

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Md. Nizamuddin

FMAT No. 376 of 2019

Pam Developments Pvt. Ltd.
Vs.
State of West Bengal & Anr.
With
COT No. 54 of 2019
State of West Bengal & Anr.
Vs.
Pam Developments Pvt. Ltd.

For the Appellants/ Respondent (in COT)	:	Mr. Sakya Sen Mr. Priyankar Saha Mr. Amritam Mandal Mr. Aditya Mondal Mr. Hemant Tiwary
For the State	:	Mr. Jishnu Chowdhury Mr. Paritosh Sinha Ms. Manali Ali Mr. Tirthankar Das Mr. Arindam Mondal Ms. Antara Chowdhury
Judgment on	:	03.06.2021.

I. P. MUKERJI, J.-

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is the third round. The first round was before the learned arbitrator. He made and published an award on 30th January, 2018 for Rs.1,37,25,252/- in favour of the appellant dealing with their claims 1 to 5 together with interest and the counter claim of the respondent state. The second round was an application by the respondent under Section 34 of the said Act before the learned District Judge, Purba Medinipur, challenging the award. The learned District Judge by a detailed judgment and order dated 8th March, 2019 set aside the award for claims 1 and 2,

and upheld the rest of the award. The third round is the appeal before us. The respondent has preferred a cross-objection.

Before us, on one hand, the award is for scrutiny. On the other hand, are the principles of law circumscribing the powers of the appeal court in interfering with the judgment of the court below made after a detailed scrutiny of the award.

A short background of the case is now necessary.

The agreement between the parties was made on 22nd December, 2010.

The work involved was widening and strengthening of 13 kms. of Egra, Bajkul Road (43 km – 30 km) in the Tamluk Highway division of Purba Medinipur district. The appellant was engaged by the respondent as a works contractor. They were to do this work in about one and a half years from 22nd December, 2010, the date of the work order. The date of completion of the work was 22nd June, 2012. It could not be completed in this period. Both the parties exchanged allegations against each other for the delay in the completion of the work. It was ultimately completed on 9th November, 2012. There was no formal extension of the time period for completion. More than six months after completion of the project, the appellant on 12th June, 2013 raised a bill for escalation.

In 20th May, 2016, the appellant invoked the arbitration clause. They made a total claim of Rs.4,71,16,939/- before the learned arbitrator which is more fully shown in the table below:

Sl. No.	Particulars of Claim as described in the Statement of Claim	Claimed Amount [Rs.]
1.	Loss of business	80,84,649/-
2.	Uneconomic Utilization of Plant and machinery	1,67,40,000/-
3.	Labour Charges for uneconomical and certain stoppage of work	47,57,000/-
4.	Interest on delay in payment of Running Account Bills and Escalation Bills	1,37,50,000/-

5.	Escalation Bill	37,85,290/-
	Total	4,71,16,939/-
6.	Interest @18% p.a. on awarded sum	
7.	Cost	

There is no grievance of the appellant with regard to the payment of the consideration under the contract. In fact, the appellant has admitted in their written notes of argument that measurement of the work was taken by the respondent and payment made. There is a claim for interest for the delay in payment and for payments for extra works together with claims in the nature of damages.

Before the learned arbitrator the appellant made claims under several heads.

The first was captioned as “loss of business”. The claimed amount was Rs.80,84,649/-. The foundation for this claim was this. The value of work executed beyond the completion date was Rs.4,04,23,245/-. This amount became payable to them after five months, which was the overrun period. They were deprived of enjoying the “profit” that would have been earned had the work deem done and payment been made on time. This was estimated to be Rs.87,26,876/- applying a formula known as Hudson formula in building engineering contract.

The learned arbitrator in his award dated 30th January, 2018 went by a completely different route. Although not claimed by the appellant, he treated this claim as one for “off site expenses”. He ruled that 1.5% of the proportionate contract work value for the overrun period should be awarded on this account and made an award for Rs.3,87,530/- for this claim.

In the impugned judgment and order the learned judge observed that no claim on this account had been made by the appellant and set aside the award for it on the ground that it was “unfair, unreasonable and contrary to the fundamental policy of justice and.....not tenable in the eye of law”.

Extensive arguments were made by learned counsel for the parties, on one hand supporting the award and on the other hand attacking it. The result was that each party supported only part of the impugned judgment and order.

Before disentangling the complex web of authorities on the subject, laying down principles on which an award may be set aside, Section 34(2)(a)(iv) of the said Act may be noticed. It is as follows:-

“34. Application for setting aside arbitral award. —(1) *Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

*(2) An arbitral award may be set aside by the Court only if -.....
.....(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”*

An arbitrator has only jurisdiction to decide what is referred to him and does not have jurisdiction to decide what is not referred to him. If a claim is not made, there is no dispute with regard to that matter before the arbitrator. It cannot and does not form part of the terms of “the submission to arbitration”. Therefore, if an arbitral award is made in respect of that matter it can be considered as a decision “on matters beyond the scope of the submission to arbitration.” Whether the appellant incurred “off site expenses or not” and whether those expenses incurred were liable to be reimbursed by the respondent were not

referred to the arbitrator. He had no jurisdiction to determine the issue. Having done that, he transgressed his jurisdiction. The learned judge had rightly set aside the award in respect of claim no. 1. Whether the appellant was entitled to loss of profit as claimed, is immaterial because the learned arbitrator held that it was not proved by them. In those circumstances, that part of the impugned judgment and order is upheld.

This kind of an error by the arbitrator also renders the award patently illegal as held in **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)** reported in **(2019) 15 SCC 131**.

In **Municipal Corporation of Delhi vs. M/s. Jagan Nath Ashok Kumar and Anr.** reported in **(1987) 4 SCC 497** the Supreme Court said that ordinarily the court never considers appraisal of evidence by the arbitrator. The arbitrator is the sole judge of the quality and quantity of evidence. Even if it was possible on the same evidence for the court to arrive at a different conclusion than that of the arbitrator, the court could not substitute its opinion for that of the arbitrator. [See also **(2018) 1 SCC 718**].

Now, before proceeding further with the award and the impugned judgment and order, the authorities on the grounds of challenge to the award cited before us need to be noticed. The court cannot substitute its own view for the views of the arbitrator by re-appreciation of the evidence or the law, provided the view taken by the arbitrator is reasonable and plausible. [See **Sutlej Construction Limited vs. Union Territory of Chandigarh** reported in **(2018) 1 SCC 718**]. The court does not sit in appeal over the award of the arbitrator. The court is not permitted to interfere with the award because it takes a different view with that of the arbitrator. (See **Associated Construction vs. Pawanhans Helicopters Limited** reported in **AIR 2008 SC 2911**). Our division bench in

Tonganagaon Tea Co. Pvt. Ltd. vs. Associated Tea Industries reported in **2019 SCC Online Cal 231** tried to summarize the law as to when the award was patently illegal in the following manner:-

“26. Then again an award could be set aside if it was patently illegal. In ONGC Ltd. v. Saw Pipes Ltd. reported in (2003) 5 SCC 705 followed in Associate Builders v. Delhi Development Authority reported in (2015) 3 SCC 49, the Supreme Court interpreted the requirement of Section 28 of the said Act imposing a duty on the arbitrator to decide domestic arbitrations in accordance with the substantive law for the time being in force in India and if there was departure from this, it could be viewed as a patent illegality calling for rescission of the award. However, the proviso to Sub-section 2A of Section 34 of the Arbitration and Conciliation Act, 1996 clarifies that the patent illegality should appear on the face of the award. Furthermore, the erroneous application of the law or failure to appreciate evidence shall not be a ground for setting aside of the award. Sub-section 2A was introduced by an amendment with effect from 23rd October, 2015. This award was made on 4th July, 2014. Nevertheless, this amendment is to be taken as declaratory or clarificatory and to be a declaration of the intention of the parliament from the time of enactment of the original section. Applying ordinary principles, an error of law on the face of the record would imply some premises of law on which the arbitrator has proceeded and which premises is absolutely erroneous. In my opinion, any mis-appreciation of the law or misapplication of it in the body of the award would not render the award liable to be set aside but any mis-declaration of the law would have this effect.”

In the recent decision of **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)** reported in **(2019) 15 SCC 131** the Supreme Court tried to comprehensively lay down the law with regard to the grounds of challenge to an award. It said that an award against public policy of India would mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 in the case of **Associate Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**, which are:

“18. In Renusagar Power Co. Ltd. v. General Electric Co., the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—

** * **

(b) if the Court dealing with the case is satisfied that—

** * **

(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

(i) The fundamental policy of Indian law,

(ii) The interest of India,

(iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

27. Coming to each of the heads contained in Saw Pipes judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.”

An award could be challenged if it was contrary to the principles of natural justice. If an award shocks the conscience of the court, it would be set aside on the ground that it was in contravention of the public policy of India or the basic notions of morality or justice. An award could

be set aside if there was patent illegality on the face of the award which means an illegality which goes to the root of the matter and not mere erroneous application of the law. An award contrary to substantive law is permitted provided such error does not offend public policy or public interest. Lack of reasons or adequate reasons in an award amounts to patent illegality.

An arbitrator is allowed to construct a contract in a fair and reasonable manner and to take a possible view of the matter. If he travels outside the contract, he transgresses his jurisdiction. On that ground the award can be set aside. A perverse award would amount to one with patent illegality. An award on no evidence or ignoring “vital evidence” is perverse. An arbitral award beyond the contract or the disputes submitted for arbitration or beyond the arbitral reference or which takes into account matters which ought not to have been taken into account by the arbitrator or does not take into account matters which ought to have been taken into account by the arbitrator is liable to be set aside.

The interpretation of awards that are against “most basic notions of morality or justice” has to be made according to paragraphs 36 to 39 of the **Associate Builders** Case [(2015) 3 SCC 49] which are:

“36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

Morality.

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Indian Contract Act, so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality".

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (XLV of 1860)."

38. In *Gherulal Parekh v. Mahadeo Dass Maiya*, 1959 Supp (2) SCR 406, this Court explained the concept of "morality" thus-

"Re. Point 3 - Immorality: The argument under this head is rather broadly stated by the learned Counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu Law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu Law considers to be immoral in that context may appropriately be applied to a case under s. 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu Law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

"The only aspect of immorality with which Courts of Law have dealt is sexual immorality..... ."

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138 :

"A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal

contracts. The immorality here alluded to is sexual immorality."

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

"Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible."

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

"The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment."

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by Courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of S. 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and

authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "the court regards it as immoral", brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognized and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

39. This Court has confined morality to sexual morality so far as section 23 of the Contract Act is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience."

A perverse award is patently illegal.

The second claim in the statement to claim is entitled "uneconomic utilization of the plant and machinery". The amount claimed was Rs.1,67,40,000/-. It was alleged that the bill of quantities provided by the respondent was delayed or erroneous. The plant and machinery which were hired by the appellant could not be utilized to their full capacity. They remained idle for a substantial period of time. The total time period of idleness was 250 days. There was further delay on account of stacking of construction materials on roads and stoppage of work etc. The extra hire charges allegedly paid for under utilization of this machinery were claimed.

The learned arbitrator adjudged the number of wasted days to be 200 machine days. He assessed the extra expenses to be Rs.61,22,000/- only by calculating the extra expenses incurred in procuring the machinery in

the same proportion as the total cost of the machinery for the extended days bore to the total cost of such machinery for the original time period.

The following reason was advanced by the learned arbitrator:-

“.....Claimant carried out work as per scope available at site for a few items at initial stage pending approval of excess quantity from competent authority. It is also on record that the claimant deployed all the plant and machinery as required under the contract and to that effect, documents have been filed by both the parties. The respondent has also submitted calculation/deployment of plant and machinery vide memo 1263 dated 28.6.2017 & 1492 dated 1.8.2017. There is no grievance or denial of deployment of such plant and machinery at material time by the respondent. Inspection of Plant & machinery of claimant was also carried out by Respondent as per record.

21.2. The claim of the claimant for delay of 297 days is not justified, as claimant should/could have taken steps for mitigation of loss during some period.....However, I consider reasonable cumulative period for underutilization should be 200 machine- days taking into consideration all relevant factors. I am unable to accept operational charges based on schedule of A.P. claimed by claimant. I find it reasonable to proceed with relevant particulars furnished by the Respondent's statement as mentioned above. Respondent had knowledge of disruption of works for reasons as listed above and in that circumstances, Claimant is entitled to be compensated reasonably on the basis of particulars on record. Respondent calculated total cost involvement of Plant & Machinery for Rs.2,18,66,028/- based on schedule rates of hire charges. Rate of any item is derived by adding profit etc. @ 10% over basic rate [As adopted in analysis of item by respondent]. Accordingly, total cost is Rs.2,18,66,208/- $\times 1.1 =$ Rs.2,40,52,829/-. Such cost is applicable for contract period of 18 months. Thereby, average weighted cost per month is Rs.24052829/18=

Rs.1336268/- or Rs.44,542/- per day. As claimant quoted 31.28% below, claimant is entitled for Rs.44,542 x (1-0.3128) = Rs.30,610/- per day. Therefore, claimant is entitled to be compensated for Rs.30,610 X 200 days = Rs.61,22,000/- only.”

The learned Judge in the impugned judgment and order overturned the finding of the arbitrator by advancing the following reasons:-

“Admittedly, the respondent herein has commenced the work for the mid February, 2011, whereas the stipulated date for commencing of work was 23.10.2010. It appears from the document on record that claimant/respondent requested the petitioners to approved supplementary work on 12.04.2011. It is evident nearly 135 days have been lost in the matter of making suggestion for supplementary work by the respondent. The claimant/respondent has claimed that there was delay of 290 days and claimant/respondent was not way responsible for such delay.

Learned Arbitrator has come to a conclusion that reasonable cumulative period for under utilization should be 200 machine days taking into consideration all the relevant factors. But, it is apparent from the award that the learned Arbitrator has turned a blind eye to the delay in commencing of work and 135 days delay in making suggestion of supplementary work.

The learned Arbitrator has awarded a sum of Rs.61,22,000/- on account of Claim No.2 without taking into account the aforesaid facts. Strangely enough, no reason has been assigned for such calculation of 200 machine days while allowing the claim No.1 put forward by the claimant/respondent. Such award appears to be unfair, unreasonable and against the concept of justice. So, award in respect of claim No.2 does not appear to be convincing in the eye of law.”

I find that the learned arbitrator has determined the cost of hire of the plant and machinery deployed by the appellant. He has also determined its underutilization in terms of machine days, which he computed at 200 machine days. The ratio of the admissible value of the hire charges for extra work to the total cost of hire was determined. That proportion of the total cost of hire was awarded.

The argument of the respondent that the appellant could not claim the cost incurred for machinery for the overrun period is not tenable because the claim is in the nature of damages arising out of underutilization of the machinery hired by the appellant for a particular quantity of work for a specified period. That quantity of work according to the appellant ought to have been done in a particular time frame. The same quantity of work having been prolonged the same machinery had to be detained for a longer period of time incurring extra hire charges. This is in the shape of damages and is not covered by the contractual bar to claim extra costs involved to complete work done during the overrun period, which should be strictly confined to labour, materials, overheads and so on.

I find that the reasoning process of the learned arbitrator was perfectly sound. It is a very reasonable view of the matter. The learned judge had no jurisdiction to substitute his own view for that of the learned arbitrator, when there was no infirmity in the award, let alone patent illegality or, breach of public policy, canons of morality etc. and so on.

Claim No.3 related to labour charges for “uneconomical and certain stoppage of work.” The claimed amount was Rs.47,57,000/-. The claim is founded on the delay in start of the work and in the progress of the work. Labour had been hired by the appellant but remained idle for lack of utilization. The learned Arbitrator in paragraph 13.2 of the award held that there was no delay on the part of the appellant to proceed with the work. Work was slowed down due to additional work directed to be done

by the respondent. The learned Arbitrator came to the conclusion that the delay was attributable to the respondent. He also held in paragraph 13.5 that the appellant could not be held responsible for the delay caused by hindrances by local people. Taking all these factors into account the learned Arbitrator opined:

“However, I consider the claim for ‘on-site establishment’ under the head ‘C’ as permissible to the extent of 3% of the contract amount as per Hudson’s formula, for expenses on engineers, supervisors etc (as per record submitted). Site establishment is not in the category of Labour. There was neither any denial by respondent nor any shortfalls of site establishment to maintain at site of work during material time. Claimant submitted documents and maintained such establishment to execute the work. No grievance is on record from the side of Respondent. As per page 634 of Building and Engineering Contracts in India G.T. Gajria, 3rd edition, an allowance of 10% would be adequate for the contractor’s actual expenses on supervisory establishment, field office and share of head office charges, travelling expenses, publicity, interest and insurance of damage to the plant and injury of labour [vide paragraph 2.36.1 – overheads.

ON SITE EXPENSE (As below)

$$\frac{3\% \times \text{Rs.}10,33,41,702 \times 4.5 \text{ months}}{18 \text{ months}}$$
$$= \text{Rs.}7,75,062/-$$

22.2:- As the claimant claimed for Rs.1,29,000/- p.m. under head ‘C’ [page-49 of SOC], I restrict award at Rs.5,80,500/- for overrun period of 4.5 months.”

The learned Judge upheld this head of award.

The first argument which I have to deal with is that there were special terms in the contract which prohibited the arbitrator from considering any extra claim on account of idle labour, machinery etc. Reference may be made to the following terms.

“SPECIAL TERMS AND CONDITIONS

CONDITION IN EXTENDED PERIOD

As Clause 4 of W.B.F. 2908 or Clause 5 of W.B.F. No.2911 (ii) as the case may be when an extension of time for completion of work is authorised by the Engineer-In-Charge, it will be taken for granted that the validity of the contract is extended automatically upon the extended period with all terms and conditions rates, etc. remaining unaltered, i.e. the tender is revalidated upon the extended period.

EXTENSION OF TIME

For cogent reasons over which the contractor will have no control and which will retard the progress, extension of time for the period lost will be granted on receipt of application from the contractor before the expiry date of contract. No claim whatsoever for idle labour, additional establishment, cost of materials and labour and hire charges of tools & Plants etc. would be entertained under any circumstances. The contractor should consider the above factor while quoting this rate. Applications for such extension of time should be submitted by the contractor in the manner indicated in Clause 5 of the printed form of W.B.F. No. 2911 (ii).

IDLE LABOUR

Whatever the reasons may be no claim or idle labour, enhancement of labour rate additional establishment cost, cost of TOLL and hire and labour charges of tools and plants Railway freight etc. would be entertained under any circumstances.”

Furthermore, notice has to be taken of the argument of the respondents that any extension of the time for performance of the contract was on the same terms and conditions and that the appellant could not have claimed any extra amount for work done during the extended period. In this respect also there was patent illegality in the award. The learned judge was in error in upholding this head of award, it was submitted.

Claim 5 was on account of alleged escalation in costs, for Rs.37,85,290/-. The learned arbitrator awarded Rs.11,51,198/-.

Clause 6 of the additional terms and conditions of the contract prohibits payment for any escalation bill. The reasons advanced by the learned Arbitrator are as follows:-

“Price adjustment bill is payable strictly under terms of contract as stipulated by formulae. Contention of respondent in SOC that contractor’s percentage is not applicable is not correct. Respondent made no observation on calculations/ statement of price adjustment bill. While examining details, I find that claimant has not considered tendered percentage ‘C’ as to be applied in computation of amount on first two heads of Bitumen & Cationic emulsion. However, claimant applied correct inputs for other heads and claims are on lower side. Accordingly, I calculated total amount payable stands at Rs.51,62,228/- after due corrections. As respondent has already paid part of such amount, Claimant is entitled to balance amount as below. Respondent paid for an amount of Rs.40,11,030/- on 14.3.2016. Such amount is disputed by the claimant.....It is the case of the claimant that all the materials were used according to the requirement of site including repair of damages etc. for stacking of moorum by third agency. There is no report of misuse or pilferage etc. at material time. The claimant is entitled for such claim after adjustment of the amount already paid by the respondent. Amount is within 10% of contract amount as per stipulation.”

Mr. Chowdhury advanced the argument that Clause 6 of the additional terms and conditions of the contract prohibited any escalation claim.

Mr. Sakya Sen, learned Advocate for the appellant had an answer to this argument. He argued that by making payment of Rs.40,11,080/- on account of escalation bill, the appellant had waived the contractual term prohibiting payment for labour and on account of escalation bill. He also drew our attention to the reimbursement of the bill for Bitumen made by the appellant vide letter dated 8th October, 2013.

A contractual term or a right may be waived expressly or by conduct. Here, there was no express waiver.

There was no implied waiver either. To constitute waiver there has to be clear and unequivocal abandonment or surrender of a contractual right or a clearly expressed intention not to enforce any term of the contract.

Payment by the respondent of Rs.40,11,080/- towards the cost incurred by the appellant to procure Bitumen could not constitute an act altogether waiving the entire contractual bar on the contractor to claim extra amounts for the extended period of the contract. The waiver would be confined only to the escalation bill with regard to Bitumen and any other payment made towards escalated cost. Any other interpretation would be perverse.

In **General Manager, Northern Railway and Anr. Vs. Sarvesh Chopra** reported in **(2002) 4 SCC 45** the Supreme Court ruled that unless the extension of time to perform the contract was expressly on the basis of altered terms and conditions with regard to payment, the contract simply extended in relation to the time of performance would have to be performed by the contractor without claiming any extra consideration.

The learned arbitrator ignored the above terms of the contract which he ought to have taken into account under Section 28(3) of the said Act, whether shown to him or not by the parties and also overlooked the law

laid down by the Supreme Court. Granting the claim for extra amounts for labour, the learned arbitrator acted with irregularity, so much so that, that part of the award can be termed as patently illegal. The learned judge erred in upholding this part of the award. Therefore, the award of Rs.5,80,500/- for labour charges against Claim no. 3 is set aside. The judgment **K. N. SATHYAPALAN (DEAD) BY LRS. VS. STATE OF KERALA & ANR.** reported in **(2007) 13 SCC 43** allowing claims for machinery, labour, materials etc. as extra charge has no application because in the contract governing that case there was no prohibition on the arbitrator's power to allow the claim.

The award for escalation bill as upheld in the impugned judgment and order is sustained.

Now, I deal with claim No.4. It claims interest on delayed payment of running account bills and escalation bills. The claimed amount is Rs.1,37,50,000/-. The award for this head of claim was for Rs.54,84,024/-.

The learned Arbitrator proceeded on the basis of the statement submitted by the appellant that there was delay in the payment of these bills. The unpaid running account bills were described as "blocked capital". He viewed the delay in receiving "this blocked capital" as "loss and damage" to the appellant and granted Rs.54,84,024/- on that reasoning, as "interest".

The learned Judge upheld this award. It is challenged by the respondent.

The respondent relies on Clauses 7, 8 and 9 of the contract by which monthly bills had to be raised by the appellant on the measurement made. These payments against the monthly running account bills were to be treated as advance under Clause 7. Payment could have been made only when the gross amount exceeded Rs.1 crore. According to the respondent no bill was raised by the appellant. According to the

statement of claim of the appellant, the first bill for Rs.1,32,91,180/- was prepared on 29th August, 2011 and paid on or about 30th August 2011. Similarly, the second was prepared on 7th February, 2012 and paid on 9th February, 2012. The third and fourth bills for Rs.1,28,23,488/- and Rs.1,30,90,000/- respectively were prepared on 5th March, 2012 and paid between 30th March, 2012 and 20th June, 2012. The fifth bill for Rs.3,14,82,214/- was prepared on 6th July, 2012 and paid between 24th July, 2012 and 1st October, 2012. The sixth bill was raised on 5th July, 2012 and paid between 6th July, 2012 and 1st October, 2012. The work was completed on 9th November, 2012.

What the learned Arbitrator did not determine were the following:

- a) Who was responsible for non-preparation of the RA bill within time?
- b) Which of the RA bill claims of the appellant were to be treated as advance under the above clause of the contract?
- c) Was any notice under the Interest Act, 1978 issued by the appellant and to what effect?
- d) For what amount and for which period the claim for interest was being entertained and granted by him?

From the above narration of facts it appears that the bills were paid soon after they were prepared. In that case there could not have been any claim for interest. If a claim for interest has been made for running account bill below one crore, under the said terms it is to be treated as a claim for interest for unpaid advance. No right to claim interest arose.

Now, unless these facts were established by the appellant and discussed by the learned Arbitrator to show that there was delay in the preparation of the bills by the respondent, that those bills were over one crore and not to be treated as advance and that the right to obtain payment thereof arose on their due submission and service of a notice under the Interest Act, 1978, the award of interest could not be justified. Total absence of discussion of these facts signifies that the learned Arbitrator completely

failed to exercise his jurisdiction. This is patent illegality under the principle laid down in the **Ssangyong Engineering** case.

In those circumstances, this award was liable to be set aside and the learned Judge erred in upholding it.

The cross-objection of the respondent with regard to this head of award succeeds. Thus, the award with regard grant of interest for delayed payment of RA bills and escalation bills is set aside.

Claim No.6 is for interest. There is a narration in the statement of claim of two judgments of the Supreme Court regarding the power of the arbitrator to grant interest. The claim is made at the rate of 18% per annum on the awarded sum. No other details of the claim are made. The award discusses those decisions briefly, does not say how, and to what extent they are applicable to this case and straightway proceeds to award interest at the rate of 12% per annum from 12th April, 2016 upto the date of the award and further interest at the rate of 9.25% per annum from that date till the date of payment.

The learned Judge upheld this head of award.

First of all, the contract between the parties prohibits grant of pre-reference interest. Hence interest could not have been granted for this period. (See **Assam State Electricity Board & Ors. vs. Buildworth Private Limited** reported in **(2017) 8 SCC 146** and all the cases referred to in it). Secondly, Section 28(3) of the said Act after amendment with effect from 23rd October, 2015 states that the arbitral tribunal shall in all cases take into account the terms of the contract between the parties. The judgment of the Supreme Court in **Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI)** reported in **(2019) 15 SCC 131** makes it explicit that an award in breach of the terms of contract would be termed as patently illegal.

Furthermore, the award in claim No.2 for uneconomic use of plant and machinery is in the nature of damages. The right of the appellant to this damage crystallized on the date of the award, i.e. 30th January, 2018 when they were ascertained. One fails to understand how the award for interest could relate back to 12th April, 2016.

If the claim for interest had to be made on the escalation bills, the appellant did not have any right, as a matter of course to claim interest. A proper notice under the Interest Act, 1978 had to be served on the respondent. There is nothing in the award to state when this notice was served if at all. Hence, this part of the award is erroneous for lack of reasons and for missappreciation of the law which goes to the root of the matter, resulting in patent illegality. The learned arbitrator could only have granted interest for the pendente lite period and post award interest in respect of this head of award and only post award interest for the award for claim No.2.

Hence, in respect of the escalation bill for Rs.11,51,198/- the appellant is entitled to interest on the award as modified by this court from 3rd August, 2016 (the date the learned Arbitrator entered upon the reference) to the date of the award and further interest at the rate of 9.25% per annum from the date of the award till the date of actual payment. Interest is at the same rate from the date of the award, i.e. 30th January, 2018 till the date of payment for the award in Claim No. 2.

The final award stands modified in terms of this judgment as follows:

1. The award of the learned Arbitrator in claim No.1 for Rs.3,87,530/- is set aside. The finding of the learned Judge in the impugned judgment and order to this effect is upheld.
2. The award of the learned arbitrator in claim No.2 for Rs.61,22,000/- is upheld. The impugned judgment and order of the learned Judge disallowing this part of the award is set aside.

3. The award of the learned arbitrator in claim no.3 for Rs.5,80,500/- is set aside. The impugned judgment and order upholding this portion of the award is set aside.
4. The award of the learned arbitrator in claim No.4 for Rs.54,84,024/- is set aside. The impugned judgment and order upholding this part of the award is set aside.
5. The award of the learned arbitrator in claim No.5 for Rs.11,51,198/- is upheld. The impugned judgment and order upholding this part of the award is upheld.
6. The award in claim No.6 for interest is modified to the following effect:
 - (a) The interest specified in this part of the award will be applicable to the award in claim no.6 only confined to the reference period i.e. pendente lite interest from 3rd August, 2016 till the date of the award i.e. 30th January, 2018 and the post award period till payment.
 - (b) In the award in claim No.2 for Rs.61,22,000/- interest shall be paid from the date of the award i.e. 30th January, 2018 till realization, at the rate specified in this part of the award.

The award dated 30th January, 2018 and the impugned judgment and order dated 8th March, 2019 are modified to the above extent.

The appeal (FMA 376 of 2019) and the cross-objection (COT 54 of 2019) are disposed of accordingly.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(MD. NIZAMUDDIN, J.)

(I. P. MUKERJI, J.)