Sikkim High Court Union Of India (Uoi) vs Sagarmull Agarwal on 27 September, 2004 Equivalent citations: AIR 2007 Sik 33 Author: R Patra Bench: R Patra JUDGMENT R.K. Patra, C.J. 1. The Union of India represented by the Garrison Engineer, New Cantonment, Gangtok has filed this appeal under Section 39 of the Arbitration Act, 1940 challenging the order dated 17-9-03 passed by the Learned District Judge (East and North) Sikkim at Gangtok in Civil Misc. Case (Arbitration) No. 1 of 2003 making the award the rule of the Court. 2. The matter has a chequered career. The appellant invited tender in respect of the work "provision of special repairs to roof, joinery, floor etc. to certain buildings at New Cant, and GNR miles 2 at Gangtok". Pursuant to such invitation the respondent submitted his tender, which on being found to be the lowest, was accepted. Contract Agreement No. GE/867/30 of 80-81 was duly executed between the parties. In course of execution of the work, different disputes cropped up which could not be settled. The Chief Engineer in letter No. 98038/SMA/ ARB/30/SZ/124/E8 dated 8-4-1997 appointed Lt. Col. P. Sengupta as the sole arbitrator to decide the disputes between the parties. The arbitrator on hearing both the parties and considering the documents filed before him, gave award on 21-10-1999 which was challenged by the appellant in the Court of the District Judge, Special Division Gangtok. 3. The learned District Judge by order dated 2-2-2002 set aside the award on the ground that the original documents including the contract agreement were not produced by the department before the arbitrator and directed to appoint fresh arbitrator to decide the claims. Against the said order, the respondent filed Arbitration Appeal No. 2 of 2000 in this Court which was dismissed by order dated 9-5-2000. Being felt aggrieved by the dismissal order, the respondent filed Special Leave Petition (Civil) No. 9264 of 2000 in the Supreme Court. Their Lordships vide order dated 22-3-2002 dismissed the S.L.P. by passing the following order: In view of the fact that the matter is remitted to the Arbitrator, we are not inclined to interfere with the matter. The Special Leave Petition is, accordingly, dismissed. 4. After remand the arbitrator heard the matter afresh and on perusal of relevant documents filed before him gave the award dated 20-12-2002 in favour of the respondent amounting to Rs. 15,19,182.17 on fourteen Items together with interest thereon. The respondent filed application under Section 17 of the Arbitration Act. 1940 (hereinafter referred to as the Act) praying the learned District Judge to make the award rule of the Court. 5. The appellant on the other hand filed application under Section 33 of the Act to set aside the award. By the impugned order dated 17-9-2003 the learned District Judge has made the award the rule of the Court with further direction that the respondent would be entitled to interest @ 9% per annum on the awarded amount from the date of the award till payment. 6. Counsel for the respondent raised a preliminary objection to the maintainability of this appeal. According to him, the appellant filed application under Section 33 of the Act out of which the impugned order of the District Judge arises which is not appealable under Section 39 of the Act. I do not find any merit in this objection. Though the appellant's application was labelled to be one under Section 33 of the Act the prayer made therein was to set aside the award. Wrong or inappropriate mention of a provision of

law does not affect the contents stated in the application. The Learned District Judge considered that application along with the application of the respondent praying to make the award the rule of the Court and passed a composite order making the award the rule of the Court by refusing to set it aside though he has not specifically indicated it therein. The impugned order of the learned District Judge being essentially and substantially one under Section 39(1)(vi) of the Act. I am of the opinion that the appeal is maintainable. 7. Shri Wangdi, learned Counsel for the appellant submitted that the contract amount for the work was only Rs. 2,17,184.50 but the amount awarded by the arbitrator is practically seven times higher than the said amount and therefore, the award cannot be sustained in law. A similar contention was urged before the Supreme Court in State of Orissa v. Dandasi Sahu , Sabyasachi Mukharji, J. (as he then was) while repelling such a contention held that the fact that merely the award amount is quite high or that a large amount has been awarded does not vitiate the award as such. One has to judge whether the amount of the award was so disproportionately high to make it per se bad in the facts and circumstances of a particular case. On perusal of the items of claims it would be evident that they all relate and arise out of the work executed by the respondent. Having regard to the nature of claims involved and for the delay and inaction of the department in prolonging the completion of the work as observed by the arbitrator, the amount of the award cannot be held as shocking the conscience of the Court. I am therefore not inclined to set aside the award on this sole ground. 8. May it be stated that the award of the arbitrator is ordinarily final and conclusive. It is a decision of a domestic tribunal chosen by the parties to. the dispute. The jurisdiction of the Court to set aside the award is circumscribed by the provisions of Section 30 of the Act. It has no jurisdiction to sit in appeal and examine the correctness of the award on merit with reference to the materials produced before the arbitrator. It cannot re-assess the materials to find out If his views are correct. An arbitrator however cannot act arbitrarily and cannot render an award independent of the contract inasmuch as he derives his jurisdictional authority from the contract. If the arbitrator gives an award ignoring relevant material on record his award becomes vulnerable. It has been held by the Supreme Court in Allen Berry & Co. (P) Ltd. v. Union of India , that even when an arbitrator commits a mistake either in law or in fact in determining the matter referred to him, but if such mistake does not appear on the face of the award or in a document appended to or incorporated in It so as to form part of it, the award is not available to be set aside notwithstanding the mistake. Mere reference to the contract in the award is not to be held as incorporating it. In Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao the Supreme Court opined that it is only in a speaking award that the Court can examine the error of law on the face of the award. It is only in the award supported by reasons the Court can look into the reasoning. 9. Keeping the aforesaid undisputed legal position in view, let me now examine the items of claims awarded in favour of the respondent. Out of 28 items of claims laid by the respondent, the arbitrator has accepted 16 items and rejected the remaining 12 items. The break-up of the 16 items is as follows: Claims Amount Awaded

Claim No. 1 Rs. 3,07,923.00 Claim No. 2(a) Rs. 3,50,000.00 Claim No. 2 (c) Rs. 10,000.00 Claim No. 4 Rs. 1,50,000,00 Claim No. 5 Rs. 3,00,000.00 Claim No. 7A(ii) Interest @ 18% per annum on

months and 14 days,

Claim No. 7A(iii) Interest at the rate of 16% per annum on the awarded amount for the pre-reference period i.e. from the date of the final bill till the date of reference, pendente lite interest @ 18% per annum on the awarded amount i.e. from the date of reference till the date of the award and future interest at the rate of 18% per annum on the awarded amount from the date of the decree till payment. Claim No. 8 Rs. 75,000.00 Claim No. 9A Rs. 70,000.00 Claim No. 9B Rs. 80,000.00 Claim No. 10A Rs. 4,847.00 Claim No, 10B Rs. 46,000,00 Claim No, 10C Rs. 5,412.17 Claim No, l2A(ii) Rs. 50,000,00 Claim No. 12A(iv) Rs. 60,000.00 Claim No, 12A(v) Rs. 10,000.00 _____ Rs. 15,19,182,00 _____

At this stage it is relevant to refer to Clause 70 of the contract which deals with arbitration. Its relevant portion reads as follows:

70. Arbitration.- All disputes, between the parties to the Contract (other than those for which the decision of the C. W. E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned In the tender documents. ... The Arbitrator shall give his award ... on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute. ... The Award of the Arbitrator shall be final and binding on both parties to the contract. From the above it may be seen that the arbitrator is required to indicate his finding along with the sum awarded separately on individual items of claims. Perusal of the award would show that the arbitrator has given the award in terms of the requirements provided in the arbitration clause.
71. Claim Item No. 1 : The respondent claimed a total sum of Rs. 3,07,923.00 under this head. The arbitrator has accepted the claim and awarded the entire amount as claimed. Shri Wangdi, learned Senior Counsel appearing for the appellant contended that the aforesaid amount was awarded by ignoring condition No. 7 of the General Conditions of the Contract IAFW 2249. Shri Gupta, counsel for the respondent on the other hand submitted that the sum granted by the arbitrator is based on appreciation of the evidence on record and the Court cannot re-assess evidence and come to a contra finding. The above claim is towards "damages and losses due to non-payment of actual work done and for extra-work which are not included in the measurement book." The descriptive heading of

the claim is somewhat misleading. The claim actually relates to non-payment of dues for the actual work executed by the respondent. In the claims statement he alleged that the contract agreement did not mention the number of buildings nor the building-wise details of the works to be executed The Engineer-in-charge had given specific building-wise instruction and when the work executed exceeded the contract agreement amount, the' Engineer-in-charge changed the site order book. When the question of payment arose the department evaded payment. The respondent accordingly brought this fact to the notice of higher authorities who on consideration of the grievance appointed a Board as per the settlement dated 6-5-1985 consisting of officers belonging to MES which took the measurements of the works done by the respondent. They were noted in the register in which both parties signed but payment was not made as per the measurements recorded by the Board in the register. The said-register is in the custody of the department. The arbitrator found that the respondent executed the work as per the direction given by the Engineer-in-charge in the site order book. Before the matter was referred to the arbitrator, the department appointed one Board which took joint measurement. In course of the arbitration proceeding neither the site order book nor the proceeding of the Board was produced despite his order for production of those documents. As the site order book and the proceedings of the Board were not produced before him, the arbitrator drew adverse inference against the department and on the basis of documents produced by the respondent showing the quantum of work done he accepted the claim as laid. In paragraphs 20 and 31 of the award the arbitrator has specifically noted that many documents including the Board proceedings were not produced despite his direction calling upon the department to produce them. In paragraph 48 he drew adverse inference for non-production of the documents and observed that had those documents been produced it would have gone against the department. From the above discussion as made by the arbitrator it is evident that he accepted the claim on the basis of evidence produced by the respondent regarding the quantum of work executed by him and there was no contra evidence. The above finding is based on evidence available on record and it cannot be jettisoned by the Court by embarking upon re-appreciation of evidence. I have carefully perused condition No. 7 of the General Conditions of Contract and there is no prohibition for grant of the aforesaid claim. Condition No. 7 provides that the contractor shall not make any alteration in addition to or omission from the works as described in the tender documents except with the written instruction of the Garrison Engineer. The allegation of the respondent, as indicated above, was to the effect that as per the direction or instruction of the Engineer-in-charge he carried out the work which was noted in the site order book but the said book was not produced before the arbitrator. Claim item No. 2(a) : Under this head against the claim of Rs. 9,82,280.75 the arbitrator has awarded a sum of Rs. 3,50,000.00. The claim is made towards the damages and losses due to actual payment

for idle labour, irregular supply of schedule 'B' store materials and the non-handing over of the building for repairs. The arbitrator has found that the work although was scheduled to be completed within six months took six years and the work got prolonged due to delay and inaction of the department which included non-handing over of the vacant building for the repairs and supply of schedule 'B' store materials. Having observed as above, the arbitrator noted that the quantum of the claim could not be established by the respondent. If the respondent was not able to establish the quantum of the claim there appears to be no legal justification to award a sum of Rs. 3,50,000.00. Such a finding is perverse as it is based on no evidence and is liable to be set aside. I hereby order so. Claim No. 2(c): The respondent claimed a total sum of Rs. 1,00,000.00 as damages and losses due to over-head expenses due to head-load of materials for repair work at Hanuman Tok. Against this claim, the arbitrator has granted a sum of Rs. 10,000/- holding that in the contract agreement there was no provision for work at Hanuman Tok and the respondent executed the work by carrying the materials by headload. The award of Rs. 10,000/- is based on assessment of evidence and this cannot be upset as this Court is not sitting in appeal on the award. Claim No. 4: Against the claim of Rs. 2,24,696.54 towards damages and losses due to incorporation of own schedule 'B' store as the department could not supply the same as per the contract agreement, the arbitrator awarded a sum of Rs. 1,50,000.00. The arbitrator has found that the department admitted in paragraph 67 of its counter that the respondent had incorporated his own store in the work which was not supplied by the department as per the agreement. Accordingly the arbitrator by working out the difference in cost of materials in issue rate and market rate assessed the claim at Rs. 1,50,000.00. The above finding is based on appreciation of evidence available on record and therefore there is no scope of interference by this Court. The department seems to have relied on a letter of the respondent dated 9-10-1986 stating therein that he had. no claim of extra cost of cement. The arbitrator has found that the said letter was written by the respondent being pressurized by the department. Claim No. 5 : The respondent claimed a sum of Rs. 5,65,174.00 towards damages and losses incurred due to breach of contract and overhead expenses. The respondent's allegation was that it took six years for completion of the work on account of non-co-operation of the department. The arbitrator found that there is no evidence of involvement of the respondent with the work during this period of six years but only during the period of 63 months he was totally involved in the work and his investment was lying idle. Accordingly he granted damages for this period of 63 months only. Basing on the instruction of the Government of India that in such case 10% of overhead expenses can be granted, the arbitrator awarded a sum of Rs. 3 lakhs. This assessment being based on materials available on record, it is legally not permissible to set aside the same. Claims No. 7A(ii) and (iii): They relate to grant of interest which I propose to discuss at a later stage. Claim No. 8 : The arbitrator

granted a sum of Rs. 75,000/- as costs in favour of the respondent. Grant of costs in favour of a successful party being discretionary, no valid exception can be taken to it. Claim No. 9(A): The respondent claimed a sum of Rs. 2,00,000/- towards increase in the rate of labour. The arbitrator has found that during the relevant period the State Government increased the labour rate. Accordingly the arbitrator has awarded a sum of Rs. 70,000/- . The grant of the aforesaid amount being based on materials available on record the same cannot be disturbed. Claim No. 9(B) The respondent claimed a sum of Rs. 2 lakhs as damages and losses due to increase of rate of materials. The arbitrator found from the price list and notification of SNT that there was increase of price of materials at the relevant period. Accordingly he awarded a sum of Rs. 80,000/-. The increase of price of materials is a fact based on the price list and the relevant notification. Therefore grant of Rs. 80,000/- on this count cannot be disturbed. Claim No. 10(A) : Learned Counsel for the appellant did not address on this claim. Therefore I am not inclined to go into the merit of it. Claim No. 10(B) : The respondent claimed a sum of Rs. 46,000 as damages and losses due to recovery of dismantling of materials. The arbitrator after examining the agreement and evidence on record found that the site was located in a restricted area and the respondent could remove the dismantled materials only after getting the permission of the Engineer-in-charge. He has accordingly awarded a sum of Rs. 46,000/- only. Since the above finding is based on appreciation of evidence available on record no valid ground is available to interfere with it. Claim No. 10(C): Respondent claimed a sum of Rs. 5,412.17 towards damages and losses due to excess recovery in schedule 'B' store issued by the department. This claim appears to be duplication inasmuch as it is covered under claim No. 4 for which a sum of rupees one lakh has already been awarded. I am therefore inclined to set aside this part of the award on the ground of illegal exercise of jurisdiction. I order accordingly. Claim No. 12A(ii) : The respondent claimed a sum of Rs. 61,584 towards damages and losses due to profit of balance work. The arbitrator has granted a sum of Rs. 50,000/- on this account. The arbitrator has held that this claim is beyond the limit mentioned in the contract agreement. In view of such finding. I am inclined to hold that the arbitrator travelled beyond the four corners of the contract and therefore the award on this claim is beyond his jurisdiction. I accordingly set it aside. Claim No. 12A(iv) : The respondent claimed a sum of rupees one lakh towards damages and losses due to non provision of the plush D. O. The arbitrator found the department has partially admitted this claim and accordingly granted a sum of Rs. 60,000/-. In view of the admission of the department, the grant of the above amount cannot be held to be illegal. Claim No. 12A(v): Respondent claimed a sum of rupees one lakh towards damages and losses due to shifting of office, labour shed, workshop, camps as per the orders of the Engineer-in-charge. The arbitrator has found that the department admitted that the site was provided to the respondent for his office, labour shed, work shop etc. in the departmental

land and the respondent had to remove the same as per the notice given by the Engineer-in-charge. In absence of any prohibition in the agreement, grant of Rs. 10,000/- as damages in favour of the respondent cannot be held to be in excess of jurisdiction. Claim. No. 7A(ii) : The arbitrator has granted interest at the rate of 18% per annum on claim item No. 1 for 2 years 7 months and 14 days. Simultaneously he has also granted interest on the entire awarded amount while deciding claim No. 7A(iii). As there can be no imposition of interest on interest, I have no hesitation to set aside claim No. 7A(ii). I order accordingly. Claim No. 7A(iii) : The arbitrator has granted interest on the awarded amount as follows:

(a) Interest at the rate of 16% per annum for the pre-reference period i.e. from the date of the final bill till the date of reference.
(b) Pendente lite interest at the rate of 18% per annum i.e. from the date of reference till the date of the award.
(c) Future interest at the rate of 18% per annum from the date of decree till payment. The learned District Judge while making the award the rule of the Court has held that the respondent is entitled to interest at the rate of 9% per annum on the awarded amount from the date of the award till full and final payment is made. Under Section 29 of the Act, the Court is competent to grant interest only from the date of the decree on the principal sum as adjudged by the award' and confirmed by the decree. Therefore the direction of the learned District Judge to pay interest from the date of the award is clearly without Jurisdiction and is liable to be varied.

11. The Constitution Bench of the Supreme Court by majority in Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Buddharaj , has held that the arbitrator has power to grant interest for pre-reference period provided there is no stipulation or prohibition in the arbitration agreement excluding his jurisdiction. No provision in the agreement is brought to my notice prohibiting the arbitrator to grant interest for the pre-reference period. There is also no prohibition in the agreement forbidding the arbitrator to grant pendente lite interest. Therefore the grant of interest as per 'a' and 'b' on the above claim No. 7A(iii) as such cannot be upset. The rate of interest appears to be on a higher side. Ends of justice will be met if it is uniformly reduced to 9% per annum on both the above sub items. It is ordered accordingly.
12. The arbitrator has further directed to pay future interest at the rate of 18% per annum from the date of decree till payment. This direction of the arbitrator for payment of interest from the date of decree is without jurisdiction because it is the Court and Court alone under Section 29 of the Act which has jurisdiction to grant interest from the date of the decree. Therefore this part of the award needs to be modified. I accordingly order that the respondent would be entitled to interest on the awarded

amount (as modified by me) at the rate of 9% per annum for the period covering the date of the award till 12-1-2003 (13-1-2003 is the day when the respondent filed the application in the Court of the District Judge under Section 17, of the Act to make the award rule of the Court). The respondent is further entitled to pendente lite interest at the rate of 9% per annum on the principal awarded amount (as modified by me) from 13-1-2003 till payment is made.

13. In the result the impugned order of the learned District Judge is set aside. The award of the arbitrator is modified to the extent indicated in the judgment. The appeal is accordingly allowed in part. There shall be no order as to costs.