Ms.G vs Isg Novasoft Technologies Ltd on 2 September, 2014

Author: V.Ramasubramanian

Bench: V.Ramasubramanian

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.9.2014

CORAM

THE HON'BLE MR. JUSTICE V.RAMASUBRAMANIAN

Original Petition No.463 of 2012

Ms.G ... Petitioner

Vs

1.ISG Novasoft Technologies Ltd.,
Represented by The Chairman of the Board,
Sucons Oki Info Park E34, IT Highway,
(OMR) Near SIPCOT,
Chennai-603 103.

2.Mr.Justice T.N.C.Rangarajan (Retd.),
Blue Lotus #103, Road No.3,
Banjara Hills,
Hyderabad-500 034. ... Respondents

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act

For Petitioner : Mr.Arvind P.Datar,
Senior Counsel for
M/s.HLC Associates.

For Respondent-1 : Mr.Arun Khosla for
Mr.S.K.Chandrakumar.

O R D E R

Not satisfied with the quantum of compensation awarded by the sole Arbitrator, who is the second respondent herein, the petitioner has come up with this petition under section 34, challenging the Award of the Arbitrator.

2. I have heard Mr.Arvind P.Datar, learned Senior Counsel for the petitioner and Mr.Arun Khosla, learned counsel for the first respondent.

3. The petitioner entered into an Employment Agreement with the first respondent-company on 10.3.2006. Under the said agreement, the petitioner was to be appointed as Vice President (M&A Integration Strategy) with effect from 27.4.2006. The agreement contemplated the imparting of training to the petitioner in Courses relating to General Management, Finance, Business Strategy and Project Management during the first year of employment. It also contemplated that the petitioner would be stationed at Chennai during the first year of employment and would be transferred to U.S.A., thereafter. The agreement contained an Arbitration Clause, with the seat of arbitration at Chennai.

4. It appears that within a few months of the commencement of the contract of employment, some untoward incidents happened, as a consequence of which, the petitioner claims to have tendered a resignation on 24.7.2006. But, the resignation did not take effect for reasons which I would not go into.

5. After a year, 3 letters of termination followed in succession. The first was dated 17.10.2007, the next was dated 12.12.2007 and the last was dated 20.12.2007.

6. Thereafter, the petitioner lodged a criminal complaint on 26.12.2007 against two Officers of the Company for alleged offences under the Indian Penal Code and the Tamil Nadu Prohibition of Harassment of Women Act, 1998. The company also filed criminal complaints of defamation and extortion against the petitioner. Eventually, when both the petitioner and the first respondent landed up at the Supreme Court, the Supreme Court referred the parties to the second respondent herein for the resolution of all their disputes through arbitration.

7. Before the Arbitrator, the petitioner filed a Statement of Claim for recovery of a total amount of Rs.28,88,55,500/- under 12 different headings. The various heads of claim and the amount claimed by the petitioner before the Arbitral Tribunal are extracted as follows:-

S.No. Nature of Claim Amount in Rs.

1.

Bonus for the completion of the first year 21,60,000

2. Arrears in Salary 11,62,500

3. Severance payouts 1,17,00,000

4. Bonus for the second year of employment 18,00,000

5. Non-revision of salary after the end of the first year of employment 67,50,000

6. Failure of the Respondent to transfer the Claimant to the Unites States of America 3,51,00,000

7. Non-compliance of procedures by the Respondent while purportedly terminating the Claimant 3,51,00,000

8. Not providing bonus in the second year of employment 18,00,000

9. Not providing learning and training opportunities 26,10,000

10. Failure to provide stock under the Respondent's Employee Stock Option Scheme 4,50,00,000

11. Loss of employment opportunity 5,76,00,000

12. Damages for non-constitution of Committee to inquire into allegations of sexual harassment 9,07,00,000 Total 28,88,55,500

8. The first respondent filed a counter to the claim of the petitioner on 2.9.2011. Apart from filing a counter to the claim of the petitioner, the first respondent also filed an independent Statement of Counter Claim on the very same date. In the Counter Claim, the first respondent sought the following reliefs:

> "(i) To declare that the Employment Agreement dated 10.3.2007 is null and void ab initio and the Claimant is liable to refund all payments (Rs.93,50,948) received by her during her employment with the Respondent Company along with interest calculated at the rate of 9% per annum from the dates of various payments till refund is made.
>
> (ii) To direct the Claimant to refund the deposit made by the Respondent Company with her in the sum of Rs.1.55 crore along with interest calculated at the rate of 9% per annum from the dates of various payments till refund is made and
>
> (iii) To direct the Claimant to pay the Respondent the sum of Rs.32,00,00,000/- along with interest calculated at the rate of 9% per annum from the date of the institution of the instant claim till payment."

9. The petitioner filed a counter to the first respondent's counter claim and the first respondent filed a rejoinder to the petitioner's counter.

10. Thereafter, the second respondent-Arbitrator commenced the proceedings at Chennai. A preliminary meeting was held on 21.11.2011 for the purpose of marking the documents on either side

and for the process of admission and denial. On the date of the preliminary hearing, both parties agreed that there would be no oral evidence and that the matter will be decided only on mutually accepted documentary evidence.

11. On the next date of hearing viz., 17.3.2012, the learned counsel on both sides argued the question of admissibility of the documents denied by the first respondent. Thereafter, the Arbitrator decided to proceed to hear the arguments on merits, keeping the objections relating to admissibility of documents in mind. The learned Arbitrator decided to take up the question of admissibility whenever the disputed documents came up for consideration and they became relevant for any particular claim. Eventually, the Arbitrator passed an Award directing payment of a sum of Rs.2 Crores as compensation to the petitioner, together with interest at 18% per annum from 1.4.2012, on the amount that was remaining unpaid after adjustment of a deposit already made. All the counter claims filed by the first respondent were rejected by the Arbitrator by his Award dated 21.3.2012.

12. In order to appreciate the manner in which the Arbitrator arrived at the award amount, under each head of claim made by the petitioner, it is necessary to present the same in a tabular form. Hence it is made as follows:-

S.No. Head of claim Amount Claimed Amount Awarded

1.

Bonus for the completion of the first year 21,60,000

2. Arrears in Salary 11,62,500

3. Severance payouts 1,17,00,000 1,68,00,000

4. Bonus for the second year of employment 18,00,000

5. Non-revision of salary after the end of the first year of employment 67,50,000

6. Failure of the Respondent to transfer the Claimant to the Unites States of America 3,51,00,000

7. Non-compliance of procedures by the Respondent while purportedly terminating the Claimant 3,51,00,000

8. Not providing bonus in the second year of employment 18,00,000

9. Not providing learning and training opportunities 26,10,000

10. Failure to provide stock under the Respondent's Employee Stock Option Scheme 4,50,00,000

11. Loss of employment opportunity 5,76,00,000

12. Damages for non-constitution of Committee to inquire into allegations of sexual harassment 9,07,00,000 In other words, the Arbitrator accepted only one head of claim, namely severance benefit and awarded a sum of Rs.1,68,00,000/-. However, the Arbitrator also stated that since the first respondent retained this benefit with them, he was rounding off the amount to Rs.2.00 Crores. Since the first respondent had already deposited some amount, in pursuance of the order of the Supreme Court, the Arbitrator directed the said amount to be deducted and the balance to be paid with interest at 18% per annum from 01.4.2012. The first respondent was also directed to give a no objection certificate indicating that it was a contractual termination as recognised in the industry, so as not to come in the way of the petitioner s future employment.

13. Aggrieved by the rejection of all the heads of claim except one, by the Arbitrator, the petitioner has come up with the above petition under Section 34. The first respondent has not chosen to challenge either the Award passed in favour of the petitioner or the rejection of all their counter claims by the learned Arbitrator. With this brief outline, let me now proceed to minute details.

14. The grievance of the petitioner can be summarised as follows:-

(i) The claims under Serial Nos.1 to 4 in the table given above, have been admitted by the Arbitrator and hence the petitioner has no grievance in respect of the same.

(ii) The fifth head of claim, according to the petitioner, was not considered by the Arbitrator at all. But the first respondent claims that what was awarded under the first four heads of claim includes the fifth claim also.

(iii) The sixth head of claim for compensation for failure of the company to transfer the petitioner to USA, was rejected by the Arbitrator, on the ground that though there was a breach of contract, no separate compensation other than the severance payments could be allowed.

(iv) The seventh head of claim relating to non-compliance with the procedure prescribed for termination of services, was rejected by the Arbitrator.

(v) The eighth head of claim, which relates to bonus in the second year of employment, was rejected by the Arbitrator, but the petitioner is not pressing this claim before this Court.

(vi) The ninth head of claim relates to the failure of the first respondent to provide learning and training opportunities. This claim is rejected on the ground that there was no specific agreement in this regard between the parties.

(vii) The tenth head of claim, which relates to the employee's stock option, was rejected by the Arbitrator on the ground that there was no evidence to show the existence of a stock option scheme.

(viii) The eleventh head of claim related to the loss of employment opportunity for the petitioner, but the same was rejected on the ground that clause 6.2 of the contract bars the award of any damages other than severance payments.

(ix) The twelfth head of claim was with regard to the failure of the first respondent to constitute a Committee to inquire into allegations of sexual harassment of women employees, as mandated by the Supreme Court in its decision in Vishaka vs. State of Rajasthan [AIR 1997 SC 3011]. This claim is rejected on the ground that there was an ombudsman and a Grievance Committee in the company and that the petitioner failed to approach them. In addition, the Arbitrator also held that in any case, he cannot award anything more than the severance payments in view of Clause 6.2.

15. Before going into the grounds of challenge to the award, it is my duty, as pointed out by Mr.Arun Koshla, learned counsel for the first respondent, to keep in mind the well settled principles of law that constitute the banks, within which, the flow of jurisdiction under Section 34, like a river, should be confined. While I cannot allow the river to overflow causing a breach of its banks, I should also ensure that it does not get dried up for the fear of the banks.

16. Unlike the Arbitration Act of 1940, the jurisdiction of the Court to interfere with an Arbitral Award is now statutorily restricted by certain well defined parameters stipulated in Section 34. Under Section 30 of the 1940 Act, an Award can be set aside when (i) an Arbitrator or umpire misconducted himself or misconducted the arbitration proceedings; (ii) an Award was made after a Court had superseded the arbitration or after the arbitration proceedings had become invalid; and (iii) an award had been improperly procured or otherwise invalid. With so many expressions such as "misconducted", "improperly procured" and "invalid", Section 30 of the 1940 Act, allowed the imagination of Courts to run riot, while dealing with a petition to set aside an Award.

17. But under the 1996 Act, an arbitration Award can be set aside in terms of Section 34(2)(a), if the party approaching the Court, furnishes proof that any one of the 5 contingencies stipulated in Clauses (i) to (v) therein existed. Alternatively, the Award could be set aside in terms of Section 34(2)(b), if the Court finds (i) that the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force; or (ii) that the arbitral Award is in conflict with the Public Policy of India.

18. In ONGC vs. Saw Pipes [2003 (5) SCC 705], the Supreme Court, after highlighting the narrower meaning assigned to the expression "public policy" in Renusagar Power Co.Ltd vs. General Electric Co. [1994 Supp.(1) SCC 644], pointed out that an Arbitral Award could be set aside, if it is contrary to (i) the fundamental policy of Indian Law; or (ii) the interests of India; or (iii) justice or morality; or (iv) if it is patently illegal. But, the Court cautioned that the illegality must go to the root of the matter. If the illegality is of trivial nature, the Arbitral Award cannot be taken to be against public policy. The Court further observed that the Award could be set aside if it is so unfair and unreasonable that it shocked the conscience of the Court.

19. Following ONGC, a Division Bench of the Delhi High Court held in NTPC Ltd vs. Marathon Electric Motors India Ltd [194 (2012) DLT 404 (DB)], that an Award is not open to challenge on the ground that the arbitral Tribunal had reached a wrong conclusion or had failed to appreciate the facts. The appreciation of evidence by the Arbitral Tribunal, the Delhi High Court pointed out, is never a matter, which the Court considers in the proceedings under Section 34. In a proceeding under Section 34, this Court does not sit on appeal over the adjudication made by the Arbitrator.

20. In Steel Authority of India Ltd vs. Gupta Brother Steel Tubes Ltd [JT 2009 (12) SC 135], the Supreme Court summarised the position in paragraph 26 as follows:-

> "26. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:
>
> (i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.
>
> (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.
>
> (iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.
>
> (iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.
>
> (v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.
>
> (vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.
>
> (vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

21. Therefore, keeping in mind the constraints placed upon the Court under Section 34, let me move on to consider the petition on hand.

22. As stated earlier, the petitioner herein was the claimant before the sole Arbitrator. Her claim was for a total sum of Rs.28,88,55,500/-. The first respondent made a counter claim. The Arbitrator rejected the counter claim in total and allowed the claim of the petitioner to the extent of Rs.2.00 Crores. The first respondent has not come up with any petition under Section 34, either as against the rejection of their counter claim, or as against the grant of an award in favour of the petitioner. But, the petitioner has come up, challenging the rejection of some of her claims. Therefore, the prayer in the present petition cannot strictly be construed as one for setting aside the arbitration award. It is actually for modification of the award in such a manner as to allow those claims, which were disallowed by the Arbitrator.

23. Therefore, two questions arise for consideration. They are:

> (i) Whether in a petition under Section 34, this Court is entitled to modify the award, either by enhancing the amount awarded by the Tribunal or by granting a relief that was rejected by the Tribunal, especially in the light of the express language of Section 34? and
>
> (ii) If the answer to the first question is in the affirmative, whether the petitioner is entitled to the grant of reliefs that were negatived by the Arbitral Tribunal?

Question No.(i)

24. Section 34(1) of the Act provides that "recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-Section (2) and Sub-Section (3)". In view of the express language so used in Sub-Section (1), the other Sub-Sections, namely Sub-Sections (2), (3) and (4) use only the expression "set aside by the Court". None of the Sub-Sections of Section 34 use any other expression, such as "modify", "revise", "reverse" or "vary". Therefore, there has been an element of doubt on the power of the Court under Section 34 to modify or revise or vary an award under Section 34.

25. Realising the above difficulty, Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioner, filed a memo in terms of Section 34(4), for adjourning the proceedings and for giving an opportunity to the Arbitral Tribunal to take such other action, as in the opinion of the Tribunal, will eliminate the grounds for setting aside the arbitral award.

26. But the said memo was filed, long after arguments concluded and orders were reserved in the main original petition. Therefore, Mr.Arun Khosla, learned counsel for the first respondent took very strong exception to the same. The learned counsel for the first respondent objected both to the form as well as to the content of the memo and submitted that the procedure adopted by the petitioner is unheard of. He submitted that no Court shall entertain any memo, especially after the conclusion of the arguments, seeking the Court to forbear from pronouncing a judgment and to remit the matter under Section 34(4) to the Arbitrator. The filing of such a memo, according to the learned counsel for the first respondent, amounted to a contumacious conduct on the part of the petitioner, deserving both condemnation and imposition of costs.

27. However, Mr.Arvind P.Datar, learned Senior Counsel for the petitioner submitted that there was nothing wrong in the petitioner filing a memo, after the conclusion of the arguments, especially in view of the grey area in which the power of this Court is now made to languish and also in view of the specific requirement of Section 34(4) that the procedure prescribed therein could be adopted "if so requested by a party". In other words, his contention is that the filing of the memo was only for the purpose of showing to the court that a request was made by the party in terms of section 34(4).

28. I have carefully considered the rival contentions revolving around the memo filed by the petitioner. At the outset, I do not think that one needs to be so touchy and condemn the procedure adopted by the petitioner in filing a memo. The question as to whether the Court has the power under Section 34, to modify or vary or revise the award, is actually perplexing. Therefore, a focus on this question, may be more fruitful than a focus on the filing of the memo.

29. Under Section 15 of the Arbitration Act, 1940, the Court was conferred with a power to modify or correct an award, subject to the restrictions contained in Clauses (a), (b) and (c). But, the 1996 Act, which followed the UNCITRAL Model Law, does not contain a provision similar to Section 15 of the 1940 Act. Section 34(1) of the 1996 Act is a replica of Article 34(1) of the UNCITRAL Model Law. It speaks only about the setting aside of the award. Therefore, the Courts have been repeatedly plagued by this question, as we can see presently.

30. In Gautam Constructions and Fisheries Limited v. National Bank for Agriculture and Rural Development [2000 (6) SCC 519], the parties entered into an agreement for the sale and purchase of office accommodation in respect of a built up area of 48,000 sq.ft. at the rate of Rs.400/- per sq.ft. The transaction was governed by two agreements, one of which prescribed the rate of Rs.250/- per sq.ft. and the other relating to amenities, prescribed an additional rate of Rs.150/- per sq.ft. Disputes arose between the parties and the matter was referred to arbitration. The Arbitrator allowed the rate of Rs.400/- per sq.ft., with interest at 18% per annum from the date of submission of the final bill. A petition was filed under the 1940 Act, to make the award, a rule of Court. The award-debtor filed a petition for setting aside the same. A single Judge of this Court upheld the claim for a rate of Rs.400/- per sq.ft., but, modified the date from which interest was payable. A Division Bench of this Court reversed the judgment of the single Judge and reduced the rate to Rs.150/- per sq.ft. and also reduced the rate of interest. When the matter was taken on appeal to the Supreme Court, the Supreme Court fixed the rate at Rs.250/- per sq.ft.

31. Interestingly, the question as to whether the Court was entitled to modify the rate from Rs.400/- per sq.ft. to Rs.250/- or Rs.150/- per sq.ft., does not appear to have been raised before the Supreme Court, with particular reference to Section 15 of the 1940 Act. The modification as ordered by the Division Bench of this Court, which was subjected to another modification by the Supreme Court, was not the one covered by Clauses (a), (b) or (c) of Section 15 of the 1940 Act. Yet, the Division Bench of the High court modified the rate to Rs.150/- per sq.ft. from Rs.400/- per sq.ft. as fixed by the Arbitrator and the Supreme Court modified the same to Rs.250/- per sq.ft. Therefore, it appears that the Supreme Court took the power of this Court to modify an award, for granted.

32. In Tata Hydro Electric Power Supply Co. Ltd. v. Union of India [2003 (4) SCC 172], a dispute arising out of an agreement between the appellant Company and the Union of India, for the supply of electric power on railway tracks was referred to arbitration. The Arbitrator awarded a sum of Rs.4.00 Crores to the claimant, payable with interest at 12% per annum. The petition filed by the Union of India under Section 34 was allowed by a learned Judge and the award was set aside, on the ground that the dispute could be resolved only under Section 26 of the Indian Electricity Act, 1910 and not through private arbitration. The Division Bench confirmed the said view and Tata Hydro Electric Power Supply Co. Ltd., took the matter on appeal to the Supreme Court. After holding that the dispute was not covered by Section 26 of the Special Enactment, the Supreme Court reversed the judgments of the High Court. Consequently, the award passed by the Arbitrator was upheld. However, the Supreme Court made a modification, restricting interest only from the date of the award and not from the date of submission of bills. This case arose only under the 1996 Act. Though in this case also, the question relating to the power of the Court to modify the award was not specifically addressed, it is a matter of fact that the award was in fact modified by the Supreme Court.

33. In Hindustan Zinc Limited v. Friends Coal Carbonisation [2006 (4) SCC 445], a contract for the sale and supply of 15,000 MT of metallurgical coke was entered into between the parties. The contract contained a price escalation clause. But, the purchaser allowed escalations only on the basis of price variation at a particular level. Not satisfied with such escalation, the seller raised a dispute which was referred to arbitration. The Arbitral Tribunal passed an award. But, the award was modified by the District Court in a petition under Section 34. Therefore, the award-holder filed an appeal under Section 37 before the High Court. A single Judge allowed the appeal and upheld the award in entirety. The same was challenged by the purchaser in an appeal before the Supreme Court. Before the Supreme Court, some understanding was reached between the parties on certain fundamental aspects. Thereafter, notes of calculation were exchanged, on the basis of which, the Supreme Court allowed the appeal, set aside the judgment of the High Court and restored the judgment of the trial Court. Even in this case, the Supreme Court did not specifically address the issue as to whether the Court has power under Section 34 to modify the award. However, the Supreme Court affixed a seal of approval on the decision of the trial Court modifying the award.

34. In Mc Dermott International Inc. v. Burn Standard Co. Ltd. [2006 (11) SCC 181], the Supreme Court was concerned with a challenge to various partial/interim awards as well as a final award passed by the Arbitrator, appointed by the Supreme Court. The Arbitrator in that case first passed a partial award. Thereafter, applications under Section 33 of the 1996 Act were filed on the ground that certain claims had not been dealt with by the Arbitrator in his partial award. Though a preliminary objection was raised with regard to the entitlement to pass a partial award, the Arbitrator passed an additional award. It was only thereafter that an application under Section 34 was filed questioning both the partial award and the additional award. During the pendency of the application, a final award was also passed and an application challenging the same under Section 34 was filed. Several questions arose before the Supreme Court, including the question as to whether a partial award is permissible in law. After holding in paragraph 35 of the report that a partial award, is in effect and substance, an interim award within the meaning of Sections 31(6) and 2(c) of the Act, the Supreme Court held that its validity is not open to question. Thereafter, the Supreme Court took

up for consideration all other challenges to the award. Before doing so, the Court indicated the legal scope of challenge to an arbitration award, in paragraphs 45 to 48 of the report. Taking note of the radical departure made in the 1996 Act from the 1940 Act, the Supreme Court observed in paragraph 52 as follows:

> "The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only like in case of fraud or bias by the arbitrators, violation of natural justice etc. The Court cannot correct errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So the scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

35. But, as in the case of other decisions, which I have dealt with in the previous paragraphs, the Supreme Court was not directly concerned, even in Mc Dermott, with the interpretation to be given to the expression "set aside" appearing in Section 34. The observations made in the paragraph extracted above, were not given in an answer to a pointed question as to whether the Court has the power under Section 34 to modify or revise or vary an award. Therefore, I do not think that the question raised in this case, is settled by the Supreme Court in Mc Dermott finally.

36. In Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra Reddy [AIR 2007 SC 817], an agreement was entered into between the parties for the construction of an irrigation scheme. After the completion of the contract, the contractor raised disputes and they were referred to the Chief Engineer under Clause 29 of the contract for arbitration. The Chief Engineer refused to act as an Arbitrator on the ground that the contract did not provide for arbitration. On an application filed by the contractor under Section 11, the High Court directed the Chief Engineer to arbitrate. Therefore, the Chief Engineer entered arbitration and passed an award. The award was challenged before the District Court under Section 34. But, the Court upheld the award. The appeal filed under Section 37(1)(b) was also dismissed by the High Court and the matter landed up in the Supreme Court. Two contentions were raised before the Supreme Court, one relating to the existence of the arbitration clause and another on the merits of the claim. After holding on the first contention that there existed an arbitration clause, the Supreme Court took up for consideration the second issue. The manner in which the Supreme Court examined the merits of the claims of the contractor and the way in which the claims were dealt with by the Arbitrator, deserve to be noted. Hence, paragraphs 11 and 12 of the decision of the Supreme Court are re-produced as follows:

> "11. On the merits of the claims made by the contractor we find from the impugned award dated 25.6.2000 that it contains several heads. The Arbitrator has meticulously examined the claims of the contractor under each separate head. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award. Here also we may add that we do not wish to interfere with

> the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.
>
> 12. As far as idling charges are concerned, the Arbitrator has awarded Rs.42,000/- per day for the period 1.2.1994 to 17.12.1994 and from 1.6.1995 to 31.12.1995 excluding the period 18.12.1994 to 31.5.1995 and from 1.1.1996 to 12.11.1996. On this basis the idling charges awarded by the Arbitrator was arrived at Rs.1.47 crores. It is contended that the contractor has not led any evidence to show the existence of the machinery at site and, therefore, he was not entitled to idling charges. We are of the view that the award of the Arbitrator is fair and equitable. He has excluded certain periods from calculations, as indicated above. We have examined the records. The delay took place on account of non-supply of drawings and designs and in the meantime the establishment of the contractor stood standstill. We suggested to the learned counsel for the respondent (contractor) for reduction of the awarded amount under this head from Rs.1.47 crores to Rs.1 crore. Learned counsel for the respondent fairly accepted our suggestion. We suggested the aforestated figure keeping in mind the longstanding dispute between the parties. Therefore, the amount awarded under this head shall stand reduced from Rs.1.47 crores to Rs.1 crore."

37. In Union of India v. Arctic India [2007 (4) Arb. LR 524 (Bom.)], a learned Judge of the Bombay High Court held, after taking note of the three decisions of the Supreme Court, in Hindustan Zinc, Mc Dermott and Krishna Bhagya Jala Nigam that "the quantum of claim as granted and the quantum of claim as rejected can be gone into, where there is a case of perversity or illegality".

38. In Union of India v. Modern Laminators [2008 Arb. LR 489 (Del.)], a learned Judge of the Delhi High Court read into Section 34 of the 1996 Act, the "obvious error" and "the slip rule" found in Section 15 of the 1940 Act. The relevant portion reads as follows :

> "In my opinion, the power given to the court to set aside the award, necessarily includes a power to modify the award, notwithstanding absence of express power to modify the award, as under the 1940 Act... If the powers of the court under S.34 are restricted to not include power to modify, even where the court without any elaborate enquiry and on the material already before the arbitrator finds that the lis should be finally settled with such modification and if the courts are compelled to only set aside the award and to relegate the parties to second round of arbitration or to pursue other civil remedies, we would not be servicing the purpose of expeditious/speedy disposal of lis and would be making arbitration as a form of alternation dispute resolution more cumbersome than the traditional judicial process."

39. Therefore, from the various decisions of the Supreme Court and of the Bombay and Delhi High Courts, it is seen that the judicial trend appears to favour an interpretation that would read into Section 34, a power to modify or revise or vary the award. Except one observation found in the

decision of the Supreme Court in Mc Dermott, all the decisions of the Supreme Court have either modified the awards or approved the modification of the awards done by the Courts under Section 34.

40. At this stage, I think it may be useful to have a look at similar provisions contained in the Arbitration Acts of England, the United States (Federal law), Canada, Australia and Singapore.

41. The English Arbitration Act, 1996 categorises the powers of the Court in relation to an award, into three types. They are (i) challenge to an award on the question of substantive jurisdiction, under Section 67, (ii) challenge to an award on the ground of serious irregularity affecting either the Tribunal or its proceedings or the award, under Section 68, and (iii) appeal to the Court on a question of law arising out of an award, under Section 69.

42. Interestingly, the jurisdiction exercisable by the Court under these three categories of challenges, appear to vary at least to certain extent. Whenever a challenge to an award is made under Section 67 of the English Act, on the question of substantive jurisdiction, the Court can, under Sub-section (3), either confirm the award or vary the award or set aside the award in whole or in part. But, when a challenge is made under Section 68 on the ground of serious irregularity, the Court may either remit the award for re-consideration or set aside the award in whole or in part, or declare the award to be of no effect in whole or in part. In contrast, the Court may, in an appeal on a point of law arising under Section 69, either confirm the award or vary the award or remit the award back to the Tribunal for a fresh consideration or set aside the award in whole or in part.

43. In other words, the power of the Court to set aside the award in whole or in part, is available in all the three Sections, namely 67, 68 and 69. But, the power to vary the award is available only in Sections 67 and 69 when the challenge is on the question of substantive jurisdiction or when it is an appeal on a question of law. In a case falling under Section 68 of the English Arbitration Act, 1996, challenging the award on the ground of serious irregularity, there is no power to vary the award. For easy appreciation, Section 67(3), Section 68(3) and Section 69(7) of the English Arbitration Act, 1996, are presented in a tabulation as follows:

> Section 67(3) Section 68(3) Section 69(7) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the Court may by order
>
> (a) confirm the award,
>
> (b) vary the award, or
>
> (c) set aside the award in whole or in part.
>
> If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the Court may-

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The Court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

On an appeal under this section the court may by order

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court s determination, or

(d) set aside the award in whole or in part.

The Court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

44. Insofar Australia is concerned, commercial arbitration is governed by two distinct statutory regimes. The first is State based and it regulates domestic arbitration. The second is Federal and it regulates international arbitration. The International Arbitration Act, 1974, was amended in 2010, with the object of giving effect to UNCITRAL Model Law. Part VII of the Act provides for recourse against the award , the very same expression used in Section 34 of the Indian enactment. Section 34 of the International Arbitration Act, 1974, as amended in 2010, is in pari materia with Section 34 of the Indian Arbitration Act, 1996, with only one exception. Section 34(1) of the Australian Act states that recourse to the Court against an arbitral award may be made either by way of an application for setting aside or by way of an appeal under Section 34-A. Under the UNCITRAL Model Law, there is no provision for appeal. Therefore, the Indian Act of 1996 also does not contain a provision for appeal. However, as we have seen earlier, Section 69 of the English Arbitration Act provides for an appeal on a question of law. Similarly, the International Arbitration Act, 1974 of Australia contains a provision for appeal on a question of law under Section 34-A. Under Sub-section (7) of Section 34-A of the Australian Act (which is in pari materia with Section 69(7) of the English Arbitration Act), the Court has the power, in an appeal, either to confirm the award or vary the award or remit the award or set aside the award in whole or in part. Therefore, if Australian Courts go by the rule of literal interpretation, the Australian Courts would not have the power to vary or modify an award, if what comes up before them is only an application for setting aside the award under Section 34 and they would have the power to modify or vary the award if what comes up before them is an appeal on a question of law under Section 34-A.

45. Insofar as Canada is concerned, they have the Commercial Arbitration Act of 1985. The Act contains only about 11 Sections and 2 Schedules. Under Section 5(1) of the Act, a Code known as Commercial Arbitration Code has the force of law in Canada. The Code applies in relation to matters, where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental Corporation, a crown Corporation or in relation to maritime or admiralty matters. Schedule I to the Act contains the Commercial Arbitration Code, which is entirely based upon the UNCITRAL Model Law. Article 34 of the Code is nothing but a re-production of Article 34 of the Model Law. Therefore, Article 34 of the Commercial Arbitration Code of Canada also uses only the very same expressions, namely recourse to a Court and set aside .

46. Insofar as United States is concerned, there is the Federal Arbitration Act of 1925, which was codified in 1947 and amended in 1954, 1970, 1988 and 1990. This Act contains three interesting provisions. The first is in Section 9, which enables the Court to confirm the award, if the parties have an agreement to have such a confirmation from a specific Court. The second provision is in Section 10. Under Section 10, the United States Court in and for the District wherein the award was made, is conferred with the power to vacate the award upon the application of any party to arbitration, if the award was procured by corruption, fraud or undue means, or if the arbitrators were guilty of misconduct either by refusing to postpone the hearing or in refusing to hear relevant evidence or where the arbitrators exceeded their powers. There is one more interesting aspect to Section 10. Under Clause (b) of Section 10, an award may be vacated even upon the application of a person other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the conditions laid down therein are satisfied.

47. The third provision in the Federal Arbitration Act, which is of significance is Section 11. Under Section 11, the United States Court in and for the District wherein the award was made, can make an order modifying or correcting the award upon an application of a party to the arbitration, under three contingencies, namely (a) where there was an evident material miscalculation of figures or evident material mistake in the description of a thing, person or property, (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision, and (c) where the award is imperfect in the matter of form not affecting the merits of the controversy. The last portion of Section 11 of the Federal Arbitration Act, 1925, requires re-production and hence, it is extracted as follows:

> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. Therefore, it appears that the power of the Court under Section 11 to modify or correct the award is available only for the purpose of giving effect to the true intent of the award and to promote justice.

48. The Singapore Arbitration Act, 2001, contains some interesting provisions. They are:

> No judicial review of award
>
> 47. The Court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act.

Court may set aside award

48. (1) An award may be set aside by the Court

(a) if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the laws of Singapore;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties, unless such agreement is contrary to any provisions of this Act from which the parties cannot derogate, or, in the absence of such agreement, is contrary to the provisions of this Act;

(vi) the making of the award was induced or affected by fraud or corruption;

(vii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or

(b) if the Court finds that

(i) the subject-matter of the dispute is not capable of settlement by arbitration under this Act; or

(ii) the award is contrary to public policy.

(2) An application for setting aside an award may not be made after the expiry of 3 months from the date on which the party making the application had received the award, or if a request has been made under section 43, from the date on which that request had been disposed of by the arbitral tribunal.

(3) When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for

such period of time as it may determine, to allow the arbitral tribunal to resume the arbitration proceedings or take such other action as may eliminate the grounds for setting aside an award.

Appeal against award

49. (1) A party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings.

(2) Notwithstanding subsection (1), the parties may agree to exclude the jurisdiction of the Court under this section and an agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Court under this section.

(3) An appeal shall not be brought under this section except

(a) with the agreement of all the other parties to the proceedings; or

(b) with the leave of the Court.

(4) The right to appeal under this section shall be subject to the restrictions in section 50.

(5) Leave to appeal shall be given only if the Court is satisfied that

(a) the determination of the question will substantially affect the rights of one or more of the parties;

(b) the question is one which the arbitral tribunal was asked to determine;

(c) on the basis of the findings of fact in the award

(i) the decision of the arbitral tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

(6) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(7) The leave of the Court shall be required for any appeal from a decision of the Court under this section to grant or refuse leave to appeal.

(8) On an appeal under this section, the Court may by order

(a) confirm the award;

(b) vary the award;

(c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's determination; or

(d) set aside the award in whole or in part.

(9) The Court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(10) The decision of the Court on an appeal under this section shall be treated as a judgment of the Court for the purposes of an appeal to the Court of Appeal.

(11) The Court may give leave to appeal against the decision of the Court in subsection (10) only if the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal. 51. (1) Where the Court makes an order under section 45, 48 or 49 with respect to an award, subsections (2), (3) and (4) shall apply.

(2) Where the award is varied by the Court, the variation shall have effect as part of the arbitral tribunal's award.

(3) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within 3 months of the date of the order for remission or such longer or shorter period as the Court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the Court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, shall be of no effect as regards the subject-matter of the award or, as the case may be, the relevant part of the award.

Effect of order of Court upon appeal or challenge against award

51. (1) Where the Court makes an order under section 45, 48 or 49 with respect to an award, subsections (2), (3) and (4) shall apply.

(2) Where the award is varied by the Court, the variation shall have effect as part of the arbitral tribunal's award.

(3) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within 3 months of the date of the order for remission or such longer or shorter period as the Court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the Court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, shall be of no effect as regards the subject-matter of the award or, as the case may be, the relevant part of the award.

49. A careful look at the above provisions of the Singapore Act would show that a Court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act. Section 48 provides for setting aside of an award and section 49 provides for an appeal against an award on a question of law. It is interesting to note that section 48 which empowers the court to set aside an award is almost identically worded as section 34 of the Indian Act and it speaks only about setting aside of an award. But section 49 which provides for a remedy of appeal, empowers the court, under sub-section (8) even to vary the award. Therefore one may tend to think that in an original application to set aside an award under section 48, the court cannot vary the award, though in an appeal under section 49, it can vary the award. But this conclusion available on a plain reading of the provisions, is dispelled by section 47 which speaks about setting aside, varying, remitting etc. As if reiterate such a conclusion, section 51, which is made applicable to both sections 48 and 49, speaks of varying an award, under sub-section (2) of section 51. Therefore, sections 47 and 51(2) of the Singapore Act, make it amply clear that the power to set aside includes a power to vary the award.

50. Keeping the above global scenario in mind, if we have a look at the language of the Section 34(1) of the Indian Act, it appears that the same also favours such an interpretation. I have already extracted Section 34(1). What Section 34(1) says is that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with the Sub-Sections (2) and (3) . Therefore Section 34(1) is obviously divided into two parts, the first conferring a right and the latter indicating the remedy. If we perceive the first part of Section 34(1) as the soul and substance, then the second part of Section 34(1) is the form in which the remedy is to be worked out. The form or manner in which a remedy is to be sought, can never curtail or limit the right, which is made available under a statute.

51. The expression recourse to a Court against an arbitral award is a comprehensive and inclusive expression. Merely because such recourse is to be made in the form of an application to set aside the award, it cannot be construed that the power of the Court is limited by Section 34(1), only to set aside the award and to leave the parties in a position much worse than what they contemplated or deserved before the commencement of the arbitral proceeding. A statute cannot be interpreted in such a manner as to make the remedy worse than the disease. A narrow interpretation of Section 34(1) would actually spell doom for the arbitration regime and actually create a mischief.

52. Therefore, in my considered view, the expression recourse to a Court against an arbitral award appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression application for setting aside such an award appearing in Section 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The form, in which an application has to be made,

cannot curtail the substantial right conferred by the statute. In other words, the right to have recourse to a Court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise.

53. The same conclusion can be arrived at, through a different route also. It is well settled that in a petition under Section 34, a Court does not exercise the powers of an Appellate Court. The jurisdiction vested under Section 34 is not an appellate jurisdiction. Even as per the decision in Mc Dermott, the Court exercises under Section 34, only a supervisory role. It is almost like a revisional jurisdiction or may be little less in its scope than a revisional jurisdiction under Section 115 of the Code of Civil Procedure. But, a revisional jurisdiction would normally include within its purview, a power to correct patent illegalities. The fact that the jurisdiction of the court under section 34 is revisional, is quite obvious. Section 34(1) comprises of two parts. The first is in clause (a), where the burden is on the party assailing the award to prove certain things. The second is in clause (b) of sub-section (1), where the court tests the award with reference to certain parameters. There is no necessity for splitting sub-section (1) of section 34 into 2 clauses, one imposing an obligation upon the party to establish certain facts and another imposing a duty upon the court to satisfy itself about a different set of factors, unless the jurisdiction sought to be conferred is revisional in nature. Therefore, I am of the view that this Court has power under Section 34 to modify or vary the award passed by the arbitral Tribunal.

54. Having answered the first question as above, let me now move on to the second question.

Question No.(ii)

55. As I have pointed out earlier, the second question that arises for consideration is as to whether the Arbitrator was right in rejecting some of the claims or in awarding lesser amount on certain claims.

56. In the table under paragraph 12 of this order, I have already given the various heads of claim made by the petitioner, the amounts claimed by the petitioner under each head of claim and the amount awarded by the Arbitrator ultimately. In paragraph 14 of this order, I have also summarised the grievance of the petitioner as against the impugned award. At the risk of repetition, I have to state that according to the petitioner (1) the claims under Serial Numbers 1 to 4 of the table given in paragraph 12 have been admitted by the arbitrator and the petitioner has no grievance.

(2) the 5th head of claim was not considered by the Arbitrator.

(3) the 6th and 7th heads of claim have been rejected by the Arbitrator and the petitioner has a grievance about the same.

(4) the 8th head of claim, is rejected by the Arbitrator but, the petitioner is not pressing for the same.

(5) the 9th, 10th and 11th heads of claim are rejected by the Arbitrator and the petitioner has a grievance about the same.

(6) the 12th head of claim is also rejected by the Arbitrator and the petitioner has a grievance.

57. Therefore, it is now necessary for me to consider (1) whether the 5th head of claim was considered and rejected by the Arbitrator or not at all considered. (2) whether the rejection of the 6th, 7th, 9th, 10th, 11th and 12th heads of claim by the Arbitrator, falls within any of the parameters of the Sub-Clauses of Clause (a) and (b) of Sub-Section (2) of Section 34 or not.

5th head of claim

58. There is now a dispute as to whether the 5th head of claim was considered by the Arbitrator or not. The 5th head of claim relates to the non revision of salary for the second year of employment. The petitioner has claimed a sum of Rs.67,50,000/- under this head. According to the petitioner, this head of claim was not at all considered by the Arbitrator. But according to the first respondent, the Arbitrator included this head of claim along with the heads of claim 1 to 4 and passed a comprehensive award for a sum of Rs.1,68,00,000/-. Therefore, let me first see whether the 5th head of claim was considered or not by the Arbitrator.

59. In paragraphs 5.35 to 5.41 of her claim petition, the petitioner has claimed that under the Employment Agreement, she was entitled to a revised salary package for the second year of employment and that on the basis of an irrelevant performance appraisal, she was denied her contractually guaranteed upward revisions of salary. According to the petitioner, no performance appraisal was ever conducted. As per paragraph 5.41 of the claim petition filed by the petitioner before the Arbitrator, she was entitled to a pay package of US$ 1,50,000 from the second year of her employment and that due to the mala fide conduct of the first respondent, she was made to work for nearly 8 months on the terms of her old pay package of US$ 1,20,000. Hence, the petitioner claims that she is entitled to the second year s salary at the revised rate of US $1,50,000, which would be multiplied by the exchange rate of Rs.45/- per $ and it works out to Rs.67,50,000/-.

60. In the counter filed by the first respondent to the claim petition of the petitioner, the first respondent denied that there was a contractually guaranteed upward revision of the petitioner s salary. It is claimed by the first respondent in their counter that the revision was contemplated subject to her re-location to the USA, factoring additional living expenses in the latter country. According to the first respondent, there was no question of revision, when the petitioner agreed to stay back in India. The first respondent states that the petitioner has acquiesced to the non revision of her salary in the second year by receiving without demur, the monthly salary.

61. Before actually looking into the award to see whether the 5th head of claim was considered or not, it is necessary to take a look at certain admitted facts. The admitted facts are: -

> (1) by an Employment Agreement dated 10.03.2006, the petitioner was appointed as Vice-President with effect from 27.04.2006.

(2) the petitioner claims to have tendered resignation on 24.07.2006, within three months of commencement of the contract of employment, but this resignation was not pressed into service.

(3) three letters of termination followed in succession one after another and they are all dated 17.10.2007, 12.12.2007 and 20.12.2007. Therefore, the petitioner was in the service of the first respondent, only for one year and 8 months, which period was also plagued by one resignation within three months and three letters of termination. In such circumstances, even if there was a term for revision of pay during the second year of employment, contained in the Employment Agreement, I do not think that any Arbitrator could have awarded the same.

62. In paragraph 17 of the award, the discussion relating to the claims made by the petitioner commences. In the last but one line of paragraph 17, the Arbitrator took note of the claim for Rs.67,50,000/- towards the salary for the second year.

63. In paragraph 18 of the award, the Arbitrator dealt with the claims under Serial Numbers 1 to 4. In paragraph 19, the Arbitrator had specifically taken up for consideration the question of revision of salary in April 2007. Since the contract of employment commenced in April 2006, the Arbitrator indicated in paragraph 19 that the claim for revision of salary was for the period from 1st April 2007 upto the date of termination namely 20th December 2007. But, the Arbitrator indicated that only bonus for the second year fixed at Rs.18,00,000/- could be granted. In so far as enhanced rate of arrears are concerned, the Arbitrator fixed it at Rs.11,62,500/-.

64. Therefore, it cannot be contended that the 5th head of claim was not at all considered by the Arbitrator. The 5th head of claim had been considered by the Arbitrator, as seen from the calculations made in paragraph 19 of the award. I do not see any error in paragraph 19 of the award that would fall within the parameters of Clause (a) or Clause (b) of Section 34(2). Hence, the objections of the petitioner with regard to the 5th head of claim, cannot be sustained.

65. It is contended by Mr.Arvind P.Datar, learned Senior Counsel for the petitioner that the relief claimed under the 5th head was actually a non-pecuniary contractual claim relating to pre-termination breach and that the breach of contract lay in not increasing the salary in the second year of employment, in a wilful and malafide manner. In this regard, the learned Senior Counsel relies upon Section 31(3)(iii) of Arbitration and Conciliation Act, which obliges the arbitral award to state the reasons, upon which, it is passed, unless the case falls under two exceptions indicated therein. Reliance is placed upon the decisions of the Supreme Court in ONGC vs. Saw Pipes [2003 (5) SCC 705] and in Delhi Development Authority vs. Sundar Lal Khatri [ILR 2009 III Delhi 648].

66. But, as I have pointed out earlier, the Arbitrator has given some reason in paragraph 19 of the award for rejecting the claim under the 5th head. Therefore, it cannot be stated that Section 31(3) of the Act was violated. The principles laid down in ONGC and Delhi Development Authority would be applicable only if there has been violation of Section 31(3).

67. From the list of dates I have indicated above, it could be seen that the contract of employment between the petitioner and the first respondent got into turbulent weather within three months of the execution of the contract. After hitting several air pockets, the contract made an emergency landing in December 2007. Therefore there would have been no question of granting a revision of pay.

68. Moreover, Article 3.3 of the Employment Agreement clearly indicated that the upward revision of pay for the second year would happen only in the event of relocating the petitioner to the United States in the second year. The petitioner was never relocated to the United States. The petitioner has already made a claim for the failure of the first respondent to relocate her to the United States, under the 6th head of claim. Therefore, the rejection of the claim under the 5th head cannot be taken exception to.

69. In so far as these heads of claim are concerned, the Arbitrator dealt with the 6th head of claim in paragraph 20, 9th head of claim in paragraph 25, 10th head of claim in paragraph 26 and the 11th head of claim in paragraph 27.

Head of claim No.6:

70. As stated earlier, the 6th head of claim is for damages for failure of the first respondent to transfer the petitioner to United States at the beginning of the second year of employment. While dealing with the 6th head of claim in paragraph 20, the Arbitrator agreed that under Article 1 of the Employment Agreement, the petitioner could have been relocated to the United States. But, the Arbitrator took note of an e-mail dated 21.03.2007 sent by the petitioner herein agreeing to the dropping of the move to relocate her to United States. She has expressly stated in the mail that both the petitioner and the first respondent talked about it and dropped the proposal, as both of them thought it best to have the petitioner operate from India.

71. After taking note of the e-Mail, the Arbitrator found in paragraph 20 of the award that the failure of the first respondent to transfer the petitioner to United States could be regarded as a breach of contract, but the petitioner had condoned the breach. On the basis of the said finding, the Arbitrator then went on to deal with the question as to whether the petitioner will be entitled to compensation for such breach, in terms of Article 6 of the Agreement.

72. Article 6 of the Agreement was analysed threadbare in paragraph 22 of the award. The Arbitrator held in paragraph 22 that if the price for prior termination of the Agreement is fixed under Article 6, the compensation for breach of the contract cannot be more than the compensation for termination. The Arbitrator considered Article 6 to represent mutually agreed quantum of liquidated damages for abrupt termination. Therefore, the Arbitrator concluded in paragraph 23 of the award that no amount can be awarded under the 6th head of claim.

73. Assailing the findings recorded by the Arbitrator in paragraphs 20 to 23, it is contended by Mr.Arvind P.Datar, learned Senior Counsel for the petitioner that the 6th head of claim was a non-pecuniary contractual claim under Section 73 of the Contract Act, 1872 and that it deals with a

pre-termination breach. According to the learned Senior Counsel, the failure of the first respondent to relocate the petitioner in United States, prevented her from regaining her H1 Visa and eventual green card. The petitioner was already working in a company in the United States with an H1 Visa, which was valid for 5 years, but she gave up the job on the express promise of the first respondent that she would be relocated in United States with an L1 Visa. Therefore, the learned Senior Counsel contends that the Arbitrator failed to apply the correct law with regard to this breach.

74. It is also contended by the learned Senior Counsel for the petitioner that after recording a finding that the first respondent was guilty of breach of contract, the Arbitrator did not take it to its logical conclusion by awarding damages in terms of Section 73 of the Contract Act. In other words, the contention of the petitioner is that the Arbitrator failed to apply the correct law.

75. I have carefully considered the above submissions. It is true that under Section 73 of the Indian Contract Act, a party, who suffers a breach of contract, is entitled to receive compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. But, Section 73 also makes it clear that such compensation is not to be given for any remote and indirect loss or damage sustained by the said breach.

76. There is no dispute about the fact that by a mail dated 21.03.2007, the petitioner agreed that she need not be relocated in United States. Therefore, her claim that her chances of revival of H1 Visa and her chances of getting a green card got spoiled because of the breach of the contract, cannot any more be accepted, since she agreed by her mail not to have relocation to United States. But, by the same mail she wanted revision of pay alone. In other words, the mail indicates that she was agreeable for her retention in India provided the revision of pay is given. Hence, the breach of the contract, if it is actually a breach, was made with the consent of the petitioner. Once an express stipulation in a contract is breached with the consent of both parties, it would only tantamount to variation of the terms of the contract. In such cases, Section 73 of the Contract Act may have an application.

77. Once the condition, as it was originally incorporated in the agreement, to relocate the petitioner in United States, was varied with the consent of the petitioner, then the only question to be considered would be whether the petitioner is entitled to the revision of pay that she demanded as a condition for continuing in India.

78. By mail dated 23.04.2007 sent by the petitioner to three officials of the first respondent company, the petitioner had asked for certain clarifications. In this mail, the petitioner had indicated that the retention of her services in the company after April 2007 was an open issue. This mail was marked by the petitioner herself as Ex.C.15. A careful reading of the mail shows that there was a lack of clarity on the question whether the petitioner wanted to continue in service. Therefore, I cannot find fault with the conclusion reached by the Arbitrator that the stipulation contained in Article 6 of the Agreement could be construed as liquidated damages and that once such damages are fixed by contract, a party to a contract is not entitled to more than what he/she would have been entitled, if breach had been committed.

79. As rightly contended by Mr.Arun Khosla, learned counsel for the first respondent, the interpretation of the terms of the contract is within the realm of the Arbitrator. Even if a different interpretation is possible, this Court would not venture to apply it under Section 34. Therefore, the rejection of the 6th head of claim by the Arbitrator will not fall under Section 34(2)(b)(ii) of the Act.

7th head of claim:

80. The 7th head of claim is for a payment of Rs.3,51,00,000/- towards damages for non compliance of the procedure prescribed under the Employment Agreement for termination of the contract. Apart from claiming the said amount, the petitioner also claimed before the Arbitrator that she is entitled to a declaration that her illegal termination was non est in law and that she was entitled to be reinstated with full back wages.

81. This claim of the petitioner was dealt with by the Arbitrator in paragraph 23 of his award. But, by a typographical mistake, the Arbitrator mentioned this to be the 6th claim. This claim was rejected by the Arbitrator by relying upon Clause 6 of the Agreement, construing the same to be equivalent to the fixation of liquidated damages for a breach of contract. The Tribunal held that what an employee is entitled to get, upon termination of the contract, would be the maximum that a person is entitled to get upon a breach of contract.

82. Assailing the said finding, it is argued by Mr.Arvind P.Datar, learned Senior Counsel for the petitioner that the said finding is wholly perverse and contrary to law. Relying upon a decision of the Supreme Court of England in Societe Generale v. Geys [(2012) UKSC 63], the learned Senior Counsel contended that in such cases, a unilateral repudiation of a contract of employment should be construed as brutum fulmen and that the person, who suffers the breach should be deemed to have fulfilled the contract by a deeming fiction, thereby being entitled to the consequences that flow out of the fulfilment of such a contract.

83. I have carefully considered the above submission. The decision of the Supreme Court of England in Societe Generale is of significance and hence, it is necessary to take note of the facts out of which the above decision arose.

84. Societe Generale is a French Insurance Company that employed Mr.Geys as its Managing Director in the European Fixed Income Sales Department of the company in London. The contract was terminable with notice as per Clause 8.2 or by payment in lieu of notice as per Clause 8.3. By a letter dated 29.11.2007, the services of Mr.Geys were terminated with immediate effect, without invoking Clause 8.3 and without making payment in lieu of notice. Thereafter, the company prepared a draft severance agreement with proposed payments, but it was not agreeable to Mr.Geys. However, a particular amount was deposited into his bank account by the company and that amount represented the amount payable in lieu of notice, which was equivalent to three months salary and flexible benefit allowance. Upon coming to know of the said remittance made into his account without his knowledge, Mr.Geys took the matter to Court. The trial Judge held that the unilateral repudiation of the contract of employment is actually brutum fulmen and that the subsequent payment of money in lieu of notice will not cure the defect. The Appellate Court confirmed that a

unilateral repudiation would not terminate the contract. However, the Appellate Court held that the contract came to an end on 18th December 2007 when the money in lieu of notice was deposited into the account of Mr.Geys. While the company filed an appeal, Mr.Geys also appealed against the findings of the Appellate Court. The Supreme Court of England held, by a majority (i) that the normal contractual rule that a contract of employment cannot be unilaterally terminated would apply; and (ii) that there is an implied requirement in Clause 8.3 that the employee must be given clear and unambiguous notice of the exercise of the option under Clause 8.3 to make payment in lieu of notice. To come to the said conclusion, the Court brought into focus the difference between (i) an elective theory of repudiation; and (ii) an automatic theory of repudiation. Under the former, a unilateral repudiation is brutum fulmen and the contract remains alive until the other party accepts the repudiation. Under the latter, the contract terminates automatically, when it is one of employment.

85. But unfortunately for the petitioner, the English Law of Contracts, though it formed the basis for the Indian Law of Contracts, may not strictly apply to the Indian contracts. In England, the Law of Contracts is in the realm of common law. But, in India, the Law of Contracts got codified under the Contract Act, 1872. Apart from being codified by the statute, there is one more speciality about the Indian Law of Contracts, especially with reference to contracts of employment. All persons appointed to civil posts or civil services of the State, cease to be governed by the terms and conditions of the contract of employment, as they acquire a status on appointment, which is Constitutionally protected. All contracts of employment relating to persons, who come within the definition of the expression "workman" under Labour Welfare Legislations, get a special protection in terms of the statute. Some of the contracts entered into with persons, who come within the definition of the word workman , are governed by statutory contracts in the form of Industrial Standing Orders. Even those, who do not hold any civil post or employed in the civil services of the State and those, who are not workmen within the meaning of the expression in the Industrial Disputes Act, get protection in terms of the Tamil Nadu Shops and Establishments Act, 1947. A termination without sufficient cause is frowned upon by such special enactments, even if the terms and conditions are strictly adhered to. If the petitioner had gone before the Appellate Authority under the Tamil Nadu Shops and Establishments Act, her termination would have been tested only on the touchstone of Section 41(2) of the Tamil Nadu Shops and Establishments Act, 1947. In such an event, the petitioner could have got as a relief, anything ranging from nothing to everything. Therefore, there is no necessity for me to refer to the English decisions for interpreting the contract of employment in the Indian context.

86. As stated earlier, the Arbitrator dealt with this issue in paragraph 23 of the award and came to the conclusion that if the price payable by the employer in the case of a proper termination of the contract is a specified amount, an employee cannot claim more than the said amount, even in the case of an improper or illegal termination. This, in my view, does not reflect the correct position of law in so far as India is concerned. But, unfortunately, the Supreme Court has made it clear in Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd [JT (2009) 12 SC 135] that the interpretation of the contract by the Arbitrator, even if wrong, is not amenable to the jurisdiction of this Court under Section 34. Therefore, I do not think that I am entitled to interfere with the findings in paragraph 23 of the award.

87. There is also one more reason for my above conclusion. Even if the Arbitrator had appreciated the law correctly and had come to the conclusion that it was a case of illegal termination, to which Article 6 would not apply, it was open to the Arbitrator, like an Appellate Authority under the Tamil Nadu Shops and Establishments Act, 1947, to award anything between something and everything. The Arbitrator, under heads of claim 1 to 4, has calculated the severance payments. Therefore, the decision of the Arbitrator cannot be interfered with in a petition under Section 34, in view of the decision of the Supreme Court in Steel Authority of India Ltd.

88. The fiction of fulfilment of the contract, as developed by the House of Lords in Mackay v. Dick [1881 VI Appeal Cases 251], cannot be applied to the case on hand. As I have stated earlier, the Law of Contracts is codified in India. Apart from that, the Specific Relief Act, 1963 specifically bars the enforcement of a contract of personal service. Exceptions to this rule, founded upon the Law of Contracts, are to be found only in the Industrial Disputes Act, 1947 and the Tamil Nadu Shops and Establishments Act, 1947. Other than the two statutory exceptions so carved out, I do not think that there can be any other exception, especially in a contract of employment where the Court can construe a termination to be non est, so as to entitle the employee to continue to receive pay and allowances till a proper termination is ordered. Today, even in the Industrial Law, a view is taken in some cases that there could be reinstatement without back wages on the principle of "no work, no pay". Therefore, I do not think that the fiction of fulfilment of the contract could be invoked. Moreover, Mackay was a decision that arose out of a contract for sale and supply of a machine. Therefore, the principle enunciated therein cannot be invoked to a contract of employment.

89. It is argued by Mr.Arvind P.Datar, learned Senior Counsel that even if the theory of brutum fulmen and fiction of employment are not acceptable, the Arbitrator should have awarded exemplary damages for non pecuniary loss arising from the breach. Relying upon the decision of the Patna High Court in Raj Kishore Sahay v. Binod Kumar [AIR 1989 Pat. 111], it was contended that damages for mental trauma caused due to the non performance of a contract can also be awarded. But, that contract related to the purchase and import of a car. A contract of employment, as stated earlier, stands on a different footing.

90. The decision of the Calcutta High Court in Sheikh Jaru Bepari v. A.G.Peters [AIR 1942 Cal. 493], is also of no application, since it related to fraud, oppression and malice, which entitled the claimant to exemplary damages. But, in paragraphs 5.5 to 5.62 of the claim petition filed by the petitioner herein before the Arbitrator, the petitioner did not pitch her claim on the allegations of fraud, malice, oppression, etc. These paragraphs related to the 7th head of claim.

91. The decision of this Court in Sukumaran Nair v. P.Narayanan [(1996) 2 MLJ 18] arose out of a breach of contract of marriage. Therefore, the principles behind the said decision cannot be invoked in cases of this nature.

92. In Makineni Nagayya v. Makineni Bapamma [AIR 1958 AP 504], a Division Bench of Andhra Pradesh High Court was concerned with a compromise decree that contained two reciprocal promises. One was the promise of B to take A's son in adoption and the other was A's promise to leave B in undisturbed possession and enjoyment of certain properties. Therefore, invoking Section

53 of the Contract Act, a Division Bench of the Andhra Pradesh High Court held that the prevention by one party would constructively tantamount to fulfilment by the other. I do not know how the said decision is of any application, since a contract of employment cannot be taken to be a contract containing reciprocal promises.

93. The decision of the Division Benches of the Kerala High Court in Secretary, Department of Irrigation v. Millars Machinery Co. Ltd. [1985 KLJ 734] and State of Kerala v. K.Kurain P.Paul [AIR 1992 Ker. 180], also arose under Section 53 of the Indian Contract Act. Therefore, what applies to Makineni Nagayya applies equally to these decisions.

9th head of claim:

94. The claim of the petitioner under this head is for compensation for the wilful breach of one of the terms of the Employment Agreement, under which, the employer agreed to provide training in courses relating, but not restricted to, General Management, Finance, Business Strategy and Project Management, during the first year of employment. She has quantified damages on this count at USD 58,000 on the ground that the said amount represented the cost of the four month Executive Education Course in General Management Programme at the Harvard Business School for the period from August to November 2011.

95. The response of the first respondent to this claim, is a one line rebuttal. The first respondent has simply requested the Arbitrator to refer to the Employment Agreement, in answer to this claim.

96. In Article 4.5 of the Employment Agreement, it is stated that the employee shall be provided training in courses relating, but not restricted to, General Management, Finance, Business Strategy and Project Management during the first year of employment. Training and professional development for the second year was to be discussed and agreed upon by both parties at a later date. Therefore, the petitioner has pitched her claim on Article 4.5.

97. The Arbitrator dealt with this claim in paragraph 25 of his award and rejected the claim on the simple ground that the training was intended for the second year and that it was to be as agreed between the parties during the second year. The Arbitrator also stated in paragraph 25 that the correspondence that took place between the parties disclose that the petitioner had decided to leave the company and that therefore, the question of imparting training did not arise.

98. Mr.Arvind P.Datar, learned Senior Counsel for the petitioner contended that the Arbitrator failed to deal with this claim as one relating to pre-termination breach with specific reference to Section 73 of the Contract Act. He also contended that the Arbitrator read Article 4.5 in an obviously wrong manner.

99. I have carefully considered the above submissions. It is true that Article 4.5 provides for imparting all types of training in the first year of employment and left it open to the parties to decide the nature of the training to be imparted in the second year. It is also true that the Arbitrator wrongly understood Article 4.5 as providing for the imparting of training in the second year alone.

100. But, the wrong reading by the Arbitrator of Article 4.5, does not take the petitioner anywhere. In paragraphs 5.72 to 5.77 of her claim petition, the petitioner has proceeded on the footing that the training, if actually given, would have benefited her to a great extent in her career and that therefore, the denial of the same gave rise to a non pecuniary loss. But, these pleadings lose sight of one important fact, namely that the training imparted by an employer to an employee is not merely for the benefit of the employee, but also for the benefit of the employer. No employer would impart any training at their cost to an employee, to enable the employee to have a great future in other organisations. The benefit of training imparted to an employee is intended to be reaped and harvested first by the employer. Therefore, the employer is also at a loss, on account of non imparting of the training to an employee.

101. Moreover, as rightly observed by the Arbitrator, the contract of employment actually suffered a jolt within three months. Thereafter, the employment just kept floating on troubled waters till it was finally grounded. Hence, I do not think that the Arbitrator could have done anything even if he had understood Article 4.5 in the right perspective with reference to Section 73 of the Contract Act.

10th head of claim:

102. This head of claim arose out of Article 3.1 of the Employment Agreement. Article 3 of the Agreement generally related to the remuneration package. Under Article 3.1, the annual remuneration of the petitioner was fixed. In addition, it was indicated in the last line of Article 3.1 that the employee shall also receive equity as per the company's Employee's Stock Option Scheme.

103. Therefore, in paragraphs 5.78 to 5.88, of her claim petition, the petitioner contended that there was a breach of this clause and that therefore, she was entitled to a sum of Rs.4,50,00,000/- towards damages and compensation.

104. The Arbitrator dealt with this claim in paragraphs 26 of the award in brief and rejected the claim on the basis of the contention made by the first respondent that there was no such scheme. But, it is contended by Mr.Arvind P.Datar, learned Senior Counsel for the petitioner that if there was no such Stock Option Scheme, then, the first respondent was guilty of misrepresentation. According to the learned Senior Counsel, the petitioner was orally promised Stock Option to the value of USD 1 million, but, even a Scheme was not put in place. It is the contention of the learned Senior Counsel for the petitioner that the Arbitrator wrongly shifted the burden of proof on the petitioner to establish the existence of such a scheme, when there was a specific clause in the Employment Agreement.

105. But, I do not think that the petitioner is right in her claim. Article 3.1 of the Agreement merely indicates the entitlement of the petitioner to such an option. The relevant portion of Article 3.1 reads as follows:

> "The employee shall also receive equity as per the Company's Employee's Stock Option Scheme (structure of salary and relevant components shall be defined by the employer in separate annexure and agreed to by both parties prior to entering into

this agreement)."

106. A careful reading of the above clause would show that the parties should have worked out in a separate annexure, the components, which went into the salary structure. No such annexure appears to have been prepared by the parties, except the salary break up, titled as salary break annexure , that is appended to the Agreement. That "salary break annexure" does not contain any indication about this Stock Option. Therefore, this claim is not based upon any concrete material. Hence, the rejection of this claim by the Arbitrator cannot be found fault with.

107. The case may not also fall within the category of misrepresentation. If Article 3.1 did not contain the specifics of the option, the Agreement with regard to the same can be construed only as vague. To constitute misrepresentation, a vague promise is not sufficient. Therefore, the rejection of the 10th head of claim by the Arbitrator cannot be found fault with.

11th head of claim:

108. The 11th head of claim is for compensation of Rs.5,76,00,000/- for the loss of employment opportunity that the petitioner suffered due to the act of the first respondent in driving her to a series of litigation. This claim is calculated, as seen from paragraph 5.94 of the claim petition, on the same lines as provided in Section 123-A of the Motor Vehicles Act, 1988 read with Schedule II to the Act.

109. This claim was dealt with by the Arbitrator along with the 12th head of claim from paragraph 27 onwards. This is due to the fact that a complaint of sexual harassment formed the basis for a series of litigation between the parties, both civil and criminal and they ultimately culminated in the arbitration proceedings. Eventually, after holding that the non constitution of a Committee to enquire into allegations of sexual harassment cannot be the basis for compensation, the Arbitrator rejected both heads of claim, namely 11 and 12.

110. Mr.Arvind P.Datar, learned Senior Counsel for the petitioner contended that the Arbitrator completely lost sight of the fact that the claim under this head is a non pecuniary tortuous claim and that the claim arose out of (i) the refusal of the first respondent to grant a no objection certificate to enable the petitioner to seek a new employment, (ii) the issue of a letter of termination containing serious allegations, making it impossible to the petitioner to seek employment anywhere, and (iii) launch of malicious and baseless prosecution for defamation and extortion against the petitioner in the Courts in New Delhi. The litigation between the parties kept the petitioner out of employment for a period of about five years at the prime of her youth. Therefore, she has become unemployable in a higher managerial cadre and has also suffered loss of reputation. Therefore, the learned Senior Counsel contended that the findings of the Arbitrator were perverse.

111. But, unfortunately for the petitioner, the Arbitrator could not have taken note of the consequences of the litigation between the parties that took place before the Supreme Court, which eventually directed both parties to have their disputes resolved through arbitration. It must be recorded here that when the Supreme Court was seized of Special Leave Petitions arising out of the

quashing of a complaint against one of the Directors of the first respondent and arising out of a complaint of extortion and defamation against the petitioner, the Court suggested the parties to have recourse to arbitration. Therefore, all litigation before various Courts came to an end with the signing of a memorandum of settlement before the Supreme Court on 08.3.2011 in SLP (Criminal) Nos.6135 of 2009 and 8272 of 2009.

112. To hold that the employment potential of the petitioner was lost due to the acts of the first respondent, I must first come to the conclusion that the legal proceedings launched by the first respondent against the petitioner were false, frivolous and motivated. But, I cannot today come to that conclusion in view of the fact that all those proceedings got terminated at one stroke with the signing of the memorandum of settlement. Hence, it is not possible for the Arbitrator to have awarded any amount under this claim.

12th head of claim:

113. The 12th head of claim is for compensation of Rs.9.07 Crores towards exemplary damages for non compliance with the law laid down by the Supreme Court of India in Vishaka. According to the petitioner, she suffered harassment at the hands of her superior by name Mr.Krishna Srinivasan, which actually forced her to tender her resignation on 24.7.2006. It was the case of the petitioner in her claim statement before the Arbitrator that the sexual harassment given to her by Mr.Krishna Srinivasan never stopped. The petitioner sent a mail dated 14.12.2007 to the Board of Directors complaining about the inappropriate behaviour of Mr.Krishna Srinivasan. But, the company did not constitute a Complaint s Committee as required by the decision of the Supreme Court in Vishaka.

114. In the reply statement filed by them, the first respondent claimed that there was no occasion to constitute a committee, as there was never any complaint of any nature. According to the first respondent, the first whisper of any harassment came in the form of a first information report lodged six days after the termination of employment and that it was later amplified to include about half a dozen senior most Executives of the company and about 12 outsiders not even connected with the company. The first respondent also claimed in their reply statement that the mail dated 14.12.2007 was never addressed to the Board of Directors. The first respondent further claimed that the company encouraged employees to share their ideas, concerns and grievances through several channels such as a feedback box on the mail, a board of network, suggestion boxes, companywide stand-in meetings, ombudspersons, etc. It was further claimed by the first respondent that the guidelines issued in Vishaka were required to be put in place only till a law was passed and that since the State of Tamil Nadu enacted a law, the guidelines issued in Vishaka ceased to have force.

115. The Arbitrator dealt with the 12th head of claim from paragraph 27 onwards of his award. After taking note of the minimum standards for maintaining safe working environment, as enunciated in Vishaka and after conceding the fact that there is a natural right to safe working environment to any worker, the Arbitrator held in paragraph 30 of the award that if a safe working environment is not provided, the worker is entitled to claim that there was a fundamental breach of contract. But, since the breach of a contract gives a right to the employee to terminate the contract, the measure of damages was held by the Arbitrator to be not more than one year s salary and that it cannot be

given in addition to the severance pay.

116. In addition, the Arbitrator also held that if one looks outside the contract and there is no statutory law, there is always the common law of torts, which recognises the duty of care by the employer to the employees and the right of the employees to seek damages, if there is a failure on the part of the employer to discharge that duty. But, the Arbitrator held that the direct liability in the case of harassment by a co-worker is only on the offending co-worker and that there is no question of vicarious liability on the part of the employer, unless the offence was committed by the offending employee in the discharge of his duties and authorized by the employer.

117. The Arbitrator also went on to hold that the claimant (the petitioner herein) had not alleged or proved any physical, mental or emotional injury on account of receiving certain SMS messages indicating inappropriate behaviour. The Arbitrator found fault with the petitioner for not making any complaint in May 2006, but filing the first information report only in December 2007, a week after leaving the job. In view of the fact that there was a continuous discussion between the parties about the compensation payable for termination, the Arbitrator came to the conclusion that the prosecution launched by her under the Tamil Nadu Prohibition of Harassment of Women Act, 1998, was conceived by the company to be an attempt to extract higher amount of compensation. Since there was a grievance committee in the company, to which, the petitioner never complained at any time, while she was in service and also since the persons, to whom she complained, were not the directors of the company, the Arbitrator came to the conclusion that the prosecution launched by her was only a step taken to bring them to the negotiating table as a legal strategy.

118. But, I am afraid that the entire reasoning given by the Arbitrator from paragraph 30 onwards is completely perverse and does not at all reflect the correct position in law. The first conclusion reached by the Arbitrator in paragraph 30 of the award that even if the natural right of an employee to a safe working environment is breached, the measure of damages cannot be more than a year s salary, is certainly not in tune with the Public Policy in India. The fact that a sexually harassed woman employee, has a right, in addition to other rights, to walk out of the company on the ground of breach of contract, is not a ground to hold that the measure of damages cannot be more than that fixed for a breach. This conclusion of the Arbitrator that the petitioner always had a right to go out, is simply akin to affixing a seal of approval upon the decision of Mr.M.F.Hussain to leave the country on the ground that if he did not have a safe living atmosphere in India, it is always open to him to move out. In paragraph 15 of its decision in Vishaka, the Supreme Court quoted its earlier decision in Nilabati Behera vs. State of Orissa [1993 (2) SCC 746], wherein it was held that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Therefore, the finding that the measure of damages is to be limited to the one provided in the contract for its breach, is to belittle the guaranteed right to a safe working environment.

119. Similarly, the finding with regard to vicarious liability in paragraph 31 of the award is not in tune with the Public Policy in India. As a matter of fact, the very directions contained in the judgment of the Supreme Court in Vishaka impose an obligation upon every employer to have a committee constituted for the redressal of the grievances of women employees. If the finding with regard to vicarious liability given by the Arbitrator in paragraph 31 of his award is accepted, then no

employer need to constitute any committee, since a victim can always be directed to take recourse individually against the offending employee.

120. In Lister Vs. Hesley Hall [2002 (1) AC 215 (HL)], the House of Lords was concerned with a claim for damages against a boarding house attached to a school, on the allegation that the warden sexually abused the inmates systematically, though without the knowledge of the owners of the boarding house. The court of first instance dismissed the direct claims in negligence and also held the owners not liable vicariously, for the warden s torts. But, the owners were held vicariously liable for another cause. The owners appealed to the Court of Appeal and they succeeded. When the claimants went before the House of Lords, the Court held that having regard to the circumstances of the warden s employment, there was a sufficient connection between the work he was expected to do and the acts of abuse committed by him. The House of Lords quoted Salmond, the great writer on the law of torts that to constitute vicarious liability within the course of employment, the act complained of must either be (i) a wrongful act authorised by the master or (ii) a wrongful and unauthorised mode of doing an act authorised by the master. According to Salmond, even the acts not authorised by the employer may lead to a vicarious liability, provided they pass the close connection test namely that the unauthorised acts are so connected with the authorised ones that they may be regarded as modes of doing them. In paragraph 24 of the report, Lord Steyn considered an employer s potential liability for non sexual assaults and held that if such assaults arose directly out of circumstances connected with the employment, vicarious liability may arise. In Lister, the owners of the boarding house relied upon a decision of the Court of Appeal in Trotman Vs North Yorkshire County Council, where the Court rejected the plea of vicarious liability, on the sole ground that no breach of duty by the council was alleged. But, the House of Lords held in Lister that the approach of the Court of Appeal in Trotman was wrong, in view of the fact that the Court of Appeal treated the case merely as one of the employment furnishing a mere opportunity to commit sexual abuse. The House of Lords indicated in paragraph 25 that the County Council, which operated the school for mentally challenged children, were responsible for the care of the vulnerable children and that they employed the Deputy Headmaster to carry out that duty on its behalf.

121. In an interesting that came up before this Court in Tiruveriamuthu Pillai Vs. Municipal Council, Shencottah [AIR 1961 Madras 230], the owner of a dog brought an action against the municipal corporation on the ground that one of the employees of the municipal council killed his dog and that therefore, the council was vicariously liable. Jagadisan,J considered the conflicting theories on the legal basis of vicarious liability where the act complained of was ultra vires. After quoting Salmond to the effect that the act of the servant is the act of the Corporation itself and after quoting Prof.Winfield to the effect that the Corporation is to be considered as a joint tortfeasor, the learned Judge held that the corporation was vicariously liable.

122. In the case on hand, the employer had an obligation imposed by the decision of the Apex Court, to constitute a committee. The constitution of such a committee was intended to serve two purposes namely (i) to redress the grievances of women employees; and (ii) to send a clear signal to all the employees that complaints of sexual assaults would be enquired into by a committee specially constituted for the purpose, with the participation of outsiders. In other words, the constitution of the committee was to serve both as preventive as well as punitive. It is actually the failure of the first

respondent to constitute such a committee, as mandated by law, that gave rise to a vicarious liability on the part of the first respondent. This aspect has been completely overlooked by the Arbitrator.

123. Likewise, the finding of the Arbitrator that the delay on the part of the petitioner in lodging a criminal complaint, especially after moving out of the company, indicated that she was only interested in compensation, is completely perverse. If the company had failed in its legal duty imposed in terms of the decision of the Supreme Court in Vishaka, then the employee cannot be expected to lodge a police complaint even while continuing in employment. The existence of a grievance committee or an ombudsperson can never be an excuse for violating the mandate of law as laid down by the Supreme Court. The failure of the petitioner to raise the issue of sexual harassment from May 2006 onwards till December 2007 and the repeated claims made by the petitioner for compensation in her correspondence during this period, cannot belittle a complaint of this nature.

124. What is more shocking is the finding of the Arbitrator in paragraph 32 of the award that the petitioner had not alleged or proved any physical, mental or emotional injury. What is res ipsa loquitor needs no proof. Emotional or mental injury for a woman is an automatic and natural result of sexual harassment at work place, unless it is pleaded by the offender that the woman in question was happy about it. It was not the case of the first respondent that the petitioner was happy about the harassment and actually welcomed it. The moment harassment is established, emotional and mental injury is to be presumed. It was for the first respondent to rebut the presumption.

125. Moreover, all the above issues fall into insignificance in the light of one important fact. The Arbitrator was not called upon to decide whether there was sexual harassment or not. A careful reading of the claim petition would show that the 12th head of claim was actually for damages for non constitution of a committee to enquire into the allegations of sexual harassment. All that was required of the Arbitrator, was just to see whether the requirement of law had been complied with by the first respondent or not and whether the non compliance of the requirement gave rise to a claim for compensation and if so, to what extent. This has been completely lost sight of by the Arbitrator.

126. The fact that no committee was constituted as per the dictate of Supreme Court has become an admitted fact. Therefore, all other issues such as the delay in lodging the first information report, the focus on monetary compensation in the correspondence during the pre-litigation stage and the lack of pleading about the sufferance of an emotional or mental injury etc., were beyond the scope of the actual issue to be decided.

127. Once it is admitted that there was no committee constituted as per the law declared by the Supreme Court in Visakha, the Arbitrator ought to have addressed himself only to the question as to whether such non constitution resulted in an injury to the petitioner and as to whether she is entitled to any compensation on account of such non constitution of the committee.

128. The claim of the first respondent that there was an ombudsman and that there was a grievance committee, deserves to be simply thrown out of the window. If the law requires a particular act to be done in a particular manner, it shall be done only in that manner and not otherwise. No

ombudsman can be a substitute for a committee as required by the Supreme Court to be constituted.

129. As per the decision of the Supreme Court in Vishaka (paragraph 17.7), the committee to enquire into such complaints, is to consist of the following persons :

(i) Should be headed by a woman;

(ii) Not less than half of its members should be women; and

(iii) Should contain a third party either NGO or other body, who is familiar with the issue of sexual harassment.

130. But, the office of the ombudsperson constituted by the first respondent comprised of one Vice President (Human Relations) and one General Manager, Corporate Committee. It was nothing but an apology of a committee and could never have been accepted. In U.S.Verma Vs. National Commission for Women [163 (2009) DLT 557], the Delhi High Court pointed out that the concern of the accusers/ complainants, is primarily to be addressed by the complaint mechanism to be put in place, in terms of Vishaka. After finding that the report of a committee constituted in that case, was not in accordance with the judgment of the Supreme Court in Vishaka, both in terms of the constitution of the committee and in terms of the procedure adopted, the Delhi High Court awarded compensation to the complainants. Therefore, it is clear that the very failure of the first respondent to constitute a committee as mandated by the Supreme Court, could give rise to a cause of action, for a woman, who alleges harassment, to seek compensation.

131. In Medha Kotwal Lele & Others Vs. Union of India [2013 (1) SCC 297], the Supreme Court indicated in paragraph 41 that the implementation of the guidelines issued in Vishaka has to be not only in form, but also in substance and spirit, so as to make available, a safe and secure environment for women at the work place. In a subsequent order passed in the same case, the Supreme Court directed that the complaint s committee as envisaged by the Supreme Court in Vishaka will be deemed to be the inquiry authority for the purposes of Central Civil Services (Conduct) Rules.

132. Therefore, it is clear (i) that the constitution of a committee as per the guidelines contained in paragraph 17 of the decision of the Supreme Court in Vishaka is mandatory; (ii) that if such a committee is not constituted, there is no use in contending that an ombudsman or a grievance committee is in place; and (iii) that the Arbitrator failed to understand that the primary grievance of the petitioner is that no such committee was constituted in the office of the first respondent.

133. The finding of the Arbitrator in paragraph 31 of the award that there is no vicarious liability for the employer, even in cases of sexual harassment of a woman employee, strikes at the very root of Vishaka, which, in turn, is based upon the Convention on the Elimination of All Forms of Discrimination against Women , which was read into Articles 14, 15(1), 15(3), 19 and 21 of our Constitution. The vicarious liability, even if it does not arise directly out of such harassment, cannot be avoided, at least in cases where the employer fails to constitute a committee as per the mandate of law. The contention of Mr.Arun Khosla, learned counsel for the first respondent that Vishaka

guidelines would cease to exist, after the enactment of the Tamil Nadu Prohibition of Harassment of Women Act, 1998, is wholly unsustainable. A comparison of the guidelines and norms laid down in paragraph 17 of the decision in Vishaka with the object and scheme of the 1998 Tamil Nadu Act would show that the 1998 Act was not intended nor it actually occupied the field, delineated in Vishaka. In paragraph 18 of its decision in Vishaka, the Supreme Court made it clear that the directions issued therein will be binding and enforceable in law, until suitable legislation is enacted to occupy the field. That the 1998 Tamil Nadu Act did not occupy the entire field created by Vishaka, is made amply clear from the very contention of the first respondent before the criminal court and the tacit approval given to the same by the Arbitrator that the expression precincts in Section 5 of the Act is narrow in its scope and ambit. The first respondent cannot approbate and reprobate, by contending on the one hand in a prosecution under the Tamil Nadu Act that the case does not come within its purview and on the other hand in an arbitration, that Vishaka guidelines evaporated with the sunrise of the 1998 Act. The finding of the Arbitrator in paragraph 32 about the lack of pleadings and proof regarding any physical, mental or emotional injury suffered by the petitioner, goes completely contrary to the accepted notions of sexual harassment of woman. The entire process of reasoning of the Arbitrator in paragraph 32 was also completely faulty. Merely because the petitioner laid stress on compensation in all her correspondence till the date of termination of the contract and merely because she launched prosecution only after the termination, the complaint of sexual harassment cannot be rejected or belittled. The existence of a grievance redressal committee and an ombudsperson in the organisation, is no substitute for a Vishaka committee. Therefore, the findings of the Arbitrator with regard to the 12th head of claim, are contrary to the Public Policy, as per the definition of the expression Public Policy enunciated in paragraph 31 of the decision in ONGC Vs. Saw Pipes. The non constitution of a Vishaka committee is illegal. The finding that the 12th head of claim is taken care of in the stipulation contained in the clause relating to termination, is contrary to justice and morality. Since the Supreme Court held in ONGC that an award will be contrary to public policy, if it is contrary to justice and morality or it is patently illegal, the impugned award is liable to be set aside at least in so far as the 12th head of claim is concerned.

134. Once it is held that the finding of the Arbitrator with regard to the 12th head of claim is completely contrary to law and that it cannot stand scrutiny in the light of the Public Policy of India, the same becomes liable to be set aside under Section 34. Therefore, as a corollary, the next question to be decided is as to whether the petitioner should be compensated and if so, to what extent. This I think is the most difficult of all questions that I have considered so far, here and elsewhere.

135. As I have indicated earlier, the 12th head of claim is for compensation, not claimed directly for the injuries suffered on account of the alleged sexual harassment, but claimed on account of the failure of the first respondent to constitute a Vishaka committee. If the first respondent had constituted a Vishaka committee, perhaps the parties would have avoided a series of litigation including civil and criminal and the consequent legal harassment to each other. Two things could have happened, had a committee been put in place. The petitioner could have complained to the committee and got her grievance vindicated. If the committee had found her allegations to be untrue, the matter would have ended there. In the first alternative, the petitioner would have continued in employment and the offender thrown out of employment. In the second alternative, the petitioner would have been legally compelled to go out without any legitimate claim against the

company.

136. But, the non constitution of the committee, has actually resulted in the damage suffered by the petitioner being unquantifiable. Therefore, all that an Arbitrator could have done, had he arrived at the correct conclusion with regard to the 12th head of claim, is to have awarded an ad hoc amount as compensation, without any scientific formula being available with mathematical precision. What the Arbitrator should have done but failed to do, is what I can do now.

137. Therefore, considering the status occupied and the position in which the petitioner was employed in the first respondent organisation and considering the opportunities that she lost on account of the non constitution of the committee, I am of the view that the grant of an amount equivalent the severance benefit of Rs.1,68,00,000/-, as compensation towards the 12th head of claim, would be appropriate.

138. Therefore, in the result, the original petition is allowed, the arbitration award is modified to the effect that apart from the compensation awarded by the Arbitrator, the petitioner will be entitled to an additional amount of Rs.1,68,00,000/- (Rupees one crore and sixty eight lakhs only) towards compensation for the 12th head of claim. This amount shall be paid by the first respondent within a period of two months from the date of receipt of a copy of this order.

Index : Yes 02.9.2014.
Internet : Yes

Svn/kpl/gr/RS

V.RAMASUBRAMANIAN,J
Svn/kpl/gr/RS

Order in

02.9.2014