24,407/- from 3.9.1990 till date of payment. The award on claims 12 13 is modified accordingly.

(D) Award of Rs.59,42,275/- in respect of counter-claim no.(3) of appellant with interest at the rate of 18% per annum from the respective dates of release upto the date of payment is upheld. (E) The direction for adjustment of the amount due under counter- claim no.(3) calculated as on 21.9.1994, against the amounts found due to the contractor calculated as on 21.9.1994 is upheld. Consequently,

the appellant shall release the title deeds deposited in regard to the plant/machinery of the contractor.

The contractor will be entitled to remove the plant, if it is not already done.

(F) Rejection of claims 4, 7, 8, 10 21, 14, 22, 23, 26, 38, 39, 40, 41 41A, 42 42A and 43 of the contractor and counter- claims 1, 2, 4, and 5 of the employer are upheld.

(G) Parties to bear their respective costs.