M.D., Army Welfare Housing ... vs Sumangal Services Pvt. Ltd on 8 October, 2003

Equivalent citations: AIR 2004 SUPREME COURT 1344, 2004 (9) SCC 619, 2004 AIR SCW 219, 2003 (3) ARBI LR 361, 2003 (8) SCALE 424.2, 2003 (4) LRI 387, 2003 (6) SLT 221, (2003) 11 INDLD 799, (2003) 3 ARBILR 361, (2003) 8 SUPREME 520, (2003) 4 RECCIVR 767, (2003) 8 SCALE 424(2), (2003) 2 WLC(SC)CVL 732, (2004) 1 CURCC 163

Author: S.B. Sinha

Bench: Chief Justice, Brijesh Kumar, S.B. Sinha

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           CASE NO.:
Appeal (civil)  1725 of 1997

PETITIONER:
M.D., Army Welfare Housing Organisation

RESPONDENT:
Sumangal Services Pvt. Ltd.

DATE OF JUDGMENT: 08/10/2003

BENCH:
CJI., BRIJESH KUMAR & S.B. SINHA.

JUDGMENT:
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J U D G M E N T S.B. SINHA, J :

Questions of some importance arise for consideration in this application filed by the respondent-herein under Sections 30 and 33 of the Arbitration Act, 1940 questioning an award dated 29.4.2002 passed by three learned arbitrators appointed by this Court.

BACKGROUND FACTS:

Army Welfare Housing Organization (for short 'AWHO') and Sumangal Services Pvt. Ltd. (for short 'Sumangal') entered into an agreement for development of land and construction of a composite housing project on a turn-key basis on approximately 17.9 acres of land situate on the VIP Road, in the town of Kolkata. For the said purpose a draft agreement initially drawn up was given finality by Articles of Agreement dated 28.8.1993. Certain terms and conditions, however, had been altered

therein with mutual consent.

The project was envisaged to be completed in three phases. Considerable progress was made in the matter of construction of work in Phase I. The plots where the said work was being carried out fell under the local administration of Gopalpur Arjunpur Gram Panchayat. The building plan for Phase I was sanctioned by the said Gram Panchayat in September, 1991 in terms whereof 11 blocks of houses could be constructed. The said area, however, became a municipality in terms of the West Bengal Municipal Act, 1932 known as Rajarhat Gopalpur Municipality. West Bengal Municipality Act, 1932, however, was repealed and replaced by West Bengal Municipal Act, 1993.

It is not in dispute that pursuant to or in furtherance of the said agreement Sumangal entered into negotiations with the owners of the agricultural lands for sale thereof wherefor sale deeds in respect of 2.32 acres of land were executed by the owners in favour of AWHO. Sumangal received the amount for consideration from AWHO paid to the owners upon furnishing a Bank guarantee as also subject to the condition that it will get the said land converted into Bastu.

Lands measuring about 13 acres had already been converted into Bastu. On or about 8.12.1994, an application was made by AWHO for modifications or revisions in the Master Plan wherefor a revised Master Plan was submitted for approval of the Municipality stating:

> "Tel: 3010820 Army Welfare Housing Organisation South Hutments, Kashmir House, Rajaji Marg, New Delhi-110011 B/03020/CAL-II/AWHO 8 Dec 94 The Chairman, Rajarhat Gopalpur Municipality Raghnunathpur, Calcutta-700059 SUBMISSION AND FINAL APPROVAL OF PLAN FROM MUNCIPAL AUTHORITY Dear Sir,
>
> 1. This is to bring to your kind notice that our organization has undertaken the construction of "Own your own House" housing project for the benefit of our Defence Personnel at no Profit no Loss basis. We have engaged M/s Dulal Mukherjee & Associates as consulting Architect for the project.
>
> 2. As per demand/requirements for the housing for Army personnel, our Architect made a Master Plan of the project and also plans for 04 types of Dwelling Units (05 Storyed) which were approved by the Gram Panchayat vide Sanction No.181/91 dated 18 Sep. 91.
>
> 3. In this connection we would like to mention that due to site constraints and also to meet the demand for housing among Army personnel, minor Modifications/Revisions have been made to the Master Plan and also to the Individual Dwelling Units which were sanctioned earlier.
>
> 4. We are submitting herewith the revised Master Plan and also individual Plan for Dwelling Units (Additions and Alterations) for your approval. We therefore make an appeal to your goodself to kindly give special consideration to our plan and approve

the same at the earliest.

Yours faithfully, (Raghu Nandan) Brig (Retd) DT & DY MD For Managing Director"

Such permission was granted only on 9.3.1995.

According to Sumangal, despite the fact that no building plan was filed or sanctioned for Phase II and Phase III but as per instruction of AWHO it proceeded with the construction of Phase II. Such an application was filed for the first time on 19.5.1995. It stands admitted that the proposed height of the towers was more than the permissible one.

The municipal authorities vide its letter dated 23.5.1995 directed stoppage of work in six/seven blocks where allegedly unauthorized construction was being carried out stating:

> "We came to learn that some 8 blocks of 5 storied buildings were approved by erstwhile panchayet before the origination of the above municipality. After the birth on 13.01.94 as per norms of W.B.M. Act '93 and Calcutta Gazette, new plans if any, or construction job if any, has to be approved of by this Municipal Authority.
>
> We learnt some additional 6/7 blocks are being constructed at your VIP project for which no plan was submitted to the Engineering Division of this office for approval. This is a gross violation of W.B.M. Act '93 and '79 T & C Development Planning Act.
>
> It is further learnt that the 7/8 blocks constructed by you on the basis of the plan sanctioned by erstwhile panchayet has also been severely deviated from actuality - which is also punishable under the law.
>
> We strongly believe that an esteemed organization like you, will not indulge in such illegal activities and refrain from all such unapproved/unauthorized works."

Sumangal thereafter sought advice of AWHO by a letter dated 24th May, 1995 pointing out therein that if any construction activity is carried out despite objections of Local Authority, persons involved would be liable for punishment both under criminal as well as civil law. It reiterated the said stand by a letter dated 25th May, 1995 drawing AWHO's attention to the provisions of Sections 204, 214 and 440 of the West Bengal Municipal Act, 1993 and requesting it for its response also to its earlier letter dated 24th May, 1995. Sumangal did not receive any reply thereto and hence by its letter dated 27th May, 1995 stated:

> "If clear out instructions are not received from you by 29th May, we shall be compelled to demobilize. Please advise urgently. We shall be constrained to consider your silence as your agreement to our demobilization."

The engineers of municipality visited the project site a number of times but the sanctioned plan had allegedly not been produced. In the aforementioned situation, the Chairman of the Municipality

issued a letter to the Project Manager, AWHO on 21.7.1995 stating:

> "Dear Sir, Our engineers have visited your project site number of times and discussed with your engineers about the drawing, design and other infrastructurals projects placed before them. The undersigned also took the opportunity to meet with you and talk to your M/s Dulal Mukherjee & Associates where we have inter changed our views and the norms of Municipal Rules & Regulations.
>
> Our engineer has been asking you for the erstwhile panchayet recommended plan by which you have constructed already 8-9 blocks. All the time he has come back without result.
>
> You would appreciate that without a plan already approved by erstwhile panchayet, we can not check/judge the present position or the viability of your project. Hence the question of your infrastructural development like construction of Road, Drains etc. does not arise at all at the moment.
>
> We would request you fervently to submit the panchayet recommended plan on the basis of which we will proceed further.
>
> Thanking you"

(Emphasis supplied) In the meantime the architect and the project engineer of AWHO met the Chairman of the Municipality and it was allegedly agreed that the work need not be stopped in the buildings for which the plans have already been approved. Sumangal, therefore, was advised not to stop the work for which plans have already been approved. (See letter of AWHO to Sumangal dated 27.5.1995).

AWHO by their letters dated 25th July, 1995 and 11th August, 1995 advised Sumangal to reorganize and recommence its work by employing sufficient strength of labour and bringing the required material to site by 11th September, 1995 to ensure that the progress of the work is substantially increased. It was threatened that if suitable action is not taken in this behalf by Sumangal AWHO may be compelled to take action under clause 129(e) of the Contract.

It appears that Sumangal replied thereto by its letter dated 14th August, 1995. In its response to the said letter dated 14th August, 1995, AWHO drew the attention of Sumangal to the fact that there are certain types of work which would not come within the purview of the stop work notice by the Municipality and as such the same could have been carried out. It was stated:

> "...You are again advised to reorganise your work by employing sufficient labour and bringing in the required material to ensure that the progress of the work is substantially increased by 15 Sep 95 failing which AWHO may be compelled to take action under clause 129 (e) on page 176 of Contract Agreement. This is without prejudice to any other right or remedy which shall have accrued or shall accrue to the

Organisation."

Some correspondences thereafter passed between the parties and by its letter dated 10th October, 1995 AWHO ultimately cancelled the contract with effect from 17th October, 1995.

A civil suit was filed by Sumangal before the 1st Assistant District Judge at Barasat being suit No. 867 of 1995 praying for a declaration that the contract was void. Certain consequential reliefs were also prayed therein in relation to the said termination of contract.

An application purported to be under Section 20 of the Arbitration Act, 1940 was filed by the AWHO before the Delhi High Court which was marked as Suit No. 2442 of 1995 for appointment of an arbitrator in terms of the arbitration agreement contained in Clause 136 of the general terms and conditions of the contract.

In the said civil suit Sumangal prayed for an order of injunction which was refused whereagainst an appeal was preferred in the High Court of Calcutta and by reason of an interim order dated 28.3.1996 the parties were directed to maintain status quo. A SLP was filed by AWHO against the said order.

This Court in the said S.L.P., however, without going into the correctness or otherwise of the interim order dated 28.3.1996 of the High Court passed the following order:

> "Leave granted.
>
> This appeal calls in question the order of the High Court of Calcutta dated 28.3.1996.
>
> In view of the developments which have taken place in this Court, it is not necessary to refer to the detailed facts of the case. Admittedly, disputes and differences have arisen between the parties and those are pending adjudication in the Court of the First Assistant District Judge, Barasat (Title Suit No.867 of 1995) and in the High Court of Delhi (Suit No.2442 of 1995). It is agreed to by learned counsel for the parties that those disputes and differences be referred for adjudication to an arbitrator. With consent of the parties, we refer the disputes arising out of the two suits noticed above to Shri H.R. Khanna, Former Judge of this Court, who shall enter upon the reference and make his Award within the statutory period. The learned Arbitrator shall fix his own fee and the manner of its payment. The parties shall be at liberty to file their claims/counter-claim before the Arbitrator.
>
> With the reference of the disputes and differences between the parties to the learned Arbitrator, the two suits pending at Barasat and in the Delhi High Court shall stand withdrawn from the respective courts where those are pending. Copy of this order shall be sent to the concerned courts for due compliance.

The learned Arbitrator shall file the Award in this Court. It is directed that no other court shall interdict the arbitration proceedings.

The appeal is disposed of accordingly. No costs."

Even before filing the statements of claims and counter-claims; the parties jointly requested the learned arbitrator to pass an interim award as regard the ownership of the lands as to whether AWHO by reason of the purported deeds of sale became the absolute owner of the property comprising 14.17 acres of land wherefor the following issues were raised by Sumangal:

"a) Whether or not AWHO/Party No.2 is the absolute owner of the suit property comprising of 14.17 acres of land vide registered Sale Deeds, mutation and conversion certificates issued by the competent authority, in favour of the petitioner including the properties built thereon and that the land so acquired absolutely and for ever by the Party No.2/AWHO and the property built thereon is not a returnable security, which property pursuant to the cancellation of contract is neither refundable nor can be same be reconveyed to Party No.1 and/or land sellers?

b) Whether Party No.2 and/or Party No.1 and/or the land sellers have a first and paramount charge on the said land sold/transferred to the Party No.2 absolutely and forever, particulars whereof are given the Annexures1 (Colly), annexed hereto, and that whether after sale of the said plots of land by the land sellers, to the Party No.2 vide registered sale deed based upon an understanding as spelled out in the developer's agreement and power of attorney and affidavits etc. executed by and between the land seller and Party No.1, which as is alleged by Party No.1 have since become void and inoperative, and therefore, is the Party No.1 entitled for the payment of a sum of Rs.38 lakhs 47 thousand as pleaded in paragrtaph 56 of its Title Suit No.867 of 1995?

c) Whether the Party No.1 has a first and paramount charge on the construction, buildings and all other materials that are lying at and within the land transferred/sold by the land sellers through Party No.1 to the Party No.2 for it's claim on the basis of item rate contract as alleged claimed for the alleged loss and damages suffered by the Party No.1 as stated in it's Title Suit No.876 of 1995?

d) Whether in alternative a decree for specific performance of the agreement referred to in paragraph 69 of the aforesaid title suit above and reconveyance of the lands mentioned in Schedule G to the Suit in favour of the Party No.1 or the land seller can be decreed either in favour of the Party No.1 and/the land sellers who had sold absolutely and for ever their plots of land vide registered sale deeds which were subsequently mutated and its land use changed from agricultural to residential by the competent authority under the West Bengal Land Reform Act in favour of the Party No.2, but are now claiming that the Deed of Sale was in reality a document or security?

> e) Whether or not the keys of the godown at contract site which the Party No.1 is illegally holding in it's custody be given back to Party No.2 to utilize the stores contained therein before commencing the work.
>
> f) Any other relief in the circumstances of the case may also be passed/awarded."

The learned arbitrator, however, was not inclined to accede to the said request. Thereafter, an application was filed by AWHO before the learned Arbitrator to the effect that it may be allowed to commence and complete uninterrupted construction work as well as development of the housing project at the risk of Sumangal. Sumangal filed a reply to the said application.

An order was passed on the said application of AWHO by the learned arbitrator on 1.11.1997 subject to the following conditions:

> (a) The question as to whether such an order can be passed at the risk of Sumangal can be raised only at the time of final award.
>
> (b) The development work may be confined to 14.17 acres of land which was the subject matter of sale and which it was stated had been demarcated at the site.
>
> (c) All those works could be subject to the ultimate decision of the case.
>
> (d) AWHO shall not give final possession of any of those flats or part of the land to any one including the person described as allottees.
>
> (e) The said order was without prejudice to any of the contentions which may be raised by the parties.
>
> (f) Constructions and development work would be of the same kind and specifications as were provided in the contract at competitive rates through an established contractor after inviting tenders therefor.

It was further stated therein :

> "It is agreed by both the parties that the contract produce for the construction of 16 towers and such 16 towers already exist on the site. If any new tower is constructed by party No. 2 or its contractor, party No. 1 would not be liable for it."

A review application was filed before the Arbitrator by Sumangal wherein several questions including the power of arbitrator to pass an interim order of injunction were raised but the same was rejected stating:

> "It has been vehemently argued that the Arbitrator has no power to make the kind of interlocutory order made on November 1, 1997. In this respect learned counsel for

party no.1 has also emphasized that effected the once the prayer for interim award has not been granted, the order dated November 1, 1997 which was in the nature of an interim award was unwarranted. I find myself unable to accede to this contention. So far as that order is concerned, it was made expressly clear that the said order would be without prejudice to any of the contentions which might be raised by the parties. It was also added that all the works which party no.2 is being allowed to do would be subject to the ultimate decision of the case, the order thus makes it clear that there was no finality attached to that order and that it would be subjected to the ultimate decision of the case. As such the order cannot be deemed to be an interim award.

Coming to the other contention that the Arbitrator has no power to make an interlocutory order dated November 1, 1997. I find that the work of measurements has been smoothly carried out and the results of measurements have been accepted by both the parties. As the proceedings of arbitration would take considerable time before the final award is given, to expedite the execution of the remaining unfinished work, party no.2 was allowed to commence and complete the unfinished work which was the subject matter of the contract between the parties. In my opinion the order made on November 1, 1997 was in the interest of justice and not to let the remaining work reaming unfinished till the time of the final award. As the order was made ex debito justitiae it call for no review or modification. In any case, it has been made clear that this order would be subject to the final decision of the case and without prejudice to any of the rights of the parties.

Another point made in the application of party no.1 is that it was working as stated in the order of November 1, 1997 that 16 blocks/buildings existed at site have gone through the order dated November 1, 1997, and no where it is stated therein that 16 blocks/buildings exist at the site. I, therefore, find no ground to review/modify the order dated November 1, 1997. The application accordingly stands disposed of".

The learned Arbitrator, therefore, did not determine the question as to whether he had jurisdiction to pass an interim order or not.

No Award was not passed by the Arbitrator for a long time although several extensions had been granted. On or about 26.2.2000 an application for revocation of the authority of the arbitrator was filed by Sumangal and by an order dated 11.5.2000 this Court constituted a board of three arbitrators instead and place of the sole arbitrator.

The award was filed before this Court on 29.4.2002 by the learned arbitrators whereagainst Sumangal filed an application on or about 8th July, 2002 under Sections 30 and 33 of the Act.

AWARD:

Before the arbitrators both the parties filed their respective claims. Claim No. 1 of AWHO related to the title, ownership and possession of 14.17 acres of land. Claim No. 2 of AWHO related to cost of completion of balance work at the risk and expense of Sumangal. Both the claims were allowed by the learned arbitrators.

Claim No. 3 related to compensation for delay in performance of the contract by Sumangal, whereas claim No. 4 related to damages for non-completion of work resulting in loss of rentals to allottees of AWHO. Claim No. 5 related to reimbursement of payments made by AWHO towards the premium on Sumangal's all risk insurance policy. Claim No. 6 related to damages for delay in transfer of land. All these claims were disallowed.

The claim on interest contained in claim No. 7 and claim of costs of arbitration in claim No. 8 were also allowed.

The claim of Sumangal relating to title of 14.17 acres of land and claim for an amount of Rs. 11,40,85,000/-, being an alternative claim was disallowed.

The learned arbitrators in making the award formulated as many as 29 issues which have been answered in the following terms:

"Issue No.1 Since we have found that SSPL had failed to discharge their obligation in terms of the Agreement dated August 27, 1993, the issue is decided against SSPL and in favour of AWHO.

Issue No.2 Since we have found that AWHO were entitled to terminate the said contract and to get the balance work executed at the expense and risk of SSPL, the issue is decided in favour of AWHO and against SSPL.

Issue No.3 Since we have found that AWHO are the full owner and in possession of 14.17 acres of land in dispute and the property built thereon, the issue is decided in favour of AWHO and against SSPL.

Since we are of the view that the sale deeds executed in favour of AWHO cannot be regarded as documents by way of security for the advance taken by SSPL from AWHO and that no charge was created on the lands in dispute, the issues are decided in favour of AWHO and against SSPL.

Issue No.6 Since we have held that the claims made by AWHO fall within the ambit of the scope of reference as laid down in the order of the Hon'ble Supreme Court, the issue is decided in favour of AWHO and against SSPL.

No submission was made on behalf of SSPL with regard to these issues. The issues are decided against SSPL and in favour of AWHO.

Since we have found that as per the agreement between AWHO and DMA, the Architect was to provide drawings and specifications of the proposed flats and external services and it was the duty of SSPL to take follow up action in the matter of obtaining sanction from the statutory bodies and it was not the responsibility of the Architect to obtain sanction from the statutory bodies including the Municipality, the issues are decided against SSPL and in favour of AWHO.

Since we have found that the Agreement dated August 27, 1993 and the preceding Letter of Intent dated January 4, 1991 and the Draft Agreement dated December 26, 1991 cannot be said to have become impossible of performance and cannot be regarded to have become void on the ground of frustration, the issues are decided against SSPL and in favour of AWHO.

Issue No.13 It has been found that the construction in respect of the units in Phase I was started after obtaining the sanction for the plans from the Gram Panchayat and though there were some deviations and alterations from the sanctioned plan but the same could be regularized. As regards the units which were to be constructed in Phase II it has been found that the said construction was made without obtaining the sanction for the plans from the competent authority but the plans had been submitted for approval during the course of construction and the said plans were subsequently approved on April 23, 1997 and the plans for the whole project were also revalidated. This issue is decided accordingly.

Issue No.14 We have found that the deviations and the alterations in respect of construction in Phase I were not very material in nature and could be regularized and were in fact regularized when the revised plans were sanctioned and revalidated by the Municipality. This issue is decided accordingly.

Issue No.15 We have found that payments for the RARs for the construction work upto August 1992 were not made since SSPL failed to abide by their commitment to transfer the balance land by February 15, 1992 and subsequently on the transfer of the balance land in august 1993 and after execution of the Agreement dated August 27, 1993, the payments for the said work were made. This issue is decided accordingly.

Issue No.16 We have found that SSPL never raised any objection regarding construction in respect of works in Phase II on the ground that there were no sanctioned plans for the same and SSPL obtained benefit in the matter of release of payments on the basis of the order placed for such construction. This issue is decided against SSPL and in favour of AWHO.

Issue No.17 It has been found that the Municipality stopped construction work in Phase II but subsequently the plans for Phase II were approved by the Municipality on April 23, 1997. The issue is decided accordingly.

Issue No.18 We have found that AWHO issued the working drawings for the project to SSPL and the delay in issuing some of the drawings was not very material. The issue is decided accordingly.

Issue No.19 No submissions were made by SSPL in support of this issue. The issue is accordingly decided against SSPL and in favour of AWHO.

The alterations in the lay out of the built up area of Phase I buildings were made by AWHO in the full knowledge of SSPL and the said alterations were not material because they were subsequently revalidated by the Municipality in sanctioning the revised plans. The issues are accordingly decided against SSPL and in favour of AWHO.

Issue No.21 There was no change in the height of the buildings in respect of Phase I inasmuch as the height of the blocks in Phase I were not above the heights as per the sanctioned plans. The heights of the blocks constructed in Phase II for which plans had not been approved were in excess of the height limitations prescribed in the buildings regulations. No Objection Certificate has been granted by the Airport Authorities of India Ltd. and it was open to the State Government to relax the height limitation. The issue is accordingly decided against SSPL and in favour of AWHO.

Issue No.23 We have found that the title to the lands transferred in favour of AWHO under the various sale deeds passed in favour of AWHO independent of the turnkey project and failure of the turnkey project did not have any bearing on the transfer of title. The issue is accordingly decided in favour of AWHO and against SSPL.

Issue No.24 No submissions were made by SSPL with regard to this issue and the issue is decided against SSPL.

Issue No.25 We have found that AWHO are entitled to compensation under claim no.2 towards cost of completion of the balance work at the risk and expense of SSPL since SSPL failed to perform their part of the obligation under the contract. The issue is decided in favour of AWHO and against SSPL.

Issue No.26 We have found that the title, ownership and possession of 14.17 acres of land which was transferred in favour of AWHO under the various sale deeds vests exclusively with AWHO and Claim No.1 made by AWHO has, therefore, been allowed. The issue is decided in favour of AWHO accordingly.

Issue No.27 We have found that SSPL are not entitled to reversion of land. The issue is accordingly decided against SSPL.

Issue No.28 We have found that SSPL are not entitled to recover any amount from AWHO. The issue is, therefore, decided against SSPL.

Issue No.29 Since we have found Issue No.28 against SSPL and found that SSPL are not entitled to recover any amount from AWHO, therefore, the question of their entitlement to recover interest from AWHO does not arise. The said issue is decided against SSPL."

In terms of the aforementioned findings, the learned arbitrators awarded:

"We make the Award in the following terms:

1. The claim of SSPL that land admeasuring 14.17 acres and structures thereon comprising of the 14 Blocks/buildings or any other construction that maybe done by AWHO during the pendency of the arbitration proceedings, vests and is owned fully, exclusively and absolutely by SSPL is disallowed.

2. The alternative claim of SSPL for an amount of Rs.11,40,85,000.00 is disallowed.

3. Claim No.1 of AWHO in respect of title, ownership and possession of land admeasuring 14.17 acres of land located at Mauza Tighonia and Koikhali, VIP Road, 24 Parganas (North), Calcutta transferred in their favour by various Vendors/Land Owners is allowed.

4. Claim No.2 of AWHO for cost of completion of balance work at the risk and expenses of SSPL is allowed to the extent of Rs.6,97,00,000.00.

5. Claim No.3 of AWHO is disallowed.

6. Claim No.4 of AWHO is disallowed.

7. Claim No.5 of AWHO is disallowed.

8. Claim No.6 of AWHO is disallowed.

9. Claim No.7 of AWHO is allowed to the extent that interest would be payable @ 12 per cent per annum on the amount of Rs.6,97,00,000.00 awarded under Claim No.2. Interest shall be payable from the date of the award till payment is made.

10. Claim No.8 of AWHO regarding costs is allowed to the extent that SSPL will reimburse AWHO towards half share of the arbitrators' fee, administrative expenses and the other incidental expenses for the conduct of the arbitral proceedings. Each party shall bear the costs and expenses incurred by it for prosecuting the arbitral proceedings."

SUBMISSIONS:

Mr. K.N. Bhat, the learned senior counsel appearing on behalf of Sumangal would raise the following contentions:

(i) A bare perusal of the award would show that the learned arbitrators ignored the terms of the agreement.

(ii) In terms of Clause 130 of the general conditions of contract, AWHO could maintain a claim as regard excess amount required for completion of the unfinished work only if the work was completed before a claim was raised or an estimate of the cost of completion is certified by the named architect. Despite the fact that none of the aforementioned conditions were fulfilled, the award was made allegedly on the ground that Clause 130 will have no application while the completion was permitted by an order passed in a judicial/ arbitral proceedings. Mr. Bhat would contend that the arbitrators being creature of the agreement were required to act within the fourcorners thereof and cannot by reason of an interim order override the basis of the agreement.

(iii) Clause 130 of the general conditions of contract would come into play only when the contract is validly terminated in terms of clause 129. The termination of contract by AwHO was on the ground that Sumangal did not resume work in relation whereto the learned Arbitrators failed to consider that the question of resumption of work by it did not arise as the Municipality had banned further construction activities. Furthermore, the Arbitrators proceeded also on a wrong premise that Sumangal failed to obtain sanction of Building Plans from the Municipal Authorities.

(iv) As the plans were not sanctioned at the relevant time by statutory authorities; Section 56 of the Contract Act was attracted having regard to the fact that it was commercially incapable of being performed upon passing of the ban order.

(v) An award ignoring material and relevant documents would be rendered illegal and bad in law. As in the case the arbitrators ignored the letter dated 8th December, 1994 of AWHO for regularization of deviations and thus thereby they must be deemed to have admitted that deviations were done by them deliberately to suit their own convenience, and as such the Arbitrators must be held to have misconducted themselves and the proceeding.

(vi) Furthermore, being a reasoned award, wrong application of law would vitiate the award.

(vii) The award of the arbitrators is vitiated in law as an agreement purported to have been entered into by and between AWHO and the architect was enforced against Sumangal although it was not a party thereto.

(viii) The finding of the arbitrator that the frustration was a self-induced one is not based on any pleadings or materials on record. In any event collusion between Sumangal and the municipal authorities was neither pleaded nor proved.

(ix) In any view of the matter the learned arbitrator committed a legal misconduct insofar as they applied a wrong principle of law as regard determination of quantum of damages.

In support of the aforementioned contentions, reliance has been placed by Mr. Bhat on Steel Authority of India Ltd. Vs. J.C. Budharaja, Government and Mining Contractor [(1999) 8 SCC 122], Shyama Charan Agarwala & Sons Vs. Union of India [(2002) 6 SCC 201], McGregor on Damages, 16th edition, pages 1142 and 1143 and Mertens Vs. Home Freeholds Co. Ltd. and Others [1921] All E.R. Rep. 372.

Mr. Arvind Kumar Tiwari, the learned counsel appearing on behalf of the appellant, on the other hand, would submit that as the learned arbitrator passed an interim order with the consent of the parties, Sumangal at a later stage cannot be permitted to take a different stand. In view of the interim order passed by one of the learned arbitrators, a notice inviting tender was issued whereafter contract was awarded to a third party and, thus, the bid made pursuant thereto could validly be made the basis of determination of quantum of damages. The plea of frustration of contract raised by Sumangal has rightly been rejected by the learned arbitrators as the same was a self-induced one having regard to the fact that it itself got the ban orders issued by the municipal authorities. In any event Sumangal in terms of the contract being liable for obtaining sanction of the building plans, must be held to have failed to perform its part of contract and consequentially has rightly been held liable for damages.

FINDINGS:

INTERIM ORDER PASSED BY ONE OF THE ARBITRATORS:

A bare perusal of the order of the learned Arbitrator dated 1st November, 1997 would clearly show that interim award was prayed for by the parties which would have granted substantial reliefs sought for by them in relation to the title in respect of 14.17 acres of land. It is admitted that the parties cooperated with each other in the matter of measurement of completed and incompleted works in terms of the Arbitrator's order dated 12th May, 1997 passed in the arbitration proceedings, the compliance whereof was recorded in minute of order dated 19th August, 1997.

The learned arbitrator admittedly was not inclined to pass an interim award on the requests of the parties; whereafter only on or about 23rd October, 1997 an application was filed by AWHO stating:

"That the development of the housing project is carried out by Party No.2 for it's allottees on no profit no loss basis which is self financed by the allottees of Party

No.2. Due to breach of contract committed by the Party No.1, allottees of Party No.2 have been denied shelter as well as their life time investments and are suffering for the want of shelters for themselves and their families. Substantial time has already been lost due to non-performance of Party No.1 and any delay in commencement of the construction activity will cause immense financial misery and loss of further time (which cannot be given back by any one) to the allottees. In order to obviate the sufferings of hundreds of allottees who have invested their hard earned money. Party No.2 therefore prays to the Hon'ble Arbitrator to grant Party No.2 following relief:"

The prayer therein is as under:

"In the premise, it is most respectfully prayed that in order to enable Party No.2 to commence early and unjustified completion of unfinished work as well as development of the housing project at the risk of the Party No.1 permission and liberty may be granted to Party No.2/applicant to forthwith take such steps to commence and complete the unfinished works including all such development work on 14.17 acres of land owned by Party No.2 at VIP Road, Calcutta as may be fit and appropriate for the normal functioning of the housing project and peaceful and safe habitation of the allottees of the Party No.2/applicant.

Party No.1, it's Directors, Officers, employees, agents and/or attorneys be also directed to hand over the keys of the stores, offices, and material lying at contract site which keys the Party No.1 is illegally holding in it's custody. The materials lying at site have already been paid for by Party No.2.

Party No.1, it's directors, employees, agents and/or attorneys be directed not to interfere in any manner in the development and construction of the unfinished housing project by Party No.2 through such agencies as Party No.2 may deem fit and proper."

Sumangal filed a detailed reply thereto.

Sumangal further stated that the AWHO was not the owner of the property and the real object for such an application was to dispossess Sumangal.

It was further pointed out that such undertaking of the contract job by a third party would frustrate the present arbitration agreement as a result whereof further disputes may arise. It was contended:

"10. The adjudication of this application without a full-fledged examination of the issues which have been raised by the parties in these proceedings would render the entire arbitration proceedings infructuous. It is further stated that after such directions as prayed for are given, the Party No.1 will be deprived of the fruits of any relief which it might obtain on final resolution of the disputes involved in this

arbitration proceedings.

> 11. The allegations contained in the petition are denied (except those which are admitted in records of proceedings). The purported cancellation or termination is wrongful. The question of completing the balance work/construction at the risk and cost of Party No.1 does not arise. The basis of the development of the housing project between Party No.2 and its allottees are not known and are neither admitted. It is denied that Party No.1 has committed any breach. The allegation relating to shelter and/or lifetime investments or suffering are not admitted and in any event, cannot override legal rights. It is denied that time has been lost due to alleged non-

performance of Party No.1. Since the Party No.1 is willing to return all moneys which are due to the Party No.2, the question of suffering financial misery of loss cannot arise and the Party No.2 cannot put the blame on the Party No.1 in these facts and circumstances.

12. The construction work commenced on 14 blocks only out of a total ordered 16 blocks over an area of 6.36 acres approximately. The said total area of 6.36 acres and the construction thereon belongs to the Party No.1 and the Party No.1 is entitled to deal with the same. The area of 7.81 acres over which no construction have been made also belongs to the Party No.1 and the Party No.1 is entitled to deal with the same."

It is, therefore, not correct to contend that the said order was passed on consent of the parties. For all intent and purport, Sumangal could not have consented to grant of such a prayer which would virtually put a final seal over the disputes. We have hereto- before quoted the purported order dated 1st September, 1997 which ex facie demonstrate that the arbitrator assumed jurisdiction to pass the said interim order at the behest of AWHO. Furthermore, as noticed hereinbefore, Sumangal filed a review application which was also dismissed in the manner noticed hereinbefore. The said interim order was, thus, not passed with consent of parties. If the learned arbitrator has no jurisdiction to pass an interim order, even by consent no such jurisdiction could be conferred. (See The United Commercial Bank Ltd. vs. Their Workmen, AIR 1951 SC 230 and Hakam Singh vs. M/s Gammon (India) Ltd., AIR 1971 SC

740).

In Hiscox Vs. Outhwaite [1991] 2 Lloyd's Law Reports 1, it is stated:

> "No act of the parties can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body. Nor again can a party submit to, so as to make effective, a jurisdiction which does not exist: which is perhaps another way of saying the same thing. The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction: The Supreme Court may, by statute, lack jurisdiction to deal with a particular matter - in this case matters including superannuation claims under s.8 - but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matters. By entering an

> unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), but not to the first (which does not)."

An arbitrator in a situation of this nature had no jurisdiction to pass the interim order under the Arbitration Act, 1940 in absence of any specific agreement in relation thereto. The learned arbitrator by an interim order could not have placed the parties to a situation which would travel beyond the subject of disputes and differences referred to the arbitration. As no claim and counter-claim had been filed before the arbitrator, the arbitrator was not even aware of the nature of claims of the parties. He neither found any prima facie case nor balance of convenience for passing the said interim order. Furthermore, an arbitrator is bound by the terms of reference.

An arbitral tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the fourcorners of the agreement, he can only pass such an order which may be subject matter of reference.

In Morgan Stanley Mutual Fund Vs. Kartick Das [(1994) 4 SCC 225] the jurisdiction of the Consumer Disputes Redressal Forum to pass an order of injunction came up for consideration. This court having regard to the fact situation obtaining therein formulated the following questions:

> "(1) Whether the prospective investor could be a 'consumer' within the meaning of Consumer Protection Act, 1986 ?
>
> (2) Whether the appellant company 'trades' in shares ?
>
> (3) Does the Consumer Disputes Redressal Forum have jurisdiction in matters of this kind?
>
> (4) What are the guiding principles in relating to the grant of an ad interim injunction in such areas of the functioning of the capital market and public issues of the corporate sectors and whether certain 'venue restriction clauses' would require to be evolved judicially as has been done in cases such as State of W. B. v. Swapan Kumar Guha and Sanchaita Investments ((1982) 1 SCC 561 : 1982 SCC (Cri) 283) ?
>
> (5) What is the scope of Section 14 of the Act?"

This Court held that a prospective investor like the respondent therein is not a consumer. The question of the appellant-company trading in shares does not arise and in that view of the matter the Consumer Disputes Redressal Forum has no jurisdiction whatsoever to pass an order of interim injunction.

Having regard to Section 14 of the Consumer Protection Act, it was held:

> "44. A careful reading of the above discloses that there is no power under the Act to grant any interim relief of (sic or) even an ad interim relief. Only a final relief could be granted. If the jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under Section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience."

In absence of an agreement to the contrary, in terms of the provisions of Arbitration Act, 1940 an arbitrator can pass only an interim award or a final award. Such awards are enforceable in law. The award of an arbitrator whether interim or final are capable of being made a rule of court, decree prepared and drawn up in terms thereof and put to execution.

It is well-settled that for the purpose of obtaining an interim order a party to the arbitration proceeding during pendency of an arbitral proceeding can only approach a court of law in terms of Section 41(b) of the Arbitration Act,1940 and not otherwise. The said provision reads thus:

> "41. Procedure and powers of Court.- Subject to the provisions of this Act of rules made thereunder :
>
> xxx xxx xxx
>
> (b) the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to any proceedings before the Court :
>
> Provided that nothing in Cl.(b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."
>
> In the instant case the proviso has no application as the Arbitrator was not vested with such power.
>
> Jurisdiction of courts in terms of Section 41 of the Act is enumerated in the Second schedule, rules 1 and 4 whereof are as under:
>
> "1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.
>
> 4. Interim injunctions or the appointment of a receiver."

Even the Court's jurisdiction under Section 41(b) of the Act is limited as it is confined to "for the purpose of and in relation to arbitration proceedings".

Courts, thus, have also no power to grant injunction ex debito justitiae.

See Union of India vs. Raman Iron Foundry [(1974) 2 SCC 231] and M/s H.M. Kamaluddin Ansari and Co. vs. Union of India and Others [(1983) 4 SCC 417].

We may observe that even provision for stay in a suit under section 10 C.P.C. is not applicable in relation to an arbitration proceeding.

In Indrajit Sinha vs. B.L. Rathi (AIR 1984 Cal 281), it is stated:

> "When Section 32, Arbitration Act, completely prohibits a Civil Court from deciding the existence and validity of the arbitration agreement and Section 41, Arbitration Act lays down that the Civil Procedure Code will apply subject to the provisions and rules of the Arbitration Act, 1940, then Section 10, C.P.C., cannot apply on the facts and circumstances of this case and the question of its applicability cannot arise.
>
> So far as Court's inherent jurisdiction under Section 151, C.P.C. is concerned, I do not think that on the facts and circumstances of this case inherent jurisdiction can be exercised to stay the pending application in view of the fact that the City Civil Court is incompetent to decide the issues pending before me in the application under Sec. 33 of the Act."

In Debendra Nath Singha and others vs. Dwijendra Nath Singha and others reported in AIR 1970 Cal 255, the law is stated in the following terms :

> "On a proper construction of Section 41 of the Arbitration Act and of Section 41(b) in particular, I am of the opinion, that the Court has the power and jurisdiction to appoint a receiver or to make any order of interim injunction or to make orders in respect of other matters set out in the Second Schedule in appropriate cases for the purpose of, and in relation to arbitration proceedings; but this power and jurisdiction of the Court cannot be exercised, if the exercise of any such power would prejudice any power which might be vested in an Arbitrator or Umpire for making orders with respect to any of such matters. I am further of the opinion that in view of the provisions contained in Section 41 of the Arbitration Act, the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule are now governed, controlled and regulated by the said section, and apart from the power and jurisdiction conferred by the said section, the Court has no power and jurisdiction independently of the provisions contained in the said Section 41 to appoint a receiver, to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule."

It is useful to notice that such a power has been expressly conferred on the arbitrator in terms of Section 17 of the Arbitration and Conciliation Act, 1996 which is as under:

"17. Interim measures ordered by arbitral tribunal.-(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-

section (1)."

A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. It cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of 1996 Act, an interim order must relate to the protection of subject matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned Arbitrator, therefore, being coram non judice was wholly without jurisdiction and, thus, a nullity. (See Kiran Singh and Others Vs. Chaman Paswan and Others [AIR 1954 SC 340 (6)], Srimathi Kaushalya Devi & Others Vs. Shri K.L. Bansal [(1969) 1 SCC 59], Union of India Vs. Tarachand Gupta and Bros. [(1971) 1 SCC 486 at 496], Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through His Lrs. [(1990) 1 SCC 193] and Smt. Kanak & Anr. Vs. U.P. Avas Evam Vikas Parishad & Ors. [2003 (7) SCALE 157]).

WHETHER THE AWARD IS VITIATED AS GENERAL CONDITIONS OF CONTRACT HAD NOT BEEN COMPLIED WITH?

Before the learned arbitrators a question was raised as regard applicability of Clauses 129(e) and 130 of the general conditions of contract which read as follows:

"DETERMINATION

129. The Organization may, without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to the Organization, cancel the contract in part or whole in any of the following cases :

If Contractor :-

(a) xxx xxx

(b) xxx xxx

(c) xxx xxx

(d) xxx xxx

(e) In the opinion of the Organisation/Architect at any time whether before or after the date or extended date for completion makes defaults in proceeding with the work with due diligence and continues in that state after reasonable notice from the Architect and or Organisation or

(f) xxx xxx

(g) xxx xxx"

"130. Whenever the Organisation exercises his authority to cancel the contract under clause 129, he may complete the works by any means at the contractor's risk and expense provided always that in event of cost of completion after alternative arrangements have been finalized by the Organisation to get the works completed or estimated cost of completion (as certified by the Architect) and approved by Organisation being less than the contract cost, the advantage shall accrue to the Organisation. If the cost of completion after the alternative arrangements have been fianlised by the Organisation to get the work completed or estimated cost of completion (as certified by the Architect) and approved by the Organisation exceeds the money due to the contractor under this contract, the contractor shall either pay the excess amount assessed by the Architect or the same shall be recovered from the contractor by other means."

The learned arbitrators refused to enter into the questions as to whether the AWHO had made out a case for canceling the contract and invoking the risk and expense clause stating :

"We do not consider it necessary to go into the question whether clause 130 requires certificate by the Architect in case completion of the work is done at the risk and expense as urged by SSPL or only where the alternative arrangements for completion of the work have not been fianlised and estimated cost of completion is to be considered, as submitted by AWHO. In our opinion, clause 130 deals with a situation where AWHO completes or decides to complete the work on their own and has no application where the completion of the work is being permitted under an order passed in a judicial/arbitral proceeding. The certification by the Architect is intended as a check against an arbitrary claim towards cost of completion. Such a check is not required when the completion of the work is done in pursuance of an order in a judicial/arbitral proceeding because the court/Arbitral Tribunal would examine any such grievance of the other party. Since in the present matter AWHO were allowed to complete the work under the order of the Sole Arbitrator dated November 1, 1997 which contained appropriate directions regarding the manner in which the contract shall be given, the certification of the Architect contemplated by clause 130 was not required."

The approach to the question by the learned arbitrators was wholly erroneous.

An award made pursuant to an order which has been passed without jurisdiction necessarily must be held to be a nullity. Refusal on the part of the learned arbitrator to consider the effect of clause 130 of the agreement would amount to a legal misconduct. Having regard to the facts and circumstances of the case, as would be discussed in details hereinafter, it was incumbent on the part of the Arbitrators to apply "due diligence" clause contained in clause 129(e), more cautiously. They were further required to consider as to whether "due diligence"

> clause be applied where the alleged violation of contract was only in relation to a small part thereof. The learned arbitrators were, in law, bound to consider the relevant provisions of the contract and in particular those which deal with the rights and liabilities of the parties.
>
> This aspect of the matter has not been taken into consideration by the learned arbitrators while making the award. Thus, they failed to take into consideration a relevant fact.
>
> In Steel Authority of India Ltd. (supra), this Court categorically stated the law thus:
>
> "It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that the arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action."

It was stated"

> "Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. In Continental Construction Co. Ltd. v. State of M.P. (1988) 3 SCC 82) this Court considered the clauses of the contract which stipulated that the contractor had to complete the work in spite of rise in the prices of materials and also rise in labour charges at the rates stipulated in the contract.
>
> It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and

> awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must.
>
> (Emphasis Supplied) In Shyama Charan Agarwala (supra) this Court referred to the said decision.
>
> A Bench of this Court recently in Bharat Coking Coal Ltd. Vs. M/s. Annapurna Construction [2003 (7) SCALE 20] upon referring to a large number of decisions stated:
>
> "The question is as to whether the claim of the contractor is d'hors the terms or not was a matter which fell for consideration before the arbitrator. He was bound to consider the same. The jurisdiction of the arbitrator in such a matter must be held to be confined to the four- corners of the contract. He could not have ignored an important clause in the agreement; although it may be open to the arbitrator to arrive at a finding on the materials on records that the claimant's claim for additional work was otherwise justified."

As regard the duty of the arbitrator to take into consideration the relevant provisions contained in the agreement, it was observed:

> "So far as these items are concerned, in our opinion, the learned sole arbitrator should have taken into consideration the relevant provisions contained in the agreement as also the correspondences passed between the parties. The question as to whether the work could not be completed within the period of four months or the extension was sought for on one condition or the other was justifiable or not, which are relevant facts and were required to be taken into consideration by the arbitrator.
>
> It is now well settled that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract."

This Court further opined:

> "There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his

> award cannot be questioned on the ground that it contains an error apparent on the face of the records."

Referring to paragraph 577 of Halsbury's Laws of England, 4th edition, Commercial Arbitration by Mustill and Boyd at page 598, Alopi Parshad & Sons Ltd. Vs. Union of India [(1960) 2 SCR 793], Heyman Vs. Darwin [1942 (1) All ER 327], Associated Engineering Vs. Govt. of A.P. [(1991) 4 SCC 93], State of Orissa Vs. Dandasi Sahu [(1988) 4 SCC 12], K.P. Poulose Vs. State of Kerala [(1975) 2 SCC 236], K.V. George Vs. The Secretary to Government, Water and Power Dept, Tri-vendrum [(1989) 4 SCC 595], Satish Kumar v. Surinder Kumar [AIR 1970 SC 833], Union of India vs. Jain Associates and Another [(1994) 4 SCC 665], Sikkim Subba Associates Vs. State of Sikkim [(2001) 5 SCC 629], Maharashtra State Electricity Board Vs. Sterilite Industries (India) and Another [(2001) 8 SCC 482], W.B. State Warehousing Corporation and Another Vs. Sushil Kumar Kayan and Others [(2002) 5 SCC 679], Bharat Coking Coal Ltd. Vs. L.K. Ahuja & Co. [(2001) 4 SCC 86] and Ispat Engineering & Foundry Works, B.S. City, Bokaro vs. Steel Authority of India Ltd., B.S. City, Bokaro [(2001) 6 SCC 347] this Court observed:

> "However, as noticed hereinbefore, this case stands on a different footing, namely, that the arbitrator while passing the award in relation to some items failed and/or neglected to take into consideration the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct (sic finding of) fact. Such an order would amount to misdirection in law."

Before the learned arbitrators a question arose as to whether certification of architect as regard estimated cost of completion was a condition precedent for determination of the quantum of damages. Construction of clauses 129 and 130 having regard to the fact situation obtaining herein was mandatorily required to be considered by the learned arbitrators. They could not have been simply ignored the same on the premise that an interim order has been passed by the arbitrator. An arbitrator cannot be equated with a court of law. Whereas court has an inherent power; an arbitrator does not have. It is a tribunal of limited jurisdiction. Its jurisdiction is circumscribed by the terms and reference. An arbitrator can act only within the fourcorners of the agreement and not beyond thereto.

Yet again this Court in Union of India Vs. M/s. V. Pundarikakshudu and Sons and Anr. [2003 (7) SCALE 323] dealt in details about an award which was found to be inconsistent, observing:

> "The question as to whether one party or the other was responsible for delay in causing completion of the contract job, thus, squarely fell for consideration before the arbitrator. The arbitrator could not have arrived at a finding that both committed breaches of the terms of contract which was ex facie unsustainable being wholly inconsistent. Clause 54 of the contract could be invoked only when the first respondent committed breach of the terms of the contract. An action in terms thereof could be taken recourse to in its entirety or not at all. If one part of the award is inconsistent with the other and furthermore if in determining the disputes between the parties the arbitrator failed to take into consideration the relevant facts or based

> his decision on irrelevant factors not germane therefor; the arbitrator must be held to have committed a legal misconduct."

This Court made a distinction between an award passed within jurisdiction and an award without jurisdiction stating:

> "In this case the District Judge as also the High Court of Madras clearly held that the award cannot be sustained having regard to the inherent inconsistency contained therein. The arbitrator, as has been correctly held by the District Judge and the High Court, committed a legal misconduct in arriving at an inconsistent finding as regard breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable being self contradictory."

This Court cannot sit in appeal over the award of the Arbitrator but can certainly interfere when the award suffers from non-application of mind or when relevant fact is ignored or irrelevant fact not germane for deciding the dispute is taken into consideration.

Where an order has been passed without jurisdiction, the principles of estoppel, waiver and acquiescence will have no application. There is no estoppel against statute.

The award, therefore, suffers from legal misconduct on the part of the arbitrators.

ROLE OF AN ARCHITECT:

> An architect plays an important role in execution of a building contract.
>
> In Hudson's Building and Engineering Contracts at page 243, it is stated:
>
> "An architect is a person who professes skill in the art of designing buildings to meet his client's need, in the organization of the contractual arrangements for their construction, and in the supervision of work and contractual administration until final completion. So a major part of an architect's activities will be concerned with the preparation of contracts, the obtaining and recommending for acceptance of estimates from builders, the selection of specialist contractors, the inspection of work carried out, the solution of difficulties encountered during the course of erecting the building, condemning and dealing with defective work, the issue of certificates under the terms of the contract and advising or ruling on disputes between the owner and the contractor. Thus it will be seen that although it is the primary and vital function of the architect to create new ideas of amenity and design and to set down those ideas on a drawing-board, his duties extend far into other fields of technical knowledge and

> business management. On the other hand, while he will remain primarily responsible to the owner for all matters of design, modern techniques of construction and specialized building products and processes in fact demand expertise and skill for which he will inevitably not always be personally qualified. The employment of outside consultants or the less satisfactory (from the legal point of view if the employer's interest is to be properly protected) device of delegating important design functions to specialist and sub-contractors and suppliers, are therefore a frequent and inevitable accompaniment of many major building projects but, as will be seen, the architect is the "captain of the ship" and will be the person to whom the owner will normally look if a design failure occurs, though in some, but not all, cases he will adequately discharge his own overall responsibility if he exercises due professional care in referring matters outside his own expertise to a consultant or specialist supplier or contractor, particularly if these latter are engaged on behalf of the owner and not by the architect himself."

An Architect has, thus, various roles to play including independently ruling on disputes between the owner and the contractor. In R. Vs. Architects' Registration Tribunal, ex. P. Jaggar [1945] 2 All ER 131, it is stated:

> "An architect is one who possesses, with due regard to aesthetic as well as practical consideration, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings or other works calling for skill in design and planning as he might in the course of his business reasonably be asked to carry out or in respect of which he offers his services as a specialist."

An architect has a great role to play in making an estimate. He is expected to neither under-estimate nor can over-estimate value of the works. He is bound by his conduct to the owner. He can be sued for his negligence. For his misconduct, fees payable to him may be forfeited. He may incur other liabilities not only under the contract but also under statute.

Clause 130 of the contract casts a burden upon an architect to estimate the damages when a risk and cost clause is invoked against the contractor. It is possible to hold that the invocation of arbitration clause would be subject to exercise of the jurisdiction by the architect as a demand has to be made upon the contractor depending on such estimate made by the architect.

In a given case having regard to the reasonableness of the estimated amount a contractor may pay the same or challenge the same either by an arbitrator or by a court of law. A dispute may fall for adjudication by an arbitrator or by a court of law only in the event a contractor refuses to accept such estimate.

In G.T. Gajria's Law Relating to Building and Engineering Contracts in India, Fourth Edition at page 563, it is stated:

> "In a contract, where there is certificate clause which is a condition precedent to payment and an arbitration clause of some third person other than the architect, the builder cannot recover without the certificate, and neither the arbitrator nor the court (apart always from some misconduct of the architect), has jurisdiction to consider any matters. In respect of which the certificate of the architect by the terms of the contract is made a condition precedent."

An architect sometimes is appointed as an arbitrator and no payment can be made except on his certificate and sometimes his position is that of a person whose certificate is held to be a condition precedent for invoking the arbitration clause [See Bristol Corporation v. John Aird & Co. (1911-13) All E.R. Rep. 1076, Hickman and Co. v. Roberts (1911-13) All E.R. Rep. 1485 and South India Rly. Co. Ltd. v. S.M. Bhashyam Naidu, AIR 1935 Mad. 356].

These decisions were considered by a Division Bench of the Madhya Pradesh High Court in Heavy Electricals (India) Ltd. Bhopal vs. Pannalal Devchand Malviya [AIR 1973 MP 7].

In this view of the matter, we are of the opinion that the arbitrator could not have ignored the role of the architect in terms of clause 130 of the agreement only on the ground that AWHO had been permitted to raise construction, pursuant to or in furtherance of an interim order. Non-consideration of the said clause in proper perspective by the Arbitrator would amount to a legal misconduct on their part.

WHOSE DUTY IT WAS TO GET THE PLAN SANCTIONED:

> M/s. Dulal Mukherjee & Associates had been the architect of Sumangal. By reason of the agreement, however, he became an architect of the employer. It was in the aforementioned situation, the following was agreed between the parties and the same was recorded in the contract agreement as under:
>
> "26. Company informed that they have negotiated with M/s Dulal Mukherjee & Associates, 28-B, Shakespeare Sarani, Calcutta as Architects for providing all Architectural Services for this turn key project. As per the understanding of the Company with the Architect, the Company has to pay to the Architect at the firm rate of Rs.6/- per sq. ft. of built-up area excluding stilt area for the turn key project. The stilt area is not to be taken into account while calculating the amount of fee payable to the Architect. Architect fee for all internal services, development of land, all external services and stilt area is deemed to be included in the rates of Rs.6.00 per sq. ft. for built up area.
>
> 27. It is hereby mutually agreed and accepted that the services of the Architect M/s Dulal Mukherjee & Associates, with immediate effect shall be controlled by the Organisation and the payments due to the Architects will be made by the Organisation direct. For making this payment an amount calculated at Rs.6.00 per sq. ft. of built up area as per para 16(d) above shall not be released by the

> Organisation to the Company. The payments due to the Architect for his architectural services shall be released by the Organisation in terms of separate agreement entered by the Organisation with M/s Dulal Mukherjee & Associates, the Architects. For the Architectural Services rendered by the Architect upto the signing of this agreement, the Company is fully responsible for any omissions and commissions. For all architectural services after the signing of this agreement, the Organisation will take the responsibility. The Company has paid a sum of Rs.5.00 lacs as adhoc advance to the Architect. This amount shall be reimbursed by the Organisation to the Company and shall be adjusted against the total amount payable to the Architects by the Organisation."

Architectural services have not been defined in the agreement. However, in a letter dated 12.6.1991 issued by AWHO to M/s. Dulal Mukherjee & Associates it was mentioned that obtaining and getting preparation of municipal drawings and obtaining sanctions was the architect's responsibility, stating:

> "1. Please refer to your letter of 04 Jun 91 following the detailed discussions on the project held on 03 & 04 Jun 91 at this HQ.
>
> 2. As per understanding arrived at between AWHO and M/s. Sumangal Services Pvt. Ltd. your employment and payment will be controlled by AWHO. Please note that the rate of Rs.6/- per sqft. as agreed between you and M/s. Sumangal Services Pvt. Ltd. remain operative for Architectural services including supervision.
>
> 3. For the release of payment the amount of Rs. 5 lacs that is already been paid by M/s. Sumangal Services Pvt. Ltd. to you as on date will also be taken into account. Recoveries @ Rs. 6/- per sq. ft. will be considered as overall payment and will be recovered from M/s. Sumangal Services Pvt. Ltd. during execution of project and paid to you on time to time through your bills.
>
> 4. It is also understood that prior to issue of this letter following works towards the project has already been undertaken by you.
>
> a) Preparation of conceptual plan.
>
> b) Interaction with local sanctioning authorities.
>
> c) Preparation of Municipal drawings and obtaining sanction.

5. Based on the discussions between AWHO, M/s. Sumangal Services Pvt. Ltd. and you held in Delhi on 03 & 04 Jun 91 it is decided that till Project Manager and staff has been posted, you will monitor the progress on behalf of AWHO.

You will also forward a weekly report on the same.

6. The contract documents between you and AWHO is under drafting and would come in effect when ready.

7. Please acknowledge."

Despite the fact, by reason of the contract agreement the services of the architect were placed solely at the disposal of AWHO, it purported to have entered into another agreement wherein Sumangal was not a party on or about 24th February, 1992 wherein the responsibility of the architect was defined as under:

> "12. Architects Responsibilities. Except to the extent otherwise stipulated in this agreement, the responsibility and services of the Architect shall include the responsibilities and obligations of Architects as laid down by the Indian Institute of Architects (except net liability and net schedule of payments) and will particularly include the following obligations of the Architect :-
>
> (e) Preparation of drawings for submission to civil agencies excluding obtaining sanctions which will be done by builder/contractor but should guide the builder/contractor but should guide the builder/ contractor in obtaining the same."

Legally the said agreement was not binding on Sumangal as it was not a party thereto.

Para 17 of the agreement provides for stages for release of payments which reads thus:

"Stage Rate per sq. ft.of plinth area

(aa)
Sanction of plans by Zila Parishad/Gram Panchayat
Rs.3.00
(ab)
On registration of converted land
Rs.33.00
(ac)
De-watering land and clearance of hyaclnth
Rs.2.00
(ad)
Survey and soil test
Rs.1.00
(ae)
Filling of earth to raise the level to VIP Road
Rs.12.00
(af)
Alongwith the progress of

```
building construction
Rs.15.00

         Total
Rs.66.00"
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It does not appear to be the case of the AWHO that there is a contractual obligation on the part of Sumangal to get the plan sanctioned. In any event, such a contractual obligation for the purpose of attracting the penal clauses must appear from the contract itself and not from any other document.

The learned arbitrators in their award did not point out any specific clause in terms whereof it was for Sumangal to get the plan sanctioned. It merely relying or on the basis of a letter of Sumangal made it partially liable therefor.

No document exists to show that Sumangal had any legal liability to get the Municipal plan sanctioned.

Section 204 of the West Bengal Municipal Act, 1993 prohibits erection of any building excepting with the previous sanction of the Board of Councillors. In terms of Section 205 it is for the person who intends to erect or re-erect a building to submit an application with a building plan in such form.

The provisions of the West Bengal Municipal Act, 1993 go to show that it was for AWHO to submit an application for sanction of the building plan together with requisite documents therefor. Ordinarily, the duty to pursue sanction of a plan is of the owner or its authorised representative. Such a job, it is common experience, is done by a qualified architect or the persons having regard to their duties to prepare a building plan in terms of the building laws so as to enable them to make clarifications as and when called upon by the statutory authorities or in a given case make modifications or alterations thereof. The building plans prepared by the architects only would be subject-matter of sanction by the municipal authorities. Furthermore, from the letter dated 8.12.1994 also it is evident that AWHO prayed for alterations of the Master Plan and in the said letter it has clearly been stated that M/s Dulal Mukherjee & Associates had been appointed by them as consulting architect for the project. From a perusal of the letter dated 21.7.1995 issued by the Rajarhat Gopalpur Municipality to Shri Manohar Singh, Project Manager, AWHO, it would appear that the author thereof had discussed the matter with Shri Manohar Singh as also with M/s Dulal Mukherjee & Associates and only with them, views were exchanged as regard the norms of Municipal Rules and Regulations. From the letter dated 27.5.1995 issued by AWHO to Sumangal, it appears that Shri Manohar Singh, its Project Manager along with representatives of M/s Dulal Mukherjee & Associates had a detailed meeting with Chairman, Rajarhat Gopalpur Municipality wherein it was agreed that the work need not be stepped for which its plans had already been approved. The alleged responsibility of Sumangal to get the plan sanctioned has been raised only in July-August, 1995, i.e. after the dispute between the parties started.

The municipality made AWHO responsible for coordination and construction activities. The stop work notice was served upon AWHO. AWHO in its letter, as noticed hereinbefore, categorically stated that its representative with the authorised representative of the architect saw the Chairman in 1995. AWHO and not Sumangal made other correspondences with the Municipality. If Sumangal was assisting them in getting the plan passed, it, in law, did not incur any liability therefor. The findings of the learned arbitrators, therefore, do not borne out from the records and are perverse.

It will amount to giving of premium to illegality if it be held that a party can ignore statutory injunction on the specious plea that the same is minor in nature and maybe validated by the statutory authorities in future. Neither any party can undertake any construction activity on the pains of facing criminal charge nor any court of law/Arbitral Tribunal encourage such violation either directly or indirectly.

Furthermore, risk and cost clause cannot be invoked on failure of the party to respond to its self-imposed obligation. Damages are to be paid for willful breach of the terms or conditions of the contract. Such a breach must be in relation to an express agreement entered into by and between the parties. An alleged breach on the part of a builder cannot be founded on a mere ipse dixit. The learned arbitrators in their award purported to have held :

> "...That SSPL had a role in getting the plans sanctioned by the competent authority is borne out by letter of AWHO to SSPL dated October 25. 1995 (Ex.E-45, AWHO, Vol.3, p.356) and the reply of SSPL dated December 9, 1994 (Ex.E-103, AWHO, Vol.17, p.54) to the said letter of AWHO . In the said letter of AWHO dated October 25, 1994, it was stated :
>
> "7. Sanctioning of building plan and revised lay out plan. Sanction of building plan and revised lay out plans has already been considerably delayed. This is effecting the progress of the work also. Though DMA is taking action but the follow up action as a part of the turnkey project is to be taken by you. Please ensure that the sanction is obtained without further delay." (AWHO Vol.3, p.357, para 7) SSPL in their reply dated December 9, 1994 said :
>
> "g) Sanctioning of building plan - You have been informed during several discussions in your office in New Delhi that there had been structural change in the local authority system affecting the project area. For some considerable period vacuum existed in many standard local govt. functions. However, the new Municipality authority has recently been formed. We are following up with the new authority in respect of the sanctioning process." [AWHO, Vol.17, p.56(g)] The letter dated 25.10.1994 referred to in the award clearly shows that the architect was asked to take action but allegedly the follow up action was to be taken by Sumangal only on the ground that the project was a turnkey one. Sumangal's letter dated 9.12.1994 merely stated that there had been structural change in the local authority system affecting the project area and there had been some vacuum in many standard local government functions and that they had been following up with the new authority in

respect of the sanctioning process. Presumably in the aforementioned backdrop, the learned arbitrators observed :

"We are, therefore, unable to hold that the entire responsibility for obtaining sanction for the plans from the competent authority had been transferred from SSPL to AWHO after June 12, 1991 and thereafter AWHO and DMA were responsible for obtaining the said sanction."

Thus, merely some role had been attributed to Sumangal in the matter of getting the plan sanctioned and not a breach of contract leading to incurring its liability under clause 130 of the agreement.

EFFECT OF SUCH AGREEMENT, ASSUMING THERE WAS ONE There cannot be an agreement that somebody would be bound to obtain a statutory order from the statutory authorities, as thereover, he would have no control.

In the Law Lexicon, the maxim 'Ex turpi causa non oritur actio' is defined as:

"On a bad (illegal) consideration on action can arise."

As regard the question as to whether such a contract in its entirety or to some extent would be illegal or not which would give rise to further question as regard its enforceability, we may notice the following passage from Immami Appa Rao and Others Vs. Gollapalli Ramalingamurthi and Ors. [(1962) 3 SCR 739]:

"Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The appellants emphasised that the doctrine which is pre-eminently applicable to the present case is ex dolo malo non oritur actio or ex turpi cause non oritur actio. In other words, they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies in pari delicto potior est conditio possidenties; where each party is equally in fraud the law favours him who is actually in possession, or where both parties are equally guilty the estate will lie where it falls. On the other hand, respondent 1 argues that the proper maxim to apply is nemo allegans suam turpitudinum audiendum est, whoever has first to plead turpitudinum should fail; that party fails who first has to allege fraud in which he participated. In other words, the principle invoked by respondent 1 is that a man cannot plead his own fraud. In deciding the question as to which maxim should govern the present case it is necessary to recall what Lord Wright, M. R. observed about these maxims in Berg v. Sadler and Moore ([1937] 2 K. B. 158,

162). Referring to the maxim ex turpi causa non oritur actio Lord Wright observed that "this maxim, though veiled in the dignity of learned language, is a statement of a

> principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities".

In Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd. and Others [AIR 1974 SC 1892: (1974) 2 SCC 533] this Court held that in relation to a contract which is hit by Section 23 of the Contract Act Section 65 and Section 70 of the Contract Act shall not apply. Only in a case where a contract has become void due to subsequent happenings, the advantage gained by a person should be restored.

The building plans would be sanctioned provided the same are in accordance with the statutory building rules. If admittedly the plans as also the constructions were not in terms of rules, question of getting them sanctioned by a statutory authority would not arise. Such a contract, it is reiterated, would be illegal. Principle of estoppel will have not application in relation thereto as that part of the agreement itself would not be enforceable. In the event, however, the builder was merely required to take follow-up action in the matter with the authorities, the contract may be valid but in that event it must not only be pleaded and proved that there existed an agreement in that behalf, but also to how and to what extent the builder failed to perform its part of the contract. The findings of the learned arbitrators are without any materials and without applying the correct legal principles and, thus, the same cannot be sustained.

Admittedly, the deviations which were minor ones were regularized only on 23rd April, 1997. The contract, however, stood terminated on 17th October, 1995.

Even in the ordinary course, Sumangal could not have carried out any construction activities in anticipation that such deviations might be regularized. Whether such deviations would be regularized in respect of Phase I or whether building plans for Phase II and Phase III would be sanctioned and if so within what time could only be a matter of speculation but the same would be irrelevant for determining the liabilities of the parties which was required to be guided by commercial considerations.

The liability to pay damages must arise out of contract and not otherwise. The award does not specifically say so.

FRUSTRATION OF CONTRACT:

> Section 56 of the Indian Contract Act reads thus:
>
> "Agreement to do impossible act:- An agreement to do an act impossible in itself is void.
>
> Contract to do act afterwards becoming impossible or unlawful:-A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act

becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful:-Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non- performance of the promise."

Impossibility to fulfill the contractual obligation may arise in different fact situations.

Statutory injunction by a statutory authority may be one of such causes. A building bye-law must be scrupulously followed. Violation of Section 204 of the West Bengal Municipal Act, 1993 attracts penal provisions contained in Section 440. It is, therefore, mandatory in nature. The correspondences between AWHO and the Municipality clearly show that even infrastructural works were not permitted to be carried out. Sumangal, therefore, cannot be said to have committed any illegality in complying with the stop work notice. To what extent it committed breach of the terms of the contract, assuming that it could have carried out some job as pointed out by AWHO would depend upon the commercial viability as a large number of workmen were to be engaged although it cannot carry out the major construction work, which was a relevant factor for determining the quantum of damages. Sumangal might have been partially liable but it cannot be faulted when it refused to carry out any constructional work in violation of the stop work notice which would attract the penal provisions of Section 440 of the West Bengal Municipal Act, 1993.

The learned arbitrators were also bound to take into consideration this aspect of the matter. They failed to do so and misdirected themselves in law.

In an interesting article titled "The Principle of Impossibility in Contract" by H.W.R. Wade published in Law Quarterly Review Volume 56 page 519, it is stated:

"Two points emerge from the argument so far: (I) There can exist no duty to do an impossible act. (II) A promise is, normally and primarily, a promise of performance simply, and not of damages in the alternative. The effect of supervening impossibility on an existing duty can now be determined, and in view of conclusion (I) the answer is a simple one. It must be that the impossibility causes the duty to cease to exist. For a duty either exists or it does not

- that is to say, every duty continues until it is discharged, and discharge is the only process known to the law by which a duty once legally undertaken can be put off the shoulders of the obligee. Its effect is a complete removal of the obligation, and discharge by impossibility of performance is no less perfect than discharge by the performance of the original promise. In the words of Professor Corbin already cited, 'society no longer commands performance' -

nothing more can be demanded of the promisor."

In Emden and Gill's Buildings Contracts and Practice, Seventh Edition, page 162-163, it is stated that liability to pay damages for non-performance of an impossibility only arises where the contract is absolute and unrestricted by any condition expressed or implied. It is further stated that a difficulty may not in all circumstances amount to impossibility. But even in that event the terms and conditions relating to performance of the contract may stand eclipsed.

The transaction was a commercial one. Sumangal could not plead frustration of contract if it itself had abandoned it. (See Hauman Vs. Nortje [1914] A.D. 293, at p. 297 and Hoenig Vs. Issacs [1952] 2 All E.R. 176, at p. 178H).

It is well-settled that a builder renouncing his obligations could not claim substantial performance.

In Hudson's Building and Engineering Contracts at page 484, the law is stated as:

> "A further overriding principle to be deduced from the cases, it is submitted, is that a party consciously in breach, a fortiori a party repudiating an obligation or abandoning work, should not be enabled to abuse the doctrine by maintaining that position while at the same time suing for remuneration under the contract. Thus in South Africa, there is long-standing authority that substantial performance is not available where work is abandoned, or the method of performance is inconsistent with an honest intention to carry out the work in accordance with the contract. Sumpter v. Hedges and Ibmac v. Marshall were clear cases of abandonment."

Such a case of abandonment was not made out. What was made out was a case of self-inducement frustration. We repeatedly asked Mr. Tiwari to show before us any pleading as regard self-induced frustration on the part of Sumangal. He failed to do so. No material far less any pleading has also been placed before us to show that there had been collusion by and between Sumangal and municipal authorities in getting the work stopped. There exists a presumption as regard the official transactions having been done in regular course of business. The onus of proving that plea of frustration was self-induced one is on the party who alleges that this is the case. (See Joseph Constantine Steamship Line Ltd. Vs. Imperial Smelting Corporation Ltd. [1942] A.C. 154]) In Treitel's Law of Contract, Seventh Edition at page 701, it is stated:

> "The onus of proving that frustration is self- induced is on the party who alleges that this is the case. In Joseph Constantine SS Line v. Imperial Smelting Corp. Ltd. [(1942) AC 154] a ship was disabled by an explosion from performing her obligations under a charter party. The owners were sued for damages and pleaded that the explosion frustrated the charterparty. The charters argued that the owners must prove that the explosion was not due to their fault, but the House of Lords rejected this argument and upheld the defence of frustration although the cause of the explosion was never explained. The rule is open to the objection that the charterer is much less likely than the owner to be able to show how the explosion occurred. This

> reasoning does, indeed, prevail in one group of cases: a person to whom goods have been bailed, and who seeks to rely on their destruction as a ground of frustration of the contract of bailment, must show that the destruction was not due to any breach of his duty as a bailee. But, this special situation excepted, the rule as to burden of proof laid down in the Joseph Constantine case can be defended on the ground that generally catastrophic events which prevent performance do occur without the fault of either party. To impose the burden of disproving fault on the party relying on frustration is therefore less likely than the converse rule to lead to the right result in the majority of cases."

It is interesting to note that at page 700 of the said treatise, the learned author states:

> "The further question arises whether a contract can be frustrated by an event brought about by the negligent act of one of the parties. Lord Simon has put the case of a prima donna who lost her voice through carelessly catching cold. He seemed to incline to the view that she could plead frustration so long as the incapacity "was not deliberately induced in order to get out of the engagement." This particular result can perhaps be justified by the difficulty of foreseeing the effect of conduct on one's health. But it is submitted that generally negligence should exclude frustration: for example, the plea should have failed in Taylor vs. Caldwell if the fire had been due to the negligence of the defendants. In such a case it would be unjust to make the other party bear the loss. A negligent omission should likewise exclude frustration."

In Cheshire, Fifoot & Furmston's Law of Contract (14th Edition) at page 643, the law is stated, thus:

> "This rule, that a party cannot claim to be discharged by a frustrating event for which he is himself responsible, does not require him to prove affirmatively that the event occurred without his fault. The onus of proving that the frustration was self-induced rests upon the party raising this allegation. For instance :
>
> On the day before a chartered ship was due to load her cargo an explosion of such violence occurred in her auxiliary boiler that the performance of the charterparty became impossible. The cause of the explosion could not be definitely ascertained, but only one of three possible reasons would have imputed negligence to the shipowners.
>
> It was held by the House of Lords that, since the charterers were unable to prove that the explosion was caused by the fault of the owners, the defence of frustration succeeded and the contract was discharged. It should perhaps be noted that in many cases a self-induced frustrating event will be a breach of contract but this will not necessarily be so. In Maritime National Fish Ltd. v. Ocean Trawlers Ltd [(1935) AC 524], the applicants were not contractually bound to licence the chartered trawler but could not excuse failure to pay hire by relying on the absence of a licence."

Even no case of negligence on the part of Sumangal made out.

The burden of proof in relation to all these pleas, thus, was on AWHO. It failed to discharge the same.

QUANTUM OF DAMAGES :

> It is not necessary for us to go into the question of quantum of damages in details but we may observe that the learned arbitrators proceeded on a wrong premise even in relation thereto. It took into consideration the subsequent events. Purported subsequent conduct on the part of Sumangal became the bed-rock of the findings against it by the learned arbitrators. The disputes and differences between the parties were required to be determined as on 10.10.1995. Conduct of the parties subsequent thereto was wholly irrelevant. Thus, there exists an error apparent on the face of the award.
>
> Liability to pay damages would indisputably arise only in the event a breach of contract has taken place. Clause 130 of the general conditions of the contract could be invoked only in the event of breach on the part of Sumangal and if AWHO could in law take recourse to Clause 129 of the Contract.

For the purpose of invoking clause 129(d) of the general conditions of contract, it was incumbent upon the learned arbitrators to arrive at a specific finding that a breach of the terms of condition has been committed by Sumangal. Such breach must be in relation to a term of the contract between the parties.

If a breach has occurred in respect of an agreement, to which Sumangal is not a party, clause 129 could not have been invoked.

The law relating to damages in this behalf is stated in McGregor on Damages, 16th edition at paras 1142 and 1143 in the following terms :

> "The normal measure of damages is the cost to the owner of completing the building in a reasonable manner less the contract price, and possibly, in addition, the value of the use of the premises lost by reason of the delay. This measure of cost of completion less contract price is laid down by the Court of Appeal in Mertens v. Home Freeholds Co., (1921) 2 K.B. 526, CA., which must be regarded perforce as the leading case since it proves to be the only one dealing with this issue. The defendant contracted to build a house for the plaintiff and was to begin work immediately after possession of the site was given to him. The defendant worked well for a month, but then deliberately failed to proceed with due dispatch in the knowledge that a government embargo on building without licence was to be imposed. Had he worked according to contract, the roof could have been on to the house before the embargo descended. Two or three years later the plaintiff completed the work himself, when building was again

> permitted but when costs had risen. It was held that the proper measure of damages was the cost to the plaintiff of completion in a reasonable manner at the earliest moment that he was allowed to proceed with building, less the amount he would have had to pay the defendant had the defendant completed the house as far as the roofing-in at the time agreed by the terms of the contract. The Court of Appeal reversed the Divisional Court which had taken for its basic figure not the cost of completion but the market value that the completed building would have had at the contractual time due for completion. Of this Lord Sterndale M.R. said :
>
> "They (the Divisional Court) have treated the contract as if it were one for the sale of goods and have held that the measure of damages is the difference between the market price of the day of what the plaintiff ought to have had and what he got. In my humble opinion that is an entirely wrong way of looking at the contract. There is no contract to deliver goods, and there is no market price for a roofed house."

Mertens v. Home Freeholds Co.[(1921)2 K.B. 526, C.A.], is also authority for taking the cost of completion as at the time when it became once again legal to build, although between breach and the removal of the government embargo on building two or three years afterwards costs had risen substantially. And conversely, as Younger L.J. pointed out, "if the cost of building had decreased in that time the damages would have been correspondingly diminished". This rule is however subject to the general principles of mitigation so that, in the words of Lord Sterndale, "the building owner must set to work to build his house at a reasonable time and in a reasonable manner, and is not entitled to delay for several years and then, if prices have gone up, charge the defaulting builder with the increased price."

We may, however, notice that in Clark and Another Vs. Woor [1965] 1 W.L.R. 650 and East Ham Borough Corporation Vs. Bernard Sunley & Sons Ltd. [1966 AC 406], law almost to the similar effect has been laid down.

In Hudson's Building and Engineering Contracts at page 1034-35, it is stated:

> "Builders constructed a school with serious defects in fixing the stone facing. The contract was in the 1956 RIBA standard form. Some years after the final certificate, a stone fell and the owners discovered the defects. The arbitrator found that the defects could have been, but in fact were not, discovered or noticed by the architect during the course of his normal supervision of the work. At the date of the breach (which the parties agreed should for purposes of convenience be treated as the date of completing the work), the cost of repair would have been considerably less, due to rising prices, than it was when the owners finally discovered the defects. Held, by Melford Stevenson J., distinguishing Phillips v. Ward [(1956) 1 W.L.R. 471] that since the owners had been guilty of no unreasonable delay once they discovered the defects, they were entitled to the greater cost of the repairs at the time they carried them out. Held, by the House of Lords, affirming the judge, that the parties must have contemplated that the architect might fail to notice defective work. The cost of

> repair at the date of discovering the breach was "on the cards" or a "loss liable to result" from the breach within the test formulated by Asquith L.J. in the Victoria Laundry case. Per Lord Upjohn: "where the cost of reinstatement is the proper measure of damages it necessarily follows as a matter of common sense that in the ordinary case the cost must be assessed at the time when the defect is discovered and put right and it is not suggested here that the building owner unreasonably delayed the work of repair after discovery of the defect...I am at a loss to understand why the negligent builder should be able to limit his liability by reason of the fact that at some earlier stage the architect failed to notice some defective work..." East Ham Borough Council v. Bernard Sunley Ltd. [(1966)A.C.406]."

Reference may also be made to illustrations given in Hudson's Building and Engineering Contracts at pages 1038-39.

In Emden and Gill's Buildings Contracts and Practice, Seventh Edition, at page 267, the law is stated thus :

> "The measure of damages for failure by the contractor to complete a building or engineering contract will include first, the difference (if any)between the price of the work as agreed upon in the contract and the cost the employer is actually put to in its completion (i), and cost of completion means cost of the completion of the contract work itself.

Illustration A builder agreed in May, 1916, to build a house for plaintiff for a lump sum, complete within a specified time.

After starting the work the builder intentionally delayed progress for the purpose of ensuring that the Ministry of Munitions should refuse a licence for construction of the house under Defence of the Realm regulations, and that he would thereby (as he thought) be released from the contract. The licence was refused, and the work had to be entirely suspended till 1919, when plaintiff completed the building. - Held: The builder could not take advantage of a prevention brought about by his own act, and the proper measure of damages was what it cost the plaintiff to complete the house as soon as the statutory restriction ceased, less any amount which have been due and payable to the builder if he had proceeded with due diligence up to the date when the licence was refused.

In a leading case, the House of Lords has held that the proper measure of damages is the cost of re-instatement, such cost must be assessed at the time when the defects are discovered and are put right."

Sumangal, thus, could have been found liable for drawings if inter alia it was guilty of one or the other misconducts as referred to hereinbefore.

TITLE IN RESPECT OF 14.17 ACRES OF LAND:

Claim No. 1 related to title of 14.17 acres of land. Sumangal entered into an agreement on a turn-key basis. The contention of Sumangal is that the lands were transferred in the name of AWHO by way of security. This may or may not be so. But, herein we are only concerned with the question as to whether the award can be set aside or not. The learned arbitrator took into consideration the respective contentions of the parties and came to the conclusion that title has, by reason of the deeds of sale, passed on to AWHO. While arriving at the said finding, the arbitrator has not applied wrong principle of law. Sumangal procured land on behalf of AWHO. It for a specific purpose and with a view to avoid double payment of stamp duty entered into an arrangement whereby the owners of the agricultural land executed sale deeds in favour of AWHO. Subject of course to furnishing bank guarantee Sumangal received consideration. Sumangal stated that by getting the land transferred in the their name by way of security at a nominal price, as part of the turn key project, AWHO has gained enormously to the tune of about 11.40 crores which they are not entitled to retain lawfully. They, thus, have unjustly enriched themselves. It does not appear that such a case has been made out before the learned arbitrators. The plea of unjust enrichment, therefore, cannot be allowed to be raised at this juncture. Such consideration was passed on to the owners of the land. Requirements of Section 54 of the Transfer of Property Act in respect of sale transaction were fully complied with. Title to the said land, thus, apparently vested in AWHO and has become absolute its owners. No exception, thus, to that part of the award can be taken.

CONCLUSION:

However, we would like to clarify that the observations made hereinbefore were meant for the purpose of demonstrating that the learned arbitrators failed to apply the correct principles of law but not for the purpose of determining finally the lis between the parties. In other words, the questions have been posed and answered for the limited purpose as to whether the award of the learned arbitrators suffer from any legal infirmity within the meaning of Sections 30 and 33 of the Arbitration Act and no more.

We, therefore, for the aforementioned reasons, while upholding Claim No. 1 of the award are of the opinion that the award of the arbitrations in relation to Claim No. 2 must be set aside. Consequently, no interest thereupon shall be payable.

The I.A. No. 11 of 2002 is allowed to the aforementioned extent. No costs.