

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) No. 712/2006**

Reserved on : December 5th, 2008

% Date of Decision : January 9th, 2009

M/s. Schlumberger Asia
Services Ltd.

..... Appellant
Through: Mr. Sanjeev Puri, Senior Advocate
with Mr. Arijit Mazumdar & Mr.
Bhavya Sethi, Advocates

Versus

Oil & National Gas
Corporation Ltd.

..... Respondent
Through: Mr. B. Sen, Senior Advocate
with Mr. R.G. Srivastava, Advocate

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, I

1. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 has been filed against the judgment and order dated September 13, 2006 passed by the learned Single Judge in OMP No. 189/1998 by virtue of which the minority award dated May 22, 1998 has been affirmed and the majority award has been set aside.

2. Briefly stated the facts of the present appeal, according to the appellant, are that the appellant and the respondent entered into a

contract dated March 29, 1993 for carrying out electro logging, perforating and other wireline services. In accordance with the contract, the appellant was to carry out the said work after mobilizing its equipment, tools, personnel etc. The said contract commenced from October 11, 1992 and was initially valid for a period of 24 months. By mutual consent of parties, the contract could be extended for another period of 12 months.

3. However, during the subsistence of the contract, the respondent released and de-hired certain equipments and tools vide communication dated 5th March, 1993.

4. According to Mr. Sanjeev Puri, learned senior counsel for appellant as the equipment was released/de-hired during the subsistence of the contract, that means before the expiry date of the contract, it was entitled to claim idling charges for the de-hired equipment equivalent to 'demobilization charge' as provided for in Clause 1.3 amounting to one and a half month equipment charge. The appellant subsequently raised invoices claiming the said amounts, which according to learned counsel for appellant, were illegally de-hired. The appellant's case is that non-payment of the invoices by the respondent was unjustified as the equipment was released/de-hired and had to be kept ready for use, if so required during the period of the contract. Further according to the appellant, the respondent's refusal to pay on the ground that Clause 6.3 was attracted was untenable in law. At this juncture, it would be appropriate to refer to

relevant Clauses of the contract executed between the parties. The said Clauses are reproduced herein below for ready reference:-

“SECTION -I : CONDITIONS OF CONTRACT

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1.10 “MOBILIZATION” means performance by the CONTRACTOR of all those things necessary to be fully ready to begin Work at the Base and shall include the satisfying of all Work pre-requisites stipulated in the CONTRACT. Mobilization shall include, but shall not be limited to providing of all transport from point of origin to base, all Equipment(s) and materials, all Personnel to the satisfaction of government requirements, and the setting up of Equipment in a condition of full readiness to commence Work.

Equipment mobilized during the previous CONTRACT and requested immediately by Letter of Intent (LOI) on the commencement of the new CONTRACT shall be deemed to have been mobilized for the purpose of the new CONTRACT. The mobilization charges will be waived for all Equipment(s) - presently under CONTRACT to the COMMISSION.

1.11 “DEMOBILIZATION” means the removal of all things forming part of the Mobilization of the CONTRACTOR, including all temporary facilities, return of Personnel and Equipment(s) to point of origin and the clean-up and restoration of the Site as required in this CONTRACT.

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6.3 DEMOBILIZATION

In no event shall COMMISSION be obliged to pay demobilization if the Unit on completion of

CONTRACT shall commence operations for another company in the Area of Operation.

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6.5 TRANSPORTATION CHARGES

a) All actual costs incurred for transportation of CONTRACTOR's Units, Tools, Equipment, spare parts, supplies and explosives, when imported into the country for the COMMISSION's exclusive service, from CONTRACTOR's point of origin i.e Houston, Dubai, Singapore, etc. to the CONTRACTOR's Base in India are for the COMMISSION's account. These recoverable transportation costs are to be re-imbursed to the CONTRACTOR in the currency of origin or in equivalent US Dollars with no component in Indian Rupees and without withholding any taxes. CONTRACTOR will furnish only copy of Supplier's invoice and/or other documentary evidence available for claiming the above costs.

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SECTION A : SCHEDULE OF RATES

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Demobilisation Charges

When Equipment is demobilized by the Commission, a demobilization charge equivalent to one and one half (1-1/2) month's Equipment rental as shown in section B of the Price List will apply.

The demobilization charges will be waived for Equipment released at the end of the contract.

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SECTION B : ORGANISATION OF EXCLUSIVE SERVICE

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1.3 DEMOBILIZATION OF EQUIPMENT

When Equipment is released by the Commission, a demobilization charge equivalent to one and one-half month's Equipment charge as shown under paragraphs 1.1. (a) & (b) in pages B.1 to B.3 will apply. The demobilization charges will be waived for Equipment released at the end of the contract. A minimum of one month written notice is required if the Commission wishes to demobilize Equipment before the end of the contract."

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(emphasis supplied)

5. As the respondent refused to pay, disputes arose between the parties and in terms of the arbitration clause contained in the contract, the appellant appointed Mr. Justice R.P. Bhatt (Retd.) and the respondent appointed Mr. Justice Rajinder Sachar (Retd.) as their arbitrators. Both the said arbitrators appointed Mr. Justice Avadh Behari Rohtagi (Retd.) as the Presiding Arbitrator. The Arbitral Tribunal by a majority award, awarded a sum of US \$ 2,34,772/- along with interest and Rs. 2 lacs as Cost. But Mr. Justice Rajinder Sachar (Retd.) dissented from the majority award and rejected the claim of the appellant.

6. On an Objection Petition being filed by the respondent being OMP No. 189/1998 under Section 34 of the Arbitration and Conciliation Act, 1996, the learned Single Judge set aside the majority award dated May 22, 1998. The relevant reasoning of the learned Single Judge's Order is reproduced herein below for ready reference:-

"15. The dispute arose out of an action of ONGC in releasing hired equipments before contract period came to an end and the contractor raising a claim for demobilization charges.

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37. Where plain and simple language of a term in a contract is clear and it admits of no two meanings, an interpretation adopted by the arbitrator which runs in the face of the plain meaning of the words used has been held to be a case of an arbitrator acting beyond his mandate.

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39. The reason is that an arbitrator is the creation of a contract. He cannot live outside the contract. His mandate is limited by the contract. He cannot, therefore, travel outside the contract.

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48. The fundamental error committed by the majority arbitrators is that they have ignored the most vital principle of interpretation of contracts. The majority opinion has gone about interpreting the word 'demobilization' in the context of the substantive clauses of the contract which contain the reciprocal obligations of the parties, ignoring that the word 'demobilization' was defined under

clause 1.11 to mean a particular facet of what 'demobilization' generically means. The majority lost sight of the fact that clause 1.3 dealt with entitlement to demobilization charges whereas clause 1.11 defined what demobilization meant. Clause 1.3 was a charging clause and clause 1.11 was a defining clause. The two operated in their own respective fields.

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57. The majority award has rendered meaningless the words 'to point of origin' in the definition clause i.e. clause 1.11 which defines demobilization.

58. Wherever the word demobilization is used in the contract in question, it must mean demobilization as defined under Clause 1.11 of the contract.

59. Ex facie, the majority opinion has redefined the contours of the word 'demobilisation' and has rewritten the same.

60. Thus, two jurisdictional errors have been committed by the majority which amount to the majority going beyond its mandate. The first is to ignore the well recognized principle of law of construction of a contract that where parties have defined a particular word, they having created their own dictionary, the person charged with the duty to construe the contract has to adopt the particular meaning assigned by the parties to a particular word. Second error committed by the majority, which again relates to its mandate is to render redundant the words 'return to point of origin' which words are an inherent and integral part of demobilization. The rule against redundancy has been violated.

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69. *Learned arbitrators expressing the majority opinion failed to note that demobilization requires return of equipment and personnel to 'point of origin' and in that context demobilization charges were not to compensate the contractor's loss of rental but was to recompense the contractor the expenses towards demobilization i.e. removing mobilized equipment and taking it back to the point of origin.*

70. *The minority award has applied correct principles of interpretation of contracts and has therefore reached the correct conclusions. I may note that the minority award has noted a fact ignored by the majority award, being that the equipment was brought to India with custom declarations that it would be used for execution of certain works and thereafter re-exported. The minority award has correctly noted that the contract in question was in consonance with the obligation of the contractor to take back the equipment to point of origin or if contractor used the equipment elsewhere in India for another contract, he would not be re-exporting the equipment from the shores of this country, meaning thereby the act of demobilization will not be completed.*

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72. *For the reasons recorded above the petition is allowed. Impugned majority award dated 22.5.1998 published by Justice Awadh Bihari Rohatgi (Retd.) and Shri R.P. Bhatt, Sr. Adv. is set aside and the award of even date published by Justice Rajinder Sachar (Retd.) is affirmed."*

(emphasis supplied)

7. Mr. Sanjeev Puri, learned senior counsel for the appellant submitted that the approach of the learned Single Judge in the

present case was untenable in law inasmuch as the learned Single Judge was not justified in referring to and in affirming the minority award dated 22nd May, 1998. He submitted that the learned Single Judge instead of considering the legality of the majority award, had considered the minority award and after referring to it, had concluded that the minority award had correctly applied the principles of interpretation of the contract. He further submitted that the said approach of the learned Single Judge was completely contrary to a Division Bench decision of the Bombay High Court in the case of **Chowgule Brothers v. Rashtriya Chemicals and Fertilizers Ltd.** reported in 2006 (3) Arb. L.R. 457 (Bombay) (DB) wherein it has been held that it is not permissible to look at the minority award while considering an Objection petition seeking to set aside the majority award.

8. Mr. Puri further submitted that the interpretation given to the contract by the majority award could not have been re-appreciated by the learned Single Judge as that was beyond his jurisdiction. In this context, he relied upon the judgment of the Supreme Court in the Case of **Associated Engineering Co. v. Government of Andhra Pradesh and another** reported in AIR 1992 SC 232.

9. Mr. Puri further contended that the learned Single Judge while exercising jurisdiction under Section 34 of the Arbitration Act, 1996 could not re-appreciate the evidence or examine the correctness of the conclusion arrived at by the arbitrator. According to him, the matter relating to construction and interpretation of the contract fell within the domain of the arbitrator. He further submitted that role of the Court while examining the validity of an award is extremely limited both under the old Arbitration Act, 1940 as well as the new Arbitration Act, 1996. According to him, the decision of the Supreme Court in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.** reported in (2003) 5 SCC 705, has no doubt interpreted the expression 'Public Policy of India' to include cases of patent illegality but that does not mean that the Court while exercising powers under Section 34 of the new Arbitration Act, 1996 sits in appeal over findings of fact recorded by the arbitrator or interpretation placed upon the provisions of the contract particularly when such an interpretation is a plausible and possible one. In this context, Mr. Puri referred to and relied upon the decisions of the Supreme Court in **Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.** reported in (2005) 6 SCC 462, **Continental Construction Ltd. v. State of U.P.** reported in (2003) 8 SCC 4, **Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Others** reported in (1987) 1 SCC 424 and a decision of this Court in **New Delhi Apartment Group Housing Society v. Jyoti Swaroop Mittal** reported in 2007 (4) Arb. LR 565 (Delhi.).

10. Mr. B. Sen, learned senior counsel for ONGC stated that as the respondent needed machinery to ascertain availability of oil, it entered into a contract with the appellant. However, as oil was not found, the appellant's equipment was de-hired. Mr. B. Sen referred to the contractual provisions reproduced hereinabove to submit that demobilization charges were to be paid only when personnel and equipment were taken back by the appellant to its 'point of origin', as defined in the contract. He stated that the admitted position was that the appellant had neither returned its personnel nor its equipment to 'point of origin'. In fact, he submitted that Mr. Puri, during his argument, had admitted that the appellant was not claiming demobilization charges but idling charges. Mr. B. Sen further referred to the issue framed by the arbitrators in their majority award, which reads as under:-

"The short question that arises for our determination is whether the Contractor is entitled to a "demobilization charge" for equipments de-hired by the Commission pursuant to clause 1.3 of Section-B Annexure-1 of the Contract dated 29.3.1993."

11. He submitted that in the present instance, the majority award had awarded something that was not asked for and the arbitrators had acted beyond the terms of their reference.

12. Lastly, Mr. B.Sen submitted that the issue of minority award's affirmation was not relevant to the present proceedings. He submitted that even if it is assumed that the minority award could not

have been considered and referred to by the learned Single Judge, then also, the majority award being contrary to the contractual provisions was liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

13. In rejoinder, Mr. Puri admitted that the appellant had not taken back either its equipment or personnel to the ‘point of origin’. However, he pointed out that this was because the respondent had stated that the equipment “may be re-hired as and when required”.

14. In our view, the scope of interference by this Court with an arbitrator’s award under Section 34 of the Arbitration and Conciliation Act, 1996 has been extensively dealt with by the Hon’ble Supreme Court in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.** (supra). The relevant observations of the Supreme Court in the said judgment are reproduced hereinbelow:-

“31.....Hence, in our view in addition to narrower meaning given to the term “public policy” in Renusagar’s case it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to :

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.”

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74. In the result, it is held that :

A. (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that :

(i) a party was under some incapacity, or

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

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

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

(2) The court may set aside the award :

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

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

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

(a) the agreement of the parties, or

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

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

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

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

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged :

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.”

(emphasis supplied)

15. The approach in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.** (supra) has been upheld and followed by the Apex Court in **State of Rajasthan & Others v. Basant Nahata** reported in (2005) 12 SCC 77 and **Hindustan Zinc Ltd. v. Friends Coal Carbonisation** reported in (2006) 4 SCC 445.

16. In **Associated Engineering Co.** (supra), referred to and relied upon by the appellant's counsel, the Apex Court has reiterated that an arbitrator being a creature of the contract, cannot travel outside its bounds. The Supreme Court emphasized that if an arbitrator acts contrary to the contractual terms, then he commits a jurisdictional

error and his award would be liable to be set aside on the ground that the arbitrator has acted in excess of its authority/jurisdiction. The relevant observation of the Supreme Court in the said judgment are reproduced hereinbelow:-

"26. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

27. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreements (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

28. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his

jurisdiction by so doing, his award would be liable to be set aside. As stated by Lord Parmoor :

".....It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which on the true construction of the submission was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties....."

Attorney-General for Manitoba v. Kelly, (1922) 1 AC 268, 276.

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself. Bunge & Co. v. Dewar & Webb (1921) 8 Lloyd's Rep 436 (KB).

29. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. [See M/s. Alopri Parshad & Sons Ltd. v. Union of India,

(1960) 2 SCR 793: (AIR 1960 SC 588); *Bunge & Co. v. Dewar & Webb*. (1921) 8 Lloyd's Rep 436 (KB); *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer*, (1954) 1 QB 8; *Rex v. Fulham* (1951) 2 KB 1; *Falkingham v. Victorian Railways Commission*, (1900) AC 452; *Rex v. All Saints, Southampton* (1828) 7 B & C 785; *Laing, Sons & Co. Ltd. v. Eastcheap Dried Fruit Co.* (1961) 1 Lloyd's Rep 142, 145 (QB); *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan*, (1978) 2 Lloyd's Rep 223 (CA); *Heyman v. Darwins Ltd.* (1942) AC 356; *Union of India v. Kishorilal* AIR 1959 SC 1362; *Renusagar Power Co. Ltd. v. General Electric Company*, (1984) 4 SCC 679 : (AIR 1985 SC 1156); *Jivarajbhai v. Chintamanrao* AIR 1965 SC 214; *Gobardhan Das v. Lachhmi Ram*, AIR 1954 SC 689, 692; *Thawardas v. Union of India*, AIR 1955 SC 468 ; *Omanhene v. Chief Obeng*, AIR 1934 PC 185, 188; *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Limited*, (1933) AC 592 (HL) and *M. Golodetz v. Schrier* (1947) 80 Lloyd's Rep 647].

30. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped, the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. [See the principles stated in *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 AC 147; *Pearlman v. Keepers and Governors of Harrow School*, (1979) 1 QB 56; *Lee v. Showmen's Guild of Great Britain*, (1952) 2 QB 329; *M.L. Sethi v. R.P. Kapur*, AIR 1972 SC 2379; *Managing Director, J. and K. Handicrafts v. M/s. Good Luck Carpets*, AIR 1990 SC 864; *State of Andhra Pradesh v. R.V. Rayanim*, AIR 1990 SC 626. See also *Mustill & Boyd's Commercial Arbitration*, Second Edition; *Halsbury's Laws of England*, Fourth Edition, Vol. 2]."

(emphasis supplied)

17. Having settled the contours of the grounds on which an arbitrator's award is liable to be set aside, we are of the view that in the present case, the majority award is contrary to contractual terms and further that the Arbitral Tribunal has not only acted in excess of its jurisdiction but has also awarded a claim which admittedly did not and could not arise.

18. It is apparent from the pleadings before the Arbitral Tribunal and from the majority award that the appellant/claimant had prayed for payment of demobilization charges only. We agree with Mr. B. Sen's submission that the *sine qua non* for payment of mobilization charges is return of personnel and equipment to 'point of origin' – which admittedly has not happened in the present case. In fact, Mr Puri not only admitted that the goods and equipment had not been returned to the 'point of origin' but further that the appellant was actually claiming 'idling charges' equivalent to demobilization charge as stipulated in Clause 1.3 of Section B of the contract. But we are of the opinion that Clause 1.3 of Section B provides only a working out of a formula as to how demobilization charges are to be calculated. The said formula can only be applied if the concept of demobilization is first attracted. To attract the concept of demobilization charges, the equipment and personnel have to be returned to the 'point of origin' i.e. Houston, Dubai, Singapore, as per Clause 6.5(a) – which admittedly has not happened in the present instance. Thus, the issue of application of the formula stipulated in Clause 1.3 of Section B, to

our mind, does not arise. We are further of the view that as the appellants had not claimed idling charges, they cannot today justify the majority award on that basis as the claim was for demobilization charges.

19. Consequently, in our view, the majority award is contrary to the contractual terms and the same is liable to be set aside on the ground that the arbitrators have acted in excess of their jurisdiction. In view of this conclusion, we are not deciding the issue as to whether the learned Single Judge in an Objection Petition filed under Section 34 of the Arbitration And Conciliation Act, 1996, could have referred to and affirmed the minority award as for the purposes of the present judgment even if the appellant's submission is presumed to be correct, then also, the appeal is liable to be dismissed.

20. In view of the above, the present appeal is dismissed but with no order as to costs.

**MANMOHAN
(JUDGE)**

**MUKUL MUDGAL
(JUDGE)**

**JANUARY 9th, 2009
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