

F-114, 115, 360, 361, 362 & 364

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

114

+ O.M.P. 9/2005 & I.A. Nos. 168/2005 & 183/2005

NAVAL KISHORE

..... Petitioner

Through: Mr. Naresh K. Daksh, Advocate.

versus

INDIAN CEMENT

..... Respondent

Through: Mr. S.K. Pruthi & Mr. Manoj Ahuja,
Advocates.

AND

115.

+ O.M.P. 10/2005

M/S HI-GLOW

..... Petitioner

Through: Mr. Naresh K. Daksh, Advocate.

versus

M/S INDIA CEMENT CAPITAL &
FINANCE LTD. & ORS.

..... Respondents

Through: Mr. S.K. Pruthi & Mr. Manoj Ahuja,
Advocates.

AND

360.

+ O.M.P. 669/2008

DR. NAVAL KISHORE

..... Petitioner

Through: Mr. Naresh K. Daksh, Advocate.

versus

M/S INDIA CEMENT CAPITAL
& FINANCE LTD. & ORS.

..... Respondents

Through: Mr. S.K. Pruthi & Mr. Manoj Ahuja,
Advocates.

AND

361

+ O.M.P. 670/2008

M/S TENDER CARE Petitioner
Through: Mr. Naresh K. Daksh, Advocate.

versus

M/S INDIA CEMENT CAPITAL &
FINANCE LTD. & ORS. Respondents
Through: Mr. S.K. Pruthi & Mr. Manoj Ahuja,
Advocates.

AND

362

+ O.M.P. 671/2008 & I.A. No. 30/2009

DR. NAVAL KISHORE Petitioner
Through: Mr. Naresh K. Daksh, Advocate.

versus

M/S INDIA CEMENT CAPITAL
& FINANCE LTD. & ORS. Respondents
Through: Mr. S.K. Pruthi & Mr. Manoj Ahuja,
Advocates.

AND

364

+ O.M.P. 682/2008

M/S TENDER CARE Petitioner
Through: Mr. Naresh K. Daksh, Advocate.

versus

M/S INDIA CEMENT CAPITAL &
FINANCE LTD. & ORS. Respondents
Through: Mr. S.K. Pruthi & Mr. Manoj Ahuja,
Advocates.

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Date of Decision : December 18, 2009

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the judgment should be reported in the Digest? | No. |

J U D G M E N T

MANMOHAN, J : (Oral)

1. O.M.P. Nos. 9/2005, 10/2005, 669/2008, 670/2008, 671/2008 and 682/2008 have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the common arbitral Award dated 15th September, 2004. Consequently, the present batch of cases is being disposed of by a common judgment.

2. Mr. Naresh K. Daksh, learned counsel for petitioners namely the Guarantor and the legal heirs of deceased Principal borrower submitted that the Arbitrator had been appointed in the present case by an incompetent person. He stated that by virtue of Clause 18 of the Hire Purchase Agreements dated 01st November, 1995, 08th February, 1995 and 04th September, 1995 (hereinafter referred to as “H.P. Agreements”), the Managing Director of the owner i.e. M/s. Aruna Sugar Finance Limited had the exclusive authority and power to appoint a sole Arbitrator. Clause 18 of the H.P. Agreements is reproduced hereinbelow for ready reference:

“18. a) All disputes, differences and/or claims, arising out of this hire purchase agreement, whether during its continuation or thereafter, shall settled by arbitration in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the Managing Director of the

Owner. The award given by such an arbitrator, shall be final and binding on the parties to this agreement.

It is a term of this agreement that in the event of such an arbitrator, to whom the matter, has been originally referred, dying or being unable to act for any reason, the Managing Director of the Owner, at the time of such death of the arbitrator or his inability to act as arbitrator, shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.”

3. Mr. Daksh stated that in the present case the power to appoint the Arbitrator had been exercised by the Chairman of the respondent-claimant company. In this connection, Mr. Daksh relied upon the respondent’s letter dated 01st February, 2000. The relevant portion of said letter reads as under:

“Dear Sir,

We are writing you this letter in connection with the dispute that has arisen between the undersigned and Mr. K. Kishore, proprietor of M/s Hi-Glow, New Delhi in relation to Hire Purchase agreement dated 1-11-1995.

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The hirer has failed to resolve these disputes and the undersigned, through his representatives has failed in his effort to settle the matter amicably with the Hirer. The undersigned, therefore, invokes the Arbitration Clause (Clause 18(a)) in the Hire-Purchase agreement and appoints you as our Arbitrator for settlement of our dispute. The statement of claim would be forwarded to you in due course.

Thanking You.

Yours Faithfully,

Sd/-

*N Srinivasan
Chairman”*

4. Consequently, according to him the impugned Award had been passed

by an arbitrator who had not been appointed by a competent and authorized person. In this connection, Mr. Daksh relied upon the following judgments:-

(i) ***A.M. Rasool Construction & Engineering Services Pvt. Ltd. vs. National Buildings Construction Corporation Ltd.*** reported in ***1998 1 AD (DELHI) 1008*** wherein it has been held as under:

“(1) Only a short point is involved in this appeal and that is whether in the absence of Project Director, who is to act as an arbitrator or to appoint somebody else as arbitrator, the Chairman-cum-Managing Director can appoint another person to be the arbitrator?”

(3) Appointment of an arbitrator is a matter of agreement between the parties. It is not possible for one of the parties to the arbitration agreement to unilaterally change the person who is to act as arbitrator or who is to nominate the person to act as an arbitrator.

(7) In the instant case, clause 14 of the contract, which is reproduced at page 22 of the appeal papers, is the arbitration agreement between the parties. The said provision reads as under :-

"14.Disputes if any relating to or arising out of the provisions of this Contract shall be referred to the Sole arbitration of the Project Director who may either himself arbitrate the dispute or refer the same for arbitration to some other officer of the Corporation other than the officers connected directly with the supervision of the works at work site. The decision of the arbitrator shall be final and binding on both the parties."

(8) Clause 14 of the contract between the parties in clear terms establishes that both the parties to the agreement agree to the sole arbitration of the Project Director who is to undertake the arbitration either himself, or to appoint some other person of the Corporation other than the officers connected directly with the supervision of the works at work site to act as arbitrator. The said provision is certain and clear.

(11) Counsel for the respondent submits that by virtue of Office Order No.1686/90, dated 6.8.1990, the powers

which were vested in the Projects Director (Overseas Projects) were to be exercised by the Chairman-cum-Managing Director himself. The said Office Order reads as under :-

*"National Building Construction Corporation Limited
(A Govt. of India Enterprise)
Team in Pursuit Of Excellence
NBCC House
LODHI Road
NEW Delhi-110003
Office Order NO. 1686/90*

In super-session of all previous office orders issued on this subject, the Chairman-cum-Managing Director is pleased to decide and direct that all the powers that were vested in the Projects Director (Overseas Projects) shall henceforth be exercised by the CMD himself, provided, however, the Chief Project Manager posted at the foreign Projects will continue to exercise the powers separately delegated to them.

*. sd/-
(K.R. Sundaram)
Chief Manager (Personnel)"*

(12) Clause 14 of the agreement between the parties contemplates arbitration by the Project Director and not by the Project Director (Overseas Project). The said office order, therefore, has no application to the facts and circumstances of the instant case.

(13) In the circumstances, the appeal succeeds. The impugned order is set aside. The matter is remanded to the Hon'ble Single Judge to proceed in the matter in accordance with law, and to appoint an arbitrator as postulated by Section 20(4) of the Act.

(ii) Punjab State Cooperative Supply and Marketing Federation Ltd. & Anr. vs. Lakhmir Singh Chadha & Co. and Ors. reported in 1998 (1) Arb. LR 582 wherein it has been held as under:

“7. It is obvious from the aforesaid that when the post of the arbitrator so named is abolished and it was intended as in the present case that vacancy should not be supplied, the Court can act under Section 8(1)(b) of the Arbitration Act. When the post is abolished and arbitrator is not available it would tantamount that arbitrator named was incapable of acting. The trial Court in these circumstances rightly so concluded.”

5. Mr. Daksh further submitted that although the original H.P. Agreements provided that Managing Director of respondent No.1 shall appoint an Arbitrator, the said arbitration clause had been unilaterally amended by respondent No.1 without petitioner's consent. He stated that the powers of Managing Director had been entrusted to the Chairman of respondent No.1 for nominating an arbitrator. According to him, the alleged amended agreement was not consented to or signed by the petitioner and was consequently void *ab initio*. In this connection, Mr. Daskh relied upon the following judgments:-

(i) ***Dharma Prathishthanam v. Madhok Construction (P) Ltd., AIR (2005) SC 214*** wherein it has been held as under :

“12. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. A unilateral appointment and a unilateral reference — both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edn., p. 104)—“

(ii) *Sime Darby Engg. SDN. BHD. v. Engineers India Ltd.,(2009) 7*

SCC 545 wherein it has been held as under:-

“28. The learned counsel for the respondent has referred to its policy decision which has been quoted hereinabove. Such policy decision cannot change the contractual clause. In any event, the contract between the parties was entered into in 2004. The said policy decision came into effect in 2005. Therefore, the said policy decision cannot in any way override the contract between the parties. The parties’ autonomy in the arbitration agreement must be given due importance in construing the intention of the parties.”

6. Mr. Daksh also submitted that the arbitration clause had never been invoked against the Petitioner-Guarantor, namely, Dr. Naval Kishore. He submitted that arbitration clause had only been invoked against Mr. K. Kishore, the Principal Borrower. In this connection, he once again relied upon the respondent’s notice dated 01st February, 2000, which has already been reproduced hereinabove. He further stated that petitioner Dr. Naval Kishore had for the first time been issued notice vide Arbitrator’s order dated 20th September, 2002, by which date, the claim petition had clearly become time barred against Dr. Naval Kishore inasmuch as the default in repayment had occurred in September, 1997. In this connection, Mr. Daksh relied upon a judgment of the Supreme Court in *Milkfood vs. GNC Ice Cream* reported in *AIR 2004 SC 3145* wherein it has been held as under:

“67. Commencement of arbitration proceeding for the purpose of limitation or otherwise is of great significance. If a proceeding commences, the same becomes relevant for many purposes including that of limitation. When Parliament enacted the 1940 Act, it was not in its contemplation that 46 years later it would re-enact the same. The court, therefore, while taking recourse to the interpretative process must notice the scheme of the legislations concerned for the purpose of finding out the purport of the expression “commencement of arbitration proceeding”. In

terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it applies to proceedings in court. For the purpose of invoking the doctrine of lis pendens, Section 14 of the Limitation Act, 1963 and for other purposes presentation of plaint would be the date when a legal proceeding starts. So far as the arbitral proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion whereafter only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply. It is relevant to note that it is not mandatory to approach the court for appointment of an arbitrator in terms of sub-section (2) of Section 8 of the 1940 Act. If the other party thereto does not concur to the arbitrator already appointed or nominates his own arbitrator in a given case, it is legally permissible for the arbitrator so nominated by one party to proceed with the reference and make an award in accordance with law. However, in terms of sub-section (2) of Section 8 only a legal fiction has been created in terms whereof an arbitrator appointed by the court shall be deemed to have been nominated by both the parties to the arbitration proceedings.

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73. Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression “commencement of the arbitral proceeding” as contained in Section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding.”

7. He further submitted that arbitrator had withdrawn from the arbitration proceedings and, therefore, his mandate stood terminated and he could not have pronounced the impugned Award.

8. Mr. Daksh submitted that the impugned Award was also contrary to public policy inasmuch as the petitioners were not given a fair opportunity of hearing. He submitted that the arbitrator had fabricated the proceedings inasmuch as the arbitrator had alleged misbehavior by petitioner’s counsel

on 14th November, 2003 and 26th December, 2003, when in fact, none had appeared for the petitioner. In this connection, he relied upon the respondents-claimants' reply-affidavit wherein it had been alleged that none had appeared for petitioner on 26th December, 2003. Learned counsel for petitioner also stated that though in the order dated 07th February, 2001, the arbitrator has stated that he had heard arguments on 15th September, 2000 on an application filed under Sections 12 and 13, but according to him no such hearing took place on 15th September, 2000.

9. Mr. Daksh, lastly submitted that the interest charged by respondent No.1 was contrary to and in excess of the rate stipulated in the H.P. Agreements executed between the parties. In this connection, he drew my attention to Clauses 12 of the H.P. agreements which reads as under:

“12. Notwithstanding anything contained in any of the aforesaid clauses, the Hirer agrees that the Owner shall be entitled to vary the Instalments of Hire Money in the event of a change occurring in the lending rates charges to the Owner by its bankers. Consequently, for every change in the banks' lending rate of half per cent per annum the instalments of hire money as mentioned in the Second Schedule, falling due on or after the date of such change shall stand revised by the amounts mentioned in the Third Schedule to this Agreement.”

10. According to Mr. Daksh, respondents-claimants were also not entitled to calculate interest @ 14% flat per annum for the period of thirty-six months as at that relevant time the PLR was 13% per annum.

11. On the other hand, Mr. S.K. Pruthi, learned counsel for respondent-claimant company stated that after the respondent-claimant was reorganised and its name was changed, the post of Managing Director was abolished.

According to Mr. Pruthi, the functions of the Managing Director were delegated to Chairman of the re-organized company. In support of this plea Mr. Pruthi relied upon the resolution dated 21st November, 1998 which reads as under:-

EXTRACT(S) FROM THE MINUTES OF THE MEETING OF BOARD OF DIRECTORS OF INDIA CEMENTS CAPITAL & FINANCE LIMITED HELD ON 21ST NOVEMBER, 1998 AT 'DHUN BUILDING', 827, ANNA SALAI, CHENNAI – 600 002.

15. Appointment of Arbitrators:

The Company's Lease/Hire Purchase agreements provide for settlement of all disputes and differences arising out of the said agreements through arbitration. As per the agreements the arbitrator has to be appointed by the Managing Director of the Company. It was suggested that in case of contracts already entered into by the Company, Chairman/President may be authorized to appoint arbitrators. After discussions it was:

“RESOLVED THAT the arbitration clause in the Lease/Hire Purchase agreements be and is hereby amended by substituting the word ‘Chairman/President’ against the word ‘Managing Director.’”

“RESOLVED FURTHER THAT Sri N. Srinivaisan, Chairman, be and is hereby authorized to appoint arbitrators in connection with all disputes, differences, and/or claims arising out of the Hire Purchase/Lease/Other agreements already entered into by the Company.”

12. Mr. Pruthi submitted that the post of Managing Director is an office and ‘persona designata’ in terms of the arbitration clause and not an individual person. According to him, the person who performs the functions of Managing Director is deemed to be the authority to appoint an arbitrator. Mr. Pruthi in this connection referred to the order dated 07th February, 2001 passed by the learned Arbitrator. The relevant portion of the said order reads as under:

15. *Undoubtedly in the present case the arbitrator has been appointed by the Chairman of the Claimant Company instead of the Managing Director. The argument of the learned Counsel for the Respondent that the Managing Director of M/s Aruna Sugars Finance Ltd. alone has the power to nominate the arbitrator, prima facie, appears to have considerable force, however, if the Chairman of the Company holds the office of the Managing Director as well or otherwise legally exercises the power of that office, there does not appear to be any legal infirmity in his invoking the arbitration clause, particularly when no prejudice is caused to the rights and interests of the Respondents. I am of the considered view that the claim, which is otherwise legally maintainable, cannot be defeated on the basis of mere technicalities. Therefore if the Claimant Company does not, for any reason, have the incumbent of the post of Managing Director or the said post has been merged with that of the Chairman, the Chairman, if he is duly authorized, can invoke the arbitration clause under the law.”*

13. Mr. Pruthi further denied that the arbitration clause had been unilaterally amended. He stated that the resolution dated 21st November, 1998 and the list of Directors of the new company had been filed with the Registrar of Companies and as such the petitioner had constructive notice of the aforesaid change and, therefore, the said amendment cannot be said to be unilateral as the public at large was aware of the same.

14. Mr. Pruthi denied that the arbitration clause had not been invoked against Dr. Naval Kishore. He pointed out that in the claim statement filed by the respondent-claimant in March, 2000, Dr. Naval Kishore was respondent No.2. He further stated that petitioner's reliance upon the respondent's request letter addressed to the Arbitrator was of no consequence as the said letter specifically stated that the claim petition had been filed not only against Mr. K. Kishore but also against other respondents.

15. Mr. Pruthi also stated that notice had been issued by the Arbitrator to Dr. Naval Kishore on 22nd May, 2000 and, therefore, even if there was a dispute with regard to the initial invocation, the arbitration clause stood invoked against Dr. Naval Kishore on 22nd May, 2000 – which admittedly was during the period of limitation.

16. Mr. Pruthi further stated that the Arbitrator had never withdrawn from the arbitral proceedings and he stated that there was no order by which the Arbitrator had withdrawn from the said proceedings.

17. Mr. Pruthi also denied that the impugned Award was contrary to public policy. He stated that he had personally attended the arbitral proceedings and the order rejecting the petitioners' applications filed under Sections 12 and 13 of the Act, 1996 had been passed only after a detailed hearing in which the petitioner's counsel had made extensive arguments. He further stated that he was present in the proceedings when petitioner's counsel Mr. Shailendra Babbar and Mr. Joginder Sukhija had misbehaved with the learned Arbitrator. In this connection he referred to para 32 of Arbitrator's order dated 15th December, 2003 which reads as under:-

“32. That on 14.11.2003 Shri Ajay Jain, Advocate filed his Vakalatnama and stated that now he would be the Counsel for the respondent No.2 Dr (Mrs.) Adarsh Kishore W/o Dr. Naval Kishore, respondent No.2 was also present. Shri K. Kishore was present with his Counsels Shri Joginder Sukhija and Shailendra Babbar. For claimants Shri S.K. Pruthi Advocate with Shri C.S. Krishna Murthi and Anuj Chandra, witness was present. Shri Ajay Jain Ld. Counsel for the respondent no.2 moved an application on behalf of Respondent No.2 for modification of

orders dated 2.09.2003, 19.9.2003 and 29.10.2003. While arguing the application Shri Jain though appeared for the first time also made certain allegations against the Arbitrator but the same were in the tolerable limits. The said application was vehemently opposed by Shri S.K. Pruthi, Ld. Counsel for the claimant. After hearing the parties it was decided that there was no substance in the said application and order on the same will be passed separately and the parties were asked to cross-examine the witness of the claimants who was present as ever. On this Shailendra Babbar one of the Ld. Counsels for the respondent No. 1 started shouting and using unparliamentary language and making uncalled for insinuations against the Arbitrator. When the reasoning failed to work with Shri Babbar he was asked not to disturb the proceedings and leave if he did not want to participate. Shri Babbar did not still behave himself nor the respondent No.1 try to rein in his counsel in this Shri Sukhija, though relatively less vociferous, supported his colleague in his misconduct. Having sensed the ugly situation and taking note of the fact that the objective of the respondents was to somehow not to let the proceedings go ahead and stifle the same on one pretext or the other, the Arbitrator had to close the evidence, per force.”

18. Mr. Pruthi also submitted that a mistake by the Arbitrator in recording the proceedings of one date cannot be a ground for setting aside the arbitral Award.

19. Mr. Pruthi also referred to Schedule-II of the H.P. Agreements which specifically provided rate of interest @ 14% flat per annum for a period of thirty-six months. He pointed out that the said Schedule had been signed by both the Principal Borrower as well as the Guarantor Dr. Naval Kishore, who was his son.

20. Mr. Pruthi further submitted that no compound interest had been awarded by the learned Arbitrator and only for the delayed period in repaying the installment, interest had been awarded by the Arbitrator in

accordance with the Clause 11 of the H.P. Agreements executed between the parties. The said Clause 11 reads as under :

“11. If default be made in payment of any instalment of the hire amount under this Agreement the Hirer shall pay to the Owner Additional Finance charges at the rate of 36 per cent per annum on the amount from time to time in arrears until payment thereof or determination of this agreement under the terms herein but this clause shall not in any way prejudice the owner’s rights under the Agreement to seize or retake possession of the Machinery or to determine the hiring of the Agreement or otherwise.”

21. He further submitted that in case there was any variation in the rate of interest and the EMIs were to be reduced, as alleged by the petitioner’s counsel, then the onus was on the petitioner to prove the reduced rate of interest before the Arbitral Tribunal which it failed to do in the present proceedings. He stated that despite number of opportunities, neither the petitioner placed on record any document to show that the interest rate had been reduced nor they cross-examined the respondent-claimant’s witnesses on this aspect.

22. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitration award passed under the Act, 1996. The Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in (2008) 13 SCC 80 after referring to a catena of judgments has held that an arbitration award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:-

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

23. Supreme Court has further held in the aforesaid judgment that an award can 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.

24. An award can also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Supreme Court has also held that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

25. At the outset, I wish to point out that neither the execution of H.P. Agreements nor the fact of non-payment of loans was disputed by petitioners before this Court. The pleas raised by the petitioners in the present petitions are only technical and legal in nature.

26. In any event, in my opinion, neither the appointment of Arbitrator in the present case was by an incompetent person nor arbitration clause had been unilaterally amended by the respondents-claimants.

27. Initially when the H.P. Agreements were executed, the name of respondent-claimant company was M/s. Aruna Sugar Finance Limited,

which was subsequently re-organised and its name was also changed to M/s. India Cement Capital and Finance Limited after taking all statutory permissions. From the documents placed on record, it is apparent that the functions of Managing Director of respondent-claimant company were transferred to its Chairman as the office of Managing Director of the respondent-claimant company was abolished.

28. In my view, unlike in *A.M. Rasool Construction & Engineering's* case (supra), in the present case pursuant to the re-organization of the respondent-claimant company, the Chairman became the successor-in-interest of former Managing Director of the respondent-claimant company. In any event, no prejudice had been caused to the petitioners as under the H.P. Agreements executed between the parties, the power to appoint the Arbitrator stood vested with the respondent-claimant company and by virtue of an internal re-organization the power to appoint the Arbitrator had been exercised by its Chairman, the successor-in-interest of Managing Director of the respondent-claimant company. Moreover, re-organisation of the respondent-claimant company was an internal affair of the respondent-claimant company. The same was also in public domain inasmuch as the amended list of Directors and the amended Articles had been filed with the Registrar of Companies. In view of the aforesaid, the case law cited by the petitioners-objectors is irrelevant to the facts of the present case.

29. I further find that in the initial claim statement filed by respondents-claimants, Dr. Naval Kishore was respondent no. 2. In the order dated 22nd

May, 2000, Arbitrator had specifically ordered that notice be issued to Dr. Naval Kishore. In fact, the Arbitrator's order dated 20th September, 2002 only states that as a matter of abundant precaution and to obviate any subsequent technical issue, another notice be issued to Dr. Naval Kishore. Consequently, in my opinion, invocation of arbitration clause against Dr. Naval Kishore was not barred by limitation.

30. I further find that the impugned Award is not contrary to public policy as petitioners had been given reasonable opportunity to prove their defences. The detailed order passed by the Arbitrator on petitioners' application filed under Sections 12 and 13 of Act, 1996 clearly shows that petitioners had advanced extensive arguments before the Arbitrator. I am also in agreement with Mr. Pruthi's argument that a mistake in recording of proceedings in one of the orders cannot be a ground for setting aside the entire arbitral Award. In fact, the Supreme Court in *M/s. Construction India Vs. Secretary Works Department, Govt. of Orissa and Ors.* reported in *AIR 1998 SC 717* has held that, "*a mistake in recording the minutes of one date cannot be the ground for setting aside the arbitration Award.*" In any event, as the admitted position is that amounts received under the H.P. Agreements have not been returned, petitioners are bound to repay the same to respondent-claimant company in accordance with the terms of H.P. Agreements.

31. On a careful perusal of the file, I did not find any order/letter by which the arbitrator had withdrawn himself from the proceedings.

32. As far as the argument that respondent-claimant was not entitled to calculate interest @ 14% flat per annum, I find that in Schedule-II of H.P. Agreements, the EMIs had been clearly worked out @14% flat per annum and the said Schedule had been signed by both the Principal borrower, namely, Mr. K. Kishore as well as his son, Dr. Naval Kishore who was the guarantor. Consequently, to raise a dispute at this stage with regard to interest @ 14% flat per annum, is not open to the petitioners. I am further in agreement with Mr. Pruthi that in case there was any variation in the rate of interest, the onus was on the petitioners to prove the same – which they had failed to discharge in the present proceedings.

33. In view of aforesaid, the impugned Award calls for no interference in Section 34 jurisdiction. Accordingly, present objection petitions are dismissed but with no order as to costs.

MANMOHAN,J

DECEMBER 18, 2009

js/rn