

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

Judgment reserved on: 12.05.2011

% **Judgment delivered on: 15.06.2011**

+ **CS(OS) 1043/2009**

M/S CHUGH KATHURIA ENGINEERS (P) LTD. Plaintiff
Through: Mr. Sandeep Sharma, Advocate.

versus

DELHI DEVELOPMENT AUTHORITY (DDA) Defendant
Through: Mr. Abhishek Puri, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

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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 Reporters or not? | : | Yes |
| 3. | Whether the judgment should be reported in the Digest? | : | Yes |

J U D G M E N T

VIPIN SANGHI, J.

I.A. No. 1008/2010

1. These are objections preferred by the respondent-DDA under Sections 30 & 33 of the Arbitration Act, 1940 against the award dated 19.03.2009 passed by Mr. Justice R.C. Chopra, retired Judge, Delhi High Court.

2. The petitioner M/s Chugh Kathuria Engineers (P) Ltd. was awarded the work of construction of 96 Type-III, 96 Type II quarters and 140 Scooter Garage in Block-B, Janak Puri, New Delhi vide an agreement No. 41/EE/HD/VII/DDA/81-82. The stipulated date of commencement of work was 20.08.1981. The work was to be completed on or before 19.05.1982 i.e. within a period of nine months. However, the work continued till 1985, and was never completed by the petitioner.

3. The respondent-DDA alleged that the petitioner had abandoned the work. On the other hand, the case of the petitioner was that the respondent was responsible for delays and breaches. Disputes arose between the parties which were referred to arbitration by Mr. M.S. Telang. Mr. Telang rendered his award on 31.01.1994. The DDA challenged the said award by filing I.A. No. 8700/1994 in CS(OS) No. 543/1994. By judgment dated 01.08.2006, the learned Single Judge decided the objection petition. While dealing with the award on claim No. 3, additional claim No. 3 and counter-claim No. 2, the court observed that the learned Arbitrator had failed to take into consideration a relevant document, namely, Exhibit R-2 dated 01.08.1985 which was written by the petitioner. Consequently, the court set aside the award pertaining to claim No. 3, additional claim No. 3 and counter-claim No. 2. The relevant extract from the said order reads as follows:

“44. On claim No.3 of the contractor as also additional

claim no.3 and counter claim no.2 of DDA, in my opinion there is serious problem with the award.

45. Claim No.3 was on account recompense claimed by the contractor for the expenditure incurred during the period contract got prolonged. Sum of Rs.6,05,800/- has been awarded to the contractor. On additional claim No.3 sum of Rs.28,900/- has been awarded. This claim also related to the contract prolonged period and was pertaining to the tools and plants stationed at the site.

46. Counter claim no.2 of DDA was for losses suffered due to contract getting prolonged.

47. In the preamble of the award, learned Arbitrator has referred to the delay in furnishing the structural drawings. He has also referred to the fact that the contractor established that the site had hindrances. Learned Arbitrator has also held that there was delay in supply of cement and steel items which were to be supplied by DDA. Learned Arbitrator has held delay attributable only to DDA.

48. Consequence of said finding is that DDA's counter claim No.2 has been rejected and contractor's claim No.3 and additional claim No.3 has been allowed in sum of Rs.6,05,800/- and Rs.28,900/- respectively.

49. Learned counsel for DDA drew my attention to Ex R-2 being a letter relied upon by DDA., The said letter dated 1.8.1995 bears the signature of the contractor.

50. The said letter written by the contractor contains an admission that delay was occasioned due to contractor's faults.

51. Learned counsel for the contractor drew my attention to the minutes of the hearing held on 20th August, 1993 (pages 49 to 57 of Part-I of the Arbitrator's record).

52. Minutes of the said meeting notes the stand of the contractor to the effect that Ex.R-2 was obtained under duress by the Engineer concerned.

It records the justification of the contractor that the said letter was written after 2 years of letter Ex. C-24 dated 6.5.1983. The minutes note that the letter Ex C-24 pertains to grant of extension of time and does not refer to any delay by the contractor. Minutes record the submission of the contractor that the language of Ex R-2 does not show

volition of the contractor. It is also noted that the letter is not on the letter head of the contractor. It is also recorded that case of the contractor is that in the parliament a question was raised as to why the project had got delayed and to save their skin the engineers of DDA had obtained said letter from the contractor.

53. Unfortunately, learned Arbitrator has not discussed Ex.R-2 while giving his justifications in the award.

54. What has been noted in the minutes dated 20.8.1993 is the respective stand of the parties. Stand of the contractor qua the said letter has been noted. But that would not be the justification for the award.

55. Reasons have to be stated in the award. I cannot enter into surmises and conjectures. As I read the award I find an omission, in that, there is no reference whatsoever to Ex.R-2.

56. It is settled law that where a material document has been ignored by the Arbitrator, in that, while discussing on the issue, no mention is made thereto, same would vitiate the award as being a case of legal misconduct, i.e. failure to consider a relevant and material document.

57. Ex.R-2 is certainly a material document. Its importance can be gauged from the fact that extensive reference has been made by learned Arbitrator to the submissions of a contractor made on 20.8.1993 pertaining to Ex.R-2.

58. Findings of the learned Arbitrator pertaining to claim No.3, additional claim No.3 and counter claim No.2 cannot be sustained due to non-consideration of Ex.R-2."

4. The court appointed Mr. Justice R.C. Chopra (Retired), as the Arbitrator to decide the petitioner's claim No.3, additional claim No.3 and DDA's counter-claim No.2. The court directed that the Arbitrator would not record any further evidence, but would decide the aforesaid claims and counter-claim on the basis of the existing evidence. As a consequence of the aforesaid order, the learned Arbitrator has rendered the impugned award which is challenged by the DDA.

5. The learned Arbitrator in his award takes note of the judgment of the High Court aforesaid. He also takes note of the submissions of the petitioner, inter alia, to the effect that the respondent was responsible for the delays in, amongst others, handing over of the construction site, the supply of construction drawings, granting approvals, issuing cement and steel doors, pipes, etc. The learned Arbitrator also takes note of the submission of the petitioner in relation to the Exhibit R-2, that there was a Parliament Question in 1985 and the Executive Engineer concerned, in order to save his skin, pressurized and coerced the claimant to write this letter accepting the responsibility for delay in execution of the work. The learned Arbitrator observes that before the previous Arbitrator, in the sixth sitting held on 20.08.1993, it was contended by the petitioner that the letter Ex. R-2 had been obtained from him in view of a parliament question. It was also argued that all letters had been written by the claimant on its letterhead whereas Exhibit R-2 alone was a letter written on plain paper. The petitioner also highlighted the fact that up to the 34th RA Bill dated 23.11.1985, the respondent had made payment under Clause 10(C) of the agreement which provides for escalation on labour cost. The conduct of the respondent in making payment under Clause 10(C) of the agreement for the period up to November 1985 shows the acknowledgement by the respondent, of the fact that the delay up to that period was not on account of the petitioner.

6. The learned Arbitrator also noticed the submission of the

respondent that Exhibit R-2 was voluntarily written by the claimant which clinches the issue with regard to the responsibility for the delay in completion of the project. It was argued that Exhibit R-2 was the truthful admission on the part of the petitioner that the delay was on its part only. The respondent relied upon the judgment reported as ***Double Dot Finance Ltd. V. Goyal MG Bases Ltd., 2005(1) ALR 324 (Delhi)***, to submit that coercion or duress in commercial contracts cannot be inferred on account of financial pressures only and various other factors have to be considered to ascertain whether the freedom of exercising free will was there or not when the person had made the admission. Pertinently, it was the submission of the respondent that a question was raised in Parliament in regard to delay in completion of the work and, therefore, the respondent was pressing the petitioner to re-organise its work and complete the same.

7. The learned Arbitrator proceed to consider the issue whether Exhibit R-2 was a voluntary and genuine admission on the part of the petitioner-claimant regarding its fault in delaying the project, or whether it was obtained from him under coercion or duress by the Engineers of the respondent who wanted to save themselves in the wake of Parliament Question. While dealing with this issue, the learned Arbitrator examines the correspondence exchanged between the parties as also the various steps taken by them for the performance of the contract. On this basis, he concludes that the delay was on the part of the respondent. He also takes note of the fact

that for about three years the respondent allowed the claimant to go ahead with the work which, according to him, showed that the petitioner was not to blame for delay in execution of the work. He notes that as per record till May 1984, when inspection was carried out the completed work was about 62% only. Still no action taken against the petitioner. He observes that this indicates that the respondent was satisfied that the petitioner was not to blame for the delay. He also notices the fact that the petitioner was paid escalation under Clause 10(C) upto the 34th RA Bill dated 23.11.1985, which indicated that till then the respondent did not blame the claimant for delay in execution of the work. He holds that the letters issued by the respondent, and relied upon by them, to claim that the progress of the work was slow were of no consequence. He holds that the said letters were apparently written in routine, only to save their own skin in regard to delay in completion of the project.

8. At this stage, I may note that the learned Arbitrator has observed that the respondent rescinded the contract on 11.10.1985. However, as a matter of fact, a perusal of Exhibit R-47 dated 11.10.1985 shows that the said letter does not purport to rescind the contract. The learned Arbitrator in paragraph 18 of the impugned award holds as follows:

“18. In the light of the aforesaid facts and circumstances and the evidence on record, it can be safely held that right from the beginning, the respondent was not adhering to the time schedule for completion of the work and did not provide the site free from hindrances to the claimant

contractor. It had also defaulted in supplying the requisite drawings and the material to the claimant promptly and as such the delay was attributable to the respondent. Throughout the period of subsistence of the contractual relationship between the parties, the claimant had been continuously writing to the respondent that it was not responsible for the delay in the project. It is not understandable as to why all of a sudden on 1st August 1985, the claimant should have taken a U-turn and written Ex.R2, which was absolutely self-damaging, contrary to its stand and exonerated the respondent of all its defaults. The claimant has been contending before the previous Arbitrator also that Ex.R2 was obtained from him by the Engineers of the respondent in the wake of a Parliament Question to save their skin. The respondent has not been able to suggest even as to why the claimant should have written such a self damaging letter Ex.R2 without any rhyme or reason. It is also noticed that all other letters by the claimant were on the letterheads of the claimant whereas Ex.R2 was on a plain paper, which indicates that it was not sent from the office of claimant but was written at some other place. This fact supports the stand of the claimant that it was obtained from him under pressure and coercion and it had no reason to write such self-damaging letter when its disputes with the respondent were still pending and its accounts had not been settled. The Judgment cited by Id. Counsel for the respondent is not applicable to the facts of the present case as it is not pleaded that Ex.R2 was obtained for releasing payments. I therefore have no hesitation in holding that Ex.R2 is a procured and false document and cannot be relied upon to hold that claimant was liable for delay in the project."

9. The submission of learned counsel for the respondent-applicant is that the impugned award is not based on any evidence placed before the learned Arbitrator, and that is an error apparent on the face of the award. It is submitted that the learned Arbitrator has ignored various documents relied upon by the respondent. These documents showed that the petitioner was behind schedule, and in spite of extensions granted to the petitioner and his promise to complete the work within the extended period, the same was not so completed. It is

also argued that the petitioner-claimant did not deny the fact that the Ex.R-2 dated 01.08.1985 was a letter written by it. There was no pleading or averment made to support the story that the said letter Ex. R-2 was obtained from the petitioner under coercion or duress by the respondent. This oral plea raised in a hearing held on 20.08.1993 was not corroborated by any material or evidence placed on record of the learned Arbitrator. Learned counsel for the respondent submits that the learned Arbitrator has misconducted himself by accepting the said plea of the petitioner.

10. On the other hand, learned counsel for the petitioner has supported the impugned award by submitting that the learned Arbitrator has considered documentary evidence placed before him to conclude that the delay was attributable to the respondent at various stages of the work, and there was no reason for the petitioner to have issued Ex.R-2 dated 01.08.1985 which was self destructive and went contrary to the position as it emerges from the evidence placed on record. The petitioner also submits that claim No. 2 had been made by the petitioner to claim escalation on account of delay by the respondent. The said claim had been allowed by the earlier appointed Arbitrator and also upheld by the High Court, which establishes that the delay was not on account of defaults of the claimant-petitioner, but on account of hindrances and delay caused by the respondent. It is argued that the decision of the High Court in regard to claim No. 2 operates as issue estoppel against the respondent inasmuch, as, by

allowing this claim the High Court had put the blame for delay on the respondent. Learned counsel for the petitioner has raised various other submissions which I shall record a little later.

11. A perusal of the impugned award shows that the learned Arbitrator has recorded a finding in paragraph 18 to the effect *"This fact supports the stand of the claimant that it was obtained from him under pressure and coercion and it had no reason to write such a damaging letter when its disputes with the respondent were still pending and its accounts had not been settled"*. The coercion and duress alleged by the petitioner was on the premise that there was a Parliament question in 1985 and the Executive Engineer concerned, in order to save his skin, pressurized and coerced the claimant to write this letter, accepting responsibility for the delay in execution of the work.

12. In relation to the said cause for coercion, pertinently there is no finding returned by the learned Arbitrator. The learned Arbitrator has not found, as a matter of fact, that a parliament question was raised around the time when the letter Ex.R-2 was issued, or that the same was issued due to coercion exercised by the respondent due to the said parliamentary question being raised, to save their skin. A perusal of the impugned award shows that the finding of coercion returned by the Learned Arbitrator is only inferential i.e. it is inferred from the finding that the respondent alone was responsible for the delay. On the basis of this finding it is inferred that there could be no other

reason for the petitioner to voluntarily give a self destructive letter as Ex. R-2. There is no direct finding of fact, to the effect that the respondent exercised coercion or duress upon the petitioner to extract Ex. R-2.

13. During the course of arguments, I called upon the petitioner to show me the pleading of the petitioner to the effect that Ex. R-2 had been given under coercion and pressure for the reason that there was a Parliament question raised in 1985, and that the Executive engineer concerned, in order to save his skin had pressurized and coerced the petitioner into writing Ex.R-2. There was absolutely no mention of Ex.R-2 in the petitioner's statement of claim. Therefore there is no pleading in relation to Ex. R-2 either. Ex.R-2 was relied upon by the respondent in its counter statement of fact while dealing with claim no.2. It would be appropriate to set out the pleading of the respondent in reply to Claim No.2. The same reads as follows:-

"Claim No.2

*Claim No.2 is in fact mischievous and without any basis. In terms of clause-10C of the agreement the claimant is entitled for claim towards the cost of material till the date of completion of the work but the claimant is not entitled to claim any rise in the cost of materials if the delay is on the part of the claimant. **Since in the present case the work has been delayed by the claimant and it is entirely attributable to the claimant therefore the claimant is not entitled for any payment under Clause 10-C after the extended date of completion. It is further submitted that since the claimant had abandoned the work on 25.11.1985 the respondent became entitled to get the work done at the risk & cost of the claimant. In fact the delay has already been admitted by the claimant in his letter dt.***

1.8.85 (Exh.R-2) wherein the claimant himself has admitted that on account of some financial problem of the contractor/claimant the claimant was not in a position to deploy the sufficient labour to complete the work as per the programme submitted by the claimant, duly concurred by the respondents. In view of the situation that the claimant has admitted the delay, he is not entitled for payment under Clause 10-C as the delay is entirely attributable to the claimant himself. The details of the payments made under clause 10-C are given in Exh.R-3 of counter statement of facts. Such payments are reimbursed to the claimant. The claim is therefore liable to be rejected and the excess payments made to the claimant may please be awarded in favour of the respondents which are being filed under the head of Counter Claims.” (emphasis supplied)

14. Pertinently, the petitioner did not file any rejoinder before the arbitral tribunal to controvert the aforesaid averments and, in particular, to controvert the respondent’s reliance placed at Ex.R-2. It would be appropriate at this stage to reproduce Ex.R-2 as well. The same reads as follows:-

*“M/S Chugh Kathuria Engineers (P) Ltd.
J-11/94 Rajouri Garden, N. Delhi.*

To,
*The Executive Engineers,
Housing Division No.XXX,
DDA, New Delhi.*

*Sub: C/o 96, Type-III, 96, Type-II house and 144 S/Grs. In
Block B Janakpuri.*

Dear Sir,

Kindly refer your letter No.F(31)A/HDXXX/DDA/84/85/1276 dated 24/7/1985 regarding slow progress on the above cited work. It is admitted that on account of some financial problem with the firm, we could not deploy sufficient labour required to complete the work as per programme given by you. We now reaffirm that the entire work as per terms and conditions of the agreement like flooring, plastering, white washing, sanitary installations,

water supply installations, miscellaneous items and item of internal development shall all be completed by 30th Sep. 85. We further assured that labour to the extent of about 150 Nos. including 30-35 Masons, carpenters and fitters etc. shall be deployed with immediate effect and department shall be liberty to deploy labour at our risk and cost, in case we fail to keep our promise and fullfil the targets.

Chugh Kathuria Engineers (P) Ltd.

c.c.S.E. Circle-XIII for kind information."

15. The stand of the petitioner that Ex.R-2 was given under duress and coercion was raised by the petitioner only during the course of oral submissions made before the arbitral tribunal in the proceedings held on 20.08.1993, while discussing counter claim No. 2 of the respondent. I think it appropriate to extract the relevant proceedings drawn up by the learned Arbitrator in relation to Ex.R-2. The same read as follows:-

"All emphasis is drawn by respondent from R-2 Ext." is granted by C-24/6.5.83 (upto 31.8.83 extension stands granted). This is the last extension on record.

R-2/1.8.85. from Claimant is almost 2 years after C-24/6.5.83.

In the light of query in Parliament: R-2 was LC found.

Language of R-2 is not on claimants own volition. Even so, it is mere promise.

It cannot therefore said to be one drafted for Claim 3 of Agt."

16. The petitioner, it appears did not lead any direct evidence before the earlier Arbitrator to establish duress or coercion. Before the learned Arbitrator it was claimed that the Parliamentary question was raised in 1985 and that Exhibit R-2 was taken from the petitioner under

duress and coercion in the wake of the said parliamentary question, to save the skin of the respondent's officers. However, there was no document placed on the record of the learned Arbitrator to show that any parliamentary question was raised in relation to the project in the year 1985. On the contrary, there is a communication dated 04.02.1984 issued by the respondent (Ex.R-30) which, inter alia, records *"You are well aware that these houses are to be completed by June. 84 as per programme given by the department to the Parliament"*. It would, therefore, appear that the issue in relation to the project was raised in Parliament well before 04.02.1984. In fact, a letter dated 30.01.1984 addressed to Sh. Harish Khanna, Vice Chairman, DDA (Ex. R-33) shows that the question in the Lok Sabha was raised as early as on 19.12.1983. As aforesaid, there is no evidence placed on record by the petitioner to substantiate the plea that the said issue was again raised before the Parliament close to the date of issue of the communication dated 01.08.1985, Ex. R-2.

17. In my view, the learned Arbitrator has grossly misconducted himself in adopting such a course of action. Firstly, the Court had remanded back the matter to the learned Arbitrator to consider Ex.R-2. Consideration of Ex.R-2 entailed the consideration of the issue, whether, in the absence of any pleading whatsoever by the petitioner, the petitioner could, at all, raise an oral plea of exercise of coercion and duress by the respondent to obtain Ex.R-2, only at the time of making its oral submissions before the Arbitral Tribunal. Even if it were

to be assumed for the sake of argument, that such a plea could be raised orally, without any foundation in pleadings, consideration of Ex.R-2 would also have entailed the consideration of the issue whether Ex.R-2 had, in fact, been obtained by duress and coercion.

18. Unfortunately, the learned Arbitrator has not addressed himself to the issue, whether the petitioner could have raised a plea of coercion and duress in relation to Ex. R-2 for the first time during the course of its oral submissions before the learned Arbitrator on 20.08.1993, without there being any basis for such a plea in the pleadings before the Arbitrator.

19. The Indian Contract Act, 1872 defines 'Coercion' in Section 15 as follows :

"Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

"Undue influence" is defined in Section 16 in the following manner:

"(1) A contract is said to be induced by "under influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generally of the foregoing principle, a person is deemed to be in a position to dominate the will of another -

(a) where he hold a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)."

A plea of coercion, or undue influence, or duress (which is not a legally defined term and is used interchangeably with the first two terms) has necessarily to be specifically raised and pleaded as a fact. As to how coercion or undue influence has been exercised by one party upon the other are all matters of fact.

20. Though the Code of Civil Procedure is not strictly applicable to arbitral proceedings, the Principles thereof, which are evolved to achieve fairness in proceedings, are attracted even to arbitral proceedings. In ***Union of Indian Vs. Bungo Steel Furniture Pvt. Ltd.*** AIR 1967 SC 1032 and ***Hindustan Construction Co. Ltd. Vs State of J & K*** (1992) 4 SCC 217 the Supreme Court held that though Section 34 CPC per se did not apply to arbitral proceedings, but the principles thereof have been held to be applicable to arbitral

proceedings.

21. In ***Union of India Vs. Baldev Dutt and another***, ILR (1972) I Delhi 811 the Court held that in an Arbitration (under the Arbitration Act, 1940), the Arbitrator is entirely in the same position as a Judge with the difference that his authority is derived not by virtue of a public office but by virtue of an agreement between the parties. The proceedings before the arbitrator are, therefore, entirely judicial. The Court distinguished the proceedings before an arbitrator appointed under the Arbitration Act, 1940 from proceedings which are called quasi judicial proceedings before an authority which combines two capacities of a Judge and an administrator. The Court held that where an arbitrator is appointed by the parties to decide the disputes arising out of the contract between them, he is just like a Judge. The arbitrator is not governed by the technical rules contained in the Civil Procedure Code and the Evidence Act. He is nevertheless required to follow the fundamental rules of fair procedure. This is why his award would be vitiated if he misconducts the proceedings. The proceedings would include the hearing of the parties and taking evidence with a view to decide the disputes between them. Evidence may, however, be documentary or oral or both. It may even consist of the admissions made in the pleadings.

22. The Court further held that if on examination of award by the Court *"it is apparent that the proceedings were misconducted by the arbitrator then the effect of such misconduct would be a question of*

*law and it would be difficult for the Court to shut its eyes to such misconduct. It is true that the misconduct must be flagrant to vitiate the proceedings. Minor mistakes of technical nature would not be misconduct. **But the complete failure of an arbitrator to collect any evidence on which he based his award would be such misconduct.***"

23. I may also note that, without going into the issue whether the provisions contained in the Civil Procedure Code, or the principles thereof apply to arbitral proceedings, this Court in **NDMC Vs. Priya Constructions and another** 2001 (2), Arbitration Law Reporter 126 (Delhi) invoked the provisions contained in Rule 8 of Order IX, Civil Procedure Code. In this case the claimant failed to appear before the Arbitrator despite notices. The learned Arbitrator, inspite of that, proceeded to pass a 'nil' award. The Court held that the arbitrator could have dismissed the claim in default but could have not rendered an award on merits. Reliance was placed on the provisions of the Civil Procedure Code, and, in particular Order IX Rule 8 Civil Procedure Code to set aside the award made by the Arbitrator.

24. In **DDA and others Vs. Alkarma** AIR 1985 Delhi 132, this court held as follows:

"The administration of justice would require that there should not be multiplicity of proceedings and the parties should not be permitted to raise disputes over and over again once the disputes have been entitled (settled sic) either by the pronouncement of a Court on (of sic) competent jurisdiction or by an award by an arbitrator. Once the suit, which is filed, has been decided, the

*provisions of Order II Rule 2 become applicable. After the trial of the suit if any claim, which could have been made, has not been made, then it is deemed that the same has been relinquished and a fresh suit in respect to the said claim cannot be filed. During the pendency of the suit, however, the plaintiff has a right to apply for amendment of the plaint under Order VI Rule 17 in order to enlarge the scope of the suit and, if he so desires, raise additional pleas praying for a larger relief than what he had prayed for originally. **Just as a Court while exercising its power under Order VI Rule 17 has the jurisdiction to allow amendment, in the arbitration proceedings as well as the same principle should be invoked. It is true that if an award has been made then the principles analogous to Order II Rule 2, C.P.C. would apply and after the making of the award a claimant cannot seek to raise a dispute which he ought to or could have raised earlier. This being so, it would indeed be unfair and unjust not to invoke the principles of Order VI Rule 17 during the pendency of the arbitration proceedings.*** (emphasis supplied)

25. It is not without purpose that Order VI Rule 4 CPC provides that *"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."* The above rule is engrafted to bind the party making the pleading to his case (so that he does not shift from his stand), and also to enable to opposite to effectively meet the same. To permit a party to an arbitration proceeding to raise an oral plea of "coercion" or "duress" or "undue influence" would cause irreparable injustice to the opposite party as the opposite party would be put to grave disadvantage in dealing with such a vague and indefinite plea which is devoid of

particulars and specifics.

26. In ***Lala Kapurchand Godha and Others Vs. Mir Nawab Himayatalikhan Azamjah***, AIR 1963 SC 250 (V 50 C23), as no plea was raised by the appellants to the effect that the endorsement on the promissory notes has been obtained by coercion, and no issue was struck between the parties as to the endorsements on the promissory notes having been obtained by coercion, the court held that the question of coercion was introduced as and by way of afterthought.

27. In ***Kale & Others Vs. Deputy Director of Consolidation & Others***, (1976) 3 SCC 119, the Supreme Court was dealing with an argument that the family settlement in question had been brought about by duress or undue influence or fraud. The Supreme Court, in para 29, held that in respect of the challenge to the family settlement that it was brought about by duress, or undue influence or fraud, there was no iota of evidence or whisper of an allegation by the challenger either in the Subordinate Courts or in the High Court. The Supreme Court held that *"it is well-settled that allegations of fraud or undue influence must be first clearly pleaded and then proved by clear and cogent evidence"*.

28. In ***Ranganayakamma and Another Vs. K.S. Prakash(Dead) By LRs. and Others***, (2008) 15 SCC 673, the Supreme Court held that:

"43. We are, however, not oblivious of the decisions of this Court and other High Courts that illegality of a contract

need not be pleaded. But, **when a contract is said to be voidable by reason of any coercion, misrepresentation or fraud, the particulars thereof are required to be pleaded.**

In *Maharashtra S.E.B. and Another v. Suresh Raghunath Bhokare* [(2005) 10 SCC 465], the law is stated in the following terms:

"5...The Industrial Court after perusing the pleadings and the notice issued to the respondent came to the conclusion that the alleged misrepresentation which is now said to be a fraud was not specifically pleaded or proved. In the show-cause notice, no basis was laid to show what is the nature of fraud that was being attributed to the appellant. No particulars of the alleged fraud were given and the said pleadings did not even contain any allegation as to how the appellant was responsible for sending the so-called fraudulent proposal or what role he had to play in such proposal being sent..."

[See also *Prem Singh Vs. Birbal*, (2006) 5 SCC 353]

44. In *Ramesh B. Desai and Others v. Bipin Vadilal Mehta and Others* [(2006) 5 SCC 638], this Court emphasized the necessity of making requisite plea of Order 6, Rule 4 stating:

"22. Undoubtedly, Order 6 Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard."

45. In *Sangramsinh P. Gaekwad and Others v. Shantadevi P. Gaekwad* [(2005) 11 SCC 314], this Court held:

"207. We may now consider the submissions of Mr Desai that Appellant 1 herein is guilty of commission of fraud. Application filed by Respondent 1 before the Gujarat High Court does not contain the requisite pleadings in this behalf, the requirements wherefor can neither be denied nor disputed.

208. It is not in dispute that having regard to Rule 6 of the Companies (Court) Rules, the

provisions of the Code of Civil Procedure will be applicable in a proceeding under the Companies Act. In terms of Order 6 Rule 4 of the Code of Civil Procedure, the plaintiff is bound to give particulars of the cases where he relies on misrepresentation, fraud, breach of trust, etc." (emphasis supplied)

29. In **National Insurance Company Limited Vs. Sehtia Shoes**, (2008) 5 SCC 400, the respondent had preferred a consumer claim under the Consumer Protection Act against the appellant. The matter travelled to the Supreme Court. The Supreme Court took notice of the decision in **United India Insurance Vs. Ajmer Singh Cotton & General Mills**, (1999) 6 SCC 400, wherein it was held that the discharge vouchers were executed voluntarily and the complainant had not alleged their execution to be under fraud, undue influence, misrepresentation or the like. The Supreme Court in **Ajmer Singh** (supra) held that in the absence of pleadings and evidence, the State Commission was justified in dismissing the complaint. In **Sehtia Shoes** (supra), though the plea of coercion has been raised by the complainant before the District Forum, but the same had not been proved. Consequently, the Supreme Court allowed the appeal of National Insurance Company Limited and remitted the matter back to the District Forum for fresh adjudication. Pertinently, the Civil Procedure Code and the Evidence Act do not apply to the proceedings under the Consumer Protection Act, just as they are not strictly applicable to the proceedings before the Arbitrator under the Arbitration Act, 1940. However, the principles of these statutes were made applicable to the Consumer Courts because the fundamental

principles of procedure and evidence cannot be given a go-bye, as these principles are founded upon concepts of fair play and natural justice.

30. Therefore, in the light of the aforesaid legal position, I cannot appreciate how the learned Arbitrator could have examined the petitioner's oral defence to Ex. R-2 that the same was obtained by coercion or duress. Such a plea could not have been entertained as it was raised without any specific pleading. The learned arbitrator has misconducted the proceedings by falling in this patent error.

31. The submission of Mr. Sharma is that when this court, in the earlier round had remanded the matter back to the Ld. arbitrator, at that stage, such a view was not taken. The court required the arbitrator to examine the issue afresh on the basis of the existing evidence and, therefore, it can not be said that without any pleading the said plea of coercion and duress could not have been entertained. This plea is meritless. A perusal of the order passed by the court in the earlier round shows that the court had not even examined whether there was, or was not, any pleading of coercion or duress raised by the petitioner. There is no discussion on the aspect of the petitioner not having raised the said defense to Ex. R-2 in its pleading. Therefore, it can not be inferred that the court had ruled that even without a specific pleading, the defence of coercion and duress could be raised.

32. Pertinently, the learned Arbitrator himself holds that in the facts of this case it was not pleaded that the coercion and duress was

economic or financial coercion or duress. The questions then arise, what kind of coercion or duress was exercised; was it threat to the life of any of the officers of the petitioner, or to the and property of the petitioner, or any of its officers? If so, to whom was the threat issued? If so, by whom? If so, when? If so, where? It is also pertinent to note that the petitioner, on its own, did not even bother to make a reference to Ex. R-2 in its statement of claim.

33. The aforesaid are some of the obvious questions that the arbitrator should have addressed himself to, before concluding inferentially that there was exercise of coercion or duress by the respondent upon the petitioner. In the absence of any pleading the aforesaid questions could, obviously, not have been raised or answered.

34. Even if one were to assume for the sake of argument, that in arbitration proceedings the plea of coercion or duress need not be specifically pleaded by a party in its pleadings, and that the same could be raised in an oral hearing, as aforesaid, the learned Arbitrator has not even gone into the absolutely imperative factual enquiry with regard to the exercise of coercion and duress by the officers of the respondent.

35. The document Ex.R-2 was suppressed by the petitioner. It was only brought out by the respondent. The petitioner, even after the execution of the said document as early as 01.08.1985, did not retract it or make any allegation of its being obtained by coercion or duress till

as late as 20.08.1993, i.e., after a lapse of more than eight years. Even this statement was made only orally during the course of the advancement of submissions before the learned Arbitrator. Despite the fact that the petitioner could have raised the said plea by filing a rejoinder to the counter-statement of facts filed by the respondent, no such opportunity was sought or availed of by the petitioner. Pertinently, the counter-statement of facts, wherein the respondent had relied upon Ex.R-2, was filed by the respondent before the learned Arbitrator on or about 04.09.1989. The oral plea, as aforesaid, was made by the petitioner nearly four years thereafter.

36. I also find that the manner in which the learned Arbitrator has dealt with the decision in ***Double Dot Finance Limited*** (supra) specifically relied upon by the respondent to be completely perfunctory. The only reason given by the learned Arbitrator to distinguish the said decision in the facts of the present case is that, in the present case, the petitioner had not alleged economic duress, whereas in the case of ***Double Dot Finance Limited*** (supra) economic duress had been raised as a defence to the execution of a full and final settlement receipt. Pertinently, the decision in ***Double Dot Finance Limited*** (supra) was rendered by Mr. Justice R.C. Chopra i.e. learned Arbitrator while sitting as a Judge of this court. In para 9 of this decision the court took note of the judgment of the Privy Council in ***Pao On and Others Vs. Lau Yiu and Another***, 1979 (3) All ER 65. By referring to the said decision, this court had held:

"It was also held that the question as to whether at the time the person making a contract allegedly under coercion had or not any alternative course open to him which could be an adequate legal remedy and whether after entering into the contract, he took steps or not to avoid it are matters which are relevant for determining as to whether he acted voluntarily or not. It was also held that the compulsion has to be of a nature which deprives a party of his freedom of exercising free will leaving no alternative course open to him. Therefore, the 'coercion' or 'duress' required for vitiating 'free consent' has to be of the category under which the person under 'duress' is left with no other option but to give consent and is unable to take an independent decision, which is in his interest."

37. This court further held as follows:

"11. In certain cases, the plea of entering into 'settlement' under coercion, mistake, duress or misrepresentation may, however, be examined and accepted even if the facts and circumstances establish that the party repudiating the agreement was under pressure of the other party at the time of entering into settlement and had without delay taken steps to disclaim the accord and satisfaction. Mere financial exigency or economic expediency cannot constitute 'pressure'.

12. However, the plea of coercion, undue influence or duress raised by a party to challenge the 'accord and satisfaction' cannot be accepted lightly merely upon word of mouth. The facts and circumstances, material on record and conduct of the parties at the time of signing the settlement agreement and soon thereafter have to be looked into. It need not be stated that the burden to establish this plea remains on the party which raises it."

38. In para 14, this court held:

"14. If such pleas are sustained, the sanctity and purpose of 'amicable settlements' between the parties would stand totally eroded. Amicable resolution of disputes and negotiated settlements is 'public policy of India'. Section 89 of the Code of Civil Procedure, 1908, Arbitration and Conciliation Act, 1996 as well as Legal Services Authorities Act, 1995 call upon the Courts to encourage settlement of

legal disputes through negotiations between the parties. If amicable settlements are discarded and rejected on flimsy pleas, the parties would be wary of entering into negotiated settlements and making payments there under as a shrewed party after entering into a negotiated settlement, may pocket the amount received under it and thereafter challenge the settlement ad re-agitate the dispute causing immeasurable loss and harassment to the party making payment there under. This tendency has to be checked and such litigants discouraged by the Courts. It would be in consonance with public policy of India. The Arbitrator, Therefore, had acted against public policy of India by accepting the plea as raised by the respondent No.1 and thereafter, passing an Award. The view taken by the Arbitrator was absolutely capricious, unfair and unreasonable and as such, the impugned award dated 29.11.2002 passed by him is liable to be set aside.”

39. Merely because the present was not a case wherein the petitioner had alleged exercise of duress and coercion on economic grounds, the decision in **Double Dot Finance Limited** (supra) did not become irrelevant, as this court had set out the General Principles and Guidelines to examine a plea of coercion, duress, or undue influence on the basis of settled law. Pertinently, it was not even pleaded, even during the oral submissions by the petitioners before the learned Arbitrator on 20.08.1993, as to what was the nature of the coercion or duress exercised by the officers of the respondent. Was it that the officers of the respondent had physically threatened any officer of the petitioner or had threatened the petitioner that the petitioner may be blacklisted, etc.? None of this is pleaded or proved. In the absence of such pleading and proof the finding returned by the learned Arbitrator that the Ex.R-2 was obtained by exercise of coercion or undue influence or duress cannot be sustained and it suffers from error

apparent on the face of the award. As observed in **Double Dot Finance Limited** (supra), in this case as well I have to say that the view taken by the Arbitrator is absolutely capricious, unfair and unreasonable and the learned Arbitrator has misconducted himself in making the impugned award.

40. The learned Arbitrator goes into the plea of duress and coercion not by directly examining the said plea as orally raised by the petitioner, for the first time, in the proceedings held on 20th August, 1993. The said plea should have been examined, if at all, by asking the question whether the petitioner had placed any material or evidence on record to show that a parliamentary question was raised regarding the construction of the flats in question some time before Ex. R-2 was issued. However, the learned Arbitrator has not even gone into this aspect of the matter. Had he ventured that way, he would have found that the petitioner had not placed on record any material or evidence to show that a parliamentary question was raised in respect of the project in question at any time proximate to the date of issuance of the Ex.R-2. Instead he would have found that the parliamentary question was raised well before early February, 1984 i.e. at least 1½ years before the issuance of Ex.R-2 dated 01.08.1985. He would have also found that there was not an iota of evidence lead by the petitioner in the arbitral proceedings to substantiate the said oral plea of duress or coercion.

41. The learned Arbitrator has examined various documents placed

on record by the petitioner while dealing with the issue of delay. Undoubtedly, the documents relied upon by the petitioner before the learned Arbitrator do show that the respondent was indeed responsible for the initial delay of the project. However, the documents taken note of by the learned Arbitrator in the impugned award do not show delays and defaults on the part of the respondent till August, 1985 or thereafter. In fact, the petitioner in its letter dated. 10.2.1984 (C-45), while raising the issue of payment of dues under clause 10(C) and 12 of the agreement stated as follows :

*“We have sufficient labour and material with us and as such there is no hindrance in our work on account of this but **the progress of our work is being hindered only for non-payment of our long outstanding dues.** Kindly release the same immediately so that we may be able to show our worth in completing the job by the target already committed.”* (emphasis supplied)

42. It is pertinent to note that after issuance of this letter dated 10.2.1984 (C-45), there was no communication from the side of the petitioner, and on 16.11.1984, the respondent issued a show cause notice under Clauses 2 and 3 of the Agreement (C-46) thereby complaining that there was slow progress of the work without any reason. On 7.12.1984 (C-47), the petitioner sent its reply. In this reply the petitioner referred to the earlier defaults and failures of the respondent, but did not refer to any ongoing failure or default of the respondent. In the concluding paragraphs of this communication the petitioner stated as follows :

“We are still on the job and hope to complete the same

with in the shortest possible time provided, we continue to get your present co-operation.

We would therefore earnestly request you to kindly atleast go through the realities of the case before the imposing penal clauses 2 & 3 of the contract.

In the end we may assure you, Sir, that with the present state of affairs, we hope to hand over the completed flats to you in the very near future.

We have deployed sufficient labour for rectification of the defects and when our labourers are at the job there is no point in engaging departmental labour on the same very job. Hence we may either be specifically informed of the work done and the quantum there to by the departmental labour to enable us to make necessary deductions from our labourers or no such claim of the department shall be entertained."

43. On 24.07.1985, the respondent issued another show-cause notice (Ex. R-45) to the petitioner, alleging that the petitioner was "*not executing the work speedily. It is evident that you have failed to carry out the work as per conditions of agreement*".

44. Between 07.12.1984 and 01.08.1985 (the date of issuance of Ex.R-2) there is no other communication issued by the petitioner alleging any further delay or defaults on the part of the respondent.

45. Pertinently, the learned Arbitrator in Para 15 of the impugned award observes "*Not only this, the drawings for water supply duly approved by MCD were supplied to the claimant on 05.09.1984 only i.e. after about two years of stipulated date of the completion of the contract*". This observations appears to be patently incorrect as none of the documents referred to or relied upon in the award suggests so.

In para 6 of the impugned award, the date of supply of drawings for water supply, approved by MCD has been noticed as 05.04.1984 i.e. 5 months earlier. Pertinently, the stipulated date of start under the contract was 20.08.1981, and the stipulated date of completion was 19.05.1982. Therefore, the period of the contract was nine months. Even if the said period is assumed to begin in April, 1984, the same would have expired in January 1985. It is not as if before April 1984, no work could be carried out by the petitioner. The petitioner had been able to complete substantial work by April 1984 (nearly 60%) as noticed by the Ld. Arbitrator. The issuance of the letter Ex. R-2 dated 01.08.1985 in these circumstances cannot be said to be unusual, or that the said letter was against the other facts emerging from the record.

46. In ***Divisional Manager, United India Insurance Co. Ltd. & Anr. v. Sameer Chandra Chaudhary***, JT 2005(6) SC 289 the Supreme Court held as follows:

".....Admission is the best piece of evidence against the persons making admission. As was observed by this Court in Avadh Kishore Das v. Ram Gopal and Ors. AIR 1979 SC 861 in the backdrop of Section 31 of Indian Evidence Act, 1872 (in short the 'Evidence Act') it is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift the burden of proof placing it on the person making the admission or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. As observed by Phipson in his Law of Evidence (1963 Edition, Para 678) as the weight of an admission depends on the circumstances under which it was made, these circumstances may

always be proved to impeach or enhance its credibility. The effect of admission is that it shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. An admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of matter, unless successfully withdrawn or proved erroneous. (See Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and Ors., AIR 1960 SC 100)....."

The admission contained in Ex.R-2 binds the petitioner as the petitioner has not pleaded or proved coercion or duress before the learned arbitrator.

47. Ex. R-2 clearly demonstrates the admission on the part of the petitioner to the fact that the petitioner was responsible for the delay. I am not suggesting that the entire delay was attributable to the petitioner.

48. From the documents referred to in the impugned award, it emerges that the delays and defaults on the part of the respondent did not continue, in any event, after April, 1984.

49. The finding of the learned Arbitrator that *"It is not understandable as to why all of a sudden on 1st August 1985, the claimant should have taken a U-turn and written Ex.R2, which was absolutely self-damaging, contrary to its stand and exonerated the respondent of all its defaults"*, appears to be result of non-application of mind to the aforesaid facts and documents/evidence on record.

50. Pertinently, the learned arbitrator has even failed to notice that

Ex. R-2 had been issued in response to the respondent's show cause notice bearing No.F(31)A/HDEXXX/DDA/84-85/1276 dated 24.07.1985 regarding slow progress of the work at the site. The said show cause notice dated 24.07.1985 was also placed on record by the respondent as Ex. R-45. Therefore, it could not be said that the letter dated 01.08.1985 (Ex. R-2) came as bolt from the blue, as held by the learned arbitrator. The facts discussed above show that the communication dated 01.08.1985 was not issued, as suddenly, as held by the learned Arbitrator. It was also not a U-turn inasmuch, as, the respondent had issued notices dated 16.11.1984 (C-46), 07.12.1984 (C-47) and 24.07.1985 (R-45) accusing the petitioner of delays and defaults in the completion of the works. The petitioner had, as early as on 07.12.1984 and responded by assuring the completion of the works *"in the very near future"*. It is clear that the learned Arbitrator has ignored, inter alia, the petitioner's reply (C-47) dated 07.12.1984, and the respondents notice dated 24.07.1985 (R-45) while rendering his impugned award. Failure to consider such relevant documents amounts to misconduct on the part of the learned Arbitrator. There is nothing placed on record to show that *"throughout the period of subsistence of contractual relationship between the parties, the claimant had not continuously written to the respondent that it was not responsible for the delay in the project"*. As aforesaid, firstly, the contract was not rescinded on 11.10.1985. Secondly, after the issuance of the letter dated 10.02.1984 (C-45), the petitioner, of its own, did not even once make a grievance of the existence of any

further hindrances, delays or defaults on the part of the respondent. The observations of the learned Arbitrator that *"the mere fact that the respondent has been writing certain letters to the claimant that the progress of the work was slow is of no consequence. It appears that the respondent was writing these letters in routine only with a view to save its own skin in regard to the delay in the completion of the project"*, shows non-application of mind by the learned Arbitrator to very relevant documents and facts. The dates and contents of these letters have not at all been examined and considered by the learned Arbitrator.

51. A perusal of the impugned award shows that the learned Arbitrator has heavily relied upon the fact that the respondent had granted escalation to the petitioner under Clause 10(C) up to 34th RA Bill dated 23.11.1985. The learned Arbitrator held that this indicates that till then the respondent did not blame the claimant-contractor for delay in execution of the work. However, the learned Arbitrator has failed to notice the case of the respondent as set out in its counter statement of facts. It was the specific plea of the respondent, in response to claim No. 2, that the claimant was not entitled to escalation under Clause 10(C). I have already extracted the stand of the respondent in this regard hereinabove. The respondent had, in fact, given the details of payments made under Clause 10(C) in Ex. R-3. The excess payment made under clause 10 (C) according to the respondent, was to the tune of Rs.1,73,220.30/- on labour account, and

Rs.96,562.72/- on account of Bricks. As already noticed above, there was no rejoinder filed by the petitioner in the arbitration proceedings to controvert the said plea of the respondent. Therefore, no conclusion could have been drawn by the learned Arbitrator to the effect that the mere over payment of escalation under Clause 10 (C) upto the 34th RA Bill dated 23.11.1985, tantamounted to an admission that the petitioner was not liable for delay after the expiry of the extended period of contract. The release of the said payment was pleaded to be in excess of what was due. Whether the payment under Clause 10(C) was in excess or not, itself depended on the determination of the issue whether the petitioner was responsible for the delay, and if so, to what extent.

52. The submission of Mr. Sharma that the award made on claim no.2 by Sh. M.S. Telang, the sole arbitrator, on 31.01.1994 having been upheld by this court, it stood established that the entire delay was attributable to the respondent, cannot be accepted.

53. A perusal of the award dated 31.01.1994 shows that the learned sole arbitrator first discussed the aspect of delay and concluded that the respondent was responsible for the same. In his consideration, the learned arbitrator did not take into account Ex. R-2. So far as claim no.2 is concerned, the amount of Rs.37,117.69 had been awarded on the basis of mutual reconciliation. It is for this reason that this Court while dealing with the award made by Sh. M.S. Telang did not interfere with the said award. Reference may be made to paras 28 to 34 of the

judgment dated 01.08.2006 passed in I.A. No.8770/1994 in C.S. (OS) No.543/1994. The said paragraphs are reproduced herein below:

"28 Claim No.2 was the contractor's claim under Clause 10C of the agreement. Contractor claimed Rs.3 lacs, sum awarded is Rs.37,117.69.

29. Objection taken by DDA is to the quantification of the amount. Shri Anil Sapra, learned counsel for DDA states that no reasons are forthcoming on the record as to how the sum of Rs.37,117.69 has been arrived at.

30. In my opinion the objection is not sustainable for the reason minutes of the various proceedings held by the learned Arbitrator shows that from time to time he was calling upon the parties to submit clarificatory statement and has been recording that disputes were narrowing down.

31. A perusal of the minutes recorded on 15th December 1992 shows that claim No.2, was discussed. Following has been noted by the learned Arbitrator :-

'respondents state that they have reconciled the figures and the amount of Rs.37,117.69 as claimed is correct.'

32. The previous minutes show that the contractor had submitted fresh calculations to the learned Arbitrator which were passed on to the Executive Engineer, DDA.

33. Unfortunately, the rough calculations submitted by the contractor are not to be found in the record of arbitration, but what is relevant for the purposes of the present decision is that in the minutes recorded on 15th December, 1992 it was recorded that the Executive Engineer DDA, after re-conciling the figures has recorded consent to claim No.2 being allowed in sum of Rs.37,117.69.

34. Objection filed by DDA to claim No.2 is accordingly rejected."

54. The aforesaid submission of Mr. Sharma cannot be accepted also for the reason that Ex. R-2, on a plain reading thereof, shows that the

petitioner took upon itself the responsibility for, at least, partial delay in the execution of the works. Therefore, when the Court remanded the matter back to the sole arbitrator for reconsideration of Ex. R-2, it obviously meant that the aspect of fixing the responsibility for delay/apportionment of the said responsibility was required to be reconsidered.

55. It is well settled that levy of liquidated damages under clause 2 is not an arbitrable dispute. In fact, this aspect was dealt with by the court while dealing with the earlier award in paras 22 to 25. The same reads as follows:

“22. DDA had levied a compensation (LD) under Clause 2 of the agreement in sum of Rs. 8,51,839/-.

23. While raising counter claim No.1 it sought adjustment of said sum. Learned Arbitrator has held that the levy of compensation under Clause 2 is arbitrary and illegal.

24. Learned counsel for the petitioner does not dispute that the issue of liquidated damages is a non-arbitrable dispute in as much as it is an excepted matter.

25. I accordingly dispose of DDA's objections to the award pertaining to claim No.1 and 4 as also DDA's counter claim No.1 by holding that the award in so far it adjudicates on the question of liquidated damages is without jurisdiction.”

56. In spite of the aforesaid position, in the impugned award, the learned arbitrator has commented on the levy of liquidated damages as being unjustified. The said finding of the learned arbitrator is wholly without jurisdiction and cannot be sustained.

57. The decision in **Delhi Development Authority v. Polo Singh, 101 (2002) DLT 401** relied upon by the petitioner is of no avail. In **Polo Singh** (supra), the award made on all the claims, except in relation to claim no.5 (for Rs.14,39,972/- being loss of profit to the extent of 10% of the contract value), was made a rule of the court. The award made in relation to claim no.5 was set aside when the matter was remanded back to the arbitrator for fresh adjudication thereon in the light of the observations made in the judgment. The arbitrator, on reconsideration, published a fresh award dated 04.03.1998 in relation to claim no.5 awarding a sum of Rs.12,35,742/- in favour of the claimant. Repelling the challenge to the award made on claim no.5, the Division Bench held that in the earlier award, while allowing claim no.1 and disallowing the counter claim of the appellant, DDA, the earlier arbitrator had returned his finding that the recession of the contract was illegal and bad in law. The said award had been made a rule of the court, except in relation to claim no.5. That decision of the learned Single Judge had become final against the appellant DDA. The Division Bench, therefore, held that while assailing the award made on claim no.5, the validity of the earlier award could not be challenged.

58. However, in the present case, the Court remanded the matter back for reconsideration of Ex. R-2, which has a direct nexus with the issue of delay, and with the issue as to who was responsible for the delay, and to what extent. It can not be said that the court while

dealing with the award of Mr. Telang had accepted the finding that the entire delay was attributable to the respondent alone. The Court while disposing of the earlier objections to the award made by Mr. M.S. Telang, had remanded the matter back for reconsideration of evidence not considered by the learned arbitrator. The Court had not put its stamp of approval on any finding to the effect that the entire delay was on the part of the respondent DDA, and that none of it was attributable to the petitioner/contractor. If that had been the case, there was no purpose of remanding the case back to the learned arbitrator for reconsideration of Ex. R-2, as that would have been a futile and wasteful exercise.

59. It is also urged by Mr. Sharma that there is no specific ground taken by the respondent in its objections contained in I.A. No.1008/2010 to the effect that the learned arbitrator had rendered his finding without any pleading of exercise of coercion or duress by the respondent at the time of issuance of Ex. R-2 dated 01.08.1985. I do not find any merit in this submission either. Grounds 7 and 8 taken by the respondent in its application raising objections reads as follows:

“VII. That Learned Arbitrator has failed to appreciate that Exhibit R-2 was a voluntary and genuine admission on the part of the claimant regarding its fault in delaying the project. The Respondent/DDA pleaded that there were no hindrances or delays on the part of the respondent/DDA and right from the beginning the claimant/contractor was not taking the work seriously. Several letters and notices were issued to the Claimant to speed up the work but it failed to complete the project and for this reason only the

respondent had written the letter Exhibit R2 dated 01.08.1985 explicitly admitting that the delay was on account of its fault. **The Claimant does not deny that the letter was written by him. But creates a story that the letter was obtained from the Claimant under duress by the Respondent. Which is not supplemented by any material on record of the arbitration proceedings and this amounts to misconduct on the part of the Arbitrator.**

VIII. **That the contention, reasons as stated by the Arbitrator in Para 16 are baseless and is made on assumption. The reason given in the para are without proper reasoning, not based on the evidence placed before him and there apparent on the face of award, and the award is liable to be set aside for the misconduct on part of the arbitrator in conducting the proceedings."**
(emphasis supplied)

60. In **Baldev Dutt & Another** (supra), the Division Bench of this Court has rejected a similar argument, while observing as follows:

"Shri R.L. Aggarwal, learned counsel for the Contractor firstly argued that this objection to the proceedings of the arbitrator has not been given specifically raised by the Government under section 30 of the Arbitration Act, 1940 and even in the grounds of appeal before us and we cannot, therefore, consider it. It is true that the objection raised was only in general terms, namely, that the arbitrator misconducted the proceedings. We are of the view, however, that section 30(a) of the Arbitration Act, 1940 gives the Court power to examine the proceedings of the arbitrator. If on such examination it is apparent that the proceedings were misconducted by the arbitrator then the effect of such misconduct would be a question of law and it would be difficult for the Court to shut its eyes to such misconduct."

The decision of the Bombay High Court in **ONGC v. Comex Services SA**, 2003(3) Arb.LR 197(Bom), does not come to the aid of

the petitioner in the light of the aforesaid judgment of the Division Bench of this Court. The aforesaid submission of Mr. Sharma, therefore, stands rejected.

61. It is then contended by Mr. Sharma that the respondent had granted extension of time till the date of abandonment of the contract by the petitioner while imposing liquidated damages for non completion of the work. In this regard, he makes reference to Ex. R-54 dated 15.04.1986, which, inter alia, states as follows:

"Extension of time is granted upto the date of abandonment of work without prejudice to the right of DDA to recover liquidated damages in accordance with the provisions of Clause 2 of the agreement.

In exercise of the powers conferred on me under clause 2 of the agreement, I.R.G. Bhatnager, Suptdg. Engineer, DDA, decide and determine that you are liable to pay Rs.8,51,839/- (Rs. Eight lakhs fifty one thousand eight hundred thirty nine only) as and by way of compensation, as stipulated in clause 2 of the agreement."

62. Mr. Sharma raises the question that if Ex. R-2 had been given by the petitioner voluntarily, where was the occasion for the respondent to grant extension of time upto the date of abandonment. He further points out that in the impugned award, the learned arbitrator has also observed that if the delay was on the part of the petitioner, why was the contract not rescinded by the respondent.

63. I cannot accept the aforesaid submissions of the petitioner. Grant of extension of time by the respondent, till the date of abandonment, cannot necessarily lead to the conclusion that the delay

was attributable to the respondent, and not the petitioner. Pertinently, by the same order (Ex. R-54), the respondent has also imposed liquidated damages. A party to a contract has the option to accept the breach thereof by the opposite party and require the opposite party to still complete the contract. It is not that whenever there is a breach of contract by one party, the opposite party should necessarily rescind the contract. Therefore, the submission of Mr. Sharma and the logic adopted by the learned arbitrator in the impugned award is contrary to the law of the land, and is rejected.

64. Coming to the award made on claim no.3, I find that though the learned arbitrator has broadly indicated the principle for computing the compensation, there is still lack of clarity as to how the learned arbitrator arrived at a figure of Rs.6 lacs. In any event, as I am of the view that the impugned award cannot be sustained, the award made on claim no.3 is set aside.

65. So far as the additional claim no.3 is concerned, learned counsel for the respondent/applicant has fairly not raised any challenge to the said award. Accordingly, the award made on additional claim no.3 is made a rule of the court.

66. Counter claim no.2 has been rejected by the learned arbitrator by holding that the entire delay in completion of the project was attributable to the respondent. This finding cannot be sustained in the face of Ex. R-2. The rejection of Ex. R-2, as I have already found, is bad. Therefore, the award on counter claim no.2 is set aside.

67. The award made on claim no.3 and counter claim no.2 requires reconsideration. I appoint Mr. Justice S.N. Kapoor, retired Judge, Delhi High Court as the arbitrator to re-examine claim no.3 and counter claim no.2, in the light of the aforesaid discussion and observations. The learned arbitrator may fix his own fee, subject to a ceiling of Rs.50,000/-.

68. For all the aforesaid reasons, I partially allow the application and set aside the impugned award to the extent indicated hereinabove, as the learned arbitrator has clearly misconducted himself, and the award suffers from serious errors on the face of the award itself. At the same time, the award made on additional claim no.3 is made a 'Rule' of the Court and a decree is passed in terms thereof.

69. The respondent/applicant shall be entitled to costs quantified at Rs.One Lac.

70. The complete arbitral record and a copy of this order be communicated to the newly appointed arbitrator.

JUNE 15, 2011
'BSR'/SR

VIPIN SANGHI, J