Supreme Court of India
M/S. Chahal Engineering & ... vs Irrigation Department, Punjab, ... on 30 July, 1993
Equivalent citations: AIR 1993 SC 2541, 1993 (2) ARBLR 436 SC, JT 1993 (4) SC 434, 1993 (3) SCALE 331, (1993) 4 SCC 186, 1993 Supp 1 SCR 449
Author: P.B.Sawant
Bench: K Singh, P Sawant
ORDER P.B.Sawant, J.

1. The present appeal arises out of an arbitration proceedings. The respondent-Irrigation Department 'the Department' proposed to get a Aqueduct constructed across the Sirsa river for a distance of 15.455 Kms. of Sutlej Yamuna Link Canal. A contract on turn-key basis was entered into between the appellant and the respondent on 19th April, 1984 for. the total cost of Rs. 6.10 crores. The drawing and design was to be supplied by the appellant for approval by the Department.

The drawings and designs submitted by the appellant did not show any sealing arrangements with provision for proper bearing pads. Hence, on 6th September, 1984, it was decided to adopt pre-stressed concrete super-structure. This involved increase in the quantities. However, the agreement had provided that in ease of any deviation in the design, increase in cost will not be charged to the respondent. The appellant later on, however, claimed extra amount on account of the increase in the quantities and costs. These gave rise to a dispute between the parties and ultimately in July 1986, the dispute was referred to the arbitration of Chief Engineer of the respondent, Shri Avtar Singh. The Claims preferred by the appellant amounted to Rs. 2.70 crores including the work of the super-structure amounting to Rs. 78 lakhs. On 14th August, 1987, Shri Avtar Singh gave his award in favour of the appellant without mentioning any specific amount. He also pronounced an interim award in favour of the appellant amounting to Rs. 55 lakhs, pending the working out of the final amount as per the directions given by him in the award.

On 16th November, 1987, Senior Sub-Judge, Ropar made the award the rule of the Court overruling the objection of the respondent that the final amount having not been specified, the matter be referred back to Shri Avtar Singh.

On 4th April, 1988, the respondent terminated the contract. Thereafter, they also filed an appeal in the High Court to set aside the award. By its judgment and order dated 11th January, 1991, the High Court set aside the award. Against the said decision of the High Court, the appellant preferred an appeal by special leave to this Court being C.A. No. 3181 of 1991.By its order dated 13th August, 1991 this Court appointed Justice A.D. Koshal (Retd.) as the arbitrator. The order stated as follows :

Against the award submitted to the court for being made a rule of the Court the main objection of the State of Punjab was that the item-wise payments due to the contractor had not been quantified and, therefore, the award was not complete. An application under Section 16(1)(b) of the Arbitration Act had been filed on that ground before the Court for remitting the award while the claimant wanted the award to be made a rule of the Court. The learned Trial Judge made the award a rule. On appeal the High Court has set it aside. Some of the comments made by the High Court were probably unwarranted in the facts of the case.

There is no dispute that the contract was divisible into two broad heads, one was the sub-structure and the other the superstructure. In regard to the sub-structure it is the common case of parties that the appellant completed it., In regard to the superstructure its contract has been cancelled. We make it clear that the contractor has no claim for the super-structure. We are also of the view, agreeing with the stand of the State Government, that until the dues were quantified the award really became incomplete unless it would be a case where there was no dispute about the performance and the arithmetic part of it remained to be calculated as a ministerial business. That aspect has not been considered mainly on account of the tact that when the arbitration proceedings were going on, the work too was on and had not been completed.

In this background, with the consent of the parties, we direct that there should be afresh arbitration. The Arbitrator should take note of the fact that the matter had once been arbitrated upon and some conclusions have been reached which were not seriously disputed by either side. He should, therefore, in this backdrop, alter looking into the background proceed to complete the unfinished part of the award by hearing parties to the extend (sic.) he in his discretion considers necessary.

By consent of parties we appoint Mr. Justice A.D. Koshal, a retired judge of this Court now living in Delhi to be the arbitrator and would request him to complete the award within four months as provided by law. He would fix his remuneration.

Before Justice Koshal (Retd.) [hereinafter referred to as the arbitrator] the respondent on 13th October, 1991 submitted their counterclaim of Rs. 7.49 crores. On 26th October, 1991, the arbitrator rejected the counter-claim on the ground that as per the direction of this Court, he had only to quantify the amounts which were left unspecified by the earlier arbitrator Shri Avtar Singh. Before the arbitrator, thereafter, both the appellant and the respondent filed their respective statements, counter-statements and documents and also their respective written statements. On 2nd April 1992, the arbitrator pronounced an award in favour of the appellant for Rs. 2,82,26,401. plus costs of Rs. 1,42,500. This amount included interest upto 31st March, 1992 and also escalation on the awarded amount. The arbitrator had allowed the claims by way of recovery amounting to Rs. 1,59,15,052.

On 22nd May, 1992, the respondent preferred objections against the award in this Court. On 13th July, 1992 the appellant submitted its written reply to the said objections which were rejoined by the respondent by its rejoinder of 8th October,1992.

2. It may be mentioned at the outset that the dispute which was referred first to Shri Avtar Singh and then to the present arbitrator Justice Koshal related to the increase in quantities and costs thereof on account of the alterations in the design of the work concerned. The subsequent dispute arising out of the termination of the contract is a separate dispute and is at present before another arbitrator Shri S.S. Mongia. Thus, we are concerned in the present proceedings with the claims and counter-claims arising out of the change in the design during the pendency of the contract of work.

3. There is no dispute that the tenders were invited on a lump sum basis and the contract on turn-key basis was awarded to the appellant for a lump-sum total cost of Rs. 6.10 crores. There is also no dispute that the lump sum tenders were to be based on the tenderer's own design and as per

the agreement entered into between the parties on 19th April, 1984, the lump sum tender was to be inclusive of all expenses for proper and entire completion of the work including the taxes, tolls etc. The tenderer was to be responsible for furnishing detailed designs and specifications and before carrying out the work, he was to obtain technical approval of the Chief Engineer of the respondent-Slate for each of the components of the Aqueduct. The Executive Engineer was empowered to order modifications at any time before the completion of work all modifications, he was to issue revised plans or written instructions or both. Any modification in original specifications, drawing, designs and instructions had to be carried out by the contractor on the same conditions in all respects on which he had agreed to do the main work and at the rates as specified in the tender lor the main work.

4. It appears that the drawings and designs submitted by the appellant did not show any sealing arrangements with provision for proper bearing pads and hence on 6th September, 1984, it was decided to adopt pre-stressed concrete super-structure. This involved increase in the quantities of material. However, the agreement had provided that in case of any deviation in the design, increase in cost will not be charged to the respondent. The appellant, however, later on claimed extra amount on account of the increase in the quantities and costs. This gave rise to a dispute between the parties as stated earlier and the matter was referred to the Chief Engineer of the respondent, Shri Avtar Singh. The contractor made ten claims before Shri Avtar Singh, but subsequently withdraw claims Nos. \ and 5 to 10. Thus, claims Nos. 2,3 and 4 were the subject-matter of the arbitration before Shri Avtar Singh. Those claims read as follows:

[1] CLAIM NO.2 - Reimbursement of extra costs due to increase in quantities in inter-mediate well - foundations; Rs. 53, 69, 712.40 [2] CLAIM No. 3 - Reimbursement ot costs of providing Rocker Roller and Bearings under the super-structure and other extra works; Rs. 78,53,028.00 [3] CLAIM NO.4 - Reimbursement of extra costs for providing well-foundations under the abutments; Rs. 33, 06, 083.00.

5. The arbitrator Shri Avatar Singh rejected claim No. 3 and allowed claim Nos. 2 and 4 and awarded compensation for the actual work done at the rates provided in the Common Schedule of Rates, Volume II [P.W.D. Manual]. Over and above these rates, he also allowed a premium of 575% Shri Avtar Singh took the view that the appellant was entitled to the extra cost incurred by him on account of increase in quantities notwithstanding that the contract was on a lump sum basis because the modifications made in the design were not to the aqueduct which forms part of the agreement but of a different type which was not included in the agreement. He also held that the respondent-Government was not competent to change the said type after the execution of the contract agreement even with the consent of the appellant unless a supplementary agreement between the parties in writing was executed. He further held that the modifications in the design were not the modifications referred to in the agreement for which the appellant-contractor was not to charge extra amount. On the other hand, the changes so made were of the category and type of aqueduct and its total design had involved colossal changes. The increase in quantities on account of the said changes were also verified by the respondent-State. He, therefore, held that the quantities and rates provided in the original contract could not be made the basis of tabulation and calculation. According to him, however, the only way left was to take the verified quantities as the basis and the

respondent should pay to the contractor for the work already done and to be done at the rates mentioned in the said P.W.D. Manual and without considering the value of Rs. 6.10 crores for the 'Hammer Head' type structure as per the agreement. The arbitrator left the matter only at pointing out that it is not the lump sum on the basis of which payment had to be made but at the rates given in the said Manual and for the quantities verified. He also indicated that the amount arrived at is to be paid with interest at the rate of 15.5 per cent from the date of the award to the date of payment under a decree of the competent authority whichever is earlier. This award was made on August 14, 1987. The award did not mention either the specific quantities or the total amount to be payable. The actual amount was left to be worked out in the light of the observations made by him.

From his award, it is clear that Shri Avtar Singh had given a complete go-by to the lamp sum nature of the contract and directed payment according to the item-wise rates given in the P.W.D. Manual. He also left both the quantities of the specific items and the total amount, to be worked out by the parties.

This award was sought to be made a rule of the Court by the appellant by filing a suit in the Court of Senior Sub-Judge, Ropar. The respondent preferred its objections to making the award rule of the Court by Order dated 16th November, 1987. It is this order which was challenged by the respondent in the High Court. The High Court set aside the order of the Trial Court firstly on the ground that the arbitrator had traveled beyond the scope of the agreement between the parties; that the contract was to be carried out out on a lump sum basis and that the arbitrator completely ignored the term in the agreement that the "lump sum tender shall be inclusive of all expenses for proper and entire completion of the work". It had also provided that if the contractor considered any work demanded of him to be outside the requirements of the contract, he would promptly ask the Executive Engineer in writing for written instructions or decisions. If the contractor was dissatisfied with the instruction or decision of the Executive Engineer, he could then within thirty days, appeal to the Superintending Engineer. If the contractor was dissatisfied even with the decision of the Superintending Engineer, the would indicate his intention to refer the dispute to arbitration within 30 days of the receipt of the appellate authority's decision failing which the decision was to attain finality. The High Court pointed out that the contractor did not take any exception to the modifications suggested by the Executive Engineer in the drawings specifications. The High Court, further, pointed out that the arbitrator had also failed to take cognisance of the fact that the preliminary designs submitted by the contractor were acceptable only if satisfactory sealing arrangement for water-tightness were ensured with that design. Thereafter, there was a meeting held on September 6, 1984 to discuss the design and in the said meeting, the contractor had agreed to provide alternative design. While agreeing to provide the alternative design, he did not ask for a supplementary agreement to which Shri Avtar Singh has referred. The High Court, therefore, found that it was an innovation made by the arbitrator in the original agreement. The High Court further pointed out that instead of sticking to the terms of the agreement, the arbitrator not only introduced the said innovation, but awarded compensation to the contractor at the rates specified in the Common Schedule of Rates Volume II and over and above it, allowed premium of 575%. The arbitrator did this in spite of the fact that the contractor had nowhere pleaded or proved that after the Executive Engineer made alterations in the original designs and specifications, he had invoked the stipulations contained in Clause 66 of the General Conditions forming part of the agreement. Since he had failed to invoked the said

provisions, he could not make a grievance that the modification suggested would make the original Aqueduct different from the one agreed upon in the agreement. The High Court also found that the interpretation sought to be given by the arbitrator to the word "modification" was alien to the one mentioned in the agreement. The contractor had himself altered the nature of the original Aqueduct of 'Hammer Head' type of structure with long cantilevers on either side with Neo Prene bearing pads since with the original preliminary designs, which he had submitted, he could not ensure fulfilment of the condition laid down by the Department while accepting the design. According to the High Court, the arbitrator had put the onus of the change in the aqueduct on the Department ignoring the Tact that the previous design was only conditionally accepted by the Department. The conclusion arrived at by the arbitrator was, therefore, according to the High Court, contrary to the admitted facts. For all these reasons, the High Court also found that the Trial Court did not appreciate the scope and ambit of the objections raised by the Department before it. Accordingly, the High Court allowed the appeal, set aside the order of the Trial Court by which the award was made the rule of the Court.

6. It is against this decision that the present appeal is filed by the contractor. We have, therefore, to read the order dated 13th August, 1991 passed by this Court referring the matter to the arbitrator, in the context of these controversies between the parties and the decision of the High Court on the same. In the first instance, the dispute referred is with regard to the sub-structure and not the super-structure of the aqueduct. That substructure has been completed. The quantities of the work done in the sub-structure were not ascertained when Shri Avtar Singh had entered the reference since the work was then in progress and without the ascertainment of the said quantities, the award given by Shri Avtar Singh was incomplete. It was also not a case where there was no dispute about the performance of the contract. Thus, the dispute related to the ascertainment of the quantities as well as to the quality of the work done under the contract. It was not merely a case of working out arithmetically the amount payable to the contractor on the basis of the agreed quantities and accepted performance of the work. These aspects, viz., the exact quantities of the work done and quality of its performance could not have been considered by Shri Avtar Singh mainly because at that time, as stated earlier, the work was still in progress. The arbitrator was , therefore, asked to look into the matter against this background and proceed to complete the unfinished part of the award which meant, firstly the ascertainment of the a quantities and the quality of the work performed. We have, therefore, to find out now in the present appeal, whether the learned arbitrator had failed to consider any of the subject-matter referred to him for arbitration or whether he had travelled beyond the scope of the dispute referred to him. We have also to consider the preliminary objection as to whether the objection as to whether the objection to the award should be permitted in these proceedings or leave the parties to challenge the award as per the provisions of the Arbitration Act., 1940 [the 'Act'].

7. It may be mentioned here that Shri G. Ramaswamy, learned Counsel appearing for the respondent made a statement on September 14, 1992 that without raising the question of maintainability of the application for making the award rule of the court, he was prepared to argue the application on merit. We do not find any application filed by the appellant or record for making the award the rule of the Court. Instead, we find that the arbitrator had filed the award in this Court and a notice of the same was issued by the Registry of this Court on 25th April, 1992 to the parties.

The learned arbitrator had filed the award in this Court in view of the decision of this Court in Guru Nanak Foundation v. Rattan Singh & Sons , where a view has been taken that when an arbitrator is appointed by this Court, the arbitrator had to file the award in this Court to the exclusion of any other Court and to that extent, the general law relating to the jurisdiction of this Court is excepted. We also find that the opinion expressed by this Court in the said decision has been referred for further consideration to a bench of five judges and the same is pending in this Court at present. We have, therefore, to proceed on the basis of the law as it stands today which is binding on us.

In the first instance it is contended on behalf of the appellant that no ground for setting aside the award under Section 30 of Act is made out by the respondent. In this connection reliance is placed on several judgments. It cannot be disputed that the misconduct of the arbitrator referred to in Section 30(a) and the expression "is otherwise invalid" in Section 30(c) would include an error apparent on the face of the record. Since as held below, we have come to the conclusion that the award suffers from several patent errors, it will have to be held that the objections raised by the respondent are within the scope of Section 30 of the Act. Since the proposition is obvious and is based upon the law settled by a series of decisions, it is not necessary to discuss the decisions here in detail. We, therefore, reject the preliminary contention.

8. The main point of controversy between the parties relates to the scope of the reference before the arbitrator. It is, therefore, necessary to understand both the background of the order dated 13th August, 1991 passed by this Court referring the dispute to arbitration and the content of the same in the light of the said background. As has been explained earlier in detail, the contract given was on turn-key lump sum basis. The designs and drawings of the work, viz., construction of the aqueduct was to be supplied by the appellant-contractor with the tender itself. This design had to be approved by the respondent and could be modified by the respondent. Either the tendered could accept such modification and proceed with the work or he could withdraw from the contract if the modification made necessitated an increase in the value of the contract. Admittedly, there was a change in the design of the contract but the appellant neither withdraw form the contract nor did not it at the time of the change in the design, ask for a change in the total value of the contract. When the dispute arose while the work was still in progress, the matter was referred to Shri Avtar Singh. In his award he proceeded on the footing that the contract on the lump sum basis had come to an end and was replaced by a contract on the item rate basis. He then proceeded to prescribe rates to the various items as mentioned in the Common Schedule of Rates Volume II [P.W.D. Manual). Where the said Manual did not prescribe rates for the items, he gave his own rates. The respondent had challenged his award mainly on this ground and the High Court had also accepted the said challenge and set aside the award. It is against the order of the High Court quashing the award on the ground that Shri Avtar Singh had changed the very basis of the contract that the appellant had preferred the appeal before this Court in which the Court made the order of 13th August, 1991. We have, therefore, to understand the said order of reference in the context of this background of facts. The order or reference first states that although the contract was divisible into two broad heads, viz., sub-structure, and superstructure the work relating to the super-structure was not a matter of dispute to be referred to the arbitrator since the contract relating to the same had been terminated However, the contractor had completed the work relating to the sub-structure. It is the dues of the contractor relating to the completed work of the sub-structure which alone was the subject-matter of

dispute to be referred to the arbitrator. Secondly, the admitted position was that Shri Avtar Singh could not quantify the amount due in the award because, at the time the work of the sub-structure was still in progress. Although, therefore, he had changed the basis of the contract from the lump sump to the item rate contract, the actual quantum of work done and its qualitative evaluation could not be done by him. His award had, therefore, remained incomplete. He only prescribed the rates for the items as per the Manual and where no rates were prescribed for the items, he gave his own rates. Probably, he expected that the parties should work out the actual value of the work, after ascertaining the work done and evaluating it in terms of the rates awarded by him. However, whether the work done was of the agreed quality or not, had also to be decided by the new arbitrator before he could quantify the rate of the items and the total value of the work done. It is in this context that we have to read the crucial second last paragraph in the order beginning with the expression "In this background" which alone is material to find out the scope of the reference before the arbitrator. The order clearly says that it is in this back ground of facts and with the consent of the parties that the Court was directing that "there should be a fresh arbitration". This direction is followed by the statements, that" the arbitrator should take note of the fact that the matter had once been arbitrated upon and some conclusions have been reached which were not seriously disputed by either side." The arbitrator, therefore, should "in this backdrop, after looking into the background" proceed "to complete the unfinished part of the award" by hearing parties to the extent "he in his discretion considers necessary" it does, therefore, appear from the aforesaid language of the order that while directing fresh arbitration the arbitrator was also required to start where the earlier arbitrator Shri Avtar Singh had left. It is also to be noted that the order does not refer to the change of the basis of the contract, viz., from the lump sum to the item rate contract, or to the High Court's comment upon it. Nor does it direct the new arbitrator to proceed on the lump sum basis of the contract. The absence of a reference to the change in the basis of the contract made by Shri Avtar Singh, and the statement that " the arbitrator should take note of the fact that the matter had once been arbitrated upon and some conclusions have been reached which were not seriously disputed by either side" coupled with a direction to the new arbitrator to complete the "unfinished part" of the award and that too by hearing parties to the extent "he in his discretion considered necessary" would suggest that the new arbitrator had to proceed on the footing that the lump sum basis of the contract no longer survived and the items of work had to be evaluated according to the rates either prescribed by the Manual or such rates that the arbitrator chose to grant. It cannot also be disputed that the arbitrator while evaluating the work had also to examine the evidence with regard to the quality of the work done. No fault, therefore, could be found with the arbitrator if he had proceeded to evaluate the work accordingly. We cannot, therefore, accept the contention on behalf of the respondent that the arbitrator had to proceed on the original lump sum basis of the contract and not on the item-rate basis.

In view of this conclusion of ours, all that we have to examine in the present case is whether while evaluating the work on the item rate basis, the arbitrator has committed any error apparent on the face of the record which invalidates the award. The direction for fresh arbitration has to be understood in this context. So understood, it means that the award is not 10 be remitted to the same arbitrator Shri Avtar Singh for which the respondent had gone to the Civil Court but the matters left unfinished by him had to be arbitrated upon by a fresh or a new arbitrator.

9. As has been pointed out earlier, in all ten claims were made by the appellant-contractor before Shri Avtar Singh. Seven claims were thereafter withdrawn. Out of the remaining three claims, he rejected Claim No.3 and granted Claim Nos. 2 and 4.

We may first deal with Claim No. 2 which was for reimbursement of extra costs due to increase in the quantities in intermediate well foundations. The total claims made for the said item was Rs. 53, 69, 712.40. Shri Avtar Singh's comments on this claim may be summarised as follows:

Out of nine wells, the appellant had executed only five wells. The claim also constituted difference of costs for the work done upto 20.10.1986 and did not exhaust even the quantities mentioned in the original contract. As the work was continuing, item rates for each item should form the basis for the work executed in future. Since the respondent-Government had adopted 575% as the basis for premium for the estimation of the cost of the Aqueduct on 10.3.1983 over and above the rates provided in the CSR Volume-II, Shri Avtar Singh awarded the premium of 575% over and above the rates mentioned against each item of work. He also stated that the said item rates were complete rates of the items executed or to be executed. He further directed to adjust interim award of Rs. 55 lakhs on pro rata basis during the execution of the work. He also held that the escalation under Clause 44 of the agreement shall be available to the appellant-claimant in addition to the above rates with effect from the quarter ending March 1983, i.e., the quarter ending alter the opening of the tenders.

10. The arbitrator has accepted the premium of 575% over the rates mentioned in C.S.R. Volume II since Shri Avtar Singh had given the said rate. There is no dispute between the parties over the said premium, although it is not known whether the premium was to be given for each item or on the lump sum. The two methods of awarding premium make a sizeable difference in the total entitlement. But in the absence of any dispute on that count, we need not go into the question.

As regards the extra costs awarded on account of the artesian conditions encountered during digging, since the contract was given originally on lump sum basis, the contractor when he filed his tender, should be presumed to have know the said conditions and filed his tender accordingly. There is nothing unusual about the artesian conditions which are expected to be encountered in work of this kind. Hence, the tenderers are expected to take into account the said conditions and tender accordingly. The increase in work due to the aid condition, therefore, does not merit extra cost. The extra cost of Rs. 30, 15 849 on that account is not justified also because there is no provision in C.S.R. Volume II for separate rates for artesian conditions. The rates mentioned there are presumed to be the complete rates in themselves for all conditions whether artesian or non-artesian. Shri Avtar Singh has also not recommended any extra-rate for boring wells in artesian conditions. The respondents contend that this is because it is easier to bore wells in such condition since the resistance to digging is less. The contention appears to be well-founded.

Further, even according to Shri Avtar Singh, the artesian condition occurred after a strata of clay at an excavation of R.L. 225. The record shows that the deepest well having a depth of 22 mtrs. was sunk upto the deepest elevation of R.L. 275, i.e., 275 - 22 at 253. This means that in all the seven wells togethers, the artesian conditions were encountered in all for 14 mtrs. [255 - 253 = 2 x 7). The

bore-hole chart annexed to the supplementary affidavit of the respondents also shows that the total depth of all the seven wells under artesian conditions was 14.21 mtrs. which more or less corresponds to the computations based on the assumption made by Shri Avtar Singh. If at all therefore the contractor was entitled to any allowance for artesian conditions, it was only for 14.21 mtrs. and that amount would come to Rs. 13,61,780.00 at the rates given by the contractor himself. The arbitrator has, however, awarded an amount of Rs. 30,15, 849.00 for a depth of 31.47 mtrs. which has no basis. What is further, as stated earlier, in view of the fact that no special provision is made in CSR Volume II for separate rates for artesian conditions they are not warranted. Assuming further that the special rates were to be given for digging in such conditions, the guidance had to be taken form note [ii] of chapter XXII of CSR Volume II which refers to well sinking. It states as follows:

In case of running streams or rivers spring level will be taken as low water level in stream or river The calculation sheet of the company shows low water level at 275 mtrs. The average silted bed level at this site is about 276 mtrs. which will mean that the spring level is only 1 mtr. below ground level. Item 22. 3 of CSR Volume II and "AF' note [i] states as under:

The rates of item No.22.3 are applicable when the spring level is upto 25' |7.5 mtrs.] below ground level. In case depth of spring level is from 25' to 50 below ground level, increase the above rates of items No. 22.3 by 50%. If depth of spring level is 50' to 100' below ground level, increase the rates of item No. 22.3 by 100%.

Since the spring level in the present case is only about 1 mtr., i.e., 3.28 ft. below (he ground level, as per the above rates given in the CSR volume II only the rates prescribed by Shri Avtar Singh are payable and no more.

It also appears that the arbitrator has taken the depth of sinking form the silted bed level instead of from the spring level or low water lever, on the ground that according to the note to item 22.3 of CSR Volume II, the spring level has to be the low water level in the running stream and therefore must be located at a point above the river bed and not below it. According to him, the lowest point at which the spring level may be located would thus be the river bed itself. This is an obvious error on his part since the spring level is always below the bed level. This wrong premise has led the arbitrator to award higher sinking rates to the contractor than even the excavation rates. On this account alone, as shown by the respondent, amount of Rs. 3,10,936.00 due to change of the item from "excavation" to "sinking" and Rs. 4,17,097 on account of increased sinking depths, have been awarded.

From the above it would be evident that the entire amount of Rs. 30. 15 849.00 awarded as the extra cost for artesian conditions together with escalation and interest thereon is wrongly so awarded and is an error apparent on the lace of the record.

The third aspect of this item is that the Department had only agreed to Rs. 47,46,863.40 on account of this item. The arbitrator has, however, assumed that they had also agreed to the payment of the additional amount of Rs. 31,80,663. That is patently wrong as is clear from the statement submitted

before the arbitrator by the respondent, which reads as follow:

S.No.of Item of Claim	Amount Claimed	Comments/Remarks
Item 4 Other Items as per Statement 'A' Page 2.	59,94,250	Agreed Irrigation Department/
Item 5 Payment against & Boulder (Page 4-7)	31,80,663	This Claim is covered sinking through Rock by Item No. 4 above Nothing more is due.
	79,27,526	(-) 47,46,863

The statement shows that what was agreed to was Rs. 47,46,863.40 which was included in Item 4 which mentions a total sum of Rs. 59,94,250. This is an omnibus item inclusive of the payments against sinking through the rocks and the boulders. Thus, the arbitrator's award of Rs. 31,80,663 on the basis that the Department had not denied the quantities is prima facie wrong. The arbitrator has also granted not only the said amount of Rs. 31,80,663 but in addition, Rs. 9,88,749 and Rs. 28,32,916 for escalation and interest respectively, against the said amount.

What is further necessary to note with regard to the aforesaid amount of Rs. 31,80,663.00 is that the Government was disputing the said amount on two grounds viz., the measure of the depth to be bored through rocks and boulders, and the rate at which the cost of boring the same was to be calculated. The Government had calculated the depth on the basis of the bore-hole data which was earlier accepted to be correct. [Annexed to the supplementary affidavit of respondent is the bore-hole chart] That borehole data showed that the total depth of rock to be bored for all the well was not more than 10 mtrs. However, the contractor produced what he called the sinking register showing depth to be bored as 27.85 mtrs. The arbitrator allowed the quantities on the basis of the depth claimed by the contractor although the sinking register was held to be unproved by him the proceedings of 5th February, 1992. The relevant observations of the arbitrator on that date are as follows"

The Register filed by Sh. Chopra along with his application for additional evidence on 9.1.1992 remains unproved and its authenticity is denied by Shri Sohal. Shri Chopra says that he will not lead any evidence to proved the register which is therefore, not admitted in evidence and is being returned to him. He has concluded his arguments.

In spite of this, the arbitrator took the said depth of 27.85 mtrs. as the correct one and awarded the total cost of boring on the said basis.

What is more, the rate, viz. Rs. 322.65 as claimed by the contractor was also disputed by the Government which contended that it is not more than Rs. 292. It is not disputed that the rate for boring through rock is five times more than the rate for boring through the boulder. The costs of boring through rock and through the boulder have to be calculated separately on the basis of the depth to which they were so bored. It is wrong to take the average of both the rates for calculating the cost of boring the two. The Company took the average of both the rates given in CSR Volume II p-52 and that rate is Rs. 47.80 and applied the premium of 575%. Even with the said average rate

and the said premium, the rate comes to Rs. 274.85. It is, therefore, difficult to understand how the rate of Rs. 322.65 was at all arrived at. According to the Government, the rate is not more than Rs. 292 as stated above. Even if we discard the rate of Rs. 274.85 which will be the correct calculation, on the basis of the Company's rate the difference would come to Rs. 7,53,032,.00. Further, the difference on account of the increase in the depth of the rock to be bored as shown by the Company is Rs. 24, 27, 631.00. Thus together, the difference comes to Rs. 31,80,663.00 which has been granted by the arbitrator on the basis that the Department had not denied the said amount which, as is shown above, is factually incorrect.

Claim No.4

10. As regards Claim No. 4, there docs not appear to be any dispute if on the quantum of work executed, the rates as recommended by shri Avtar Singh are awarded.

11. In addition to the errors apparent on record pointed out in respect of Claim No. 2 as above, we also notice further errors as follows:

Escalation:

Clause 44 of the Agreement between the parties provided, among other things, as follows:

The amounts paid to the Contractor for the work done shall be adjusted for increase or decrease in the rales of labour and material excepting these materials supplied by the government as per Annexure 'II'.

The increase or decrease in the costs on account of labour and material was to be calculated in accordance with the formula laid down in the Agreement. The price adjustment further was applicable only to the work carried out within the stipulated time or within the extensions granted which extensions were not on account of the contractor's default and no claims for price adjustment order than those provided in the contract were to be entertained. As regards the increase, 01 decrease in the rate of wages, it was the average consumer price index for industrial workers at the town nearest to the site of the work which Was to be taken as the basis, the index being that released by the Labour Bureau of the Government of India and published in Ihe Reserve Bank of India Bulletin. The price index lor the material was to be obtained from the competent authority. In terms of this agreement, the escalation was to be given to the contractor as per the price indicated both for labour and material prevailing during the quarters from July 1984 to March 1988, the contract having been terminated on 4th April of 1988. The arbitrator, however, committed a patent error by granting escalation based on the price index of December 1991. The respondents have produced the comparative price indices of both labour and material which show the price indices for December 1991 January 1992 were almost double those averaging during the period from July 1984 to March 1988. As the respondent have pointed out, this itself has made a difference of Rs. 49,23,263.

Interest :

In addition to the escalation, the arbitrator has also awarded interest on the entire amount payable inclusive of the escalated amount and, as stated above, the wrongly calculated escalated amount. Although under the contract, ihe interest on the dues of the contractor is payable w.e.f. 1.4.1988 since the escalation is to be paid during the currency of the execution of the work i.e., upto March 1988, the arbitrator has awarded both escalation and interest from 14.8.1987 to 31.3.1992. The interest payable on the amount of escalation calculated on the wrong indices itself runs into an amount of Rs. 35,36,129 as shown by the respondent.

The arbitrator has also not taken into account the amount due from the contractor to the respondent as on 1.4.1988. The total amount of interest on that amount itself conies to Rs. 1,84,51,665.

Counter-claims and recoveries:

We agree with the appellant that the arbitrator was supposed to taken into consideration the entire work of the sub-structure of the aqueduct executed by them and hence the scope of reference of arbitration was no confined to the work which was completed when Shri Avtar Singh gave his award. It extended also to the work executed thereafter. The respondent-Government has not in its contention staled that the scope of the reference before the arbitrator did not include the work executed after Shri Avtar Singh's award. However, on account of the said extended scope of the reference, the arbitrator had also to take into consideration the counter-claims of the Department which arose out of the entire said work. Secondly, since the whole basis of the contract was changed, the consequences thereof having bearing on the original contract and all that was done on the said basis earlier, had also to be worked out for the benefit of the parties. It was, therefore, necessary to consider the claims of the respondent in particular with regard to the [i] wastage and pilferage of materials supplied by them to the contractor and [ii| advance of Rs. 24.40 lakhs made to the contractor towards the provisions lor the construction of the hutment and setting up of a field office, since the contract was originally a lump sum contract, and [iii| the fact that the new rates of contact were complete and inclusive of all expanses incurred on the items and no separate claim for such expenses was to he entertained. The arbitrator did not consider the said aspect.

The arbitrator has refused to entertain any counter-claim on the erroneous assumption that the counter-claim did not form part of the reference. The counter-claim of the respondents is itself of the amount of Rs. 7.49 crores. What is further, the arbitrator also disallowed the recovery statement submitted by the State Government which was to the tune of Rs. 1.91 crores which included a sum of Rs. 32,38,542.00 on account of wastage of material and Rs. 24.40 lakhs paid to the contractor for construction of field offices and colonies etc. as a part of (he lump sum contract which was originally granted. Since the rates given in the CSR Volume II are inclusive of the expenses incurred by the contractor on account of the establishment of field offices and colonies etc. and since the lump sum basis of the contract was later on change to the item rate basis, the contractor was clearly not entitled to an additional sum of Rs. 24.40 lakhs. The arbitrator failed to notice this obvious fact.

12. In view of the aforesaid errors apparent on the fact of the record, we are of the view that this is a case covered both by Sub-section (a) of Section 30 of the Act and the second part of Sub-section (c) thereof. The award in question will, therefore, have to be set aside. We accordingly allow the

objection and set aside the award and refer the award to a new arbitrator who will proceed on the basis that the contract is no longer on the lump sum basis but is on item rate basis and evaluate the work on the letter basis by considering the entire work executed till the termination of the contract, viz., 4.4.19X8 and the claims and counter-claims of the parties in respect of the work done till that date including the claims of the parties arising out of the change in the basis of the contract and steps taken earlier, i.e.. before the award of Shri Avtar Singh, treating the contract on the lump sum basis.

The appeal is disposed of in above terms. In the circumstances of the case, there will be no order as to costs.