

## **State Of Rajasthan vs M/S Nav Bharat Construction Company on 4 October, 2005**

**Equivalent citations: AIR 2005 SUPREME COURT 4430, 2006 (1) SCC 86, 2005 AIR SCW 5265, (2005) 9 JT 173 (SC), (2006) 1 ALLMR 235 (SC), (2006) 1 CLR 328 (SC), 2005 (7) SLT 632, 2006 (1) ALL MR 235, 2006 (1) CLR 328, 2005 (3) ARBI LR 429, 2005 (8) SCALE 372, 2005 (9) SRJ 489, 2006 (8) SUPREME 800, (2005) 8 SUPREME 800, (2005) 8 SCALE 372, (2006) 1 WLC(SC)CVL 127, (2006) 3 CIVLJ 95, (2006) 1 CIVILCOURTC 749, (2005) 8 SCJ 137, (2006) 71 CORLA 156, (2005) 3 ARBILR 429, (2005) 4 RECCIVR 473, (2006) 1 ICC 456, (2006) 1 CURCC 85**

**Author: S. N. Variava**

**Bench: S. N. Variava, Tarun Chatterjee**

CASE NO.:

Appeal (civil) 2500 of 2001

PETITIONER:

State of Rajasthan

RESPONDENT:

M/s Nav Bharat Construction Company

DATE OF JUDGMENT: 04/10/2005

BENCH:

S. N. Variava & Tarun Chatterjee

JUDGMENT:

**J U D G M E N T** [With Civil Appeal No.2501 of 2001] S. N. VARIAVA, J.

These Appeals are against the Judgment dated 10th December 1999 of the Rajasthan High Court.

Briefly stated the facts are as follows.

The Appellants invited tenders for construction of Bhimsagar Dam. Pursuant thereto, various tenders were received. Ultimately the tender of the Respondent was accepted. A contract was awarded to the Respondent on 18th January 1979. Under the contract, the work was to be started on 16th November 1978 and to be completed by 15th May 1981. The work was not completed within this time and time was extended. It appears that the work was not completed within the extended time also. The Appellants terminated the contract and got the balance work completed from some other

contractor. The Respondent raised various claims which were rejected by the Appellants. The Respondent, therefore, moved an application under Section 20 of the Arbitration Act, 1940 for referring the claims mentioned therein to arbitration. By an Order dated 11th November 1982, the District Judge held that only one claim was referable to arbitration and refused to refer the other three claims to arbitration. The Respondent filed an Appeal before the High Court. The High Court by its Order dated 7th June 1984 held that it was for the Arbitrator to decide whether the claims were to be awarded or not. The High Court held that reference could not be refused and, therefore, directed that all the four claims be referred to arbitration. Even before the High Court passed the Order dt. 7th June 1984, the Respondent had, on 31st March 1983, filed another application under Section 20 of the Arbitration Act, 1940. By this application the Respondent sought reference of 24 more claims. The District Judge by an Order dated 1st March 1985 allowed the application. The disputes were referred to two Arbitrators. One Shri M.K. Gambhir was appointed by the Appellants and Shri Leeladhar Aggarwal was appointed by the Respondent. The Respondent, however, filed 39 claims amounting to Rs. 42,59,155.56 before the Arbitrators. Parties led oral and documentary evidence. There was a difference of opinions between the two Arbitrators. Therefore, the Arbitrators referred the disputes to an Umpire viz. one Shri V. K. Gupta.

The Appellants filed an application under Section 11 of the Arbitration Act, 1940 for removal of Shri V. K. Gupta as an Umpire on the ground of bias. This application was dismissed on 16th November 1993 inter alia on the ground that there was no evidence to show that there was any bias. The Appellants filed a Revision which also came to be dismissed by the High Court in January 1995. The Umpire entered into the reference and gave an Award on 29th May 1995. The operative part of the Award reads as follows:-

"..... And having carefully considered the oral evidence, the documents, site topographical conditions, analysis of rates, technical specifications, other exhibits filed by the parties, the operations required for various items of existing B.S.R. and newly approved rates for Bhim Sagar Dam, Schedule 'C' the conditions of the contract, P.W.F.A.R. and various case laws cited by the parties, I make the award as under:-

I award an amount of Rs. 29,96,060/-

(Rupees Twenty nine lacs Ninety-six thousand and sixty only) payable by the Respondents to except Claim No. 30 (as awarded below separately) and enumerated under paras 15 and 16 of the statement of claims of the Claimants.

I further award refund/release of the Bank F.D.R.S. amounting to Rs. 2,84,000/- (Rupees two lacs eighty-four thousand only) being security deposit by the Respondents in favour of Claimants as claimed under para 17 of the Claim statement.

I award an interest difference of (18% - F.D.R. interest rate on F.D.R. amount w.e.f. 15.12.82 till released to the Claimants or decreed whichever is earlier however the interest already accrued from 17.11.78 upto 14.12.82 is to be reduced from the final

calculated sum.

I also award an interest @ 18% per annum from 15.12.82 to 14.7.83 on total amount of claims except F.D.R. amount payable to Claimants as prior to reference.

I further award an interest @ 18% p.a. from 15.7.83 to 29.5.95 on total amount of Claims except F.D.R. amount payable to Claimants as pendente lite interest.

I further award an interest @ 18% p.a. on total amount of Claims except F.D.R. amounts beyond 29.5.95 upto the date of payment or decree of the Court whichever is earlier.

I further award that the Respondents shall pay a part of the cost of arbitration and part of fees of arbitrator and Umpire to the extent of Rs.20,000/- to the Claimants."

The Appellants filed objections under Sections 30 and 33 of the Arbitration Act 1940, which were dismissed by the Trial Court on 16th July 1996. The Appellants filed an Appeal before the High Court and the Respondent filed a Cross-Appeal claiming compound interest. The High Court by the impugned Judgment dismissed both the Appeals. Civil Appeal No.2500 of 2001 is by the Appellants who are aggrieved by the dismissal of their objections. Civil Appeal No.2501 of 2001 is by the Respondents against dismissal of their claim for compound interest.

Mr. Mohta has assailed the Award on five grounds:

(1) that the Umpire was biased against the Appellants inasmuch as he was person, who regularly appeared for the Respondent in arbitration matters and assisted the Respondent in their arbitration cases; (2) that the Court had referred only 28 claims yet all the 39 claims have been allowed by the Umpire. It was submitted that in respect of the claim which had not been referred to arbitration the Umpire had no jurisdiction to arbitrate and the Award in respect of those claims had to be set aside; (3) that as there had been a difference of opinion between the two Arbitrators and, one of the Arbitrators namely, Mr. Gambhir, had given a speaking and reasoned Award, the Umpire was also bound to pass a reasoned Award. It was submitted that by not giving a reasoned Award the Umpire had misconducted himself;

(4) that the Umpire had misconducted himself inasmuch as he had not applied his mind to the terms of the contract and had awarded contrary to the terms of the contract; and (5) that the interest awarded is very high and that in an identical matter between the same parties, reported in (2002) 1 SCC 659, this Court has reduced interest to 6%.

Mr. Mohta first submitted that the Umpire was biased against the Appellants inasmuch as he was the person, who regularly appeared for the Respondent in arbitration matters and assisted the Respondent in their arbitration cases. Mr. Mohta relied on the case of Ranjit Thakur vs. Union of India & Ors. reported in (1987) 4 SCC 611. In this case it has been held that the test of real likelihood

of bias is whether a reasonable person in possession of relevant information would have thought that bias was likely and whether the authority concerned was likely to be disposed to decide the matter only in a particular manner. It is held that what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. Mr. Mohta also relied on the case of Jiwan Kumar Lohia & Anr. Vs. Durga Dutt Lohia & Ors. reported in (1992) 1 SCC 56 wherein also the same principles have been reiterated. We see no substance in this first ground of challenge. On the ground now urged the Appellant had earlier filed an application for removal of the Umpire. That application came to be rejected on 16th November 1993 and an Appeal against that Order was also dismissed in January 1995. Having failed in their attempt to remove the Umpire, in our view, this ground is no longer available to the Appellants. Even otherwise except for making bare averments no proof has been produced to substantiate the averments. If, as claimed, this Umpire was appearing for and/or regularly assisting the Respondents there would be documents showing his name/ appearance. None have been produced.

So far as the second ground is concerned, we have seen the two applications made by the Respondent. It prima facie appears that the two applications were for referring, in all, 28 claims to arbitration. The Respondent then made 39 claims before the Arbitrators. The Umpire has awarded in respect of all the 39 claims. If claims not referred to Arbitration have been dealt with and awarded the Umpire would have exceeded his jurisdiction. However Mr. Moolchand Luhadia, partner of the Respondent who appeared in person, contended that all the claims were referred to the Arbitrators by the Order dt. 1st March 1985. He submitted that this is clear from the directions to the Arbitrators to decide all disputes arising between the parties. We are unable to accept this submission. The Order dt. 1st March 1985 allows "application dt. 9th April 1983 as part of application dt. 5th October 1981". It is in the context of claims raised in these two applications that the Arbitrators are instructed to decide all disputes between the parties. Mr. Lohadia then submitted that all claims were included in the two applications made by them. It was submitted that in the applications some of the claims were clubbed together but whilst filing the statement of claims they were segregated and separated. As we are proposing to refer the matter back to an Umpire, we do not propose to go into the question as to whether or not the 39 claims were part of the two applications filed by the Respondent. In our view, this is a question which can be decided by the Umpire. All that we need to clarify is that if any claim did not form part of the two applications the same cannot be arbitrated upon and the Umpire will confine the reference to the claims made in the two applications. It must be mentioned that in the case of Orissa Mining Corporation Ltd. Vs. Prannath Vishvanath Rawlley reported in (1977) 3 SCC 535 this Court has held that when an agreement is filed in Court and an order of reference is made, then the claim as a result of the order of reference is limited to that relief and the arbitrator cannot enlarge the scope of reference and entertain fresh claims without a further order of reference. It must also be mentioned that Mr. Lohadia had relied upon the case of H. L. Batra & Co. vs. State of Haryana & Anr. Reported in (1999) 9 SCC 188. In this case the award of the arbitrator was set aside and a new arbitrator was appointed. The order stated that the new arbitrator was appointed "for settling disputes between the parties". Before the new arbitrator 7 additional claims, over and above the 30 claims originally made, were made. It was held that the award was not vitiated as the terms of reference did not confine the second reference to only 30 claims. This authority is of no assistance to the Respondent as it does not lay down that the arbitrator can entertain claims not referred to him. We, however, see no

substance in the third ground i.e. that reasons should have been given by the Umpire. It is settled position that under the Arbitration Act 1940, unless the contract so required, reasons were not required to be given. A Constitution Bench of this Court in the case Raipur Development Authority & Ors. vs. M/s Chokhamal Contractors & Ors., reported in (1989) 2 SCC 721, has held that it is not necessary to give reasons and that an Award cannot be set aside merely because it is a non-speaking Award. The mere fact that two Arbitrators had differed and that the matter was required to be dealt with by an Umpire does not mean that the Umpire should give reasons for his Award. We further clarify that the Umpire now being appointed by us need not give reasons.

Mr. Mohta had next contended that the Umpire has misconducted himself inasmuch as he had ignored the terms of the contract and awarded contrary to the terms of the contract. To this objection, the Respondent had submitted that such a point had neither been urged before the District Judge nor before the High Court. We, however, find that this point has in fact been urged both before the District Judge as well as before the High Court. This point, therefore, requires to be considered.

In order to consider this point, some of the terms and conditions of the tender documents and the contract are required to be set out. The Respondent has given a declaration which inter-alia reads as follows:

"1. I/We have visited the Site and fully acquainted myself/ourselves the local situation regarding materials, labour and other factors pertaining to the work before submitting this order.

2. I/We carefully studied the N.I.T. conditions of contract, specification, additional instructions, general rules and directions and other documents related to this work and I/We agree to execute the work accordingly.

.....

I/We do hereby tender for the execution for the Rajasthan Government of the work specified as above within the time specified in Schedule 'F' and at the rates entered in Schedule 'G'. The work will be carried out in accordance in all respects with the detailed specifications, designs, drawings and instructions referred to in the attached Schedule sheet."

The relevant terms of the tender document (which is part of the contract) and the contract reads as follows;

"7. HOUSES:-

No local housing is likely to be available and the contract should arrange for suitable housing for the staff and labour. Land for the same will be granted free of charge for temporary use during the period of contract.

.....

12. SUPPLY OF PETROL AND DIESEL:-

The contractor has to make his own arrangements for the supply of petrol and diesel and lubricants. The nearest place from where it can be obtained is Jhalawar.

.....

Clause 12 The Engineer-in-Charge shall have power to make any alterations in or additions to the original specifications, drawings, designs and instructions, that may appear to him be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the working in accordance with any instruction which may be given to him in writing signed by the Engineer-in-Charge and such alteration shall not invalidate the contract and any additional work which the Contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work bears to the original contract work, and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. And if the additional work includes any class of work for which rate is specified in this contract then such class of work shall be carried out at the rates entered in the schedule of rates of the district if it exists and such last mentioned class of work is not entered in the schedule of rates of the district, then the contractor shall, within seven days of the date of this receipt of the order to carry out the work, inform the Engineer-in-Charge of the rate which it is his intention to charge for such class of work and if the Engineer-in-Charge does not agree to this rate he shall, by notice in writing, be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable, provided always if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined as lastly herein before mentioned, then and in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Chief Engineer will be final.

.....

Clause 23 Except where otherwise specified in the contract the decision of the Chief Engineer of the Government of Rajasthan for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship, or materials used on the work or as to any other

question, claim, rights, matter, or thing whatsoever in any way arising out of, or relating to, the contract, designs, drawings, specifications, estimates, instructions, order, these conditions or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof, or the contract by the contractor shall be final, conclusive and binding on the contractor.

.....

Clause 36 The Sales Tax or any other tax on materials issued in the process of fulfilling contract payable to the Government under rules in force will be paid by the contractor himself.

.....

Clause 38 Fair Wages Clause:--(a) The contractor shall pay not less than fair wage to labourers engaged by him on the work.

Explanation:-- 'fair wages' means minimum wages for time on piece work fixed or revised by the State Govt. under the minimum Wages Act, 1948.

(b) The contractor shall not withstanding the provisions of.....contract to the contrary cause to be paid fair wages to labourers indirectly engaged on the work including any labour engaged by him, his sub-contractors in connection with the said work as if the labourers has been immediately or directly employed by him.

(c) In respect of all labourers indirectly or directly employed on the work for the purpose of the contractor's part of this agreement, the contractor shall comply with or cause to be complied with the P.W.D. contractor's labour regulation made way of that be made by the Government from time to time in regard to payment of wages period, deductions, maintenance of wages register, wage card, publications and submission of wages periodical returns in all other matters of like nature.

(d) The Executive Engineer-in-Charge shall have the right to deduct from the money due to the contractor may sum required to estimate to be required for making good the loss suffered by a worker by reasons of non-fulfillment of the conditions of the contract for the benefit of the worker or workers non-payment of wages or deductions made therefor which are not justified by the terms of contract or as a result of non-

observance of the aforesaid regulations.

(e) Vis-`-vis the Government of Rajasthan the contractor shall be primarily liable for all payments to be made and for the observance of the regulations aforesaid without prejudice to his right to claim indemnity from his sub-contract.

(f) The regulations aforesaid shall be deemed to be part of this contract and breach thereof shall be deemed to be breach of contract."

Special Conditions of the contract inter-alia provide as follows:

"31 LABOUR CONDITIONS:-

(a) The contractor shall comply with the labour laws viz. Contractor Labour Regulation Act, Minimum Wages Act.

Workman's Compensation Act, Industrial Disputes Act, etc. as may be current and shall furnish the returns and information as any required and be specified from time to time. The contractor will have to carry out registration with the office or Regional Labour Commissioner, and obtain a valid licence for employing labour.

(b) The contractor shall as far as possible, obtain his requirements of labour, skilled and unskilled from the local area. No person below the age of 12 years shall be employed as labour.

(c) The contractor shall pay fair and reasonable wages (whether or not such wages are controlled by any Laws existing at the time) to the workmen employed by him for the work. In the event of any disputes arising between the contractor and his workmen on the grounds that the wages paid are not fair and reasonable the dispute shall in the absence of legal or other relief to the workmen, be referred to the Engineer who shall decide the same the decision of the Engineer shall be conclusive and binding on the contractor but such decision or any decision in this behalf that the contractor's workmen may obtain by resource to law or other legal means available to them, shall not, in any way, affect the condition in the contract regarding payment to be made by Govt. to the contractor only at the rate accounted in this contract.

(d) The contractor shall not employ animals suffering from source, lameness, or emaciation or which are immature nor shall treat them in a way that may be considered inhuman.

(e) The Engineer shall have the authority to remove from the work any animal or workmen that, in his opinion which shall be conclusive, he may consider unfit or undesirable and no responsibility shall be accepted by the Government for any delay or extra expenses caused towards the completion of the work such removal.

(f) While employing skilled or un-skilled labourers piece workers the contractor shall be first preference to the person certified to him by the Engineer, or his duly authorized representative as persons who are adversely affected by the Bhimsagar submergence and are suitable for employment and shall be minimum fair wages not below the minimum which has been fixed to this implementation of this work sited by the Engineer, whose decision shall be final, binding on the piece worker/contractor.



(g) The contractor shall employ any famine, convict or other labour of a particular class or kind if ordered in writing to do so by the Engineer.

(h) Should Government declare a state of famine to exist in any village within 10 miles of the work, the contractor shall employ upon such parts of the works as are suitable for unskilled labour, any persons certified to him by the Engineers or by a duly authorized agent of the Engineers, in writing to be in need of relief and the contractor shall pay to such persons wages not below the minimum which the Government may have fixed in this behalf. Any disputes which may arise in the implementation of this provision shall be decided by the Engineer whose decision shall be final and binding on the contractor.

(i) The contractor shall provide reasonable facilities to the satisfaction of the Engineer, for the labour employed by him, where no such natural facilities exist.

The usual facilities are weather proof shelter for rest and supply of wholesome drinking water, facilities for obtaining food reasonable washing and sanitary facilities special facilities for women workers, suitable residential accommodation, recreation and cultural activities, general sanitation and health measures etc.

(j) The implementation of any provision of this clause shall, in no way, entitle the contractor to claim compensation or rates higher than tendered in his contract.

.....

57) The quantities given in Schedule 'G' are approximate and payments will be made on measurement of actual quantities of different items of work executed by the contractor.

The rates quoted shall be for the committed item in the schedule. The contractor is advised to see the site fully and investigate in detail as to the source of materials availability of labour means of approach and carrying quarries to be put stocking of materials putting tools and plants in use and other site conditions such as flood levels etc. He is expected to have investigated as to the execution of work and quote his tender accordingly. No claim on his account shall be accepted. It shall be assumed that his rates quoted in 'G' Schedule cover all possible eventualities that may be not within the course of execution of this work.

.....

60. Owing to difficulty in obtaining certain materials in the open market the Government has undertaken to supply materials specified in the schedules of the tender form. There may be delay in obtaining materials by the Department and the contractor is therefore required to keep in touch with the day to day position of supply of material from the Engineer-in-Charge need to so adjust the progress of the work that their labour may not remain idle nor there may be any other claim due to or arising from delay in obtaining materials. It should be clearly understood that no monetary claim whatsoever shall be entertained by the Government on account of delay in supplying way.

61. Under no circumstances shall any claim for compensation from the Government on any account be considered unless the contractor shall have informed the reasons for the claim in writing to the Engineer-in-Charge within 7 days of occurrence of cause of such claim. Similarly any hindrances to the work which may cause extension of period of completion of work shall be immediately informed in writing to the Engineer for his consideration."

Schedule 'G' to the contract lists the estimated quantities of items of work and the rates payable for such work. At the end of this Schedule a lead statement and some notes appear, the relevant portion of which reads as follows:

"LEAD STATEMENT S. Items Source Lead in Total No. Kms. Km.

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1. Stone Ballast Local 1 km. 1 km.

2. Sand Piplia river 46 km. 46 km.

1) Any extra items if involved will be paid on the basis of the B.S.R. 1975 of Ajmer Irrigation on which 'G' Schedule is prepared plus the tendered premium of the Contractor.

2) If any construction material is not available at the sources indicated in the Lead Statement and has to be obtained from other sources intimated in writing by the Executive Engineer and if such other sources are nearer or further than the original source indicated recovery or extra payment will accordingly be made for the leaser or greater distance involved as per B.S.R. on which 'G' Schedule is based plus the premium tendered by the contractor."(emphasis supplied) Thus the Respondents had fully acquainted themselves with the local conditions and had agreed to execute the work as per specifications and at the rates specified in Schedule 'G'. It is only in respect of additional work that the Respondents were entitled to be paid at rates set out in B.S.R. 1975. Clause 12 provides that the Respondents had to make their own arrangements for petrol, diesel and lubricants.

Clause 31 of the special conditions provides that the Respondent shall pay fair wages and comply with labour laws. The contract provides that the fact that the contractor had to pay fair/minimum wages and comply with labour laws would not entitle the contractor to claim compensation or rates higher than those tendered in the contract. Clause 57 of the special conditions provides that the rates quoted in Schedule G cover all possible eventualities and that no claim can be made in respect of items like source of material, availability of labour, means of approach etc. At this stage it becomes necessary to set out a summary of the claims made by the respondent. They are as under:

S. No Claim No. Claim Amount (Rs.) Amount of Final Bill 2,00,000.00 (1) For Chisel Dressed Face Stone 2,78,737.92 (2) Cost of C.R. Stone Cost of R. R. Stone 2,71,282.00

Rehandling of Sand 1,18,559.82 Rehandling of Stone 15,743.59 Extra lead of stone 15,743.59 Extra lead of Rubble Stone 11,123.19 Preparation of Foundation for slides 1,49,955.00 Final excavation of sides 18,556.57 Carriage of porous pipes 2,662.90 Finishing of the concrete 5,861.16 R.C.C. in inspection gallery and sluice 32,000.00 Rock cutting by line drilling chiseling 25,947.31 Mechanical mixing of cement mortar 1,82,990.72 Cleaning of surface by air & water daily 66,079.74 Shuttering of stair case in Galleries 2,231.60 Cement concrete in saturated condition 29,223.81 Shuttering at the junction of the Dam heel and the Down stream protection 5,126.49 Mechanical mixing of cement concrete 2,463.26 Carriage of Air vent pipe 2,497.50 Crusher broken aggregate 33,669.00 Cleaning the foundation surface handed over by the department 28,092.00 Increased in rates of royalty 17,216.87 Increased in rates of Diesel 1,22,604.36 Increased in minimum labour wages 5,27,638.60 Increased in minimum labour wages and increase in price in the rates 10,52,797.30 Loss of profit 3,07,038.00 Due to unlawful withdrawal of the running work 1,58,904.85 Over establishment and overheads beyond 16.5.81 (stipulated date of completion) 4,33,347.00 Difference of interest of F.D.R. 56,800.00 Wrong recovery from bills for sand department & extra carriage (6364.71 + 23206.90 29,571.61 Recovery of labour 2,730.30 Recovery of Storage charges 22,549.30 Material remain unused 5,856.00 Electric charges 10,205.20 Excess charges of hire charges of machine Recoveries to be final For screening of sand 4,165.00 Royalty charges on departmental material 6,243.30 Mr. Mohta relied upon the case of Bharat Coking Coal Ltd. vs. L. K. Ahuja & Co. reported in (2001) 4 SCC 86, wherein it has been held that if an Arbitrator has not applied his mind to important terms of the contract between the parties and has not applied such terms in making his award, then, even though the award is a non-speaking award. This error is apparent on the face of the award, the entire lump sum award is required to be set aside. He also relied upon the case of Continental Constructions Co. Ltd. vs. State of M. P. reported in (1988) 3 SCC 82. In this case also it has been held that if an Arbitrator awards extra costs on account of changes in circumstances such as price rise, in spite of a provision in the Contract to the contrary, it would amount to the Arbitrator mis-conducting himself and that such an award would be required to set aside.

Mr. Mohta took us through a number of claims and pointed out that under most of the claims additional/higher amounts were being claimed in respect of works covered by the Contract. He submitted that there were a number of claims where, for doing the contracted work during the extended period, higher rates were claimed and the Umpire has awarded those claims not on the basis of contracted price but on basis of rates given to the new contractor who was appointed to complete the work left unfinished by the Respondent. Mr. Mohta submitted that the letters extending time categorically provided that the work would be done at the contracted rate. He submitted that this had been accepted by the Respondent. As we propose to remit the matter back to an Umpire we do not deal with each instance pointed out by Mr. Mohta. Only by way of example we refer to two claims. As set out hereinabove claim no. 2 is in a sum of Rs.2,78,737.92 and it is for chisel dressed face stones. Under this claim, the Respondents have claimed extra amounts for chiseling the stones on all four sides when, under the Contract, they are supposed to do this work at

the rates specified for such work in Schedule G. Mr. Mohta pointed out Clause 5.11(iii) of the Technical Specifications the relevant portion of which reads as follows:

" xxx xxx xxx Dressing:- The face stone shall be squared on all joints and beds. The beds shall be hammer dressed true and square for at least 7.5 cms. Back, from the face and the side joints for atleast 7.5 cms. The faces of the stones shall be single line chisel dressed and bushing shall not project by more than 3.75 cms. No pinnings will be allowed on the face. All side joints shall be vertical and beds horizontal and no joint shall be more than 12 mm. in thickness. Stones shall break joints in courses above and below by at least half the height of the courses. The joint in face work shall not be thicker than 12 mm. for single line chisel dressed stones.

xxx xxx xxx"

He submitted that this was the work which was required to be done under the Contract at the rate specified in Schedule G and yet the claim had been made at higher rates. He submitted that the Umpire had not rejected the claim. He submitted that even though the award was a lump sum award it was also in respect of claim No. 2. Mr. Mohta also referred to claim No. 26 which was for Rs. 10,52,797.30 for increase in minimum labour/wages and increase in prices. He pointed out that this claim was contrary to Clause 38 of the Contract and Clause 31 of the Special Conditions of the Contract which specifically provided that the contractor would not be entitled to claim compensation or higher rates because he had to implement labour laws or pay fair wages.

In the same manner, Mr. Mohta took us through a large number of other claims to show that they were contrary to the terms of the Contract. As stated above it is not necessary, for the purposes of this Judgment, to set out in detail the submission of Mr. Mohta in respect of other claims referred to by him.

On the other hand, Mr. Luhadia submitted that this was a non- speaking lump sum award and therefore the grounds on which this Court can interfere with such an award are very limited. In support of his submission he relied upon a number of authorities including the cases of Hindustan Steel Works Construction Ltd. vs. C. Rajasekhar Rao reported in (1987) 4 SCC 93. In this case it has been held that it is only in a speaking award that the Court can look into the reasoning of the award. It is held that it is not open to the Court to probe the mental process of the arbitrator and speculate, where no reasons are given, as to what impelled the arbitrator to arrive as to his conclusions. He also relied on the cases of S. Harcharan Singh vs. Union of India reported in AIR (1991) SC 945; Hindustan Constructions Co. Ltd. vs. State of J. & K. reported in AIR (1992) SC 2192 and Continental Construction Ltd. vs. State of U. P. reported in (2003) 8 SCC 4. In these cases the question was regarding interpretation of the terms of the contract. It was held that the Court cannot substitute its own interpretation to that of the arbitrator so long as the interpretation of the arbitrator is a possible one. Reliance was also placed upon the case of M/s. Sudarsan Trading Co. vs. State of Kerala reported in AIR (1989) SC 890. In this case also it has been held that it is for the arbitrator to interpret terms of the contract and that if the view taken by the arbitrator is a possible view then the court would not interfere. In the case of P. M. Paul vs. Union of India reported in AIR

(1989) SC 1034 the questions referred to the arbitrator were (a) who was responsible for the delay; (b) what are the repercussions of the delay and (c) how to apportion the consequences. The arbitrator gave a reasoned award holding the Union of India responsible for the delay and awarded escalation in costs to the contractor. It must immediately be mentioned that there was no provision in the contract which permitted or barred grant of escalation. This Court held that the arbitrator had not exceeded his jurisdiction nor misconducted himself. In the case of Build India Construction System vs. Union of India reported in (2002) 5 SCC 433 after the contract was entered into it was amended to provide that in cases where the claim is more than 1 lakh a reasoned award should be given. The arbitrator gave an unreasoned award. The challenge to it on the ground that the award was unreasoned was not accepted as this point was taken for the first time in the high court and also on the ground that a contract cannot be unilaterally altered.

There can be no dispute to the well established principle set out in these cases. However these cases do not detract from the law laid down in Bharat Coking Coal Ltd's case or Continental Construction Co. Ltd's case (supra). An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so he will have misconducted himself. Of course if an interpretation of a term of the contract is involved than the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However where the term of the contract is clear and unambiguous the arbitrator cannot ignore it. Mr. Luhadia submitted that the respondents had made claims totaling Rs. 4556155.56p. He submitted that claims for damages were to the tune of Rs. 27.50 lacs. He submitted that the claim for final bill was for Rs. 2 lacs. He submitted that the claims for extra items were for Rs. 1598495. He submitted that the Umpire had only awarded Rs. 2996060. He submitted that as the award is a non speaking award, even presuming without admitting that some claims were covered by the terms of the contract, it still could not be said that the Umpire has awarded towards claims covered by the contract. He submitted that thus the award could not be set aside. In support of this submission he relied upon the case of Paradip Port Trust & Ors. vs. Unique Builders, reported in AIR (2001) SC 846. In this case the claim had been for Rs. 1293260. The arbitrator awarded as follows:

"M/s Unique Builders Ltd. the claimant is entitled to receive from Paradeep Port Trust a sum of Rs. 851315 with interest .."

It was contended in that case that claims 2 and 7 (therein) could not have been awarded. This Court held that as the award was a lump sum award and as only Rs. 851315 had been awarded against a claim of Rs. 1293260 it was not possible to say whether any amounts had been awarded against claims 2 and/or 7. relying on this Mr. Lohadia submitted that even in this case it cannot be said whether any amounts have been awarded against claims alleged to be covered by the contract. We are unable to accept this submission. In this case the award itself states that the award of Rs. 29,96,060/- is against claims 1 to 39, except claim no. 30. Therefore this award is in respect of claims covered by the contract and to that extent the Umpire has misconducted himself. Even otherwise the claim for damages is not in a sum of Rs. 27.50 lacs as claimed. Claims 27 and 28 which deal with damages are for Rs. 3,07,038/- and Rs. 1,58,904.85. The other claims, included in the figure of Rs. 27.50 given to this Court appear to be claims at enhanced rates for the contracted work

done during the extended period. Mr. Lohadia denied that Respondents had agreed to do work during the extended period at the contracted rate. Thus at this stage, unlike in Paradip Port Trust's case (supra), it does appear on the face of the record that higher rates for items covered by the contract have been awarded.

As regards claim No. 2 Mr. Luhadia fairly admitted that Clause 5.11(iii) of the Contract requires chiseling of stones on all sides. He however submitted that the rates given in Schedule G were only for chiseling of stones on one side. He submitted that this was clear from Note 1 under Schedule G which stated that Schedule G was based on B.S.R. 1975. He submitted that B.S.R. 1975 showed that such rates were only for chiseling stones on one side. He submitted that when the stone has to be chiseled on all sides the rates given in B.S.R. 1975 were to be applied. He submitted that claim No. 2 was based on those rates. We are unable to accept this submission of Mr. Luhadia. The Contract is very specific. The work specified in the Contract has to be done at the rates specified in Schedule 'G'. Even though Schedule G may be based on B.S.R. 1975 it is not exactly as B.S.R. 1975. Where in respect of a work specified in the contract the rate has been given in Schedule G that work could only be done at that rate. Works specified in the Contract does not become extra work. It is only in respect of extra work that rates specified in B.S.R. 1975 can be applied. To us it is clear that the claim No. 2 is contrary to the terms of the Contract. It is barred by Clauses 57, 60 and 61 of the Contract. As regards claim No. 26, Mr. Luhadia relied upon the case of Tarapore & Co. vs. State of M.P. reported in (1994) 3 SCC 521. In this case, the question was whether the contractor was entitled to claim extra amounts because he had to pay increased wages to his workers. This Court has held that the contractor would have tendered on the basis of the then prevailing wages and as the contract required the contractor to pay the minimum wages if the minimum wages increased it was an implied term of the contract that he would not be entitled to claim the additional amount. However, it must be noted that, in this case, there was no term in the contract which prohibited any extra claims being made because of the increase in wages. Clause 31 of the Special Conditions of the Contract, which has been reproduced hereinabove, specifically bars the contractor from claiming any compensation or an increase in rate under such circumstances. Not only that but the Respondents had with their initial tender put in a term which provided that if there was any increase in the minimum wages by the Government the rates quoted by him would be increased by the same percentage. At the time of negotiation this clause was dropped. Thus, the Respondents had themselves specifically agreed not to claim any compensation or increase by reason of increase in wages. This claim could therefore not have been granted.

It prima-facie appears that the majority of the claims are against the terms of the Contract. However, there are also other claims which are not against the terms of the Contract. To merely set aside the Award on ground of misconduct would work hardship on the Respondent as they would then be deprived of claims which may be maintainable. In our view the correct course would be to set aside the award and refer the matter back to an independent Umpire appointed by this Court. The Umpire will fix his own terms and conditions. We however clarify that only those claims covered by the two applications will be considered. Of course the Umpire will decide how many of the 39 claims formed part of the claims made in the two applications. Needless to state that the terms of the contract will be kept in mind and claims contrary to terms of the contract will undoubtedly not be allowed. The Umpire will also decide whether the Respondent had agreed to do

the contracted work done during the extended period at the same rates and/or whether the Respondent is entitled to increased rates and if so at what rate. The Umpire shall decide only on the basis of the materials already placed before the earlier Arbitrators and the earlier Umpire.

Under the circumstances and for reasons set out hereinabove, we set aside the Award and appoint Justice N. Santosh Hegde, a retired Judge of this Court, as the Umpire. The Umpire, Mr. V. K. Gupta, shall forthwith forward all papers and documents to Justice N. Santosh Hegde at his residence, i.e., 9, Krishna Menon Marg, New Delhi. The parties shall appear before Justice N. Santosh Hegde on 6.10.2005 at 5.00 P.M. at 9, Krishna Menon Marg, New Delhi. Justice N. Santosh Hegde shall fix his fees which shall be borne by both the parties equally. Justice N. Santosh Hegde is requested to fix the schedule and give his award within a period of 4 months from the date of receipt of all the papers and documents from the outgoing Umpire Mr. V. K. Gupta. The award to be filed in this Court. We leave the question of grant of interest open to be decided by the Umpire in accordance with law.

Lastly, it is clarified that this is not a new reference but a continuation of the earlier proceedings and thus the Arbitration Act 1940 shall continue to apply.

The Appeals stand disposed off accordingly. There will be no order as to costs.