

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 06.07.2015

CORAM

THE HONOURABLE MR.JUSTICE R. MAHADEVAN

O.P.No.643 OF 2009

M/s.Jeypore Sugar Company Limited
No.239, Anna Salai,
Chennai - 6. Petitioner

Versus

1.M/s.Laxmi Organic Industries Ltd.
Chandramukhi Basement
Nariman Point
Mumbai-21.

2.The Hon'ble Chief Justice Ratinam (Retd)
16 Pelathopu
Mylapore
Chennai-4.

3.The Hon'ble Chief Justice P.R. Gokulakrishnan (Retd)
No.7, Anna Avenue,
Bakthavatsalam Nagar Extn. Adyar
Chennai-20.

4.The Hon'ble Justice K.P.Sivasubramanian (Retd)
New No.47 (Old NO.46) Pulla Avenue
Shenoy Nagar
Chennai-30. Respondents

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Prayer: Petition is filed to set aside the award, dated 19.8.2009 and to direct the first respondent to pay the costs.

For Petitioner: Mr.AR.L.Sundaresan, Senior Counsel
for Mr.A.S.Vijayaraghavan

For Respondent No.1 : Mr.K. Manoj Menon

ORDER

This petition has been filed to set aside the Award, dated 19.8.2009 directing the petitioner to pay a sum of Rs.1,00,00,000/- together with interest at 12% per annum to the first respondent from 3.5.2005 till the date of payment.

Facts-in-brief:-

2. The first respondent had entered into an agreement with the petitioner on 11.3.2005 for purchasing of 8000 M.T. of Ethyl Alcohol, which was imported by the petitioner for its own consumption and the same was stored in the Customs Bonded Storage tanks located in Vishakhapatnam Port.

3. The petitioner while offering the product for sale had represented that it was the sole and absolute owner of the said ethyl alcohol and that it had the absolute right and authority to sell the same and that such sale could be completed expeditiously free from all encumbrances.

4. Totally relying on the words of the petitioner, the first respondent had agreed to purchase the entire

quantity of 8000 M.T. of the said product and had

also agreed to pay a sum of Rs.1.00 crore as advance towards the sale price, which was fixed at Rs.13,36,72,000/-, on 14.3.2005.

5. The first respondent had entered into an agreement with the petitioner on 11.3.2005 for the purchase of 8000 M.t. of the said product by way of 'bond transfer' as the product was in the custody of the customs authorities in a bonded warehouse.

6. Since the factory of the first respondent is situated at Mahad, Maharashtra, they had to transport the Ethyl Alcohol either by sea or by road.

7. As the specific permission of the Government was required for selling the said product without which the sale of the said product was prohibited and this fact was not aware of by the first respondent and the petitioner did not disclose this fact to the first respondent. The non-disclosure of this material fact by the petitioner would vitiate the due performance of the terms of the said agreement and deemed to be in violation of Clause 20 of the said agreement and therefore, the first respondent called upon the petitioner to repay the advance amount of Rs.1.00 crore together with interest at 24 per cent per annum from 14.3.2005 and to refrain from dealing with/parting with the possession of the said product until the

repayment of the said amount.

8. The petitioner in its reply, dated 26.4.2005 has alleged that the first respondent was attempting to wriggle out of the agreement and that the allegations of the first respondent in its letter, dated 22.4.2005 were baseless and unfounded.

9. According to the petitioner, as per Clause 6.2 of the agreement, it is the responsibility of the first respondent to secure the required permission from the concerned authorities. Further, the petitioner was in the process of securing the approval from the concerned authorities, the question of returning the advance amount does not arise.

10. It is the case of the first respondent that it was the responsibility of the petitioner to get the permission from the authorities concerned to sell the product and such permission to sell can only be obtained by the owner of the product, viz., the petitioner.

11. Heard both sides.

12. The learned Senior Counsel appearing for the petitioner has contended that the stand of the first respondent that it was not aware of the statutory provisions in respect of the sale of ethyl alcohol cannot be a ground to avoid the agreement as the

ignorance of law is no excuse.

13. Further, the learned Senior Counsel has contended that in pursuant to the offer from the first respondent, the agreement, dated 11.3.2005 was entered into and the first respondent was aware of the fact that the goods were lying in the Customs Bonded Storage Tanks located at Vishakapatnam Port and the sale from 'Bond to Bond' would be free from all encumbrances since it had absolute right and authority to sell the ethyl alcohol and therefore, there is no question of any misrepresentation or concealment of any material fact on the part of the petitioner.

14. In support of his contentions, the learned counsel for the petitioner has relied on the following decisions:-

a. Additional Collector of Customs, Madras and others (1981 E.L.T. 153 (Mad.).)

b. K. Jamal Co. vs. Union of India (1981 E.L.T. 162 (Mad.).)

c. Shewbuxrai Onkarmall vs. Assistant Collector of Customs and others (1981 E.L.T. 298 (Cal.).)

d. Shri Ramalkanga Mills Pvt. Ltd., vs. Assistant Collector of Customs and another (1984 (16) E.L.T. 62

e. Bayer (India) Ltd. Bomaby vs. Collector of Customs, Bombay (1984 (16) E.L.T. 375 (Tribunal).

15. Per contra, the learned counsel appearing for the first respondent has contended that the failure on the part of the petitioner to get the permission to sell the product would be in breach of the terms of the agreement and it had to be construed that the petitioner had suppressed all the vital and material facts, which is very against the Clause 20 of the said agreement and therefore, the first respondent is entitled for claiming the repayment of the advance amount with interest and damages as sought for in the claim petition.

16. The learned counsel has pointed out the scope of Clause 6.2 of the said agreement which provides for securing permission from the concerned authority for the purpose of utilising the said ethyl alcohol, as contemplated in the agreement, which could be done only after the sale and therefore, the said agreement had become voidable and in such circumstances, the first respondent wanted to avoid the agreement and repudiate the same and the same was also accepted by the petitioner in its reply, dated 3.5.2005.

17. The learned counsel has vehemently contended that the petitioner was well aware of the fact that the prior permission from the Government was required for the sale of the said product, which had not been secured, but which was very material and vital with regard to the performance of the transaction and that the petitioner had deliberately and with a mala fide intention had chosen to conceal the same prior to or while entering into the said agreement and therefore, the petitioner is liable to return the advance amount together with interest at 24% per annum.

18. The learned counsel has also argued that when the first respondent wanted the permission to transport the material, it came to know that the petitioner had no right to sell the contracted material until the specific approval for such sale had been obtained from the Government by the owner of the product, viz., the petitioner and that the first respondent avoided the agreement entirely due to the fraudulent concealment and misrepresentation of facts by the petitioner.

19. The learned counsel further submitted that considering all these aspects, the learned Arbitrators had directed the petitioner to repay the advance amount with interest and therefore, nothing is to interfere with the award and hence, the petition may be dismissed.

20. In support of his contentions, the learned counsel has relied on the following decisions:- a. **Municipal Corporation of Delhi vs. Jagan Nath Ashok Kumar and another** ((1987) 4 SCC 497).

b. **Puri Construction Pvt. Ltd. vs. Union of India** ((1989) 1 SCC 411).

c. **M/s. Sudarsan Trading Co. vs. Government of Kerala and another** ((1989) 2 SCC 38). d. **B.V. Radha Krishna vs. Sponge Iron India Ltd.** (1997) 4 SCC 693).

e. **U.P. State Electricity Board vs. Searsole Chemicals Ltd.** ((2001) 3 SCC 397).

f. **Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.** ((2003) 5 SCC 705).

g. **State of U.P. vs. Allied Constructions** (2003) 7 SCC 396). i. **Pure Helium India (P) Ltd. vs. Oil & Natural Gas Commission** (2003) 8 SCC 593).

j. **Bharat Coking Coal Ltd. vs. L.K. Ahuja** ((2004) 5 SCC 109).

k. **Bhagwati Oxygen Ltd. vs. Hindustan Copper Ltd.** (2005) 6 SCC 462). l. **Hindustan Zinc Ltd. vs. Friends Coal Carbonisation** (2006) 4 SCC 445)

j. **Oil and Natural Gas Corporation Ltd. vs. Western Geco International Ltd.** ((2014) 9 SCC 263).

k. **Associate Builders vs. Delhi Development Authority** (2014 SCC one line SC 937)

21. I have considered the aforesaid submissions and perused the documents available on record along with the Award.

22. Now, the question to be decided first is, whether the import of the product has been completed or not. Only then, we can go into the question of breach of agreement committed by whom and therefore, firstly, it is better to decide for the disposal of the case on hand, the former question and not a latter one.

23. Section 2(23) deals with import, it reads as under:-

"(23) "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India"

24. While dealing with Section 2(23) of the Customs Act, the Division Bench of the Calcutta High Court, in **Birendra Bahadur Pandey vs Gramophone Co. Of India Ltd. (AIR 1984 Cal 69)**, the Division Bench of the Calcutta High Court, has observed as under:-

"The question that was debated at the Bar is whether the petitioner can be deemed to have imported the goods when

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The word 'import' has been defined in

Section 2 (23) of the Act, thus:--"Import with its grammatical variations and cognate expressions means bringing into India from a place outside India''. The contention of Mr. Rao therefore is, the moment the aircraft landed at Mecnambakkam air-port, there was an import of the dia-monds in India. **The learned counsel would contend that, if goods arrived by a vessel can be deemed to be imported into the country the moment they enter the territorial waters of India, there is every reason to conclude that the moment the plane landed at one of the air-ports of the country, the goods have been imported. However, it is now settled by high authority that unless goods that are brought into the country for the purpose of use, enjoyment, consumption, sale or distribution are incorporated in and get mixed up with the totality of the property in the country, they cannot be said to have been imported.** It will be useful in this connection to refer to the decisions of the Supreme Court in *Empress Mills v. Municipal Committee*. In that case, Section 66 (1) (c) of the C. P. and Berar Municipalities Act, 1922 authorised the importation of a terminal tax on goods imported or exported from the limits of the municipality. The question was whether the goods passing in transit through the municipal limits without loading or unloading or stopping

within the municipal limits was liable to the terminal tax. The Supreme Court observed thus -- 'By giving to the words imported into or exported from', their derivative meaning without any reference to the ordinary connotation of these words as used in the commercial sense, the decided cases in India have ascribed too general a meaning to these words which from the setting context and history of the clause was not intended. To construe the words 'import' and 'export' as meaning bring in or take out of or away from and cover the goods in transit, by the words imported into or exported from would make rail borne goods passing through a railway station within the limits of a municipality liable to the imposition of the tax on their arrival at the railway station or departure therefrom or both which would not only lead to inconvenience but confusion, and would also result in inordinate delay and unbearable burden on trade both inter-State and intra-State. It is hardly likely that that was the intention of the Legislature. Such an interpretation would lead to absurdity which has according to the rules of interpretation, to be avoided.

Import is not merely the bringing into but comprises something more, i.e., 'incorporating and mixing or mixing up of the goods imported with the mass of the property' in the local area.

Similarly the word export has reference to taking out of goods which had become part and parcel of the mass of the property of the local area and will not apply to goods in transit i.e., brought into the area for the purpose of being transported out of it. If the intention was to tax such goods then the word used should have been re-exported which means to export (imported goods) again." This decision of the Supreme Court is authority for the proposition that goods could not be deemed to be imported the moment an aircraft lands in one of the airports in India as contended by Mr. Rao. The acceptance of Mr. Rao's contention would amount to making air borne goods passing through the airport in India liable to confiscation or other penalties provided for under the Act as soon as the plane lands or takes off from an airport and as pointed out by the Supreme Court would not only lead to inconvenience and confusion but also result in inordinate delays and unbearable burden on trade. If the argument of Mr. Rao is given its full effect then the moment an aircraft lands at an airport in India all the goods contained in the aircraft must be deemed to have been imported and the moment the aircraft takes off again the goods must be deemed to have been exported from the country. Consequently, the interpretation suggested by Mr. Rao,

would, if I may respectfully borrow the language of the Supreme Court, "lead to absurdity which according to the rules of interpretation should be avoided." Similar view was expressed in the decision of the Madras High Court in the case of K. Jamal Co. v. Union of India, 1981 ELT 162 where the word 'import' in Section 2(23), Customs Act, 1962, meant bringing into India from a place outside India. 'Bringing into India' would obviously mean the clearance of goods which were also substantiated by Section 15. Therefore, the relevant date for import of the goods was the date of presentation of the bill of entry and not the date when the ship arrived at the port. Though the decision was based on the meaning of the expression 'import', the facts of that case were entirely different. Mr. Justice S. S. Chadha of Delhi High Court in the case of Trilochan Singh v. Union of India, 1981 ELT 667 had also occasion to construe the expressions 'import' and 'export'. The learned Judge observed that the words 'import' and 'export' could not be construed to mean to 'bring in' or 'take out' of India the goods because it would make even the airborne goods passing through India liable to confiscation and other penalties as provided under the Customs Act, 1962. Such an interpretation would lead to chaos and confusion rendering the goods,

intended to be taken to other countries liable to Customs Laws of this country. *Therefore, unless the goods were brought into the country for the purpose of use, enjoyment, consumption, sale or distribution so that they were incorporated and got mixed up with the mass of the property of the country, they could not be said to have been imported. Importation could not be said only to have taken place when they had crossed the Customs barrier. Reliance had also been placed on the decision of Mr. Justice Padmanabhan which we have referred to hereinbefore. Indeed the trial Judge had himself expressed a similar view in the decision reported in (1981) 1 Cal HN 369."*

25. As per the above decision, it is clear that unless the goods were brought into the country for the purpose of use, enjoyment, consumption, sale or distribution so that they were incorporated and got mixed up with the mass of the property of the country, they could not be said to have been imported. Importation could not be said only to have taken place when they had crossed the Customs barrier.

the above said decision, since the product of the petitioner is stored in the bonded warehouse and it was not released for the purpose of use, enjoyment, consumption, sale or distribution and did not mix with the mass of the property of the country, the product could not be said to have been imported.

27. Even, while analysing the decisions relied on by the learned Senior Counsel for the petitioner, they reveal the same principle.

28. In **K.R. Ahmed Shah vs. Additional Collector of Customs, Madras and others (1981 E.L.T. 153 (Mad.))**, the learned Single Judge of this Court, has observed as under:-

"To construe the words 'import' and 'export' as meaning 'bring in' or 'take out' of or away from and cover the goods in transit by the words 'imported into' or 'exported from' would make the air borne goods passing through India liable to confiscation or other penalties provided for under the Customs Act as soon as the plane lands or takes off from the airport. Such an interpretation would not only lead to inconvenience and confusion but would also result in inordinate delay and unbearable burden on the

inter State and intra State trade. *Therefore, it is well settled law that unless goods are brought into the country for the purpose of use, enjoyment, consumption, sale or distribution are incorporated in and got mixed up with the totality of the property in the country they cannot be said to have been imported. Thus it cannot be said that the moment the aircraft landed at the airport or the ship entered the territorial waters of India, an importation has taken place. Importation can only be said to have taken place when the goods have crossed the customs barrier."*

29. In *Shewbuxrai Onkarmall vs. Assistant Collector of Customs and others* (1981 E.L.T. 298 (Cal.)) the learned Single Judge of the Calcutta High Court has ruled that, "unless and until the goods are removed from the bonded warehouse, the process of importation of goods cannot be said to be complete."

30. In *Bayer (India) Ltd., Bombay vs. Collector of Customs, Bombay* (1984 (16) E.L.T. 375 (Tribunal)) the Special Bench 'C' of CEGAT, at New Delhi, has held as under:-

"Reference to Section 2(25) of the
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 Act to the definition of imported

goods does not advance the matter for the appellant. The definition says that "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. Thus it is clear that the goods remain imported goods till they are cleared for home consumption, which cannot be done without complying with Section 15, and presenting a Bill of Entry under Section 46 of the Act. Therefore, the definition of imported goods would suggest that import is not complete for fiscal purposes at the time when the ship entered the territorial waters. Rather import is incomplete till the goods are cleared for home consumption.

31. Therefore, it is very clear that unless and until the imported goods are clear for home consumption, it cannot be said that the importation of goods is completed and therefore, since the product of the petitioner is still in the bonded warehouse, it cannot be said that the process of import of goods is completed and that any agreement or contract entered by the petitioner with the first respondent cannot be held to be a valid contract, but it is a voidable one as it cannot be enforced.

32. Further, when the petitioner has not become the absolute owner of the said product, it does not have any power to execute any agreement over the said product with anybody and therefore, this court is of view that the agreement entered into by the petitioner with the first respondent is void.

33. Since the very agreement has been held as void, the question of breach of agreement does not arise. However, a perusal of the Clauses of the agreement also would reveal that the breach of agreement was committed by the petitioner, which is evident from Clause No.20 of the Agreement.

34. Clause 20 of the agreement reads as under:-

"Disclosure By Parties: The Parties hereto state and affirm that they have, prior to and at the time of entering into this Agreement, made full disclosure of all material circumstances and information known to it respecting the subject matter of the Agreement and transaction which would be likely to influence the conduct or decision of the other Party."

35. As per Clause 20 of the agreement, the petitioner ought to have disclosed the fact that the product is not cleared for home consumption and the process of importation is yet to be completed and such the non-

disclosure of such fact, would invalidate the very agreement itself by the self contained clause.

36. Had the petitioner revealed the fact that the process of importation has not yet been completed, the first respondent would not have entered into an agreement with the petitioner. Even then, if he had entered into the agreement, the petitioner cannot be held responsible for the breach of agreement.

37. The learned Senior Counsel has strenuously argued that though there is a specific Clause in the agreement with regard to the obtaining of permission from the Customs and State Excise Authority for utilising the said product by the purchaser, the failure on the part of the first respondent to get necessary permission from the concerned authorities would amount to breach of contract as per Clause 6.2 of the agreement and therefore, the petitioner need not to repay the advance amount with interest as per the Award.

38. At this juncture, it is pertinent to refer to Clause 6.2 of the Agreement, which reads as under:-

"The Buyer shall take the responsibility to get the required specific permission from the Customs / State Excise authority for utilising the imported Special Denatured Spirit (SDS). Originally, it was imported for specific purpose of converting the same

into Anhydrous Ethanol."

39. A plain reading of the above clause would show that since the Ethyl Alcohol was imported for the purpose of converting into Anhydrous Ethanol and when the same was not utilised for the said purpose and when it was decided to sell the same to the first respondent, it is the duty of the petitioner to obtain permission from the authorities concerned for selling the same. Even that has not been done by the petitioner and therefore, this Court is of the view that the petitioner has committed breach of contract as per Clause 6.2 of the agreement also.

39(a). In this regard, it is more pertinent to refer to the letter addressed by the Office of the Commissioner of Prohibition and Excise A.P. Hyd in Cr.No.13645/2004/CPE/B4, dated 21.4.2005 to the first respondent and a copy of the same was sent to the petitioner. It reads as under:-

"In the reference cited it was informed that the above company has purchased 8000 Mts of Special DS imported from Brazil by M/s.KCP Sugar & Industries and M/s. Jeypore Sugar & Co. Ltd. on bond to bond transfer basis and requested to permit them to transport the goods from Visakhapatnam to their factory at Mahad in Raigad district of Maharashtra State either by Sea or by road tankers.

In this connection they are informed that the above two companies have imported Special DS for specific purpose and for any change in the purpose or for sale of imported SDS they have to obtain specific permission from the Govt. and without that they cannot sell the material. For this purpose they have to approach the Govt. As regards the request in the reference cited M/s.Laxmi Organic Industries Ltd. are informed that they have no Locus Standi and any representation in this regard has to be made by the owner of the property i.e. M/s.KCP Sugar and Industries Corpn. Ltd and M/s.Jeypore Sugar & Co. Ltd. Hence, their request cannot be considered."

39(b). In the above letter, it is clearly stated that the petitioner has imported Special DS for specific purpose and for any change in the purpose or for sale of imported SDS, they have to obtain specific permission from the Government and without that they cannot sell the material, for which, they have to approach the Government and therefore, the petitioner cannot rely on the Clause 6.2 of the agreement.

39(c). In view of the above letter, the first respondent has addressed a letter, dated 22.4.2005, that is , the very next day, narrating the above said facts and demanded repayment of the advance of rupees one

crore with interest and therefore, considering all these aspects, the learned Arbitrators have passed an award directing the repayment of rupees one crore with interest, which is just and reasonable and there is no reason for this Court to interfere with such well-reasoned award.

40. Further, the learned counsel for the first respondent has contended that that when the learned Arbitrators have considered all the aspects and ultimately passed the well-reasoned award directing the petitioner to repay the advance amount with interest, this Court cannot interfere with the findings and conclusion of the learned Arbitrators.

41. In the decisions relied on by the learned counsel for the first respondent, it is just and necessary to refer to the following extracts:

(a) Municipal Corporation of Delhi vs. Jagan Nath Ashok Kumar and another ((1987) 4 SCC 497), the Hon'ble Supreme Court, has held as under:-

"2. The arbitrator gave reasons in support of the award. The question is whether reasonableness of the reasons in a speaking award is justiciable under Article 136 of the Constitution. We are of the opinion that such reasonableness of the reasons given by an arbitrator in making his award cannot be challenged in a

proceeding like the present. It is desirable, however, that we state our reasons for so holding.

4. In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factors to be taken into consideration. The award cannot be said to be vitiated by non-reception of material or non-consideration of the relevant aspects of the matter. Apprisement of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of apprisement of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The Arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by it self is no ground in our view for setting aside the award of an arbitrator.

7. In this case the reasons given by the arbitrator are cogent and based on materials on record. In

Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is "reasonable" in each particular case. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. See the observations, in *Re a Solicitor* [1945] K.B. 368 at 371 of the report . "

b. In *Puri Construction Pvt. Ltd. vs. Union of India* ((1989) 1 SCC 411), the Supreme Court has observed as under:-

"7.....When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the

award on merits. However, so far as the present case is concerned, the decision of the arbitrator is supported by the evidence led before him including the evidence of the Union of India, and appears to be correct on merits also.

13. Although Mr. Sibal relied upon various other parts of the records, we do not think it necessary to consider the merits of the claim, in further detail, specially because no detailed reply was attempted on behalf of the respondent. Besides, a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The scope is very limited and none of the points which can be entertained has been substantiated by the objector-respondent. Mr. Sibal dealt with the merits of the claim, as he put it, only for satisfying the conscience of the Court that the award was fair. He went to the length of saying that actually by refusing further relief to which the contractor is entitled to (which will be dealt with hereafter), the arbitrator acted very strictly in allowing the claims."

c. In **M/s. Sudarsan Trading Co. vs. Government of Kerala and another** ((1989) 2 SCC 38), the Apex Court has observed as under:-

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"29. The next question on this aspect

which requires consideration is that only in a speaking award the court can look into the reasoning of the award. It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao, [1987] 4 SCC 93. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he was done what he has done; he has narrated only now he came to make the award. In absence of any reasons for making the award, it is not open to the court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisal of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator. See the observations of this Court in [Municipal Corpn. of Delhi v.](#)

M/s Jagan Nath Ashok Kumar & Anr., [1987]
4 SCC 497.

31. An award may be remitted or set aside on the ground that the arbitrator in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside award--whatever might be said about it in the award or by the arbitrator. See in this connection, the observations of Russell on The Law of Arbitration, 20th Edn. 427. Also see the observations of *Christopher Brown Ltd. v. Genossenschaft Oesterreichisch-er etc.*, [1954] 1 QB 8 at p. 10 and *Dalmia Dairy Industries Ltd v. National Bank of Pakistan*, [1978] 2 Lloyd's Rep 223. It has to be reiterated that an arbitrator acting beyond his jurisdiction--is a different ground from the error apparent on the face of the award. In Halsbury's Laws of England (4th Edn. Vol. 2 para 622) one of the misconducts enumerated, is the decision by the arbitrator on a matter which is not included in the agreement or reference. But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. See the observations in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 AC 147

and Regina v. Nosedá, Field, Knight & Fitzpatrick, [1958] 1 WLR 793. But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of 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 or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction."

d. The Apex Court in **B.V. Radha Krishna vs. Sponge Iron India Ltd.** (1997) 4 SCC 693, has rendered thus:-

"11. The disposal of the matter by the High Court in the manner shown above does not come within the ambit of section 30 of the Arbitration Act. This Court, time and again, has pointed out the scope and ambit of section 30 of the Act. In State of

Rajasthan vs Puri Construction Co. Ltd. and Another (1994) 6 SCC 485 after referring to decisions of this Court as well as English cases. The Court observed as follows:

"On the scope and ambit of the power of interference by the court with an award made by an arbitrator in a valid reference to arbitration, various decisions have been made from time to time by Law Courts of India including this court and also by the Privy Council and the English Courts. Both the parties have referred to such decisions in support of their respective contentions. The factual contentions of the respective parties are proposed to be scrutinised and then the facts are proposed to be tested within the conspectus of judicial decisions governing the issues involved. This Court again observed in paras 26-28 as follows :- "The arbitrator is the final arbiter for the disputes 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. In *Sudarsan Trading Co. Vs. Govt. of Kerala* it has been held by this Court that there is a distinction between disputed as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be conflict as to the power of the arbitrator to grant a particular remedy. 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 law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis supplied) Where 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 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 award, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

e. The Supreme Court in **U.P. State**

Electricity Board vs. Searsole Chemicals Ltd. ((2001)

3 SCC 397), has held as follows:-

"However, as noticed by us, there were reasons set out in the log books or, as noticed earlier, those reasons, in the

opinion of the arbitrators, were either not relevant or where they were relevant, they were untenable. Therefore, the view taken by the arbitrators cannot be characterised as not emanating from the agreement and falls squarely within the excepted part of the proviso to clause 1 of the agreement. When the arbitrators have applied their mind to the pleadings, the evidence adduced before them and the terms of the contract, we do not think, it is within our scope to re-appraise the matter as if this were an appeal, and it is clear that where two views are possible - in this case there is no such scope - the view taken by the arbitrators would prevail.

f. The Hon'ble Apex Court in *State of U.P. vs. Allied Constructions* (2003) 7 SCC 396, has laid down as under:-

4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or

on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see [M/s. Sudarsan Trading Co. v. The Government of Kerala, AIR](#) (1989) SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering [see [U.P. State Electricity Board v. Searsole Chemicals Ltd.](#), [2001] 3 SCC 397 and [ISPAT Engineering & Foundry Works, B.S. City, Bokaro v. Steel Authority of India Ltd.](#), [B.S. City, Bokaro](#), [2001] 6 SCC 347].

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i. In Pure Helium India (P) Ltd. vs.

Oil & Natural Gas Commission (2003) 8 SCC 593), the Supreme Court has rendered as under:-

"21. Before the arbitrators apart from construction of the contract agreement, the questions which, inter alia, arose were : (a) the effect and purport of circular letter dated 25.9.1989 issued by the Central Government: (b) the conduct of the respondent in making the payments to the persons similarly situated.

22. Construction of a deed sometimes pose a great problem.

23. Justice Frankfurter said : "there is no surer way to misread a document than to read it literally." [Massachusetts B. & Insurance Co. vs. U.S. (1956) 352 US 128 at p. 138].

24. We, however, as discussed in details a little later are strictly not concerned as regard true import and purport of the relevant clauses of the contract agreement. Our concern is merely to see as to whether the learned arbitrators exceeded their jurisdiction in making the award.

25. The learned arbitrators, as noticed hereinbefore, in making the award took into consideration the documentary as well as circumstantial evidence including rival pleadings of the parties. It is trite that the terms of the contract can be express or implied. The conduct of the

parties would also be a relevant factor in the matter of construction of a contract. 27. Construction of the contract agreement, therefore, was within the jurisdiction of the learned arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, thus, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties as also the circumstantial evidence.

28. A dispute as regard the construction of clause 23 of the contract vis-à-vis the notification issued under Section 40 of the Reserve Bank of India Act also fell for their consideration. Such a question of law, it is trite, is also arbitrable and was specifically raised by the appellant. The learned arbitrators were further entitled to consider the question as to whether the appellant had been discriminated against insofar as similar claims have been allowed by the respondent.

CASE LAWS ON THE POINT :

29. In State of U.P. vs. Allied Constructions [2003 (6) SCALE 265], this Court held :

"...Interpretation of a contract, it is trite, is a matter for arbitrator to

determine (see M/s Sudarsan Trading Co. vs. The Government of Kerala, AIR 1989 SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. One it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering..."

30. In K.R. Raveendranathan (supra), the law was laid down in the following terms :

"2. The learned counsel for the appellant points out that the question in issue in the present appeals is squarely covered by the decision of this Court in Hindustan Construction Co. Ltd. v. State of J&K ((1992) 4 SCC 17). In particular,

<https://hcservices.ecourts.gov.in/hcse/vites/> drew our attention to para 10 of the judgment and the portion extracted from

the decision in Sudarsan Trading Co. case (Sudarsan Trading Co. v. Govt. of Kerala, (1989) 2 SCC 38) wherein it was said that by purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. That is exactly what the Court has done in the instant case..."

31. K.R. Raveendranathan (supra) has been followed by this Court in P.V. Subba Naidu (supra) stating:

"4. The entire thrust of the judgment is on examining the terms of the contract and interpreting them. The terms of the arbitration clause, however, are very wide. The arbitration clause is not confined merely to any question of interpretation of the contract. It also covers any matter or thing arising thereunder. Therefore, all disputes which arise as a result of the contract would be covered by the arbitration clause. The last two lines of the arbitration clause also make it clear that the arbitrator has power to open up, review and revise any certificate, opinion, decision, requisition or notice except in regard to those matters which are expressly excepted under the contract, and that the arbitrator has jurisdiction to determine all matters in dispute which shall be submitted to the arbitrator and of which notice shall have been given.

5. In the present case all the claims in question were expressly referred to arbitrator and were raised before the arbitrator. The High Court was, therefore, not right in examining the terms of the contract or interpreting them for the purpose of deciding whether these claims were covered by the terms of the contract."

36. It was concluded :

"(a) It is not open to the Court to speculate, where on reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the arbitrator

was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction."

conclusions arrived at in Rajasthan State Mines & Minerals Ltd. (supra).

Clause (g) of the conclusion in the said case, as quoted supra, is not applicable in the instant case inasmuch as there does not exist any provision which does not permit or give the arbitrator the power to decide the dispute raised by the claimant nor there exist any specific bar in the contract to raise such claim."

j. The Supreme Court in **Bharat Coking Coal Ltd. vs. L.K. Ahuja ((2004) 5 SCC 109)**, has held as follows:-

"11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

Ltd. (2005) 6 SCC 462), the Hon'ble Apex Court has observed as under:-

"25. This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power under Section 30, cannot re-appreciate the evidence or examine correctness of the conclusions arrived at by the Arbitrator. The jurisdiction is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, other view is equally possible. It is only when the court is satisfied that the Arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is 'otherwise' invalid that the court may set aside such award.

26. In the leading decision of *Hodgkinson v. Fernie*, (1857) 140 ER 712, Williams, J. stated;

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent

witness or the rejection of a competent one. The court has invariably met those applications by saying, 'You have constituted your own tribunal; you are bound by its decision.'" (emphasis supplied)

29. In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr., [1999] 9 SCC 283, this Court after considering several decisions on the point, held that if an Arbitrator has acted arbitrarily, irrationally, capriciously or beyond the terms of the agreement, an award passed by him can be set aside. In such cases, the Arbitrator can be said to have acted beyond the jurisdiction conferred on him.

30. In U.P. State Electricity Board v. Searsole Chemicals Ltd., [2001] 3 SCC 397, this Court held that where the Arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the court could not interfere by reappraising the matter as if it were an appeal.

31. In Indu Engineering & Textiles Ltd. v. Delhi Development Authority, [2001] 5 SCC 691, it was observed that an Arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with.

32. In Bharat Coking Coal Ltd., v. M/s. Annapurna Construction, [2003] 8 SCC 154, this Court held that there is

distinction between error within jurisdiction and error in excess of jurisdiction. The role of the Arbitrator is to arbitrate within the terms of the contract and if he acts in accordance with the terms of the agreement, his decision cannot be set aside. It is only when he travels beyond the contract that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate court.

35. In our opinion, however, the learned counsel for BOL is justified in submitting that really it was in realm of appreciation and re-appreciation of evidence. At the most all those letters go to show that HCL had some complaint against BOL and it had also disclosed its intention to purchase oxygen gas from other sources but as observed by the Arbitrator, it was not proved that HCL had in fact purchased oxygen from other sources under Clause 10.4. If in the light of such evidence, the Arbitrator did not think it fit to allow counter claim, it could not be said to a case of misconduct covered by Section 30 of the Act. The learned single Judge as also the Division Bench were, therefore, not justified in setting aside the award passed by the Arbitrator dismissing the counter-claim and hence the order of the learned single Judge as confirmed by the Division Bench deserves to be set aside by restoring

dismissal of counter-claim of HCL by the Arbitrator.

1. In Hindustan Zinc Ltd. vs. Friends Coal Carbonisation (2006) 4 SCC 445), the Hon'ble Supreme Court laid down thus:

"13. This Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., III (2003) SLT 324=II (2003) CLT 242 (SC) =2003 (5) SCC 705, held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by Court under Section 34(2) of the Act. This Court observed :

"The question, therefore, which requires consideration is whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the

Transfer of Property Act or in violation of the Indian Contract Act, the question would be whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34."

"....., in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a

wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renuagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to

public policy and is required to be adjudged void."

14. The High Court did not have the benefit of the principles laid down in *Saw Pipes (supra)*, and had proceeded on the assumption that award cannot be interfered, even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in *Saw Pipes (supra)*, has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

j. In **Oil and Natural Gas Corporation Ltd. vs. Western Geco International Ltd.** ((2014) 9 SCC 263), it is held as under:

"28. Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must

apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

29. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury's* principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available."

42. On a perusal of the Award in the light of the principles laid down in the above cited decisions and for

the foregoing reasons, this Court is of view that the

learned arbitrators gave valid reasons in support of the award. After having discussed elaborately, the learned Arbitrators have come to the just and correct conclusion that since the petitioner has committed the breach of agreement, they are liable to re-pay the advance amount with interest, however, negated the other claims of the first respondent and therefore, there is nothing warrants the interference of this Court with the Award of the learned Arbitrators.

In the result, the petition is dismissed, confirming the Award passed by the learned Arbitrators. However, there will be no order as to costs.

sd/.R.M.D.J
06.07.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/03.08.2015

COURT OFFICER

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