Tarapore & Co vs State Of M.P on 16 February, 1994

Equivalent citations: 1994 SCC (3) 521, JT 1994 (2) 162, AIRONLINE 1994 SC 332, 1994 (3) SCC 521, (1994) 1 ARBILR 341, (1994) 1 SCR 1012 (SC), (1994) 2 ANDH LT 53, (1994) 2 JT 162 (SC), (1994) 2 RRR 225, (1994) 68 FACLR 816, (1994) JAB LJ 412, 1994 UJ(SC) 1 449, (1995) 2 CURCC 429

Author: B.L Hansaria

Bench: B.L Hansaria, B.P. Jeevan Reddy

```
           PETITIONER:
TARAPORE & CO.

        Vs.

RESPONDENT:
STATE OF M.P.

DATE OF JUDGMENT16/02/1994

BENCH:
HANSARIA B.L. (J)
BENCH:
HANSARIA B.L. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
 1994 SCC  (3) 521        JT 1994 (2)   162
 1994 SCALE  (1)612


ACT:



HEADNOTE:



JUDGMENT:
```

The Judgment of the Court was delivered by HANSARIA, J.- The appellant impugns the judgment of the High Court of Madhya Pradesh by which it has upheld the order of the District Judge, Jabalpur, setting aside the award of the arbitrators in exercise of power conferred by Section 30(a) of the Arbitration Act, 1940, hereinafter the Act.

2. The award to be set aside was one which had come to be passed following the order of the District Judge dated May 6, 1987 in Civil Suit No. I-A/87 by which an earlier award had come to be remitted to the arbitrator for reconsideration keeping in view the legal arguments advanced. The first award owes its origin to the following question referred for determination by the two arbitrators named in the order of the District Judge passed on April 12, 1985:

> "Whether the State is not liable to reimburse to the applicant Rs 3,42,69,847.00 for the period August 7, 1979 to August 31, 1984 on account of difference in wages."

3. The reference was made on an application made by the appellant under Section 20(1) of the Act. That application was based on the terms of the agreement entered into by the appellant with the State of Madhya Pradesh relating to construction of Bargi Masonry Dam. One of the terms of the agreement as incorporated in clause 4.3.29(2) provided for settlement of dispute arising out of contract by arbitration. The appellant's averment was that after the contract was entered into, minimum wages were raised by the State and the appellant was required to pay wages accordingly. The rates quoted by the appellant, however, related to wages as were prevalent at the time when the tender was invited. The revision of the wages upset all the calculations as extra amount had to be paid on this count. The Superintending Engineer rejected the claim of reimbursement on the ground of no escalation clause in the contract, whereupon the appellant called upon the Superintending Engineer to appoint an arbitrator on behalf of the State. This not having been done and the appellant having appointed one Brigadier D.R. Kathuria as arbitrator, it approached the court to direct the State to file the arbitration agreement and to make an order of reference. The nonapplicant did not oppose; indeed it filed no reply. Not only this, it even named one Shri V.M. Chitale as arbitrator while filing the arbitration agreement.

4. In these circumstances the aforesaid question was referred for determination by the two named arbitrators. After the reference was entered into by the arbitrators the appellant claimed a sum of Rs 3,42,69,847 on the aforesaid count. The State admitted that the contractor was liable to pay the increased wages under the Minimum Wages Act, but took a stand in paragraph 12 of its counter that the claimant was not entitled to the increased amount on account of revision of wages and denied its liability to reimburse. The arbitrators, however, by order dated November 20, 1986 awarded a sum of Rs 236 lakhs with simple interest @ 12 per cent to the claimant-appellant. It may be stated that by the time the award was passed one Shri K.C. Goel had stepped into the shoes of Brigadier D.R. Kathuria.

5. The State approached the District Judge to set aside the award, inter alia, on the ground that the arbitrators had not decided the question of the liability of the State to reimburse the claim due to escalation of wages which was one of the matters referred to the arbitrators. This is what appears from the State's petition filed on January 23, 1987 under Section 30 of the Act. When the matter came to be taken up by the District Judge the main contention advanced was, however, relating to quantum of award, as it would appear from paragraph 5 of the order of the District Judge passed on May 6, 1987. The attack on this score was on the ground that the arbitration could not have calculated the amount on the task-basis of the sub-contractor and piece workers. The District Judge took the view that the difference in wages was required to be calculated on "actual basis" unless the

parties agreed upon some other formula for calculation. As the arbitrators had calculated the amount taking the labour components as 35 per cent, the finding of the arbitrator was held to be based on "wrong basis". Something was also said about interest. The District Judge took the view that the whole award was not required to be set aside and remitted the same as contemplated under Section 16(1)(c) of the Act.

6. After the matter was taken up again by the arbitrators, the State brought to their notice that as per the aforesaid remand order they were required to decide the question whether the State was liable to pay escalation amount in the light of the agreement. This is what finds place in paragraph 3 of the submissions made before the arbitrators, a copy of which is at p. 226 of Volume 11. In the remand proceedings the appellant brought further materials on record and also examined some witnesses. By a speaking order the arbitrators required the State to pay to the claimant a sum of Rs 236 lakhs with simple interest @ 12 per cent. Though the actual wages paid by the appellant on account of the increased rates came to Rs 245 lakhs, but as the earlier award was for Rs 236 lakhs this was the amount which came to be awarded by the arbitrators.

7. The State again approached the District Judge to set aside the award by its application dated October 31, 1987/November 2, 1987. What is stated in paragraph 6 of this application is material which reads as below:

> "The learned Arbitrators erred in fixing the liability to reimburse the escalated wages in the face of clear condition in the agreement of contract, that they are bound to comply with all labour laws and that the increases in the wages, were made by the Labour Welfare Department and as such it is the responsibility of the contractor to pay at the rates prescribed. There is no clause in the work contract to allow claim towards escalated payments of wages."

8. The District Judge by his order dated July 21, 1988 set aside the award being of the view that the arbitrator did not at all consider whether the State was liable to reimburse. Some defect was also found on the question of quantification. The appellant carried the matter in appeal to the Madhya Pradesh High Court which held in the impugned judgment that the arbitrators ought to have given their finding insofar as primary question of liability was concerned which, however, was not done. On the question of quantum also the High Court was not satisfied inasmuch as in the second award also the same basis had been adopted as had been done in the first award, which had been regarded as wrong by the District Court.

9. On the aforesaid facts, the main question which calls for our determination is whether on the face of two awards and the cases put up by the parties can it really be said that the arbitrators had acted beyond jurisdiction in awarding the sum in question and had thereby misconducted themselves. Another question which we shall have to answer, if we hold that the arbitrators had jurisdiction, relates to quantum.

10. Shri Sanghi appearing for the State has strenuously urged that the arbitrators assumed jurisdiction which they did not have and thereby misconducted themselves. We are reminded that if

an adjudicating authority has no jurisdiction it cannot assume it even if the same were to be acquiesced. According to Shri Nariman, however, present was not a case where the arbitrator lacked jurisdiction altogether. The argument, therefore seems to be that present was not a case of patent lack of jurisdiction; if at all: it was a case of latent lack of jurisdiction, in which case acquiescence would be material.

11. Did the arbitrators have jurisdiction? The question of jurisdiction is the real bone of contention between the parties. Shri Sanghi has drawn our attention to the following conditions in the tender notice. (As per paragraph 2.13 of tender notice "all the conditions of tender notice will be binding on the contractor and will form a part of the agreement to be executed by the contractor.....) Let us therefore note the relevant conditions of tender notice. These are as below:

> "(1) 2.2 The percentage of tender above or below schedule of rate, item rate, lump sum (as the case may be) should be expressed both in words and figures and all overwriting should be neatly scored out and rewritten and corrections should be duly attested prior to the submission of the tender.
>
> (2) 2.19 The contractor shall pay not less than fair wages to labourers engaged by him on the work (Copy of rules enclosed vide Annexure-B) (3)Para 10 of Annexure-A The contractor shall observe all labour laws enacted by Govt. of Madhya Pradesh or Govt. of India as amended from time to time, without having any claim on Irrigation Department.
>
> (emphasis supplied) (4)Para 1 of Annexure-B The contractor shall pay not less than FAIR WAGE to labourers engaged by him on the work.

Explanation:'Fair wage' means wage whether for time or piece work notified at the time of inviting tenders for the work and where such wages have not been so notified the wages prescribed by the PWD (Irrigation Department) for the division in which the work is done.

(emphasis ours) (5) 4.3.15. Time-limit for unforeseen claims. Under no circumstances whatever, shall the contractor be entitled to any compensation from Government on any account unless the contractor shall have submitted claim in writing to the Engineer-incharge within one month of the clause of such claim occurring.

12. Relying on the aforesaid terms of agreement, Shri Sanghi contends that the appellant having been made known beyond doubt that it has to give tender as per item rate or lump sum bearing in mind the fair wage at the time of inviting the tender and para 10 of Annexure-A having required the contractor to observe all labour laws amended from time to time without "having any claim on Irrigation Department", if the appellant had paid to the labourers any increased amount on account of rise of minimum wages which it was required to do because of clause 2.19 of tender notice, it must be deemed to have agreed that it would do so without having any claim on the Irrigation Department. In view of this, Shri Sanghi urges that the arbitrators had no jurisdiction to fasten any liability on the State on the aforesaid count, and by doing so they travelled outside the contract. That

in such a situation the award would be without jurisdiction is contended on the basis of Associated Engineering Co. v. Government of A. P. I and Managing Director, J & K Handicrafts, Jammu v. Good Luck CarpetS2.

13. As Shri Nariman has not contested the legal proposition that an arbitrator cannot travel beyond the contract, it is not necessary to labour on this point. It would be enough if we take note of aforesaid two decisions, in first of which it was stated clearly that an arbitrator cannot go out of contract 1 (1991) 4 SCC 93 : (1991) 2 SCR 924 2 (1990) 4 SCC 740 and if he does so the award would be without jurisdiction. In that case the award was so found because of which it was stated in paragraph 30 that the award flew in the face of the contract and so it was set aside. In the second decision this Court stated that if the question of jurisdiction of arbitrator is raised, the only way to test the correctness is to look into the agreement between the parties as reference can be one which is contemplated by the agreement.

14. Shri Nariman's emphasis on this facet of case is that the question as referred to the arbitrators by the District Judge on April 12, 1985, if interpreted in the background in which it was made, would show that the State had accepted its liability and the reference was really on the question of quantification of the liability. This is sought to be brought home by drawing our attention, inter alia, to the fact that the appellant had approached the District Judge under Section 20 of the Act after the Superintending Engineer had rejected the claim on account of increase of wages, by taking a stand that there was no escalation clause under the contract agreement, as would appear from the minutes of the meeting held on April 7, 1984, a copy of which is at p. 125 of the additional documents filed on behalf of the appellant to be referred as Volume II. Learned counsel then refers to the statement of claim as made before the arbitrators in paragraph 16 of which it had been stated that in case of M/s SEW Construction Private Limited, which too was given contract for construction of a part of the dam in question, the Superintending Engineer despite finding that the claim on account of escalation of wages was justified had not paid the same, whereupon a sole arbitrator was appointed and the arbitrator gave an award on July 12, 1984 directing reimbursement on account of rise in fair wages and the award was honoured by the State and payment was made in accordance with the award. As to this averment, the only reply of the State in its counter was that this was irrelevant as that agreement was entirely different. Shri Nariman urges that this contention is incorrect inasmuch as there was one tender notice pursuant to which contract was given not only to the appellant but to three others including M/s SEW Construction Private Limited. The learned counsel also brings to our notice a communication of Superintending Engineer dated August 7, 1984 to the Chief Engineer of Bargi Dam wherein the claim of the appellant itself was regarded as justified.

15. Our attention is then invited to the communications of the appellant to the Labour Welfare Officer/Executive Engineer, Bargi Dam, as at pp. 70, 82, 97 and 100 of Volume 11 by which the appellant used to bring to the notice of the aforesaid officials stating that wages had been paid as per the circular/communications referred therein dealing with payment of wages, rates of which were being raised from time to time. In these communications, the appellant either used to state that relevant muster rolls were available for scrutiny or enclose copies of the same. Shri Nariman finally submits that the appellant having been asked to give tender taking the fair wage "at the time of inviting tender"

and having been further asked not to pay less than "fair wage" and the appellant being informed from time to time by the government officials either about the rise in rates of minimum wages or the one decided by the wage committee of the concerned division of the Public Works Department, it is apparent that the terms of the agreement did require the appellant to pay wages to the labourers as per the rates of minimum wages fixed under the provisions of the Minimum Wages Act, 1948, or as fixed by the wage committee; and so, merely because of what has been stated in paragraph 10 of Annexure-A, it cannot be contended that the appellant would have no claim on the Irrigation Department due to increase of aforesaid wages. According to the learned counsel this paragraph in Annexure-A has to be confined to the subject-matter of that annexure which is "Model rules relating to labour water supply and sanitation of labour camps". A perusal of that annexure shows that it deals with matters like 'sanitary facilities', 'latrines', 'drinking water', 'bathing facilities'. We have noted that it is really Annexure-B which is relatable to fair wages.

16. Shri Nariman buttresses his submissions by contending that the aforesaid was the reading of the relevant clauses of agreement by the State itself as it would appear from the stand taken by its counsel before the District Judge when he examined the matter in the first instance, as, the "main contention" then advanced was on the subject of calculation of the amount of reimbursement, as it would appear from paragraph 5 of the District Judge order dated May 6, 1987. It is apparent that if jurisdiction of the arbitrators would have been the main plank of State's case, that would have been the main contention. It is because of this the matter was remitted to the arbitrator under clause (c) of Section 16(1) of the Act and not under clause (a); the latter of which comes into play when a point is left undetermined by an arbitrator. It is stated that in the first award, as in the second, the arbitrators had not dealt specifically with the question of liability of the State. Despite this the main contention on the first occasion was concerning the calculation and not the liability.

17. The next leg of the argument of Shri Nariman is that mere absence of any clause in the agreement that the contractor could lay claim on account of escalation of wages is not conclusive as escalation is a normal incident and a claim of escalation cannot be rejected merely because of absence of such a provision in the agreement. This proposition of law is advanced by referring to P.M. Paul v. Union of India3 and Continental Construction Co. Ltd. v. State of Mp.4

18. Shri Nariman concludes by submitting that the present is not even a case of apparent error of law which merited setting aside of award; and in any event, even if there was any error, it was an error within jurisdiction and not error of jurisdiction because of which the courts below had no jurisdiction to set aside the award.

19. The aforesaid are the rival contentions relating to jurisdiction. Before we express our views on this all important question, it deserves to be stated 3 1989 Supp (1) SCC 368 : (1989) 1 SCR 11 5 4 (1988) 3 SCC 82 that if an authority would lack jurisdiction

> in the sense that the subjectmatter is not amenable at all to its decision, i.e. the case be of patent lack of jurisdiction, acquiescence of the parties would not be material inasmuch as it is settled law that by agreement jurisdiction cannot be conferred. The present is, however, not such a case inasmuch as the arbitration clause, 4.3.29, reading as below:
>
> "... any dispute as to the meaning or the specification, conditions etc. or as to the quality of materials, workmanship etc. or any other matter, thing, dispute or question whatsoever relating to or arising out of or in any way connected with the contract whether arising during the period of the contract or after the completion shall be referred to the Arbitration of two persons, one each to be nominated by either party to the dispute, the two Arbitrators so appointed selecting an Umpire."

would show that any dispute relating to or arising out of or in any way connected with the contract has to be referred to arbitration. The present was definitely a dispute arising out of or connected with the contract. The subject-matter of the dispute is thus squarely covered by the arbitration clause and therefore we do not read patent lack of jurisdiction on the part of arbitrators in having gone into the question of reimbursement. The best that could be said is that the terms of the agreement being what they are, the arbitrators had no jurisdiction to entertain the claim, and so, the present was a case of latent lack of jurisdiction. In such a case acquiescence of the parties may be relevant.

20. We do not, however, propose to decide the question relating to jurisdiction on the narrow or technical ground of acquiescence seized as we are with an award which is in the neighbourhood of Rs 2.5 crores; instead, we would address whether the terms and conditions of the agreement at hand did permit entertaining of the claim of the appellant on the score of escalation of wage rates. Despite this approach to be adopted, it would be appropriate to say that the State did seem to take a stand at the relevant time that the arbitrators had jurisdiction to entertain the claim. We have said so because in the very first round of litigation before the District Judge the " main contention" advanced was relating to the calculation of the contract. It is apparent that if the State would have been of the view that the arbitrators had no jurisdiction to entertain the claim, the question of jurisdiction would have been put at the forefront and not the question of quantum. It may be that this stance was taken by the State because of its stand when a similar claim by M/s SEW Construction Private Limited came to be made which was ultimately accepted. To us, it appears that it is because of this that in the remand order the District Judge did not mention about clause (a) of sub- section (1) of Section 16 of the Act but referred to clause

(c) and the thrust of the remand order was, if the same is read in the light of the legal arguments advanced which were required to be kept in view as stated in paragraph 9 of the remand order, to make fresh calculation of the claim as the earlier calculation was found to be based on a wrong basis.

21. Let it now be seen as to whether the terms of the agreement, as these were, did permit the arbitrators to entertain the claim at hand. Shri Nariman, in support of this contention has strongly relied upon the decisions in P.M. Paul v. Union of India3 and Continental Construction Co. v. State

of M.P.4 In Paul case3 a claim was made by the contractor to compensate for the extra amount he had to spend due to escalation of prices caused due to the delayed completion of the work. The delay had occurred because of some dispute in handing over of the site. The arbitrators allowed the claim which was upheld by this Court. What is relevant for our purpose is that while doing so the Bench observed at p. 121 that escalation is a normal incidence arising out of gap of time in this inflationary age. This observation was made while meeting with contention advanced on behalf of the Union of India that in the absence of any escalation clause it was not permissible to the arbitrator to grant any claim on the ground of escalation which contention was noted at 120 C. But this was a case where the Government was at fault in failing to hand over the site as per the agreement.

22. In the case of Continental Construction Co.4 the award of the arbitration on the score of rise in prices of materials and labour charges was held bad because the clauses in the contract had stipulated that the contractor would complete the work despite such increases. Shri Nariman, however, brings to our notice what was observed in paragraph 10. There reference was made to Tarapore and Co. case5 where it was held that: (SCC pp. 90-91, para 10) "... if the agreed fact situation, on the basis of which agreement was entered into, ceases to exist, the agreement to that extent would become otiose. If rate initially quoted by the contractor became irrelevant due to subsequent price escalation... contractor's claim for compensation for the excess expenditure incurred due to the price rise could not be turned down on ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read."

23. Shri Nariman urges, on the strength of the aforesaid two decisions, that the absence of escalation clause in the present case would not, therefore, be conclusive to deny the relief to the appellant. As to the judgment of this Court in Associated Engineering Co. v. Govt. of A. P. I which has been relied on by Shri Sanghi to urge that in the absence of escalation clause award could not have been made, Shri Nariman contends that in that case there was a specific term in the contract requiring the contractor to carry out "any other haul roads", despite which the arbitrator had awarded some amount for maintenance of haul roads. That award was thus in the teeth of specific provision in the contract to the contrary. So, counsel urges, that what was stated in Associated Engineering case' would not apply to the facts of the present case.

24. Shri Sanghi has strenuously urged that in the present case also there is an express exclusion inasmuch as para 10 of Annexure-A states about 5 Tarapore and Co. v. Cochin Shipyard Ltd., (1984) 2 SCC 680 laying no claim on the department due to observance of amended labour laws. But as already noted Annexure-A deals with different aspects of labour laws, whereas Annexure-B is on the subject of fair wages, and so, what has been stated in the former cannot be read as excluding the claim at hand.

25. The aforesaid shows that the present was not a case where on the basis of the terms of the agreement entered between the parties it can be held that the arbitrator had no jurisdiction to make the award because of there being no express provision for it in the contract. Therefore, on the basis of what has been stated in Good Luck Carpets2 according to which if a challenge is made to the award on the ground that the arbitrator has no jurisdiction, the only way to test the correctness is to look into the agreement itself because the jurisdiction of the arbitrator flows from the reference and

a reference can be only with regard to such disputes which are contemplated by the agreement, it cannot be held that the arbitrators had no jurisdiction to make the award because of lack of specific provision permitting the claim at hand. This does not conclude the matter. It has to be seen whether the term of the agreement permitted entertainment of the claim by necessary implication. It may be stated that we do not accept the broad contention of Shri Nariman that whatever is not excluded specifically by the contract can be subject-matter of claim by a contractor. Such a proposition will mock at the terms agreed upon. Parties cannot be allowed to depart from what they had agreed. Of course, if something flows as a necessary concomitant to what was agreed upon, courts can assume that too as a part of the contract between the parties.

26. Let it now be seen whether the claim of the appellant because of the escalation in the rates of aforesaid wages can be read as a necessary concomitant to that which was agreed upon. As the increased payment owes its origin either to increase in rates of wages pursuant to notifications issued in exercise of power under clause (b) of sub-section 1(i) of Section 5 of the Minimum Wages Act, 1948 (copies of some of which notifications are at pp. 62-67 and 95-96 of Volume 11) or to increase in rates of wages by the wage committee of the concerned division of the PWD (some of which determinations are at pp. 72-79 and 86-93) it has to be seen whether there was an implied contract to reimburse the increased cost on account of rise of rates of wages on both the counts. Payment of wages as per the rates fixed under the Minimum Wages Act being statutory obligation and the terms of the contract being silent about payment of minimum wages, as the relevant term (para 1 of Annexure-B) speaks of "fair wages", which concept is different from minimum wages, as would appear from what was stated by this Court in Hindustan Times Ltd. v. Their Workmen6 which decision was cited with approval in Hindustan Antibiotics Ltd. v. Their Workmen7, Workmen v. Gujarat Electricity Board' we hold that insofar as increased 6 (1963) 1 LLJ 108, 112: (1964) 1 SCR 234: AIR 1963 SC 1332 7 (1967) 1 SCR 652: (1967) 2 LLJ 114, 124: AIR 1967 SC 948 8 8 (1969)ISCC266,269:(1969)2LLJ791,796 payment on account of rise in the rates of minimum wages is concerned, the parties were not in any sort of agreement express or implied to reimburse the same. The appellant paid as per these rates not pursuant to any term of the contract but because of the mandate of law.

27. But then, the terms at hand did require the appellant (who is the contractor) not to pay less than fair wages as would appear from what has been stated in para 2. 1 0 and para 1 of Annexure-B. The Explanation to latter para states that where fair wages have not been notified these wages would be the one "prescribed by the PWD (Irrigation Department) for the division in which the work is done". Now these wages were being increased from time to time as would appear from the decisions of the wage committee referred to above; and if the appellant was being required to pay wages as per these decisions, we do read a meeting of mind insofar as the claim of escalated payment on account of increase of fair wages is concerned. It has to be assumed that when the appellant was required to pay fair wages at increased rates, the authorities did visualise that the appellant would not do so by cutting down its profit. By asking the appellant to give tender by taking into account the fair wages notified at the time of inviting tenders, the authorities did give an impression that fair wages to be paid would be the one then notified/prescribed, a la the Explanation to para 1. In such a situation, if rates of fair wages were raised afterwards, the tendered sum cannot be taken to be agreed amount for completing the contract, in the face of the directions of the authorities requiring the appellant to

pay wages at rates higher than those prescribed or notified at the time of inviting tenders. On this fact situation, we hold that the State had by necessary implication agreed to reimburse this increased payment.

28. In the aforesaid view of the matter, the contention of Shri Nariman that the error, if any committed by the arbitrators, was an error within their jurisdiction (the same being relatable to interpretation of the contract) and such an error is not amenable to correction by courts as held in Sudarshan Trading Co. v. Government of Kerala9 does not really survive for consideration, as in the case where an arbitrator travels beyond the contract, the award would be without jurisdiction, because of what was held in Associated Engineering Co. 1 and Good Luck CarpetS2 cases. The error in the present case cannot be regarded as one within jurisdiction; the same is really an error of jurisdiction insofar as that para of award is concerned which is relatable to increase in minimum wages. Needless to say that if an arbitrator acts beyond jurisdiction, the same would amount to misconduct (see para 10 of Hindustan Construction Co. Ltd. v. State of J & K10 because of which the award would become amenable of being set aside by a court.

29. We need not also enter into the controversy whether the present was the case where the arbitrators rejected the plea of non-liability sub silentio and for this reason the award cannot be regarded as incomplete the same 9 (1989) 2 SCC 38 :(1989) 1 SCR 665 10 (1992) 4 SCC 217 having not been made "de praemissis", that is, concerning all the matters referred to. This inference may, however, be permissible here because of what has been opined in Santa Sila Devi v. Dhirendra Nath Sen" and N. Chellappan v. Secretary, Kerala State Electricity Boardl2. We would state the same as regards the argument of Shri Nariman that if the view taken by the arbitrators be also possible, interference by the Court is not permissible, to sustain which submission we are referred to State of A.P. v. R.V. Rayanim13; Hind Builders v. Union of India14; Hindustan Construction Co. v. State of J & K10 (para 10); and Jagdish Chander Bhatia v. Lachhman Das Bhatia 15.

30. This being legal and factual position, we are of the opinion that the view taken by the courts below that the award merited to be set aside on the ground that the award was beyond the jurisdiction of arbitrators was not the correct view to take insofar as the increased payment on account of rise in the rates of fair wages are concerned. We would, therefore, reverse this finding qua the rise in the rates of fair wages, while sustaining the same as regards rise in rates of minimum wages.

Quantum of reimbursement

31. The two courts below have also found fault with the award because of the basis adopted by the arbitrators in fixing the amount payable to the appellant the same being a sum of Rs 236 lakhs. This has been so held because the basis of making this computation was the same which had not found favour with the District Judge when he had examined the soundness of the award in this first instance, because of which he had remitted the award to the arbitrators to find out the amount reimbursable on "actual basis" and not on "notional basis".

32. After the matter was remitted to the arbitrators they had, however, received further documents of which reference has been made in the award itself. This apart, two piece workers were also examined by the appellant as LCW 1 and CW 2 of which mention has been made in para 3 of the second award. In para 2 it has been noted that the claimant furnished details of wages paid by it to the labourers directly and also details of payments made to piece workers. Our attention is also invited by Shri Nariman to what has been stated in paragraph 6 of the award relating to filing of two documents during resumed hearing. Shri Nariman finally brings to our notice documents at pages 165 to 167 of the aforesaid volume showing details of the payments made to piece workers for the period in question. These were verified by the Labour Welfare Officer as it would appear from page 168 which is a letter addressed by him to Superintending Engineer, Bargi Dam, in which mention was made only about two discrepancies these being: (1) wrong showing 11 (1964)3SCR410:AIR1963SC1677 12 (1975) 1 SCC 289 13 (1990) 1 SCC 433 : (1990) 1 SCR 54, 58 14 (1990) 3 SCC 338: (1990) 2 SCR 638,649 15 (1993) 1 SCC 548,557 of a sum of Rs 1,67,521.23 as payment made to piece workers in August 1979; and (2) inclusion of Rs 16,222.30 as labour charges, whereas the same was incurred towards transport charges. This shows thoroughness of verification. Not only this, the appellant had even produced vouchers of payment made to piece workers for verification as stated in the aforesaid communication of the Labour Welfare Officer. The minutes as recorded on November 29, 1986 (a copy of which is at pp. 245-246) would bear this statement. The appellant had also made known to the arbitrators the "percentage of increase" and "amount of increase" of amount paid to labour through piece workers for different period by filing a tabular statement, a copy of which is at page 189 of Volume

11.

33. From the above, it would appear that all that was possible on the part of the appellant to prove actual payment was done. It is a different matter that because of lapse of time many of the piece workers were not available and despite notices issued to them only four replied of whom two were examined, as noted in para 3 of the award. A litigant cannot be asked to do what is not possible on his part to do or get done. He cannot be made to suffer for no fault on his part.

34. Insofar as acceptance of 35% as labour component, which is the primary reason for finding of fault as to quantum, Shri Nariman brings to our notice the statement made at the end of the para 6 of the award according to which the respondents (meaning the State and its Officers) had "tacitly accepted" by their own actions 35% as the labour component in the type of work done by the appellant. The award further states that the documents placed on record in this regard "have not been denied by the respondent during the arguments and have been taken on record".

35. Because of the above, we hold that the fault found by the High Court regarding the basis on which the second award was made was not the correct view to be taken. But, as we have held that the appellant is entitled to be reimbursed for the extra payment made only on account of rise in the rates of fair wages and as the arbitrators had not calculated the extra amount paid on this count separately, we remit the case back to the High Court to give its finding on this aspect, for which purpose parties would be allowed to place further material on record, if prayed for. We make it clear that while calculating the amount as stated earlier, the High Court would take into account that part

of enhanced rate of fair wage which was, if at all, above the rate of minimum wages prevailing at the relevant time. We have said so because conceptually fair wage is higher than minimum wage and is required to be so. We also state that the total sum to be determined by the High Court would not, in any case, exceed a sum of Rs 236 lakhs, which is the amount awarded by the arbitrators on the second occasion also.

36. We have another observation to make. The same relates to the rate of interest. According to us, in the facts and circumstances and the equities involved, the rate of interest on the sum which would be found due as aforesaid should be 9% instead of 12% as awarded. The interest would be calculated from 14th day of September, 1987 which is the date of the second award. It may be stated that the arbitrators have also made the interest payable from the date of award.

37. The appeal is allowed accordingly. No order as to costs.