State Of Rahjasthan vs Puti Construction Co. Ltd on 16 September, 1994

Equivalent citations: 1994 SCC (6) 485, JT 1994 (6) 412, 1994 AIR SCW 5061, 1994 (6) SCC 485, (1995) 1 ARBILR 1, (1994) 3 CIVLJ 790, (1994) 3 CURCC 393, (1994) 6 JT 412 (SC)

Author: G.N. Ray

Bench: G.N. Ray

PETITIONER:
STATE OF RAHJASTHAN

Vs.

RESPONDENT:
PUTI CONSTRUCTION CO. LTD.

DATE OF JUDGMENT16/09/1994

BENCH:
RAY, G.N. (J)
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RAY, G.N. (J)
VENKATACHALLIAH, M.N.(CJ)

CITATION:
1994 SCC (6) 485 JT 1994 (6) 412
1994 SCALE (4)419

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by G.N. RAY, J.- Both the parties have appeared through their respective counsel and oral and written submissions besides filing objections and counter-objections to the validity of the impugned award of the joint arbitrators have been made.

2. The short facts concerning the arbitration award in question may be stated as follows.

3. A contract for the construction of second portion of Mahi Bajaj Sagar Dam, Banswara was given to the respondent Company, Puri Construction (P) Ltd. by the appellant State of Rajasthan in April 1975. Differences and disputes arose between the parties. The respondent contractor invoked the provisions of the arbitration agreement and nominated a retired Chief Justice of Delhi High Court, Mr Justice S.N. Andley as an arbitrator. The appellant State of Rajasthan appointed as its nominee Shri S. Adiappa, a retired Chief Engineer, PWD (B&R) Rajasthan as an arbitrator. However, the proceedings before the said arbitrators did not continue. The respondent contractor filed a petition under Section 20 of the Arbitration Act before the Delhi High Court. Such application was registered as Suit No. 758-A of 1982. By an order passed on 9-11-1982 by the Delhi High Court, the arbitration agreement between the parties was filed and reference to arbitration was made. The parties thereafter sought for variation of the reference order dated 9-11-1982. Instead of reference to a sole arbitrator, reference was made to two arbitrators namely Shri Manohar Lal being, the nominee of appellant State of Rajasthan and Shri Guru Charan Singh being the nominee of the respondent contractor. The State of Rajasthan moved the Division Bench of Delhi High Court for stay of arbitration proceedings. The said arbitrators Shri Lal and Shri Singh thereafter resigned. Against the order of the Delhi High Court, the appellant, State of Rajasthan filed a special leave petition before this Court being SLP (Civil) No. 9089 of 1984.

4.In the said SLP (C) No. 9089 of 1984 it was agreed to refer all the subsisting disputes and differences between the parties to the arbitration of Mr Justice C.M. Lodha, retired Chief Justice of Rajasthan and Mr Justice A.B. Rohatgi, a retired Judge of the Delhi High Court. The parties agreed to refer all the disputes and differences including subject-matter of Civil Suit No. 4 of 1979 pending in the Court of the District Judge, Banswara, Civil Suit No. 4 of 1980 pending before the District Judge, Jaipur, and the said Suit No. 758-A of 1982 pending before the High Court at Delhi, FAO (OS) No. 5 of 1983 and suit pending under Order 37 CPC before the District Judge, Banswara, filed by the State of Rajasthan for recovery of bank guarantee amounts.

5.By an order dated 25-2-1985 passed in SLP (C) No. 9089 of 1984 this Court noted that the parties for the said SLP having agreed to refer all the disputes arising out of the agreement dated 2-6-1975 between the Government of Rajasthan and the respondent contractor the appellant State of Rajasthan has appointed as its nominee Shri C.M. Lodha, a Senior Advocate and retired Chief Justice of Rajasthan High Court and the Respondent 1-contractor M/s Puri Construction (P) Ltd. has appointed as its nominee a retired Judge of the Delhi High Court Shri A.N. Rohatgi as an arbitrator. On the prayer of the learned counsel of both the parties this Court appointed Mr Justice A.C. Gupta, a retired Judge of this Court as the umpire. This Court on the basis of the said agreement since filed before this Court evidencing the desire of the parties to refer the matter to arbitration, referred the disputes to the arbitration of Mr Justice C.M. Lodha and Mr Justice A.B. Rohatgi.

6.The arbitration proceedings before the said arbitrators continued for about seven years and about seventy hearings had taken place before the said arbitrators. On 21-10-1992, the said arbitrators made a joint award in the said arbitration proceedings. As per direction of this Court the arbitrators filed the award before this Court on 18-1-1993. The respondent contractor made an application for making the award decree of the court and for certain reliefs by way of interest and damages and

costs. The State of Rajasthan, the appellant herein, filed on 6-3-1993 the petition of objection to the award and the respondent contractor also filed written statement to the said petition of objection.

7.The respondent contractor made an application under Sections 15, 17, 18, 28 and 29 of the Arbitration Act, 1940 for the prayers that (a) award of Rs I crore in favour of the said applicant be made rule of court (b) the interest be awarded from 24-2-1979 or in lieu thereof from 30-5-1979 i.e. date of breach (c) modify the award and decree the award of interest at 10% per annum calculated with quarterly interest on the entire sum of Rs I crore from 24-2-1979 and 30-5-1979 and to allow further interest on the sum decreed at 15% per annum from the date of decree till date of payment (d) that the bank guarantees of Rs 19.25 lakhs, be returned and cancelled (e) the State of Rajasthan be allowed to withdraw approximate sum of Rs 25 lakhs or Rs 26 lakhs that have been realised from the sale of the applicant contractor's assets under the orders of this Court and as set out in the award, after the State of Rajasthan has satisfied the decree that would be passed by this Court in the facts of the case and in the interest of justice (f) the time for making the award be extended in terms of the agreement between the parties (g) the State of Rajasthan be directed to pay the applicant costs of Rs 10 lakhs in addition to the amounts that this Court would decree towards principal and interest (h) the State of Rajasthan be directed to pay the balance fee of the arbitrator Shri Lodha. The said application was made by the respondent contractor on 17-2-1993.

8. In the petition of objection the State of Rajasthan, the appellant herein has contended that the arbitrators misconducted in misinterpreting and misconstruing various clauses of the said agreement pertaining to the work of the construction of the dam since allotted to the respondent contractor and also failed to appreciate evidence of Shri Adi Anklesaria and on misconception of facts and misinterpretation of documents on record and by failing to consider some of the relevant facts and circumstances, the erroneous and illegal award was made. Some of the findings on the basis of which the impugned award was made, consequent upon misreading and misinterpreting relevant documents and evidences adduced are erroneous on the face of the record and have resulted in misconduct on the part of the arbitrators, thereby rendering the award illegal and invalid. In support of such contention reference to various findings of the arbitrators and the alleged impropriety of such findings with reference to certain facts and materials on record have been indicated. Written submissions have also been filed challenging the validity and legality of the award pointing out legal and factual errors. As such contentions raised in the written submissions will be scrutinised hereafter, it is not necessary to refer to all the contentions made in the said petition of objection in greater detail at this stage.

9. On 18-3-1993, the respondent contractor filed a written statement by way of counter to the objections made by the appellant State of Rajasthan contending inter alia that the objections raised against reasoned award are not admissible within the limited ambit of challenge admissible within the scheme of the Arbitration Act. It has been contended that if a question is submitted to the arbitrator, and the arbitrator answers it, the fact that the answer invokes erroneous decision on a question of law does not make the award bad on its face so as to permit of its being set aside. The respondent contractor has further contended that the arbitrators were nominees of the respective parties to the arbitration and the arbitrators being men of unimpeachable integrity and the award running 39 pages and containing detailed findings on all the issues that were framed is quite legal

and valid. Some of the important conclusions reached by the arbitrators by giving reasons therefor have been indicated in the counter. It has been contended that an award can be either set aside or modified or remitted to the arbitrators for reconsideration strictly within the ambit of Sections 15, 16 and 30 of the Arbitration Act. It has been averred in the said counter that vague allegation of error apparent on the face of the record and vague allegations that the clauses of agreement have been erroneously interpreted by the arbitrators are of no consequence and the objections raised by the appellant are liable to be rejected in limine. The court should not substitute its own evaluation of the conclusion of law or fact made by the arbitrator for the purpose of holding that such conclusion being contrary to the contract the arbitrator has acted beyond jurisdiction. It has been further contended that unless reference to arbitration specifically so requires the arbitrator he is not bound to deal with each claim separately but can deliver a consolidated award. It has also been alleged that the first part of the work of Mahi Bajaj Sagar Dam, Banswara was given to M/s R.S. Sharma and the respondent contractor was given Part 11 of the work. In the case of M/s R.S. Sharma arbitrators were named on 13-6-1982 and the arbitrators gave their award for lump sum amount Rs 75,41,755 in favour of M/s R.S. Sharma. Although M/s R.S. Sharma was permitted to remove the machinery the respondent contractor was prohibited by an injunction from the Court of District Judge, Banswara, to remove its assets. The respondent contractor has alleged that machinery of the respondent contractor was twice in value to the machinery of M/s R.S. Sharma and the replacement costs of the machinery would not be less than Rs 250 lakhs. The arbitrators gave no reasons for the lump sum award in favour of M/s R.S. Sharma. This Court upheld the award vide judgment in State of Rajasthan v. R.S. Sharma & Co.1 In the counter, statements and submissions made in various paragraphs of the objection petition were referred to and the contentions and submissions made therein have been denied and disputed and in support of submissions as to true legal position concerning an arbitration award various decisions of this Court and English Law Courts have been referred to. It has also been contended that the respondent contractor had borrowed money for undertaking the construction works of the said Mahi Bajaj Sagar Dam. In 1979 the appellant State of Rajasthan rescinded the contract of the respondent contractor and refused to make payment for the work executed at contract rates and also refused to make payments for extra items of work. The appellant seized all the machinery and assets of the respondent contractor and even on the depreciated value of the said assets, a sum of Rs 32 lakhs was realised. The respondent contractor could not take them for other contract work of similar 1 (1988) 4 SCC 353 nature and the respondent contractor was reduced to a state of bankruptcy. In 1987 Punjab and Sind Bank filed a Suit No. 1337 of 1987 in the High Court of Delhi and the Bank is seeking a decree for a sum of Rs 1,00,48,978 and interest at 17.5% per annum from the date of institution of the suit till date of realisation. The Bank is also seeking to sale of the mortgaged property being the residential house of the Managing Director of the respondent contractor. In support of such statement a copy of the plaint in the said suit filed by the Bank has been annexed to the counter. Various factual and legal contentions raised in the counter disputing the contentions made in the petition of objection need not be elaborated and indicated in detail at this stage.

10. It may be stated here that by an order dated 26-3-1993 passed in IA No. 3 in SLP (C) No. 9089 of 1984, this Court directed that the claim made by the arbitrator Shri Lodha towards his fee of Rs 46,904 be paid and it was further directed that one-half of the award including interest accrued thereon would be paid to the respondent contractor against bank guarantee to the satisfaction of the

Registrar of this Court.

11. It may also be indicated here that the appellant State of Rajasthan has filed additional objections. In the additional objections raised in the affidavit of Shri Zakir Hussain, Executive Engineer, Mahi Menu Dam Division I, it has been alleged that one of the arbitrators, Shri A.B. Rohatgi was nominated by the respondent Company but subsequent to his appointment as an arbitrator in the case in question and during the pendency of the arbitration proceedings the said Shri Rohatgi chose to accept the brief for the claimant before this Court in Puri Construction (P) Ltd. v. Union of India2 which was heard by this Court on 20- 1-1989. Alleging that Shri Rohatgi did not disclose the fact of his accepting the brief for one of the parties it has been urged that in view of his identifying with the interest of one of the parties although in a different cause of action, the arbitrator lost the neutrality required to be maintained by an arbitrator and in the aforesaid facts, there has been serious misconduct on the part of the arbitrator thereby rendering his award invalid. In the counter to such additional affidavit, the respondent had contended that the respective nominee of the parties was quite close to each of the parties and the nominee of the appellant Shri Lodha was appearing as a counsel for the appellant in various matters but as the arbitrators were men of unimpeachable character, both the parties did not object to their nominations. Moreover, despite full knowledge of the fact that Shri Rohatgi had appeared for the respondent in a case, the appellant wilfully participated in the arbitration proceedings and invited adjudication. Hence allegations of misconduct on that score cannot be permitted. It has also been contended that such additional objection by way of an affidavit having been filed after 270 days of the notice of filing the award in this Court such objection need not be considered at all being time barred under Article 119 of the Limitation Act.

2 (1989) 1 SCC 411 : AIR 1989 SC 777 : JT (1989) 1 SC 132

12. On the scope and ambit of the power of interference by the court with an award made by an arbitrator in a valid reference to arbitration, various decisions have been made from time to time by Law Courts of India including this Court and also by the Privy Council and the English Courts. Both the parties have referred to such decisions in support of their respective contentions. The factual contentions of the respective parties are proposed to be scrutinised and then the facts are proposed to be tested within the conspectus of judicial decisions governing the issues involved.

13.Before we deal with the various facts referred to by the respective parties, we may refer to the objection that has been raised by way of an additional affidavit affirmed by an Executive Engineer of the Government of Rajasthan, Shri Zakir Hussain, raising the question of misconduct of one of the arbitrators and in the written submissions filed by Shri Tulsi the learned Additional Solicitor General appearing for the State of Rajasthan, such misconduct and consequential disqualification of arbitrator has been specifically contended. It has been alleged that one of the arbitrators, namely, Shri A.B. Rohatgi, disqualified himself from acting as an arbitrator in the arbitration proceedings in question by accepting a brief from the claimantrespondent in respect of a case though concerning a different cause of action, and representing the respondent claimant in this Court in Puri Construction (P) Ltd. v. Union of India2. It has been alleged that the said Shri Rohatgi did not disclose the said fact before acceptance of the brief and also thereafter.such act is therefore, not only

inconsistent with his duty as an arbitrator but the same tantamounts to misconduct thereby rendering the award invalid. Disputing the allegation that the factum of Shri Rohatgi's appearing in a case before this Court for the appellant was not known to the appellant it has been contended that the State of Rajasthan being represented by eminent lawyers was fully aware that Shri Rohatgi had appeared before this Court in an appeal on behalf of the respondent contractor. It has been further contended that the said decision was mentioned by Shri Sarupriya and Shri Arun Jaitley, Senior Advocate, appearing for the State of Rajasthan before the arbitrators and despite the knowledge of the appellant that Shri Rohatgi had represented the respondent in an appeal before this Court, no objection was raised at any point of time that by accepting such brief from the respondent, Shri Rohatgi had disqualified himself to act any further as an arbitrator. According to the respondent, the arbitration proceedings thereafter continued till August 1992 but the appellant chose not to make any demurrer against the impartiality of the said arbitrator. The plea taken by the deponent Shri Hussain that he was advised not to raise any objection against the arbitrator but to point out the aforesaid fact before this Court at a later stage has been criticised by Shri Sibal learned counsel appearing for the respondent, as devoid of any substance. It has been urged that such objection being hopelessly barred by limitation, cannot be considered. It has been contended by Shri Sibal that even on merits, such objection is liable to be rejected. The question of raising objection by the appellant about the validity of the award would not have arisen if the award was not made against the appellant. Shri Sibal has contended that even in spite of the knowledge of Shri Rohatgi's acting as a counsel of the respondent in an appeal, the appellant did not object to his functioning as an arbitrator but on the contrary the appellant had participated in the arbitration proceedings in all the sittings and made submissions before the arbitrators. After taking a chance to succeed in the arbitration, the appellant cannot be permitted to raise any contention of misconduct of Shri Rohatgi on account of his acting as a counsel for the respondent in a case. Shri Sibal has contended that reference to arbitration was made by this Court in the special leave petition which is pending. There was no impediment to mention the said fact before this Court and seeking appropriate direction against Shri Rohatgi if the appellant had any doubt about the neutrality of the said arbitrator. Shri Sibal has submitted that the other arbitrator Shri Lodha had also appeared for the appellant State of Rajasthan as an advocate during the subsistence of arbitration proceeding when he was acting as an arbitrator and such fact may be convincingly demonstrated by referring to the reported decisions of this Court namely Bansidhar v. State of Rajasthan3 and Mehmood Alam Tariq v. State Of Rajasthan4. Mr Sibal has submitted that senior counsel appearing for a client owe a duty to the institution and they do not identify with the interests of the client in matters in which they are not appearing. Senior advocates appearing for one litigant appear against him in other matters. Such appearance is neither illegal nor improper. Shri Sibal has submitted that the appellant and the respondent had never doubted about the impartiality and integrity of the said arbitrators who are men of unimpeachable character and precisely for the said reasons, there was no occasion on the part of the appellant to raise any objection against the functioning of Shri Rohatgi as an arbitrator and the said plea of Shri Rohatgi's disability in the aforesaid facts as sought to be raised, is an afterthought and made in despair.

14.Considering the facts and circumstances of the case, it is quite evident that the appellant was aware of Shri Rohatgi's appearance as a counsel for the respondent in an appeal before this Court but despite such knowledge, appellant did not raise any objection either before the arbitrators or

before this Court during the pendency of the arbitration proceedings but the appellant chose to make various submissions from time to time before the arbitrators and invited adjudication on the reference to arbitration. In this connection, reference may be made to a decision of this Court in Neelakantan & Bros. Construction v. Superintending Engineer, National Highways, Salem5. In that case, the arbitrator, a senior engineer entered upon the reference and proceeded for some time but in view of his transfer he could not complete the same and successor of his office had taken up the arbitration case from the stage where from the said arbitrator entering upon the reference had left and the said successor-in-office thereafter gave the 3 (1989) 2 SCC 557 4 (1988) 3 SCC 241 : 1988 SCC (L&S) 757 :(1988) 7 ATC 741 5 (1988) 4 SCC 462: AIR 1988 SC 2045 award in question. Questioning the validity of the award it was contended that as the former arbitrator had entered upon the reference and statements of the parties were filed before him and witnesses were also examined before him, the successor engineer had no jurisdiction to proceed with the arbitration matter from the stage left by the arbitrator. Such challenge to the invalidity of the award was, however, not accepted by this Court by holding that as the fact of taking over the arbitration proceedings by the successor engineer was known to the parties and no objection was raised about his continuing with the arbitration proceedings, the parties had acquiesced to the functioning of the said successor engineer. Accordingly, a party who had acquiesced to the arbitration by the successor engineer was precluded from objecting to such arbitration and giving award or the reference. Referring to the Comments of Russel : Arbitration, 18th Edn., p. 105, it has been pointed out in the said decision that attending and taking part in proceedings with full knowledge of the relevant fact will amount to acquiescence. This Court has also referred to an old decision of the Judicial Committee in Chowdhri Murtaza Hossein v. Mst Bibi Bechunnissa6. Reliance was also made to the observations in the decision of the Calcutta High Court in the case of Jupiter General Insurance Co. Ltd.7 Reference was also made to another decision of this Court in N. Chellappan v. Secy., Kerala State Electricity Board8 holding that acquiescence defeats the right of the appellant at a later stage. Similar view was also expressed in another decision of this Court in Prasun Roy v. Calcutta Metropolitan Development Authority9. Similar view has also been expressed in a recent judgment of this Court in Reserve Bank of India v. S.S. Investments 1O. In the said decision, this Court has negatived the contention that umpire's entering upon the reference was invalid by holding that a party objecting to the umpire's entering upon the reference, had agreed to extend the time to enable the umpire to make the award. Having agreed to extend such time, it must be held that such party had waived its objection to the umpire's entering upon the reference.

15. In the instant case, admittedly both the parties agreed to extend the time for finally making the award by the joint arbitrators despite the knowledge that Shri Rohatgi had represented one of the parties in a case before this Court. No objection to his functioning was either raised before the arbitrators or before this Court in the pending special leave petition but the appellant had taken part in all the sittings before the arbitrators and made oral and written submissions and invited the adjudication on the reference. It is, therefore, quite evident that even if there was any disability of one of the arbitrators, in spite of the knowledge of such disability, the appellant had participated in the arbitration proceedings, agreed to the extension of time for making the award and invited adjudication on the reference. Accordingly, 6 3 IA 209 : 26 WRPC 10 : 3 Suther 342 7 Jupiter General Insurance Co. Ltd. v. Corpn. of Calcutta,AIR 1956 Cal 470: 60 CWN 721 8 (1975) 1 SCC 289 9 (1987) 4 SCC 217 : AIR 1988 SC 205 the appellant cannot be permitted to raise any objection

about the validity of the award on the score of disqualification of one of the arbitrators. That apart, such objection has not been filed within the period of limitation but the same has been sought to be raised after 270 days of the notice of filing the award before this Court. Therefore, the aforesaid objection as to the validity of the award on account of the alleged disqualification of one of the arbitrators is devoid of any substance and must be rejected.

16. The challenge to the invalidity of the award on account of various errors and omissions apparent on the face of the record as alleged by the appellant in the written arguments for the appellant may be summarised as follows:

> (a) The arbitrators clearly misconstrued clause 8 of the special conditions in the contract and the arbitrator failed to take into account that clause 2 to the special conditions only dealt with the "handing over of the site" and that clause 8 only dealt with the measurements prior to start of the work which was to be done on the request of the contractor to enable him to prepare the bill.
>
> (b) The arbitrators misread the statement at page 148, Vol. II, relating to the dates of handing over of the site and the dates of taking of measurements. Several dates mentioned in the award in this respect are contrary to the statements at page 148, Vol.
>
> 11.

(c)The arbitrators have taken the date of handing over of the flank block 23 prior to monsoon of 1976. Such finding is contrary to the records placed before the arbitrators.

(d) The arbitrators misread the statement of Shri Adi Anklesaria, because the arbitrators have only referred to answer to Question No.

27. They have failed to consider the notes to Question No. 147 wherein the said witness explained that it was not necessary in the case of construction of dam that the entire site should be made available before the work could start.

(e) The arbitrators have again misread the statements of Shri Adi Anklesaria in holding that the progress of the claimant was so fast that the claimant was directed to go slow to avoid flooding of Banswara township. It is contended that the documents on record clearly contradict the finding that the contractor was asked to go slow.

(f) The arbitrators failed to take into account the letter dated 6-5-1975 written by the claimant (Ex. R-44) wherein the claimant himself expressed difficulty in commencing the work before 15-10-1975 and sought to utilise the said period for the construction of other enabling works.

(g) The finding of the arbitrators about the delay in handing over the site to the contractor is wrong.

(h) The arbitrators have committed a fundamental error in awarding damages on account of alleged delay in carrying out the measurements prior to the work being started without going into the question whether the claimant suffered any loss on account of any such delay. In this connection, it is also alleged that the arbitrators have not recorded any finding that the target was ever completed or exceeded by the contractor in any of the working seasons, and in the absence of such evidence and in view of evidence to the contrary, there was no question that the claimant had suffered any loss as a result of any delay in getting the measurement done for being able to start work on the site in his possession.

(i) There is no material on record that the claimant ever sought measurement of particular site but the same was delayed and refused by the appellant.

(j) That the finding of the arbitrators that there was a delay on the part of the State in supplying the material is erroneous and contrary to the records and arbitrators have failed to take into account special conditions to which the materials were to be supplied by the States on availability. In the absence of any evidence produced by the claimant that as a result of delay in supplying the materials, the construction work was held up and the claimant had suffered loss, the award of damages on the basis of the finding of non-

supply of materials in time, tantamounts to an error apparent on record.

(k) That the actual proof of loss suffered by the claimant is sine qua non for award of damages and in the absence of finding of actual loss suffered by the claimants, the award of damages is patently erroneous. In this connection, it has been urged that the arbitrators have misused the letters of Chief Engineer with regard to shortage of gelatin (Ex. R- 148). It is contended that the letter of the engineer was written in the context of future requirement of entire project but the same did not deal with the requirement of the contractor.

(1) The statement with regard to the shortage of cement referred by Shri Anklesaria has also been read out of context. The arbitrators in recording the finding of delay in supplying the cement ignored the plea of the appellant in the written statement and there was not even one incident to show that on account of non-availability of cement, the claimant's work suffered.

(m) The finding of the arbitrators that the claimant was entitled to extension has been assailed by contending that the arbitrators failed to take into account the plea of the appellant raised at page 164, Vol. 11, of the written submissions that the claimant had failed to apply for extension of time within the stipulated period as per clause 5 and has also failed to give cogent reasons for extension.

17. The award of damages without quantifying the same in accordance with any rational principle has been assailed by contending that in a case of speaking award, the quantification of damages must be based on some principle and cannot be quantified arbitrarily by adopting rule of thumb. It has also been contended that the damages of Rs 1 crore awarded by the arbitrators are patently excessive and disproportionate to any loss suffered by the claimants. In this connection, it has been alleged that the amount for which the tender was submitted by the claimants was Rs 6,36,76,741 and

average rate for the claim of masonry and concrete work is Rs 1.35 per cubic metre. The quantity payable to the claimant from 1975-78 is for 1,85,000 cubic metres and at the rate of Rs 1.35 per cubic metre amount payable to the claimant comes to Rs 2,49,75,000 and the amount actually paid to the claimant in respect of the work done is Rs 2,73,00,000. It has been contended that in fact, the claimant received excessive payment for the total work performed by him. It is contended that the award of Rs 1 crore in favour of the claimant when he had also received Rs 24 lakhs in excess of his tender price, is patently unjust.

18. Disputing the aforesaid contentions about the invalidity of the award on account of error in fact and in law it has been contended by the respondent that the arbitrators have specifically held that;

(a) Appellant was in breach of its fundamental obligation.

(b) The appellant repudiated the material provisions of the contract.

(c) In para 28 of the Written Statement, the appellant admitted that in the first working season only 59.64% of the site could be progressively handed over.

(d) For the second working season the site could only be handed over for another 1 1.89%.

(e) The appellant State of Rajasthan delayed giving possession of the complete site by three years.

It has also been alleged that in coming to such findings the arbitrators have relied upon the record of the proceedings of Mahi Control Board and the contemporaneous reports of the Chief Engineers of the State to the said Board. The arbitrators also relied upon the evidence of Shri Anklesaria, the principal witness produced by the State of Rajasthan. The arbitrators have held that the admissions made by Shri Anklesaria in cross-examination, were further evidenced by the report of the Chief Engineers to the Mahi Control Board. The arbitrators have also held that the State should have granted extension of time under the provisions of clause 5 and in terms of the force majeure clause of the contract. The arbitrators also held that besides floods, there was shortage of raw materials over which the contractor had no control like the non- availability of the stone, sand, short supply of cement, power and gelatin. The arbitrators have also held that the refusal of the State to extend time and the invocation of clauses 2 and 3 resulted in the breach of the contract by the State of Rajasthan. Disputing the contention that there was any error in the findings of the arbitrators about the delay in handing over the site and the other fundamental breaches committed by the State, reference has been made to the depositions before the arbitrators of the principal witness of the State of Rajasthan, Shri Anklesaria, by indicating the answers given in respect of Question Nos. 235, 236, 237 and also Question Nos. 208, 209, 204, 157, 138, 118 and Question Nos. 24, 31, 81 and 166. In the written submissions filed on behalf of the respondent, such questions and the corresponding answers have been quoted. It is also contended that the arbitrators have placed reliance on three separate reports submitted by three separate Chief Engineers to the Mahi Control Board. Such reports were made by Shri Gurucharan Singh, Shri B.K. Mehra and Shri J.I. Gianchandani. In the said reports the danger of the flooding of Banswara township was mentioned. The delayed handing over of flank blocks was admitted. The proposal to take up the work at the risks and costs of the

contractor after invoking clauses 2 and 3 of the contract was also indicated. The Chief Engineers reported about the critical short supply of cement, power, gelatin, face stone, stone from Aeru quarry and short supply of sand. It is also contended that to avoid financial liability, a proposal to invoke clauses 2 and 3 of the contract was forwarded to the Mahi Control Board and in the said reports there are admissions about the fundamental breaches of obligations of the State of Rajasthan. It was decided to cancel the contract without granting any extension of time. The report of Shri Gurucharan Singh, Chief Engineer, revealed that the bottlenecks requiring immediate removal were the short supply of cement and dynamite, short availability of stone and sand, short availability of face masonry, inadequate power and settlement of the financial claims of the contractor.

19. Shri Gianchandani, another Chief Engineer in his report categorically admitted that the contractor gave satisfactory report during the working season 1977-78. On 6-10-1977, the Chief Engineer in his note to the Mahi Control Board stated:

> "As per conditions of contract the rates tendered by them were valid for a period of 5 years and thereafter escalation is to be paid.
>
> * * * * It will be in the interest of the Government to limit the amount of work to be carried out beyond April 1980 to the minimum so that the unascertained liability on the department is reduced to the minimum."

20. It has been urged by the respondent that based upon these reports and other evidences available before the arbitrators, the arbitrators have held:

> "Consequently, the State's exercise of power to terminate the contract was unlawful. The State's election to take the performance of contract out of the hands of the contractor was unjustified. The State's action to seize the plant and machinery of the contractor was wholly illegal."

It has been contended that the arbitrators have held that the State of Rajasthan did not perform their part of the bargain and the State wrongfully invoked the provisions of clauses 2 and 3, and wrongfully denied the claimant extension of time. The arbitrators have held that forfeiture under clause 4 could have only been exercised if the invocation of clauses 2 was rightfully made. Exercise of power under clause 4 was invalidated as the delay was caused by the State. The arbitrators have held that the remedy for wrongful forfeiture is to award damages as would put the claimant contractor in as nearly as possible the same position as if no such wrong was committed. It has been contended by the respondent claimant that since the State was guilty of breach and repudiation of the contract, and had also resiled from its contractual obligations, it was not entitled to claim any liquidated damages from the claimant. If the State was even partly responsible for the delay, the State could not invoke clauses 2 and 3 and levy liquidated damages. In view of an agreed liquidated damage clause, the State's claim for unliquidated damage is also not sustainable.

21. In support of the contention that coming to an erroneous decision on facts by the arbitrator is not a misconduct and it is also not misconduct if the relevant facts are misunderstood and misappreciated, several decisions have been referred to. It has been urged by Mr Sibal that appraisement of evidence by the arbitrator is ordinarily a matter which the courts do not question and consider and the court has no jurisdiction to substitute its own evaluation of the conclusion in law or fact.

22. It has been contended that the arbitrators were men of wide judicial experience. They had taken pains in referring to various facts in detail in basing their findings in support of the award. Both the parties were given adequate opportunities to lead evidences and to make submissions. The long award runs over 38 pages containing cogent reasons for basing the various findings in support of the award with reference to materials on record. Even if it is held that the arbitrators have failed to appreciate the evidences and material on record in the proper perspective, the findings made by the arbitrators on misunderstanding or misappreciation of the law and fact do not render the award invalid warranting interference by the court.

23. It has been urged by Mr Sibal that the appellant State of Rajasthan has miserably failed to point out that the arbitrators have referred to any proposition of law which is patently illegal on the face of it. There is no material to show that the award is so patently erroneous and perverse that it shocks the judicial conscience of the court and no reasonable man would have arrived at the conclusions made by the arbitrators on the face of materials on record. It has been contended that when a case is referred to arbitration, the award rendered by a judge by the choice of the parties, should be accepted and preserved as far as possible and unless there is gross error apparent on the face of the record or the misconduct of the arbitrator can otherwise be convincingly demonstrated, interference with an award is not called for and the law is well settled in this regard.

24. After considering the respective contentions of the parties and submissions made by the learned counsel of the parties and the award impugned, it appears to us that the arbitrators have not taken into consideration any matter outside the scope of reference. On the basis of agreement between the parties and in terms of the nomination of the respective arbitrator by the parties, the dispute and differences covered by the written agreement had been referred for arbitration by the said joint arbitrators. It is nobody's case that the arbitrators are incompetent to enter upon the reference. It is also not the case of either of the parties that any extraneous matter has been taken into consideration by the arbitrators. There is also no allegation that reasonable opportunity of being heard has not been given to either of the parties by the arbitrators or the arbitrators have considered any document behind the back of any party. It prima facie appears to us that in basing the findings in the award, the arbitrators have referred to and relied upon the materials on record and it cannot be reasonably contended that there was no basis whatsoever to base the findings made by the arbitrators upon consideration of the materials on record.

25. In our view, the appellant has failed to demonstrate that any finding made by the arbitrator is either fanciful or not referable to the materials on record. What has been sought to be contended by the appellant is that the arbitrators have failed to properly appreciate various clauses of the agreement between the parties relating to the project of Mahi Bajaj Sagar Dam. The appellant has

also contended that the evidence given by Shri Anklesaria has been misappreciated, misunderstood and has been appreciated out of context. The arbitrators have considered the deposition of Shri Anklesaria and reports of the Chief Engineers out of their context and on misappreciation and misreading of the materials on record, the erroneous findings are arrived at.

26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. Govt. of Kerala1 I it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis supplied) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will 11 (1989)2SCC38 not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

27.In Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumarl2, it has been held by this Court that appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may be possible that on the same evidence the court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award. It has also been held in the said decision that it is difficult to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasies of the individual and the time and circumstances in which he thinks. In cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is 'reasonable' in each particular case. The word reasonable has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably knows or ought to know. An arbitrator acting as a judge has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Therefore, where reasons germane and relevant for the arbitrator to hold in the manner he did, have been indicated, it cannot be said that the reasons are unreasonable.

28. In this case, claims before the arbitrators arise from the contract between the parties. It is well settled that if a question of law is referred to arbitrator and the arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. In this connection, reference may be made to the decisions of this Court in Alopi Parshad & Sons Ltd. v.

Union of India 13 and Kapoor Nilokheri Coop. Dairy Farm Society14. In Indian Oil Corpn. Ltd. v. Indian Carbon Ltd.15, this Court has held that the court does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous.

29. It may also be mentioned here that it is not necessary to indicate in the award computation made for various heads and it is open to the arbitrator to give a lump sum award. In this connection, reference may be made to the decisions made in State of Rajasthan v. R.S. Sharma and Co.1, State of Orissa v. Lall Bros.16 and in Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. 17

30. In the State of Orissa v. Lall Bros. 16 it has been held that an award is conclusive as a judgment between the parties and the court is entitled to set 12 (1987) 4 SCC 497 13 (1960) 2 SCR 793 : AIR 1960 SC 588 14 Kapoor Nilokheri Coop. Dairy Farm Society Ltd. v. Union of India, (1973) 1 SCC 708 15 (1988) 3 SCC 36 16 (1988) 4 SCC 153 17 (1967) 1 SCR 105 : AIR 1967 SC 1030 aside an award only if the arbitrator has misconducted himself in the proceedings or when the award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid under Section 30 of the Act. An award may be set aside by the court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and argument, it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. (emphasis supplied)

31. A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter partes. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given

the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject.

32. The contentions about factual errors and omissions apparent on the face of record as raised in the written argument are essentially errors and omissions in not properly considering the materials on record, in misreading and misconstruing such materials and consideration of some documents and statements out of their contexts. The arbitrators have given the award by referring to various documents and statements available on record and indicating the reasons for basing the findings. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. It does not appear to us that the findings made by the arbitrators are without any basis whatsoever and are not referable to documents relied upon and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings. Hence, on the score of alleged misreading, misconstruction, misappreciation of the materials on record or failure to consider some of the materials in their proper perspective, the impugned award is not liable to be set aside. It has

been urged that computation of lump sum damage in the absence of any material showing actual loss suffered by the contractor is patently unjust and improper warranting interference by this Court. Lump sum award by itself is not illegal as held in a number of decisions of this Court. The contractor's case was that because of delay in handing over the site and for non-supply or delayed supply of materials essential for the construction work thereby putting obstacles and hindrances to execute the work within the stipulated time and ultimately repudiating the contract and seizing machines etc. of the contractors, he not only suffered huge loss but was practically reduced to bankruptcy. It is the case of the contractor that on account of illegal seizure of costly machines by the appellant, he was prevented from undertaking other works of contract. A part of machines seized by the appellant have been sold for Rs 20 lakhs. In the award, the arbitrators have recorded that the appellant admitted that the remaining machines would cost about Rs 5 lakhs. That apart, constructions of labour quarters, laying of roads etc. at substantial cost incurred by the contractor have been utilised by the appellant after repudiation of contract. It may be stated here that the first part of construction work of Mahi Bajaj Sagar Dam was given to M/s R.S. Sharma. A lump sum award of Rs 75,41,755 was awarded in favour of M/s R.S. Sharma. The machines of M/s R.S. Sharma were not seized by the appellant. Such lump sum award of more than Rs 75 lakhs without indicating how such quantum was determined has been upheld by this Court and the decision is reported in State of Rajasthan v. R.S. Sharma & Co.1 The respondent contractor has urged that the machines including those seized and sold at depreciated value will now cost about Rs 2.5 crores of rupees. Considering the magnitude of work involving costly machines and materials, if the two arbitrators in their wide experience have quantified the total damage and have given the award for Rs 1 crore in favour of the respondent, it cannot be held that such award is so patently unjust and irrational and shocking to the conscience of the court, that the same should be interfered with. As already indicated, in the case of other contractor concerning first part of the work in Mahi Bajaj Sagar Dam, namely, R.S. Sharma & Co. the arbitrators quantified damages to the extent of over Rs 75 lakhs without indicating how such damages had been quantified. But challenge to such award by the State of Rajasthan failed and the award has been upheld by this Court. We, therefore, dismiss the petition of objection and additional objection challenging the validity of the award.

33. We are now left with the claim of further interest besides the interest awarded by the arbitrators in favour of the respondent on the said sum of Rs I crore @ 15% per annum from 30-9-1986 till the date of payment of decree whichever is earlier. The respondent contractor in its application under Sections 15, 17, 20 and 29 of the Arbitration Act filed in the said Special Leave Petition (Civil) No. 9089 of 1984 has prayed for modification of the award of interest. It has been contended by the respondent contractor that the arbitrators had jurisdiction to award interest from 24-2- 1979 when the subject-matter of dispute was pending arbitration. It has been contended that in the Constitution Bench judgment of this Court in the case of Secy., Irrigation Department, Govt. of Orissa v. G.C. Roy18, the decision made in Abhaduta Jena19 was overruled. The Constitution Bench stated with approval the passage in the 4th Edn., Vol. 2, para 534 in Halsbury's Laws of England where it is stated that the arbitrator must decide the dispute in accordance with the ordinary law. The Constitution Bench has also held in the said decision that:

> (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called

interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative forum for resolution of disputes arising between the parties, If so, he must have the power to decide all the disputes for differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii)An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow as they think fit so long as they are not opposed to law. All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

34. The Constitution Bench has pointed out that over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite and until Jena casel9, almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. It has also been indicated in the said Constitution Bench decision that the interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

35. In the case of Santokh Singh Arora v. Union of India20, relying on the said Constitution Bench decision in G.C. Roy case18, this Court has held that the appellant in the said case was entitled to be compensated for denial of his legitimate dues. This Court has allowed interest from 18-12-1968 18 (1992) 1 SCC 508 19 Executive Engineer (Irrigation) v. Abhaduta Jena, (1988) 1 SCC 418 20 (1992) 1 SCC 492 when the arbitrator was named and not from 21-11-1983 when the matter was referred to the arbitration of Shri Justice A.C. Gupta. The respondent has claimed that interest be awarded from 24-2-1979 or from 30-5-1979 that is the date of the breach and the award should be modified and decreed on that basis by allowing interest @ 18% per annum.

36. Considering the facts and circumstances of the case, we are, however, not inclined to award any interest from 24-2- 1979 or from 30-51979 and the prayer for enhancement of the rate of interest at 18% is also not allowed. Since the total damages suffered by the respondent has been quantified by the arbitrator in the award at Rs 1 crore without indicating different heads for the computation of the said sum, it should be presumed that the arbitrators had taken into consideration all relevant facts in assessing the actual loss suffered up to the date of award. The appellant State of Rajasthan will be allowed to withdraw a sum of Rs 25 lakhs or Rs 26 lakhs that has been realised from the sale

of the respondent's assets under the order of this Court and as set out in the award, after the State of Rajasthan satisfies the award which is made a rule of court. The prayer for cost of Rs 10 lakhs in addition to the amounts under the award to be paid to the respondent is also rejected. The bank guarantee, if any, furnished by the respondent under the order of this Court made in Special Leave Petition (Civil) No. 9089 of 1984 stands discharged in favour of the respondent. The application is accordingly disposed of without any order as to costs. No further order need be passed on the pending application. The interim application therefore stands disposed of.