Supreme Court of India
Union Of India vs A.L. Rallia Ram on 19 April, 1963
Equivalent citations: 1963 AIR 1685, 1964 SCR (3) 164
Author: S C.
Bench: Shah, J.C.

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
A.L. RALLIA RAM

DATE OF JUDGMENT:
19/04/1963

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SINHA, BHUVNESHWAR P.(CJ)
AYYANGAR, N. RAJAGOPALA

CITATION:
1963 AIR 1685 1964 SCR (3) 164
CITATOR INFO :

R	1964 SC1714	(10)
R	1966 SC 275	(6)
R	1966 SC 395	(16)
R	1967 SC 188	(4)
R	1967 SC 203	(9)
R	1970 SC 729	(11)
F	1971 SC 141	(8)
R	1972 SC1507	(28,34)
RF	1976 SC1533	(7)
D	1979 SC 852	(3,5)
RF	1980 SC 680	(19)
E	1980 SC1109	(4)
R	1984 SC1072	(22)
F	1987 SC2045	(7)
R	1988 SC2149	(13)
RF	1989 SC 606	(6)
D	1992 SC 732	(30,40,41)

ACT:
Arbitration--Tender for purchase of goods--Acceptance of--Clause for reference to arbitration--If binding on Government--Reference of specific question of law--Arbitrator framing issues--Parties agreeing to issues being decided--If amounts to reference of specific question of law--Setting aside of award-Error on the face of the

award--Government of India Act, 1935, (Geo. 5 Oh.2.), s. 175 (3).

HEADNOTE:

In 1946, the Chief Director of Purchases (Disposals), Food Department, Government of India, invited tenders for purchasing war surplus American Cigarettes. The respondent submitted a tender offering to purchase the entire stock- This tender was accepted by a letter with which was enclosed a Form containing the general conditions of contract including a clause for arbitration. The respondent took delivery of 29,93, 597 packets and p. aid Rs. 17,78,573/6/4 for them. On inspection some of the cigarettes were found to be mildewed and unfit for use. Ultimately, the Government decided to cancel the contract with respect to the undelivered cigarettes and offered to take back from the respondent cigarettes which "were in their original packing and could be identified, subject to the condition that no claim will be made by the respondent in respect of freight, storage, rents, charges or any other expenses incurred by him in respect of the cigarettes taken back." The respondent accepted this offer reserving his right to claim incidental expenses. He returned 24,13,500 packets and Government refunded Rs. 14,54,21517/, to him. Thereafter, each party, in accordance with the arbitration clause, appointed an arbitrator

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and the arbitrators entered upon the reference. The parties filed their statements of claim and written statements. Issues were framed and the parties agreed that the dispute between them be tried on those issues. As the arbitrators were unable to agree upon the decision they appointed an umpire. The umpire gave an award awarding to the respondent Rs. 1,32,417/10/- for loss suffered in respect of cigarettes not returned, Rs. 1,25,000/- for incidental expenses and Rs. 68,833/l2/3 as interest. The respondent applied to the Subordinate Judge for filing the award and the appellant applied for setting aside the award. The Judge ordered that a decree be issued in terms of the award. In appeal the High Court confirmed the order. The appellant contended that there was no arbitration agreement as the contract was not executed in accordance with s. 175 (3) of the Government of India Act, 1955, and that there was error of law apparent on the face of the award. The respondent contended that the agreeing by the parties to a trim of the issues raised amounted to a reference of specific questions and the award on such reference could not be set aside even if there was error apparent on the face thereof.

Held that there was a binding arbitration agreement between the parties and the arbitrators had jurisdiction to

enter upon the reference. The letter of acceptance of the tender signed by the Director of Purchases fulfilled all the requirements of s. 175 (3) of the Government of India Act. Section 175 (3) did not require the execution of any formal document nor was there any such direction by the Governor-General in respect of sale of disposals goods. The goods offered to be sold belonged to the Government of India and all the action in respect thereof was taken by the Government and in the name of the Government. There was thus a binding contract between the parties which contained an arbitration clause. Further, the appellant was not precluded from challenging the existence of a binding arbitration. agreement on account of its having submitted to the jurisdiction of the arbitrators and on account of its not having raised the objection before them, as the 'jurisdiction of the arbitrators depended upon the existence of such an agreement.

Seth Bikhraj Jaipuria v. Union of India, [1962] 2 S.C.R. 880, referred to.

Held further, that agreeing to a trial of the dispute on the issues raised by the arbitrators could not be regarded as reference of specific questions of law implying an agreement between the parties that they intended to give up their right to challenge the award before the court even if the award

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vitiated on account of an error apparent on the face thereof. The parties merely agreed to have their differences adjudicated on the issues raised, and not to submit the issues raised for adjudication. Besides, the agreement before the arbitrators could not amount to a fresh arbitration agreement independent of the original agreement, for to be valid and binding the agreement had to satisfy the requirements of s. 175 (3) of the Government of India Act, 1935. The appellant was entitled to attack the award on the ground of error apparent on the face thereof.

Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd., (1923) L.R. 50 I.A. 324, Seth Thawardas Pherumal v. Union 0.1 India, [1955] 2 S.C.R. 48, F.R. Absalom Ltd. v. Great Western (London) Garden village Society, [1933] A.C. 592, M/s. Alopi Petshad & Sons ltd. v. Union of India, [1960] 2 S.C.R. 793 and Durga Prosad Chamaria v. Sewkishendas Bhattar, A.I.R. (1949) P.C. 334, referred to.

Held further that there was error of law on the face of the award in so far as it awarded incidental expenses and interest to the respondent and this part of the award had to be set aside. Incidental expenses were awarded in respect of expenditure by the respondent on advertisement, publicity, storage, agency commission and other overhead expenses incurred after the respondent took delivery of the cigarettes, i.e. when he had become owner of the goods. The expenditure was in respect of his own goods and the

respondent could not claim it as compensation for breach of warranty in respect of the goods retained. Interest was awarded on all the moneys paid by the respondent to the Government with respect to the goods returned from the date of payment to the date of return. Such interest was payable neither under s. 61 (2) of the Sale of goods Act as it was not a claim for refund of sale price nor under the Interest Act. In the absence of any usage, contract, express or implied, or of any provision of law to justify the award of interest, interest cannot be awarded by way of damages. In respect of that part of the contract which was abandoned, if any liability to pay interest had arisen it was for the respondent to claim it in settling the terms of cancellation of the contract. Interest could not be awarded on equitable grounds.

Bengal Nagpur Railway Company Ltd. v. Ruttanji Ramji, (1937) LR. 65 I.A. 66 and Maine and Hew Brunswick Electrical Power Company v, Hart, [1929] A.C. 631, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION Civil Appeal No. 414 of 1961, Appeal from the judgment and decree dated April 17, 1958 of the Punjab High Court in F.A.O. No. 75 of 1951. Bishan Narain, Naunit Lal and R.N. Sachthey, for the appellant.

G.S. Pathak, Anant Ram Whig, B. Datta and Gvan Singh Vohra, for the respondent.

1963. April 19. The Judgment of the Court was delivered by SHAH J.--This is an appeal with certificate under Art. 133 (1) (c) of the Constitution against the order of the High Court of Punjab in First Appeal No. 75 of 1951 confirming the order of the Subordinate Judge, Delhi, refusing a motion to set aside an award directing payment by the Union of India of Rs. 3,26,251/6/3 with costs and future interest a per cent to the respondent.

In August, 1946, the Chief Director of Purchases (Disposals), Food Department, Government of India, invited tenders for purchasing the stock of American cigarettes lying in Calcutta, Karachi, Delhi and Agra. The respondent submitted his tender offering to purchase the entire stock at uniform rate of Re. -/8/3 per packet of 20 cigarettes. The total value of the stock offered at that rate amounted approximately to Rs. 39 lakhs. The Government of India accepted the tender. The acceptance letter (with which was enclosed Form F.D. (M)70 setting out the general conditions of contract) was signed by the Chief Director of Purchases. Condition No. 13 in Form F.D. (M) 70 contained an arbitration clause:

> "In the event of any question or dispute arising under these conditions or any special Conditions of Contract or in connnection with this contract (except as to any matters the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator to be 'nominated by the Chief Director and an

> arbitrator to be nominated by the Contractor or in the case of the said arbitrators not agreeing, then to the award of an Umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the arbitrators, or in the event of their not agreeing of the Umpire appointed by them shall be final and conclusive x x x x The respondent took delivery of 29,93,597 packets of cigarettes and paid Rs. 17,78,573/6/4 but on inspection he found that some cigarettes were mildewed and unfit for use.

A Board of Survey appointed by the Government of India to inspect the undelivered stock reported that cigarettes of the value of Rs. 6,58,453/- were wholly "unfit for issue," for the remaining cigarettes the Board recommended reduction in price at certain rates. The respondent did not agree to accept the goods on the revised terms reported by the Board and requested the Government of India to agree to a uniform reduction of 50 per cent in price on the cigarettes delivered to him as well as those still lying with the Government. The Government of India thereafter decided to cancel the contract in respect of the undelivered cigarettes, and offered to take back from the respondent, out of the stock of cigarettes delivered such as "were in their original packing and could be identified," subject to the condition that no claim will be made by the respondent in respect of freight, storage, rents, charges or any other expenses incurred by the respondent in connection with the cigarettes taken back by the Government. The respondent accepted the offer made by the Government, reserving his right "to claim incidental expenses." 24,13,500 packets of cigarettes in the original packing were then returned by the respondent and between June 13, 1947 and February 8, 1948, Rs. 14,54,215/7/- were refunded to him by the Government of India. On June 26, 1948 the respondent addressed a letter to the Director General of Disposals intimating that he had appointed M. W. Lewis as arbitrator on his behalf in accordance with el. 13 of the general conditions of F.D. (M) 70 and called upon the Director General of Disposals to appoint his arbitrator. By his letter dated July 7, 1948 the Director General informed the respondent that the Government of India had appointed Bakshi Shiv Charan Singh as their arbitrator, reserving full liberty to take all pleas before the arbitrator including the plea that no dispute between the parties which could be referred to arbitration survived.

The arbitrators entered upon the reference but could not agree upon a decision, and the dispute was referred to an umpire. The umpire by his award dated January 30, 1950 awarded to the respondent Rs. 1,32,417/10/- for loss suffered in respect of the 6,34,270 packets of cigarettes not returned by him; Rs. 1,25,000/- for incidental expenses; and Rs. 68,833/12/3 as interest. The umpire accordingly awarded against the Union of India Rs. 3,26,251/6/3 and future interest and costs of the arbitration.

The respondent applied to the Subordinate Judge, Delhi for filing the award under s. 14 of the Arbitration Act, and the Union of India applied for an order setting aside the award. It was contended, by the Union of India that there was no legally binding contract between the Union and the respondent, for the acceptance note was not signed on behalf of the Governor-General of India, and the entire proceeding including the appointment of the arbitrators and the umpire was vitiated for want of compliance with s. 175 (3)of the Government of India Act, and that in any event the award contained errors of law apparent on its face. The Subordinate Judge, refused the motion for

setting aside the award and ordered that a decree be issued in terms of the award. In appeal against the order refusing to set aside the award, the High Court of Punjab confirmed the order.

Two questions arise for determination in this appeal :--

> (1) Whether the award is liable to be set aside on the ground that there was in existence no valid arbitration agreement in conformity with s. 175 (3) of the Government of India Act, 1935 which authorised the umpire to make his award; and (2) whether the award is liable to be set aside on the ground that it is erroneous on the face thereof.

The letter accepting the tender dated September 9, 1946 issued under the signature of the Director of Purchases recited that the tender submitted by the respondent was accepted to the extent shown in the schedule attached to the letter and subject to the special terms and conditions in the letter from the Chief Director of Purchases, and the general conditions of contract in Form F.D. (M) 70 which accompanied that letter. The general conditions of contract by the first clause defined 'Government' as meaning "the Governor-General for India in Council and when the context so admits his successors and assigns and the Government of India and officers acting for him or them." By cl. 2 it was provided that the Governor-General for India in Council was not bound to accept the highest or any tender or to assign reasons for non-acceptance. The other clauses prescribed conditions for payment of price, state of goods, risk, delivery, liability, failure to pay price and failure to take delivery after payment, recovery of sums due, etc. By cl. 13, the arbitration clause was incorporated as a term of the contract. Acceptance of the tender was therefore subject to the special conditions in the letter of the Chief Director of Purchases and the general conditions in F.D. (M) 70, and in case of conflict special conditions were to prevail over the general conditions.

Did the terms of the acceptance letter which formed the contract between the parties comply with the requirements of the Government of India Act, 1935? Section 175 (3) provided:

> "All contracts made in the exercise of the executive authority of the Dominion or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

The section was in terms mandatory. Before a liability binding the Dominion of India could arise, the contract had to be expressed to be made by the Governor-General, if it was made in exercise of the executive authority of the Dominion, and it had to be executed on behalf of the Governor-General, and by such persons and in such manner as he directed or authorised. This Court in Seth Bikhraj Jaipuria v. Union of India (1), held in dealing with the validity of contract which did not conform to (1) [1962] 2 S.C. R. 880, the requirements of s. 175 (3) of the Government of India Act that the provisions of s. 175 (3) were mandatory and not directory and if the contract did not conform to the requirements prescribed by s. 175 (3), no obligation enforceable at law flowed

therefrom.

The authority of an arbitrator depends upon the authority conferred by the parties by agreement to refer their differences to arbitration. By s. 2 (a) of the Arbitration Act, 1940 "arbitration agreement" means "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." A writing incorporating a valid agreement to submit differences to arbitration is therefore requisite:it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties; There must be an agreement to submit present or future differences to arbitration, this agreement must be in writing, and must be accepted by the parties. Clause 13 in Form F.D. (M) 70 fulfils all these requirements. But the Dominion of India being a party to the arbitration agreement, to be binding the agreement had also to conform to the requirements of s. 175 (3) of the Government of India Act, 1935, for an arbitration agreement is a contract within the meaning of the Government of India Act and it must, to bind the Dominion of India, be made in the form prescribed by that section. The question which then falls to be determined is whether the letter accepting the tender of the respondent conformed to the requirements of s. 175 (3)of the Government of India Act.

Section 175 (3) does not in terms require that a formal document executed on behalf of the Dominion of India, and the other contracting party, alone is effective. In the absence of any direction by the Governor-General under s. 175 (3) of the Government of India Act prescribing the manner a valid contract may result from correspondence if the requisite conditions are fulfilled. The contracts for sale of "War-disposal" goods were not directed by the Governor-General to be made by a formal document executed on behalf of the GovernorGeneral as well as by the purchasing party. It is true that s, 175 (3) uses the expression "executed" but that does not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of s. 175 (3). The goods offered to be sold belonged to the Government of India. The tender notice was also issued by the Government of India, Department of Food. The title of the notice was "Tender Notice issued by the Government of India, Department of Food (Division III), New Delhi." The name of the authority issuing the tender notice was "Government of India, Department of Food (Division III), office of the Chief Director of Purchases, Jamnagar House, New Delhi." By el. 9 delivery was to be made, ex site the Government agreeing to afford assistance for movement to the extent feasible, and by cl. 11 import duty on the cigarettes was to be , paid by the Government. Clause 6 provided that the stock of cigarettes to be delivered will be surveyed by the Survey Board appointed by the Government of India and the decision of the Board shall be binding on the tenderer. In the letter dated August 21, 1946, submitting his tender the respondent stated that he, was Willing to offer a rate of Re.-/8/3 per packet only on the condition that the Government gave "a guarantee not to undersell the cigarettes at any stage.;' It appears that the respondent had a discussion with the Chief Director on September 3, 1946, and certain terms were agreed upon, which were robe incorporated in the acceptance letter. In his letter dated September 4, 1946, the respondent set out these terms. These terms clearly show that the Government undertook certain obligations, such as appointment of a Survey Board, if the

goods were rejected on the ground that they were unfit for consumption, issue of separate delivery letters for each Depot to facilitate delivery, and an assurance that the Government shall tender help in getting railway priority and other transport facilities in the dispatch of goods lying at the various depots, undertaking transportation from the Assam Depot to Calcutta at the risk and cost of the Government. These conditions were incorporated in the acceptance note issued by the Chief Director of Purchases. The acceptance note is also headed "Government of.India, Department of Food (Div.III) New Delhi" and refers to the obligations of the Dominion in cls. 6, 9, 10 and by cl. 13 made the special conditions prevail over the general conditions which were incorporated in the contract. The correspondence between the parties ultimately resulting in the acceptance note, in our judgment, amounts to a contract expressed to be made by the Government and therefore by the Governor-General, because it was the Governor-General who .had invited the tender through the Director of Purchases, and it was the Governor-General who through the Chief Director of Purchases accepted the tender of the respondent subject to the conditions prescribed therein. The authority of the Chief Director of Purchases to contract for sale of "War-disposal" goods and sign the contract is not denied. The Chief Director of PurChases has subscribed his signature in his official designation and he has not stated in the description that the contract was executed on behalf of the Governor-General, but on a fair reading of the contents of the letter, in the light of the obligations undertaken thereunder, it would be reasonable to hold that the contract was executed on behalf of the Governor-General. No rules made by the GovernorGeneral have been placed before the Court showing that in executing a contract for the sale of"Wardisposal" goods, the officer authorised in that behalf must describe himself as signing on behalf of the Governor-General of India.

The High Court held that the Government of India having agreed to refer differences to arbitration and having taken part in the proceeding before the arbitrators and the umpire, had waived the objection as to the illegality of the contract and could not therefore raise any such objection in an application for setting aside the award. We are unable to agree with that view. The requirements of s. 175 (3) of the Government of India Act are mandatory, and the fact that the Government of India did not contend before the arbitrator that there was in law no arbitration agreement on which the arbitrator was competent to act would not invest the arbitration agreement with any validity. It is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate: if in law there is no valid arbitration agreement, the proceedings of the arbitrator could be unauthorised. Every contract to bind the Government must comply with the requirements of s. 175 (3) of the Government of India Act, 1935, and waiver will not preclude the Government from pleading absence of a contract in consonance with the law. An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the. Court cannot interfere with the award if

otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. An error in law on the face of the award means: "you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound" Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd. (1). But this rule does not apply where questions of law are specifically referred to the arbitrator for his decision; the award of the arbitrator on those questions is binding upon the parties, for by referring specific questions the parties desire to have a decision from the arbitrator on those questions rather than from the Court, and the Court will not, unless it is satisfied that the arbitrator had proceeded illegally interfere with the decision. The argument advanced by the respondent that in the present case specific questions were referred to the umpire, and his decision on those questions must be regarded as binding and not liable to be re-opened, even assuming that there is some error on the face of the award, must therefore be examined. The arbitrators on July 16, 1948 called upon the parties to file their respective statements of claim and written statement. The respondent filed on August 16, 1948, an argumentative claim petition setting out in paragraph-22 the three heads under which he made a total claim of Rs. 5,95,518/13/-. To this claim, the Dominion of India filed a written statement denying the claims made by the respondent. A replication was filed by the respondent to the written statement. The arbitrators recorded that the parties had complied with the order, that issues had been proposed by counsel for the respondent, and that the parties were agreed that the dispute between them be tried on those issues. Then they set out ten substantive issues, and evidence was led before the arbitrators. The arbitrators recorded that they were unable to agree upon the decision, and therefore they submitted the case to the umpire R.B. Nathoo Ram. The umpire entered upon the reference, the (1) (1932) L.R. 50 I. A, 324.

evidence which was recorded before the arbitrators was accepted as evidence before the Umpire, and the umpire proceeded to pronounce his award after recording reasons in support of his conclusions on the diverse issues which were raised before the arbitrators. But filing of pleadings pursuant to the directions of the arbitrators and agreeing to a trial of the dispute on the issues raised by the arbitrators cannot be regarded as reference of specific questions implying an agreement between the parties that they intended to give up their right to resort to the Courts even if the award was vitiated on account of an error apparent on the face thereof. The only permissible inference from the agreement recorded by the arbitrators was that the parties agreed to have the dispute8 adjudicated on the issues raised, and not to submit the issues raised for adjudication. The terms of

el. 13 of the contract F.D. (M) 70 which incorporated the arbitration agreement are general. By his letter dated June 26, 1946 the respondent intimated the Director of Purchases that he had appointed an arbitrator on his behalf "in accordance with clause No.13 of the general conditions of the contract" and the appointment of an arbitrator by the Union by their letter dated July 7, 1948 (subject to the reservation of a right to contend that there was no dispute) for adjudication of the claim made by the respondent. In these two letters there is no reference to any specific questions to be referred to the arbitrators: nor can the filing of pleadings in support of their respective cases by the parties pursuant to the direction given by the arbitrators, and the framing of issues arising thereon with the object of focussing the attention of the parties on the question to be decided for adjudicating upon the dispute amount to a reference on specific questions, rendering the award binding upon the parties. In Seth Thawardas Pherumal v. The Union of India (1), Bose, J, delivering the judgment of the Court observed in dealing with the contention that there was a reference of a specific question, and (1) [1955] 2 S.C.R. 48.

the award was nor liable to be questioned even on the ground that it disclosed an error on its face:

> "Therefore, when a question of law is the point at issue, unless both sides specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about point of law in the course of the proceedings is not enough."

The learned Judge also observed at p. 59 after referring to F.R. Absalom Ltd. v. Great Western (London) Garden Village Society (1):

> "Simply because the matter was referred to incidentally in the pleadings and agruments in support of, or against, the general issue about liability for damages, that is not enough to clothe the arbitrator with exclusive jurisdiction on a point of law."

In dealing with a similar question in M/s. Alopi Parshad & Sons Ltd. v. The Union of India (2), the Court observed:

> "Issues were undoubtedly raised by the arbitrators, but that was presumably to focus the attention of the parties on the points arising for adjudication. The Agents had made their claim before the arbitrators, and the claim and the jurisdiction of the arbitrators to adjudicate upon the claim, were denied. The arbitrators were by the terms of reference only authorized to adjudicate upon the disputes raised. There is no foundation for the view that a specific (1) [1933] A.C. 592, 616. (2) [1960] 2 S. C. R. 793.
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> reference, submitting a question of law for the adjudication of the arbitrators, was made."

In Durga Prosad Chamria v. Sewkishendas Bhattar (1), the Judicial Committee held that questions of law were specifically referred to arbitration where in a pending suit after issues were raised with the consent of parties "the outstanding matters" in the suit were referred to three named arbitrators, conferring upon them special enumerated powers. But the decision was reached in the special circumstances of the case, and not on the view that where agreed issues are raised before the arbitrator on the pleadings filed before him, the reference must be regarded as a reference on the specific questions incorporated in the issues.

Undoubtedly, under an arbitration agreement which is initially in terms general the parties may after disputes have actually arisen, refer specific questions to arbitration. But each case must depend upon its facts. Filing of pleadings before the arbitrators, or even an agreement that certain issues arise on the pleadings will not always yield the inference that the parties agreed to refer specifically the questions incorporated in the issues to the arbitrator, so as to preclude themselves from challenging the award on the ground of error of law on the face of the award.

The test indicated by Lord Russell of Killowen in F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd. (2) adequately brings out the distinction between a specific reference of a question of law, and a question of law arising for determination by the arbitrator in the decision of the dispute. was observed at p. 607:

> " x x, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law (1) A.I.R. (1949) P.C 334, (2) [1933] A.C. 592,616 becomes material distinct from the case in which a specific question of law has been referred to him for decision. x x x x The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

Then after referring to the authorities it was observed at p. 610:

> " x x x The primary quarrel between the parties was whether, if the value of work executed and materials on site up to and including March 11, 1929, had been truly assessed, the net value available for certification on that date was in excess of(as the contractor alleged) or less than (as the employer contended) the amount which had actually been certified up,to and including that date x x x x. Those were the disputes in regard to the issue of certificates and the validity of the notice' which were in general terms submitted to the arbitrator. No specific question of construction or of law was submitted. The parties had, however been ordered to deliver pleadings, and by their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued so as to include therein the excess net value which they had alleged and which the arbitrator has found (though for a reduced amount) to have existed. on March 11, 1929. It is at this point that the

> question of the construction of condition 30 arose as a question of law, not specifically submitted, but material in the decision of the matters which had been submitted. This question of law the arbitrator has decided; but if upon the face of the award he has decided it wrongly his decision is in my opinion open to review by the Court."

In the present case the respondent had claimed from the Dominion of India, compensation m respect of the goods delivered to him under the contract, interest on the amounts raised by him for carrying out the contract and for incidental expenses incurred by him after delivery of the goods. That dispute was referred to arbitration pursuant to clause 13 of Form F.D. (M) 70. Pleadings were filed. by the parties pursuant to the direction of the arbitrators, but thereby the parties did nothing more than state in writing their respective cases. the parties also agreed that certain issues arose on those pleadings but the function of the issues was to focus the attention of the parties to the points on the decision of which the adjudication of the dispute between the parties depended. The issues of law may be material for the determination of the dispute, but they are not issues of law specifically referred to the arbitrators.

There is one more aspect which must be considered. Assuming that during the course of arbitration proceedings, the parties may enter into. a fresh agreement and modify the original terms of reference, and extend or restrict their scope. But such an agreement must, to be effective, amount to an arbitration agreement. The respondent has not relied and could not rely upon any subsequent agreement modifying the agreement of reference, for any subsequent contract between him and the Union of India had also to satisfy the requirements of s. 175 (3) of the Government of India Act, 1935 or Art. 299 of the Constitution if such an agreement took place after the Constitution came into force and such an agreement can only be in the form prescribed by these constitutional provisions. By merely assenting to the issues raised before the arbitrators the advocate appearing on behalf of the Government of India could not assume to himself authority to bind the Dominion or the Union to a specific reference on a question of law, because a reference on a specific question may be effective only if there be an agreement express or implied that the arbitrator will decide the question specifically referred to him and that his decision will be binding upon the parties. In the absence of any such contract in the form prescribed, a plea of an agreement subsequent to the reference would be futile. We are therefore unable to agree with the High Court that specific questions of law were referred to the arbitrators, the decision whereof is binding upon the parties. The question then remaining to be decided is whether the award of the umpire was in law erroneous on the face of it. The umpire has awarded Rs.1,32,417/10/-under the head loss suffered by the respondent in respect of the packets of cigarettes delivered to him. He has awarded Rs. 1,25,000/- in respect of the incidental expenses and Rs. 68,833/12/3 as interests. The Loss sufferred in respect of the packets of cigarettes is computed in this manner: the contract rate of cigarettes was Re.-/8/3 per packet, the respondent was able to sell the packets supplied to him at the rate of 'Re. -/4/9 per packet. That a part of the stock of cigarettes supplied to the respondent was mildewed and unfit for consumption is not denied. The respondent was therefore entitled to claim compensation for breach of contract on the ground that the Government of India had committed a breach of warranty. It appears that the Government disposed of some stock of cigarettes at the rate of Re.-/1/9 per packet. The respondent had claimed that the goods supplied to him were only worth Re.-/1/9 per packet because that was

the price. which the Government recovered by sale of similar goods and he was entitled to get from the Government as compensation the difference at the rate of Re,-/6/6 per each packet. The umpire held that the respondent was not entitled to compensation at the rate claimed by him but to get the difference between the price paid and price received by him on sale. In our view no error apparent on the face on this part of the award is disclosed and the award in so far as it awards Rs. 1,32,417/10/- to the respondent under this head is not open to challenge. But on the second head the claim for Rs. 1,25,000/- for incidental expenses cannot be sustained. The umpire in paragraph (xi) of his award observed:

> "While the Government sold the stocks of cigarettes taken back by it at Re. -/1/9 the purchaser was able to get a very substantial higher price. This undoubtedly resulted from the efforts which he put in, advertisement, publicity, storge, transport, payment of agency commission and other overhead expenses. It appears to me that to all such expenses the purchaser is clearly entitled, in addition to the expenses incurred by him with respect to the cigarettes taken by the Government. The law of compensation compels me to hold that all expenses incurred by the purchaser with respect to the cigarettes taken back by the Government must be paid to him."

This observation proceeds upon a clear fallacy. The respondent had purchased and taken delivery of 29,74, 270 packets, out of which he sold 6,34,270 packets and returned 23,40,000 packets under an arrangement whereby the Government of India was to take back the goods found with the respondent in their original packing. The respondent had purchased the goods under the acceptance of tender dated September 9, 1946 which provided by cl. 11 that "All sales will be conducted on the distinct understanding that the goods sold are on a 'said to contain' basis. No responsibility for quality will be accepted whatsoever after the delivery is made at the depot". When he took delivery of the goods, he became owner of the goods by the express intendment of the contract. The expenditure incurred for advertisement, publicity, storage, agency commission and other overhead expenses since the respondent took delivery was therefore in respect of his own goods and he cannot claim these expenses as part of compensation payable for breach of warrant in respect of goods retained by him. The respondent was undoubtedly entitled to the difference between the contract price and the market price of the goods which he retained, and that compensation has been awarded to him. Transport and storage charges after the Government agreed to take back the goods, properly attributable to the goods, may also be awarded to the respondent as expense incurred on behalf of the Government of India. But no such claim was made. For the goods returned the respondent could not maintain a claim for damages, because the contract was by mutual arrangement cancelled. For his claim for incidental expenses in respect of goods appropriated by him the respondent's claim could not be, apart from the damages, awarded. The amount of Rs. 1,25,000/awarded by the umpire to the respondent, on the head of incidental expenses could not therefore be awarded as compensation, on any view of the case. The amount has been awarded on an erroneous assumption of law, which is on the face of it erroneous. We. are, therefore, of the view that the award on that part cannot be sustained.

The claim for interest was discussed by the umpire in paragraph (ix) of his award:

> "Applying the principles on which compensation is assessed, I have come to the conclusion that the purchaser was entitled to be paid interest on all the moneys paid by him to the Government, with respect to stores taken back by the Government, fight from the date of pay- ment up to the date on which moneys were returned. The rate of such interest has to be the same as the rate at which the purchaser paid interest to his bankers. This I find on the evidence to be 0 per cent per annum.

Irrespective of the rate at which the Government usually borrows money, the law of compensation compels me to award interest at the rate of 6 per cent per annum."

It is again difficult to appreciate on what ground, interest could be awarded to the respondent. The contract did not provide for payment of interest in respect of amounts paid by the respondent if the contract fell through. Nor could interest be awarded under s. 61 of the Sale of Goods Act. The right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed, is undoubtedly not affected by the Sale of Goods Act, and by sub-s. (2) of s. 61 in the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price to the buyer in a suit for refund of the price in case of a breach of the contract on the part of the seller. But the claim made by the respondent was not for refund.of price. In respect of that part of the contract which was cancelled, by mutual agreement, price paid was refunded. In respect of the goods sold by the respondent his claim was for damages, and damages have been awarded. The respondent claimed before the umpire (and that claim was upheld) that he had to borrow from his bankers a large amount of money for meeting his obligation under the contract with the Government and he was entitled to recover from the Dominion of India interest paid by him to his bankers, for the period during which his moneys remained with the Dominion of India. Mr. Pathak for the respondent submits that the umpire was in this state of affairs competent to award interest on the amount which was detained by the Dominion by way of damages. But as held by the Judicial Committee in Bengal Nagpur Railway Company Ltd. v. Ruttanji Ramji (1), in the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest, interest cannot be allowed by way of damages caused to the respondents for wrongful detention of their money. In that case in an action against the Railway Company for remuneration for work done by the contractor not covered by the contract Rs. 67,000/- were found due by the Railway Company to the contractor on the basis of fair and reasonable rates. The contractor claimed interest on that amount for the period prior to the date of the suit. The Judicial Committee held that interest on the amount awarded as compensation could not be awarded by way of damages, and there being no contract, nor statute, nor usage in support of such a claim, the claim for interest had to be disallowed.

In dealing with the claim for interest on the principle incorporated in illustration (n) of s. 73 of the Indian Contract Act which is as follows:

> (n) "A, contracts to pay a sum of money to B, on a day specified. A, does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally mined. A. is not liable to make good to B,

> anything except the principal sum he (1) (1937) L.R. 65 I.A. 66.
>
> contracted to pay, together with interest up to the day of payment."

The Judicial Committee observed at p. 72:

> "The illustration, however, does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment."

Illustration (n) therefore does not aid the respondent. Mr. Pathak submitted that interest may be awarded on grounds of equity, and placed reliance upon the Interest Act, 3" of 1839. Under that Act the Court may allow interest to the plaintiff if the amount claimed h a sum certain which is payable at a certain time by virtue of a written instrument. The Act, however, contains a proviso that interest shall be payable in all cases in which it is now payable by law. This proviso applies to cases in which the Court of Equity exercises jurisdiction to allow interest. As observed by the the Judicial Committee in Bengal Nagpur Railway Company's case (1) after referring to the observation made by Lord Tomlin in Maine and New Brunswick Electrical Power Company v. Hart (2), observed: (1) (1937) L.R. 65 I.A. 66, (2) [1929] A.C. 631,540.

"In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract which equity can give specific performance. The present case does not, however, attract the equitable jurisdiction of the court and cannot come within the purview of the proviso. The judgment of Their Lordships of the Privy Council in Bengal Nagpur Railway Company's case (1) was relied upon in Seth Thawerdas Pherumal's case (2) in negativing a claim for interest. In that case a contractor had entered into a contract with the Dominion of India for supply of bricks. Under a clause which required that all disputes between the parties to the contract should be referred to arbitration, dispute having arisen, the matter was referred to arbitration and the arbitrator gave award in the contractor's favour. The Union of India which had succeeded to the rights and obligations of the Dominion contested the award on numerous grounds one of which was the liability to pay interest on the amount awarded. Bose, J, in delivering judgment of the Court observed that the interest awarded to the contractor could not in law be awarded. He pointed out that an arbitrator is not a court within the meaning of the Interest Act of 1839: in any event interest could only be awarded if there was a debt or a sum certain, payable at a certain time or otherwise, by virtue of some written contract at a certain time and there must have been a demand in writing stating that interest will be claimed from the date of the damand. In the view of Bose, J, none of the

elements was present and the arbitrator erred in law in thinking that he had the power to allow interest simply because he thought the demand was reasonable. (1) (1937) L.R. 65 I.A. 66. (2) [1955] 2 S.C.R. 48.

The umpire has awarded interest to the respondent on the footing that for the purpose of carrying out his contract with the Government of India, the respondent was required to make arrangements by borrowing moneys from his bankers and he had to pay interest in that behalf, and when the contract was abandoned after it was partially performed, the Government of India became liable to make good the loss of interest which the respondent suffered. We know of no principle on which the Government of India could be rendered liable for payment of interest in the circumstances relied upon. In respect of that part of the contract which was abandoned,. if any liability to pay interest had arisen it was for the respondent to claim it in settling the terms on which cancellation of the contract was to be made. In respect of the goods which had been returned by him, he could claim compensation for breach of warranty, but such compensation could not include interest as damages for detention of money. Interest was therefore allowed on a view of the law which appeared on the face of the award to be erroneous.

This appeal must be partially allowed and the award of the umpire set aside in so far as it awards interest amounting to Rs. 68,833/12/3 and incidental expenses amounting to Rs. 1,25,000/-. The award in so far as it awards Rs. 1.32,417/10/- for loss suffered by the respondent in the matter of 6,34,270 packets of cigarettes is not liable to be set aside. In view of the partial success, there will be no order as to costs throughout.

Appeal allowed in part.