

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

Arb.A.No. 2 of 2012 ()

AGAINST THE ORDER IN OP (A) NO.170/1993 of PRL.SUB COURT,TRIVANDRUM
DATED 11-07-2011

APPELLANT/CLAIMANT:

K.SODARAN
GOVT. CONTRACTOR, SREE KRISHNA NILAYAM, EDAMALAKKAL
ANCHAL

BY ADVS.SRI.SHEJI P.ABRAHAM
SRI.O.K.MURALEEDHARAN

RESPONDENTS/RESPONDENTS:

1. STATE OF KERALA
REP.BY SECRETARY
IRRIGATION DEPARTMENT GOVT SECRETARIAT
TRIVANDRUM 691003

2. THE SUPERINTENDING ENGINEER
KIP (R.B) CIRCLE, KOTTARAKKARA 691508

R1 BY GOVERNMENT PLEADER SMT.ROSE MICHAEL

THIS ARBITRATION APPEAL HAVING BEEN FINALLY HEARD ON
20/02/2015, THE COURT ON 20/05/2015 DELIVERED THE FOLLOWING:

**T.R.RAMACHANDRAN NAIR &
P.V.ASHA, JJ.**

Arb.Appeal No.2 OF 2012

Dated this the 20th day of May, 2015

JUDGMENT

Ramachandran Nair, J.

This appeal is filed by the appellant contractor aggrieved by the order passed by the Principal Sub Judge, Thiruvananthapuram in O.P. (A)No.170/1993. The appellant has mainly challenged the order passed by the learned Judge on various grounds.

2. The necessary facts for the disposal of the appeal are the following :

The appellant had moved the Principal Sub Judge by filing O.P. under Section 17 of the Arbitration Act, 1940 for making the award as a rule of court. As per the award, the Arbitrator had considered claim for damages under three heads and the same stood allowed with interest at 18% per annum for the period from 12.11.1990 to the date of decree or date of payment whichever is earlier. A total amount of `4,55,743/- was awarded to the appellant by the Arbitrator. The court below

considered the application filed by the appellant under Section 17 of the Act along with the application filed under Section 30 of the Act by the respondents to set aside the award and reduced the award amount to ` 1,75,000/- and the rate of interest also has been reduced to 9%.

3. We heard Sri.Sheji P.Abraham, the learned counsel for the appellant and the learned Government Pleader Smt.Rose Micheal.

4. Before going into the contentions of the parties, we will just advert to the disputes between the parties leading to the award passed by the Arbitrator. The appellant was successful in a competitive tender invited by the second respondent for construction of “K.I. and T.C.D.P. (RB) for the formation of Elavakkodu Distributory from C.H.O to 1900 m including C.D.works”. This was in relation to the Kallada Irrigation Project. The agreement is dated 30.6.1988. Certain disputes arose between the parties which were referred for arbitration and on mutual agreement, a retired Chief Engineer was appointed as the sole Arbitrator. Reference for arbitration was made as per Clauses 51 and 52 of the Local Competitive Bidding Specification (LCB) which forms part of the agreement. In the agreement between the

parties, the time for completion given was five months and the work order was issued on 11.1.1989 to start the work and he had to complete it by 10/06/1989. The time had to be extended and the work was completed on 30.06.1990 viz; the extended period. The claims raised by the appellant are mainly three in number, namely 15(a), 15(b) and 15(c). Under 15(a), he claimed compensation for loss and damages sustained due to escalation for all works done. It was alleged that the execution of the work was dragged on beyond the original period of completion and during the said period the cost of construction materials increased, wages of labourers were enhanced and there was unprecedented increase in price index, industrial index, cost index and living index. Even though the Government had revised schedule of rates during 1986, 1988 and 1990, no corresponding increase was effected in the agreed rates. A total amount of ` 4,75,285/- was claimed as compensation under Claim No.15 (a).

5. Claim No.15(b) related to idling charges to the establishment. He had to incur payment by way of rent to building and to the skilled and unskilled workers, agent, supervisors etc. @ `2,000/-

per day for 90 days. It was contended that there was delay in providing of unhindered possession of site. Similarly it was also contended that there were obstructions to the work by certain land owners alleging non- payment of value of land by the Government. Claim 15(c) related to the idling of establishment and machineries due to delay in supply of cement. According to the contractor he had incurred expenditure towards hire charges, capital out lay, interest, overhead expenses etc.

6. At the outset the learned counsel for the appellant submitted that in exercising the power under Section 30 of the Arbitration Act, 1940, the court cannot sit in appeal over the award as an appellate court. It is submitted that reasonableness of the reasons of the Arbitrator cannot be gone into by the court and there cannot be any reappraisal of evidence also and the court cannot enter into different conclusions in the manner as now done. It is submitted that the Arbitrator had arrived at the figures after assessing the evidence and materials produced by both sides. The claims have been allowed and detailed reasons are given in the award itself. The attempt made by the trial court in scaling down the damages fixed by the Arbitrator, the

learned counsel for the appellant submits, cannot be supported legally. Such a jurisdiction is not available under Section 30 of the Act. It is well settled that an award can be set aside only on the specified grounds provided under Section 30 of the Act and those cannot be overlooked. It is therefore submitted that the Court has acted illegally in re-evaluating the evidence and reducing the total amount fixed as damages. It is also submitted that when the award is well reasoned, there cannot be any interference at all. The learned counsel for the appellant relied upon a series of decisions of the Apex Court in that regard.

7. The learned Government Pleader submitted that scaling down of amounts by the Sub Court is well justified and will come within the scope of grounds available under Section 30 of the Arbitration Act, 1940. It is submitted that the respondents cannot be saddled with any liability for the alleged claims raised by the contractor. It is also submitted that supplemental agreements have been executed by the contractor for extension of time for completion of work and the finding rendered by the Arbitrator that such agreements were

executed under coercion is not at all sustainable. In the light of the execution of supplemental agreements, whereby, he had agreed to do the work without any revision of rates, the Arbitrator went wrong in awarding more amounts by way of escalation. According to the learned Government Pleader, the contractor is also answerable for the delay, which is the finding recorded by the learned Sub Judge. Therefore, the order passed by the learned Sub Judge is a well reasoned one, which is not liable to be interfered with by this Court in this appeal. It is also submitted that there is duplication of claims under 15(b) and 15(c). Both represent the same claim, namely idling charges. Thus it is submitted that the court below was perfectly justified in reducing the total amount. Actually, the contractor has not proved the claims under 15(a) and (b), it is submitted.

8. Under Claim 15(a), the Arbitrator found that the contractor was liable to be compensated to an extent of 40% of the amount of ` 5,24,358.61/-, which represents the value of the work done and the resultant amount is ` 2,09,743/-, towards escalation.

9. Under Claim 15(b) for idling charges of establishment, the

Arbitrator has fixed amount due at `1500/- per day for 84 days which include rent of office, building, wages of skilled workers, agent and supervisors which had to be paid by the claimant.

10. Under Claim 15(c) as compensation towards idling of establishment and machineries during the period of non-availability of cement, against the claim of `7000/- per day for 120 days by the contractor, the Arbitrator has awarded `1,20,000/- for 60 days @ `2,000/- per day.

11. A reading of the order passed by the learned Sub Judge will show that as regards first item under 15(a), the said amount has been reduced to ` 1,00,000/- and under 15(b), the amount fixed by the trial court is ` 50,000/- and under 15(c), an amount of `25,000/- has been granted. Thus the total amount going by the refixation made the learned Sub Judge is `1,75,000/-.

12. Since the learned counsel on both sides argued vehemently on the legal principles governing Section 30 of the Arbitration Act, 1940, we will first consider the same so as to find out whether the exercise done by the learned Sub Judge can be termed as legal.

13. The learned counsel for the appellant, as already noticed, has relied upon various judgments of the Apex Court to support the plea that the court has acted beyond jurisdiction.

14. The decisions relied upon mainly are :

Arosan Enterprises Ltd. v. Union of India and Another [(1999) 9 SCC 449], Ispat Engineering & Foundry Works, B.S.City, Bokaro v. Steel Authority of India Ltd., B.S.City, Bokaro [(2001) 6 SCC 347], Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003 5 SCC 705), Kwaliti Manufacturing Corporation v. Central Warehousing Corporation [(2009) 5 SCC 142], Madhya Pradesh Housing Board v. Progressive Writers and Publishers 2009 5 SCC 678, and O.P.Pathrose v. State of Kerala and Another [(2010) 12 SCC 100].

15. The last of the decisions in **O.P.Pathrose v. State of Kerala and Another [(2010) 12 SCC 100]** dealt with a civil contract under the same project. The award of the Arbitrator which was made a rule of court by the Sub Court was interfered with by the Division

Bench of this Court which was found not justified by the Apex Court.

16. In paragraph 18, while considering the question whether this Court could have upset the findings recorded by the Arbitrator, the Apex Court has held as follows :

“ 18. We are of the view that the High Court has not stated any cogent reasons for upsetting those findings recorded by the arbitrator. The unreasonableness of an award is not a matter for the court to consider unless the award is per se preposterous or absurd. Primarily, it is for the arbitrator to appraise the evidence adduced by the parties.”

17. In that case, the Apex Court had referred to various judgments. The significant observation that primarily it is for the Arbitrator to evaluate the evidence adduced by the parties is important. Therefore, the learned counsel for the appellant submitted that unreasonableness of the award is not a matter for the Court to consider unless the reasons are said to be absurd.

18. In **Ravindra Kumar Gupta and Company v. Union of India [(2010) 1 SCC 409]**, the law with regard to the scope and ambit

of jurisdiction of court to interfere with the Arbitration award has been discussed in detail. Their Lordships have referred to various earlier judgments of the Apex Court. We will refer to the principles discussed in some of the judgments which have got relevance in this case also.

19. In **State of Rajasthan v. Puri Construction Co.Ltd.** [(1994) 6 SCC 485], it has been held by the Apex Court in paragraph 26 as follows :

“ The Arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of the law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was

contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons.”

20. In **Arosan Enterprises Ltd. v. Union of India [(1999) 9 SCC 449]** also, it was held that there cannot be any reappraisal of the evidence. It has been held as follows in paragraphs 36 and 37 therein:

“ It is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the

event of however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.”

21. The learned counsel for the appellant therefore submitted that the exercise done by the court below herein is completely beyond the scope of Section 30 of the Act.

22. In **Kwality Manufacturing Corporation v. Central Warehousing Corporation [(2009) 5 SCC 142]**, it was held that “*at the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act does not sit in appeal*

over the findings and decision of the arbitrator. Nor can it reassess or reappreciate evidence or examine the sufficiency or otherwise of the evidence.” (paragraph 10).

23. In **G.Ramachandra Reddy and Company v. Union of India and Another [(2009) 6 SCC 414]**, it has been held in paragraph 19 as follows :

“Interpretation of a contract may fall within the realm of the arbitrator. The court while dealing with an award would not reappreciate the evidence. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong proposition of law. If two views are possible, it is trite, the court will refrain itself from interfering.”

24. Importantly, the very same principles have been discussed in **Ispat Engineering and Foundry Works v. SAIL [(2001) 6 SCC 347]** and **Continental Construction Ltd. v. State of U.P. [(2003) 8 SCC 4]**. In the latter decision, in paragraph 21 the earlier judgment of the Apex Court in **State of U.P. v. Allied Constructions [(2003) 7 SCC 396]** and the limit of jurisdiction under Section 30 of the

Arbitration Act has been discussed.

25. Therefore, the question will be whether reappraisal of evidence is possible and whether different conclusions can be arrived at ordinarily. The principles discussed above will show that unless there is a finding that the Arbitrator has acted arbitrarily, irrationally, capriciously or in conscious disregard of the contract, no interference is possible. Even if two views are possible, the view taken by the Arbitrator cannot be interfered with. The court cannot substitute its evaluation of facts. It is within the competence of the Arbitrator to fix a particular amount towards liability.

26. The learned counsel for the appellant, to support his plea that the rate of interest awarded by the Arbitrator could not have been interfered with, relied upon paragraph 37 of the judgment of the Apex Court in **Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. [(2005) 6 SCC 462]**. Therein it was held that “*Section 34 of the Code of Civil Procedure has no application to arbitration proceedings since the arbitrator cannot be said to be a “court” within the meaning of the Code. But an arbitrator has power and jurisdiction to grant interest*

for all the three stages provided the rate of interest is reasonable.”

27. The following are the decisions relied upon by the learned Government Pleader :

State of Rajasthan and Another v. Ferro Concrete Construction Private Ltd. [(2009) 12 SCC 1], Oil & Natural Gas Corporation v. M/s Brothers Builders & Engineering Pvt. Limited (JT 2010 (10) SC 146), A.P.State Trading Corporation v. Malla Reddy (2010 (4) KLT SN 27 (Case No.31) SC., Associate Engineering Company v. Govt. of Andra Pradesh and Another (AIR 1992 SC 232), Veeraraghava Iyer & Co. v. Divisional Superintendent, Southern Railway (2002(3) KLT Case No.12 SN), Hindustan construction Co. Ltd. v. State of Jammu and Kashmir (AIR 1992 SC 2192).

28. It is emphasized by the learned Government Pleader that the reduction of amounts, under various claims, by the learned Sub Judge is justified. The decision of a Division Bench of this Court in

A.S.No.533/2000 has also been relied upon to show that therein this Court has held that the Kallada Irrigation Project is not a commercial venture of the Government and therein 6% interest was granted. As rightly pointed out by the learned counsel for the appellant, the said rate was adopted in a civil suit and this court was considering the rate of interest to be granted under Section 34 of the C.P.C.

29. The reliance placed on **Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir (AIR 1992 SC 2192)** is to advance the proposition that award can be set aside on the ground of error apparent on the face of the award. Paragraph 5 of the judgment is relied upon to contend that the arbitrator cannot award interest at a rate which is unreasonable. Therein, the Apex Court had held as follows :

“ 5. The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the latest decision of a five-Judge Bench of this Court in Secretary, Irrigation Department of Orissa v. G.C.Roy (1991) 6 JT 349 :(AIR 1992 SC 732). Though the said decision deals with the power of the Arbitrator to award interest pendente lite, the principle of

the decision makes it clear that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to a arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of S.34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply.”

30. In **Oil & Natural Gas Corporation v. M/s Brothers Builders & Engineering Pvt. Limited (JT 2010 (10) SC 146)** also, it was held that where there is an error on the face of the award or misconduct by the arbitrator interference will be warranted. But therein also the Apex court held that the court would not act as an appellate court and reappreciate material on record.

31. In **Associate Engineering Company v. Govt. of Andhra Pradesh and Another (AIR 1992 SC 232)**, in paragraph 23, it has

been held as follows :

“ Where it is apparent not by construction of the contract but by merely looking at the contract that the umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award, it is an error going to the root of his jurisdiction ”

32. It was further held that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract.

33. A reading of the judgment will show that the award of amounts in that case against certain terms of the contract was held as not justified. The finding by the trial court herein does not show that the court was of the view that the Arbitrator has acted against the terms of the agreement. Therefore, the said principle may not apply herein.

34. ***George v. State of Kerala [2001 (1) KLT 760 (SC)]*** deals with the power of the arbitrator to grant interest and it was held that he can award interest on all four stages i.e. pre-reference, pendente lite, future interest from date of award and from date of decree till realisation.

35. In **A.P.State Trading Corporation v. Malla Reddy [2010 (4) KLT SN 27 (Case No.31) SC]**, the Apex Court in a case arising under Section 30 of the Arbitration Act, 1940 held that “ *in absence of any specific contract in regard to rate of interest, pendente lite and future interest should not exceed 9% per annum.*”

36. The learned Government Pleader heavily relied upon the above to support the order passed by the learned Sub Judge, as regards interest.

37. Our attention was invited by the learned Government Pleader to a decision of the Apex Court in **State of Rajasthan and Another v. Ferro Concrete Construction Private Ltd. [(2009) 12 SCC 1]** to support the reduced rate of interest awarded by the learned Sub Judge. Therein in paragraph 67, it was held that “*the award of interest at 18% per annum in an award governed by the old Act (the Arbitration Act, 1940) was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid*

on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by Reserve Bank of India under the Banking Regulation Act, 1949. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendente lite interest and future interest upto the date of payment.”

38. We find from paragraph 68 of the judgment that the Apex Court also considered the manner in which the court will have to consider the matter. We extract the following portion of the said paragraph :

“ The arbitrator has awarded certain amounts against these claims by examining the material placed before him and the terms of contract. He has also assigned reasons for awarding the amount against these claims. Courts cannot sit in judgment over the award of the arbitrator, nor reappraise the evidence.”

39. Thus when the Arbitrator has awarded certain amounts by assigning reasons with the support of materials, the court cannot sit in

judgment over it or reappreciate the evidence.

40. In the light of the above principles, we will have to analyse how the matter was dealt with by the learned Sub Judge. According to the learned counsel for the appellant, the scaling down of the amounts under various heads is not justified.

41. We find from the award that it is a reasoned one. With regard to claim under 15(a), it was contended that the original time for completion was from 11/1/1989, the date of the order to start work upto 10/06/1989. It was further extended upto 30.06.1990. The reasons for the delay have been attributed under three heads :

1)delay in finalizing the tender and execution of agreement.

Tender was on 23.2.1988. The work order was issued on 17.5.1988 and the agreement was executed on 30.06.1988.

2)delay in handing over unhindered possession of site for work.

Though the site was handed over on 31.8.1988, the trees standing in the land were auctioned on 6.10.1988. The trees were removed only on 28.10.1988.

3)delay in finalisation of earth work proposals, hydraulic

particulars and issuing order to start the work. The work order to start the work was given only on 11.1.1989 after finalizing the proposals which shows that nearly an year has elapsed after the date of tender for issuing the work order. Similarly, non-payment of cost of land taken on advance possession also has delayed the work as the land owners obstructed the entry of contractor's men to their land till the payment of cost. This was settled only after the negotiation conducted by the Deputy Collector and the Tahsildar (LA) on a later date.

42. After referring to the documents, pleadings and the arguments on both sides, the Arbitrator has recorded his reasons as follows in page 10 :

“ I have carefully examined the relevant records, the exhibits furnished, and the arguments put forth by both sides. The work order to commence the work was given on 11.1.1989. There was obstruction to the work from 28.1.1989 to 9.2.1989 because of obstruction by land owners even as admitted in defence statement (para 4) by respondent. The letter dated 30.6.89 from Assistant

Executive Engineer to Executive Engineer and letter dated 15.7.89 of Executive Engineer addressed to District Collector show that the work had to be stopped due to obstruction from land owners again from 22.6.89. This could naturally upset the entire programme and arrangement made by the claimant for the speedy execution of work. This could have been avoided, had the respondents taken timely careful action to procure unhindered possession of land, before arranging the work. Non approval of hydraulic particulars before commencement of earth work formation of canal and change in specification during course of execution etc. ought have caused atleast some delay and affected the progress as procedural formalities of inspection by higher authorities and taking decisions regarding changes require a minimum unavoidable delay for which the claimant is not at fault. The statement of respondent in para 8 of defence statement that the lining of canal can be taken up only after the completion of entire length of canal formation cannot be accepted. Formation is not completed for the entire length of 1900 ms simultaneously, but only bit by bit according to the arrangement made. The lining of canal in the portion

where formation is completed can be taken up for the better progress of work, had the hydraulic particulars and specifications are finalised in advance. So the argument of respondent that there was no delay due to change in specification of lining is not acceptable.”

Thus the contention that delay had occasioned was accepted.

43. In paragraph 4 under Claim 15(a) the contention of the claimants that the supplemental agreement for extension was signed only under protest and because of urgent need of getting pending payments so as to facilitate progress of work has been noted. Such protests were given in writing then and there (Exts.C29, C31, C33). The arbitrator has dealt with further reasons for delay in page No.11 as follows :

“ Regarding scarcity of cement required for the work in the letters dated 15.5.89, 29.5.89 and 17.7.89 from the (Ext.C14, C15, C23, C 24 etc.) claimant to Superintending Engineer the delay in getting cement for the work had been brought to notice of the 2nd respondent. The Executive Engineer in his report dated 30.10.89, accompanying extension application has

mentioned that the scarcity of cement from 25.5.89 is a common fact affecting the whole projects. That shows the argument of claimant that the delay in issuing cement by department has affected the progress of work is genuine and requires consideration. On going through the records it is seen that the reasons for the delay shown in applications for extension of time are obstruction by land owners, scarcity of cement etc. and these reasons are reported to be genuine by the Executive Engineer while recommending sanction without penalty. It is worth mentioning here that all the sanctions for extensions are given without invoking liquidated damages, which clearly shows that the claimant was not responsible for the delay in execution. On a careful and factual consideration of above aspects I have come to the conclusion that the failure of respondent in giving unhindered possession of land, delay in issuing clarification regarding change in specification of work and delay in supply of cement have contributed for the prolongation of work beyond the original date of completion, 10.6.89 upto 30.6.90 for about an year and that the reasons for the delay are attributable to the respondents only.”

The finding is that the period for completion of the work stood extended by one year, and the respondents are responsible for it. Cogent reasons have been stated as evident from the discussion which are supported by relevant materials.

44. To sum up:- it was held by the Arbitrator that the reason for delay are attributable only to the respondents. His conclusion was that there is failure on the part of the respondents in giving unhindered possession of land. Obstruction was made by landowners, claiming the compensation amount. Along with it, the delay in issuing clarification regarding change in specification of work and delay in supply of cement have contributed to the prolongation of work beyond the original date of completion for about an year. It was also noted that the period was extended without imposing any penalty or damages against the contractor.

45. In the next paragraph it was held that supplemental agreements were executed by the claimant contractor, but not voluntarily. Since the trial court has reversed the said finding we extract the said portion from the award of the Arbitrator below :

“ The supplemental agreements executed by the claimant and 2nd respondent are also to be considered before going into the merit of Claim 15.a. The Respondent's counsel has argued that the claimant has signed the supplemental agreements 1 and 2 for the extensions of time agreeing to carry out the work during the extended period without any extra claim. The claimant's counsel has argued that the execution of such supplemental agreements is not contemplated in original agreement. Those supplemental agreements were signed under duress as the claimant was hard pressed for money and the department was not prepared to make payment of large amount due unless the supplemental agreements are signed. The claimant had no other go other than signing the supplemental agreements as stipulated by the department as no departmental materials required for the work will be issued nor the departmental officers will be making timely inspections of work unless the supplemental agreements are signed. So these existed a coercive situation arised for signing supplemental agreements, compelling the claimant to sign the same though original agreement does not provide for it. Thus the

supplemental agreements were executed not voluntarily and so cannot be taken for binding on the claimant.

On going through the details of payment made to Claimant by the respondent, it is seen that the 1st part bill was paid in 3/89, time of completion (original) was 10-6-89, the 2nd part bill amounting to Rs.2,81,357/- was paid only in 11/89. For about 8 months considerable quantum of work remained unpaid as evident from the fact that the 2nd bill amount was Rs.2,81,357/- out of total P.A.C. of only Rs.7,27,507/-. So the argument of claimant that payments due was not made unless the supplemental agreement for extension of time was signed by claimant though it was not a condition in original agreement seems genuine. I therefore conclude that the supplemental agreements 1 and 2 for extension of time were signed under pressure as the claimant was badly in need of money for continuing with the work. So the execution of these supplemental agreements are not a bar for allowing compensation for loss due to price hike for the work carried out after the original period of completion as the reasons for delay in completion of work were not due to fault of claimant, but due to lapses on the part of

respondents only.”

The arbitrator has entered the findings based on materials available and produced before him.

46. It was then concluded that during the extended period, there was considerable increase in the market rate of materials and labour and the department has also revised the schedule. The Arbitrator was of the view that the claimant had to incur increased expenditure for carrying out the works during that period which was not anticipated at the time of tendering. Therefore, he will have to be compensated. But in the supplemental agreements, no hike in respect of those items were given and finally after calculating the total value of work done at 5,24,358.61, 40% has been assessed towards increase in costs of materials and labour charges.

47. With regard to award of this item, the trial court has observed at page 7 as follows :

“ This court cannot fully accept the award which can be gathered from the materials and records and

evidence. The claimant has committed breach of contract. The claimant did not perform his part of the contract. During the initial stage of the work the delay in execution of the agreement, handing over the site etc. were delayed due to the non-cooperation of the claimant with the respondents. The obstructions made by the land owners were only for 13 days from 28.1.1989 to 9.2.1989. The change in specification has no considerable effect on the execution of work.....”

Further down, at page 8 it has been held that:-

“There is nothing in evidence to show that the claimant was under threat or coercion. On the other hand, the evidence shows that the claimant has wilfully executed the supplemental agreements. As per clause 15 and 17 of LCB condition, claimant has to furnish the quarterly requirement of materials to be used at site, at least 14 days in advance. This is not done in this case. Hence the respondent cannot be held responsible alone. Thus the award amount cannot be fully accepted. Reasonable amount that can be awarded is ` 1 lakh. Thus the award on the claim (a) is partly set aside limiting to ` One lakh.

48. Even though the learned Government Pleader vehemently

sought to sustain the above finding, we cannot agree. The exercise adopted by the learned Sub Judge is contrary to the well settled principles. The court cannot sit in appeal over the award of the arbitrator. There is no finding that the Arbitrator has misconducted himself or there is any apparent error on the face of the record. As noticed already, reasons have been shown by the Arbitrator which cannot be said to be not germane. There was extension of time to complete the work and period was extended without imposing any penalty. During this period there was revision of rates by the Government also. There was increase in cost of materials and labour charges. This is the finding by the learned Arbitrator. We also find that practically no material or evidence has been discussed by the learned trial Judge in upsetting the conclusion of the Arbitrator. The amount of ` 1 lakh has been fixed without disclosing the basis for reducing the amount fixed in the award. While the Arbitrator has awarded 40% of the total value of work done towards escalation, no proper method has been indicated by the learned Judge in fixing the amount as Rs. 1,00,000/-. In fact, the respondents could not establish that the

claimant has committed breach of contract which is clear from the discussion in the award, which we have already extracted. Therefore, there is no basis for the finding by the learned Judge that he has committed breach of contract and he did not perform his part of the contract and he is also responsible for the delay in completion of the work. The learned trial Judge went on to record that there was non-cooperation on the part of the claimant. The said plea was not accepted by the Arbitrator even though raised by the respondents. The reasons for the delay in completion of work mainly were the delay in issuance of work order after completing various formalities, delay in finalizing the proposals, obstruction of work by the land owners and the delay in supplying cement, etc.. All these have been properly dealt with by the learned Arbitrator.

49. Apart from the same, the learned Arbitrator had found that the supplemental agreements have been executed due to coercion which finding has been upset by the learned trial Judge by holding that there was no coercion or threat. Herein also, we find that the reasons stated by the Arbitrator have been brushed aside by stating that “ *there is*

nothing in evidence to show that the claimant has executed supplemental agreements under threat or coercion.” A reference to the award shows that the claimant had relied upon his own protests under Exts.C29, C31 and C33. The Arbitrator had found that the first part bill was paid in 3/89, the time for completion (original) was 10.6.89 and the second part bill amounting to ` 2,81,357/- was paid only in 11/89. It was therefore found that the argument of the claimant that payments due were not made unless the supplemental agreement for extension of time was signed by the claimant though it was not a condition in original agreement seems genuine. Accordingly, it was finally concluded that supplemental agreements 1 and 2 for extension of time were signed under pressure as the claimant was badly in need of money for continuing with the work and hence the execution of supplemental agreements are not a bar for allowing compensation for loss due to price hike for the work carried out after the original period of completion was over.

50. It cannot be said that reasons stated by the Arbitrator are devoid of any merit. The Apex Court in ***O.P.Pathrose v. State of***

Kerala and another [(2010) 12 SCC 100] in respect of similar claims, that too where supplemental agreements were also executed, agreed with the view taken by the learned Arbitrator that they were executed under coercion. This is clear from paragraph 19 of the judgment. We extract the same below :

“ Further with regard to Claim (b) it has been clearly stated by the arbitrator in the award that, during the course of the arguments, it was submitted by the respondents that unless the supplemental agreement is executed, payments would not be effected and no materials would be released. Further, it was pointed out that refusal to execute supplemental agreement would be considered as a default and the respondents would terminate the agreement under Clause 45 of LCB condition. Those factual disputes have not been controverted by adducing any evidence.”

51. Similar is the position herein. The award of amount by the Arbitrator was based on materials placed before him and it is supported by reasons. We therefore reverse the finding by the learned trial Judge on the claim under 15(a) and restore the amount awarded by the Arbitrator.

52. As regards claim 15(b), the Arbitrator found that the claim is for idling charges of establishment. We record the findings of the Arbitrator under claim 15(b) below :

“ The claimant's counsel argued that the establishment and arrangements made by the claimant at site had to be idled as the unhindered possession of site was not handed over. The claimant had to incur by way of rent for building payment to skilled and unskilled workers, agents, supervisors etc. at a rate of ` 2,000/- day for a period of 90 days. The claimant is to be compensated by the respondent for this loss as per the argument of his counsel.

The respondents counsel has argued that this claim is not admissible as no evidence for payment is furnished by claimant in this regard. On examining the records, produced exhibits filed and weighing the arguments put forth by both sides I find that the claimant had to idle his establishment. When the work had to be stopped suddenly due to interruption by land owners as admitted by respondent and evident from files from 28.1.89 to 9.2.89 and from 22.6.89 to 31.8.89, a total of 84 days (The letter dated 31.8.89 from claimant to respondent show that the

obstruction was not cleared even on 31.8.89) and so he is entitled for compensation for loss on this account. Taking into account the rent of office, building, wages of skilled workers, agent and supervisors which had to be paid by claimant an amount of `1500/- day is fixed as compensation for idling under this item. Hence an amount  $1500 \times 84 = `1,26,000/-$ is found reasonable as compensation to be paid on this account.”

It has been clearly found that the work was interrupted for 84 days in total, and to arrive at the said findings materials have been relied on. ` 1,500/- per day was fixed as compensation, by taking into account the rent of office, building, wages of skilled workers, agent and supervisors.

53. The amount arrived at is ` 1,26,000/-. This was reduced by the learned trial Judge to `50,000/- by stating as follows :

“ This court cannot accept the award in full. The compensation awarded by the arbitrator is excessive. The claimant did not produce the muster of roll of employees deployed by him who are skilled and unskilled. What are the actual wages given to them are also not revealed from any evidence. The claimant also failed to produce any

satisfactory evidence to show that he paid rent and other expenditure @ 2,000/- or 1500 per day. Thus the arbitrator simply adopted a guess work without any material foundation. The reasonable amount that can be awarded is `50,000/- on this claim. Thus the award is limited to ` 50,000/-."

Clearly the Court has sit in appeal over the award.

54. The learned counsel for the appellant points out that all the records were before the Arbitrator which is clear from paragraph 8 of the award, wherein it is recorded as follows :

" The original agreement, supplemental agreements, copies of concerned files, documents such as measurement books, field books, plotted sheets etc. were produced by the 2nd respondent as required by me for perusal."

Paragraph 6 of the award shows that during the hearing on 15.5.1993, the claimant's representative filed 59 numbers of exhibits and those were taken to file.

55. It is further submitted that when the records were before the Arbitrator which have been perused, there is no reason for the learned

trial Judge to hold otherwise. Even though the learned Government Pleader vehemently submitted that relevant records were not available before the Arbitrator, we cannot agree to it in the light of the reference to the various items of records in paragraphs 6 and 8. Further, the claim is based on the expenditure incurred towards rent of building, payment by way of idling charges to skilled and unskilled workers, agent, supervisors etc. Even though the claim was at ` 2,000/- per day, the Arbitrator fixed it at ` 1500/- per day. Wages towards unskilled workers have not been reckoned. The reasonableness of the reasons cannot be a matter for the Court to upset the award. The idling of establishment was clear from the evidence. For fixing the amount at Rs.50,000/-, no material has been relied upon by the trial court also. The reasons stated by the Arbitrator for awarding the claim under 15(b) cannot be said to irrational. The interference made by the learned trial Judge cannot therefore be supported and we reverse the said finding also on the basis of the principles we have already discussed and explained by the Apex Court in various judgments. The reasonableness of the reasons in the award cannot be a matter for assessment. The

conclusions made by the Arbitrator cannot be said to be preposterous or absurd.

56. The vehement argument raised by the learned Government Pleader that the trial court has acted legally in scaling down the amounts cannot be supported in the light of the well settled principles laid down by the Apex Court. No apparent error has been found by the trial court. According to the learned Government Pleader, the entire claims were fully unsustainable. But we find that there is no such finding by the trial court also. When the trial court has actually re-fixed the amount only and did not set aside the award in full, it shows that the trial court has also agreed that compensation was due. As already noted, going by the judgment of the Apex Court, there cannot be any interference on the fixation of quantum in that manner. The court cannot substitute its evaluation, as the view taken by the Arbitrator is a possible one.

57. As far as claim 15(c) is concerned, what is claimed is compensation towards idling charges of establishment and machinery due to nonavailability of cement. The question is whether there is

duplication of the claim to an extent which is the view taken by the trial court. The Arbitrator found that in the light of allowing the claim under 15(a), wherein also it has been held that there was delay in supplying cement, it has affected the progress of the work. Naturally the establishment and machineries of the claimant have idled during that period due to nonavailability of cement for carrying out the work. The following are the reasons stated by the Arbitrator :

“ Naturally the establishment and machineries of the claimant has idled during that period due to nonavailability of cement for carrying out work. So the claimant is to be compensated for the loss incurred by him towards payment of establishment and hire charges of machineries during that period. The claim put forth by claimant at ` 7,000/- per day for 120 days is on higher side. On perusal of files, and examining the exhibits and other documents produced and considering the argument of both sides I find that a compensation for 60 days at ` 2,000/ day = ` 1,20,000/- is reasonable in this regard and this amount is to be paid by respondent as the idling occurred due to lapse on the part of the respondent in issuing cement in time.” (emphasis supplied)

58. We find that the amount calculated is for a period of 60 days. Even though the claim was @ Rs.7,000/- per day for 120 days, the said claim was held to be on higher side and the Arbitrator has perused files and examined the exhibits and other documents while awarding `1,20,000/-. This has been upset by the trial court by stating as follows :

“This Court cannot accept the award as such. As per clause 15 and 17 of LCB general conditions of contract the claimant shall submit a detailed quarterly requirement statement regarding the supply of materials which are necessary at site for the execution of work. The claimant has asked for the materials in short interval at times. He has not programmed the work subject to the availability of materials such as cement. Apart from that the claimant has not brought any satisfactory evidence or material before the arbitrator that he suffered a loss of `7,000/- per day towards idling of wages etc. In fact without any material whatsoever the arbitrator adopted a guess work and passed the award amount. The reasonable amount that can be awarded under claim C is `25,000/-. This is because claim of idling charges under

claim C will also include the idling charges claimed on claim B.”

59. The finding by the learned trial Judge is that the claimant had asked for the materials in short interval at times. He has not programmed the work subject to the availability of materials such as cement. Herein also, there is no discussion of any evidence by the learned trial Judge to find that the view taken by the learned Arbitrator is irrational and is totally devoid of any evidence at all.

60 While discussing the matter under claim 15(a), the learned Arbitrator has concluded that there was delay in supply of cement by the Department. Going by the contract, it was the responsibility of the department to supply cement also. The argument by the respondent that the delay in supplying the cement was due to non-furnishing of quarterly requirement of materials by the department was rejected by the learned Arbitrator. Reference was made in this context to the communications like Ext.C14, C 15, C23 and C24 which are letters dated 15.5.89, 29.5.89 and 17.7.89. The claimant through those letters, addressed the Superintending Engineer about the delay in getting

cement for the work. The reply by the Executive Engineer is clear from his report dated 30.10.89 which accompanied the extension application and it was mentioned that scarcity of cement from 25.5.89 is a common fact affecting the whole project. After adverting to the above, the Arbitrator has held as follows :

“ That shows the argument of claimant that the delay in issuing cement by department has affected the progress of work is genuine and requires consideration.”

61. Actually the view taken by the Arbitrator was that the extension was granted by the Department without imposing penalty. In the light of above aspect also, we cannot agree with the view taken by the learned trial Judge that there was delay on the part of the claimant to require materials.

62. The learned Government Pleader vehemently submitted that the same is the correct fact. But we find that the Arbitrator has discussed the relevant evidence, has considered the letters given by the claimant along with the report made by the Executive Engineer to the Superintending Engineer while recommending extension of the period

to complete the work. They were therefore relevant materials on which right conclusion was arrived at by the learned Arbitrator. The Arbitrator has considered claims 15(b) and 15(c) as separate claims. The award will show that under 15(b) amount of compensation is awarded for rent of office, building, wages of skilled workers, agent and supervisors. Under 15(c), compensation is granted for loss incurred by the contractor towards payment of establishment and hire charges of machineries for 60 days. These two items are not common. Hence, there is no duplication of claims.

63. We have already noted there is no basis for the finding by the trial court on this claim and no relevant evidence has been discussed to show that there was delay on the part of the claimant to require materials like cement. Therefore, we fail to appreciate the way in which the amount was lowered by the learned trial Judge. We therefore reverse the said finding also.

64. Therefore, the award of the claims by the Arbitrator under 15(c) will have to be upheld and we do so.

65. The learned Government Pleader has brought to our notice

the promulgation of Kerala Revocation of Arbitration Clauses and Reopening of Awards Act, 1998 (Act 12 of 1998) by the Government in relation to Kallada Irrigation Project. It is submitted that by Section 3, arbitration clauses have been cancelled. It is submitted that a Division Bench of this court in the judgment in O.P.No.4206/1998 and connected cases has declared the Act as unconstitutional and consequently SLP was moved and Special Leave Petition No.8491/2014 and connected matters are pending before the Apex Court and the interim order passed therein was brought to our notice. Interim order is to the effect that the State shall not take any coercive steps against the respondents who have already been paid amounts due under various arbitral awards. We are of view that the pendency of the special leave petitions will not stand in the way of considering the merits of this appeal.

66. As far as the rate of interest is concerned, the Arbitrator has granted interest @ 18% per annum on all amounts due, for the period from 12.11.1990 to the date of decree or date of payment whichever is earlier. Learned counsel for the appellant argued for retaining the

interest at the same rate, since it is within the power and discretion of the Arbitrator. The learned trial Judge has fixed the interest at 9% per annum. Reliance was placed on **A.P.State Trading Corporation v. G.V.Malla Reddy (2010(4) KLT SN 31)** and **State of Rajasthan and another v. FERRO concrete construction (P) Ltd (2009(12) SCC 1)**. In the latter decision, it was held that award of interest at 18% per annum under Arbitration Act 1940 was an error apparent on the face of the award. The learned counsel for the appellant submits that fixation of interest is purely discretionary and therefore there is no error apparent on the face of the award. But in the light of the dictum laid down by the Apex Court in **Ferro Concrete Construction Pvt. Ltd.'s case {(2009) 12 SCC 1}**, after referring to Interest Act 1978 and the view taken therein that pre-reference interest should be at 9%, we find that the view taken by the learned trial court on this aspect is perfectly in order. IN Malla Reddy's case (2010 (4) KLT SN 27 (C.No.31) SC, 9% interest was awarded as interest pendente lite and future. The rate at 9% is reasonable for pendente lite and future interest. We do not

therefore interfere with the said part of the judgment of the trial court.

Therefore we allow the appeal and we hold that the appellant is entitled to realise from the respondents the amount of ` 4,55,743/- with 9% interest from 12.1.1990 till realisation and a decree is passed accordingly. The parties will suffer their costs in this appeal.

T.R.RAMACHANDRAN NAIR, JUDGE

P.VASHA, JUDGE

The date “12.1.1990” occurring in the last paragraph of the judgment is corrected and substituted as “12.11.1990”, as per order dated 21.11.2015 in I.A.No.3871/2015 in Arb.Appeal No.2/2012.

Sd/-

Registrar (Judicial)

sv.