PURE HELIUM INDIA PVT. LTD. A

v.

OIL AND NATURAL GAS COMMISSION

OCTOBER 9, 2003

[V.N. KHARE, CJ. AND S.B. SINHA, J.] B

Arbitration Act, 1940—Section 30—Setting aside award—Grounds for—Jurisdiction of Courts—Arbitrator giving non-speaking award holding that appellant was entitled to higher price due to escalation in price of dollar —Respondent challenging award on ground that contract did not C *provide for any benefit to appellant due to escalation in price—Held, interpretation of contract was within the scope of arbitration agreement—No infirmity in award.*

A notice inviting global tender for supply of helium gas was issued D **by the respondent. Clause I.16.1 of the tender stipulated that where payments were required in Indian rupees, the bidder should indicate if it would need any foreign exchange for completing the supplies/ services that may be ordered on it. The bidder was required to quote the total price along with its breakdown between Indian currency** E **portion and the foreign currency. Clause 2.6 of the tender required the bidder to quote a firm price and no escalation was permissible. Under Clause 21 any dispute, difference or question which arose between the parties in respect of the agreement or concerning any thing contained or arising out of the agreement or as to the rights, liabilities or duties** F **of the parties under the agreement, was to be referred for arbitration.**

The appellant submitted the lowest bid. After negotiations, the appellant agreed to supply the gas at Rs. 149 per cubic meter out of which US $ 4.60 was to be the foreign exchange component. Contract was awarded to the appellant. During the subsistence of the contract, G **there was an increase in the value of US dollar *vis-à-vis* Indian rupees and the appellant claimed from the respondent the difference of price of dollar as on the date of the contract and the date of supply. The claim of the appellant was recommended by the Government. The respondent, however, rejected the claim.** H

A The appellant invoked the arbitration agreement between the parties. The arbitrators made a non-speaking award holding the respondent liable to compensate the appellant for exchange rate fluctuation.

B The respondent filed a petition under Section 30 of the Arbitration Act, 1940 questioning the validity of the award on the ground that the contract provided did not provide for any escalation in price and thus, the award made by the arbitrators was against the provisions of the contract. The Single Judge of the High Court dismissed the petition filed by the respondent. The respondent thereafter preferred an appeal C before the Division Bench of the High Court. The Division Bench allowed the appeal.

The appellant challenged the judgment and order of the Division Bench. Allowing the appeal, the Court

D HELD. : 1.1. The jurisdiction of the court in interfering with the non-speaking award is limited. If the claim of the claimant is not arbitrable having regard to the bar/prohibition created under the contract, the court can set aside the award but unless such a prohibition/ bar is found out, the court cannot exercise its jurisdiction under E Section 30 of the Arbitration Act, 1940. [583-A-C]

State of U. P. v. *Allied Constructions,* [2003] 6 SCALE 265; *K. R. Raveendranathan* v. *State of Kerala,* [1998] 9 SCC 410; *P. V. Subba Naidu and Others* v. *Government of A. P. and Others,* [1998] 9 SCC 407; *H. P.* F *State Electricity Board* v. *R. J. Shah and Company,* [1999] 4 SCC 214; *W. B. State Warehousing Corporation and Another* v. *Sushil Kumar Kayan and Others,* [2002] 5 SCC 679; *Bharat Coking Coal Ltd.* v. *M/s Annapurna Construction,* [2003] 7 SCALE 20; *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engineering Enterprises and Another,* [1999] 9 SCC 283; *Food* G *Corporation of India* v. *Surendra, Devendra & Mahendra Transport Co.,* [2003] 4 SCC 80 and *Shyama Charan Agarwala & Sons Ltd.* v. *Union of India Etc.,* [2002] 6 SCC 201, referred to.

1.2. Construction of the contract agreement was within the jurisdiction of the learned arbitrators having regard to the wide H nature, scope and ambit of the arbitration agreement and they cannot

be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties as also the circumstantial evidence. [577-F] A

1.3. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. [577-A] B

1.4. *Massachusetts B. & Insurance Co.* v. *U. S.* (1956) 352 US 128 and *Khardah Company Ltd.* v. *Raymon & Co. (India) Private Ltd.,* [1963] 3 SCR 183, referred to. C

1.5. The court, having regard to the proposition of law that the jurisdiction of the arbitrator will be ousted only in the event that there exists a specific bar in the contract as regard raising of a particular claim must necessarily hold that the award was sustainable. As in the instant case there did not exist any such bar, it is enforceable in law. The arbitrators were called upon to determine a legal issue which included interpretation of the contract. The arbitrators, therefore, cannot be said to have travelled beyond jurisdiction in making the award. [585-D-E] D

2.1. The appellant quoted the foreign exchange component in its bids in terms of the notice inviting tenders. The same was asked for by the respondent itself for a definite purpose. A contract between the parties must be construed keeping in view the fact that the fluctuation in the rate of dollar was required to be kept in mind by the respondent having regard to the fact that the tender was global in nature and in the event the respondent was required to pay in foreign currency, the same would have an impact on the cost factor. [583-F] E F

2.2. In the instant case, the appellant did not ask for any enhancement in the price. It only asked for the difference in price occurred owing to fluctuation in the rate of dollar. By taking recourse to the interpretation of documents, the appellant did not become entitled to claim a higher amount than Rs. 149 but, thereby the appellant had not unjustly enriched itself. Had the price of the dollar fallen, the respondent would have become entitled to claim the difference G H

A **therefor. [583-D-E]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6478 of 2001.

B From the Judgment and Order dated 24.2.2000 of the Bombay High Court in A. No. 612/96 in Arbitration Petition No. 52/94 in Award No. 200 of 1993.

Dipankar P. Gupta and Ashok Mathur for the Appellant.

C Mukul Rohtagi, Additional Solicitor General, Saurabh Kirpal, Subhash Oberoi, C.M. Gopal and K.V. Mohan for the Respondent.

The Judgment of the Court was delivered by

D **S.B. SINHA, J. :** Whether jurisdiction of an arbitrator to interpret a contract can be subject-matter of an objection under Section 30 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act', for the sake of brevity) is in question in this appeal which arises out of the judgment and order dated 24.2.2000 of the High Court of Judicature at Bombay in Appeal No. 612 of 1996 arising out of a judgment and order of a learned Single E Judge dated 13.10.1995 dismissing the said objection of the respondent.

BACKGROUND FACT :

The parties hereto entered into a contract for supply of Helium Diving F Gas pursuant to a notice inviting global tender dated 2.5.1989. In terms of the said notice inviting tender, the respondent herein was to take supply of Helium gas, which is one of the rare gases being not chemically produced and is mainly extracted from the natural gas wells in mineral form. The said gas is ordinarily imported from U.S.A., Algeria, Poland and Russia. In terms of the said notice inviting tender, three different G categories of rates were to be quoted by the tenderers both foreign and Indian. Whereas the foreign tenderers were to quote their prices in foreign currency, the Indian bidders could indicate the nature of payment, i.e. if a part thereof was recoverable having foreign exchange component. Pursuant to or in furtherance of the said notice inviting tenders, the H tenderers submitted their technical bids. The bidding was to be in two

stages; in terms whereof the technical bids were to be opened first whereafter only final bids were to be considered. The appellant's bid was found to be the lowest in that the appellant had bid a price of Rs.150 per cubic meter out of which US$ 5 was to be the foreign exchange component. The said bid of the appellant having been found to be the lowest, the parties entered into a negotiation; pursuant to or in furtherance whereof, the appellant lowered its offer to Rs. 149 per cubic meter, out of which US$ 4.60 was to be the foreign exchange component.

The respondent having felt the need of Helium gas urgently, pending execution of the contract, placed an order for *ad hoc* supply of 52000 cubic meters of Helium gas with the appellant. The respondent again placed an order for supply of 300000 cubic meters of Helium gas on 25.5.1990.

The Ministry of Petroleum and Natural Gas, Government of India, vide its letter dated 21.5.1990 released foreign exchange for procurement of Helium gas, by reason of letter addressed to the respondent stating :

> "I am directed to refer to your letter No.DIH/BOP/OBG/OS/30/90 dated 19.4.90 on the above subject and to convey the approval of the President to the procurement of 3,00,000 M3 of Helium Gas from M/s Pure Helium India Ltd., Bombay at a cost of Rs. 4.47 crores including a foreign exchange component of Rs. 2.38 crores (US $ 1.380 million @ US$ 5.7875 = Rs.100)."

The respondent thereafter issued two supply orders on 12.6.1990 to the appellant for supply of 52000 cubic meters and 300000 cubic meters Helium gas respectively at a price of Rs. 149 per cubic meter inclusive of foreign exchange component of US$ 4.60. Having regard to the increase in price of the US dollar, the appellant herein claimed the difference of price of US dollar as on the date of the contract and the date of supply. The claim of the appellant was recommended by the Secretary, Petroleum and Natural Gas Department as well as by certain other senior officers. The respondent, however, rejected the claim on or about 14.7.1992 whereafter the arbitration agreement was invoked. The arbitrators entered into a reference on 1.3.1993. A non-speaking award was made by the arbitrators on 13.8.1993 holding that the respondent was liable to compensate the

A appellant for Exchange Rate Fluctuation in the sum of Rs.1,03,41,309 with interest at the rate of 18% per annum from the date of the invoices till the date of the award. The respondent herein questioned the validity of the said award by filing a petition under Section 30 of the Act before the Bombay High Court which was marked as Arbitration Petition No. 52 of
B 1994. A learned Single Judge of the High Court of Judicature at Bombay dismissed the said petition and directed the award to be made a rule of the Court by an order dated 13.10.1995.

Aggrieved by and dissatisfied therewith the respondent preferred an appeal thereagainst which by reason of the impugned judgment has been
C allowed. The appellant is, thus, in appeal before us.

SUBMISSIONS :

Mr. Dipankar P. Gupta, learned Senior Counsel appearing on behalf
D of the appellant, would contend that the Division Bench of the High Court committed a manifest error insofar as it proceeded to determine the dispute on the premise that the claim could not have been preferred under any clause of the contract. The learned counsel would contend that the arbitrators had, having regard to the scope and purport of the arbitration agreement entered into by and between the parties were entitled to go into
E the question of the construction of contract and they, thus, having the requisite jurisdiction therefor, the High Court could not have independently construe the same.

Drawing our attention to various clauses of the contract as also the
F claim petition, the learned counsel would contend that the arbitrator had analyzed the terms and conditions of the contract having regard to the facts and circumstances of this case as also keeping in view the pleadings of the parties and in that view of the matter the High Court while exercising its jurisdiction under Section 30 of the Act could not have interfered therewith
G particularly as the award was a non-speaking one. It was urged that such a claim was also maintainable having regard to a circular letter dated 25.9.1989 issued by the Government of India.

Mr. Gupta would submit that the approach of the respondent in denying the just claim of the appellant must be held to be arbitrary and
H unfair insofar as payments on similar terms as claimed by the appellant had

been made not only to the foreign bidders but in fact had been made to the other Indian bidders where the price was payable in the Indian currency. By preferring such a claim, the learned counsel would urge, the appellant had not asked for any escalation in the price but merely claimed damages in terms of the provisions of the contract occasioned by fluctuation in the rate of dollar in terms of the notification issued by the Reserve Bank of India under Section 40 of the Reserve Bank of India Act and such revision was permissible also in terms of clause 23 of the contract.

In support of the said contentions, Mr. Gupta strongly relied upon *W.B. State Warehousing Corporation and Another* v. *Sushil Kumar Kayan and Others,* [2002] 5 SCC 679, *K.R. Raveendranathan* v. *State of Kerala,* [1998] 9 SCC 410, *P.V. Subba Naidu and Others* v. *Government of A.P. and Others,* [1998] 9 SCC 407, *H.P. State Electricity Board* v. *R.J. Shah and Company,* [1999] 4 SCC 214, *Shyama Charan Agarwala & Sons Etc.* v. *Union of India Etc.,* [2002] 6 SCC 201.

The learned counsel would further argue that for the purpose of interpretation of a contract not only the terms thereof but also the conduct of the parties and surrounding circumstances are relevant. Reliance has been placed on *Khardah Company Ltd.* v. *Raymon & Co. (India) Private Ltd.,* [1963] 3 SCR 183. In any event, the learned counsel would contend that the respondent was bound by the policy decision of the Central Government in the matter of payment of difference in the rupee value owing to fluctuation in the rate of US dollar.

Mr. Mukul Rohtagi, learned Additional Solicitor General, on the other hand, would submit that the bid price for supply of Helium gas made by the appellant herein in terms of the contract being firm, the appellant was not entitled to any escalation in the price and, thus, in the event, the contention of the appellant is accepted, the same would run counter to the clause in the contract prohibiting escalation in the price of the goods.

Mr. Rohtagi would contend that disclosure of the foreign exchange component in the price to be paid in Indian currency was sought for only for the purpose of evaluation of bids. He would urge that for all intent and purport, the foreign exchange component had nothing to do with the payment of the price for supply of Helium gas to the appellant. In support of his contention, Mr. Rohtagi relied upon *Rajasthan State Mines &*

Minerals Ltd. v. *Eastern Engineering Enterprises and Another,* [1999] 9 SCC 283.

The learned counsel would further argue that the notifications issued by the Reserve Bank of India do not constitute 'any change in law' in terms of the provision of Section 40 of the Reserve Bank of India Act or otherwise.

RELEVANT CLAUSES IN THE CONTRACT :

"1.16 *Prices :*

1.16.1 In cases where payments are required in Indian Rupees, the bidder should clearly indicate if it shall need any foreign exchange for completing the supplies/services that may be ordered on him. For this purpose they should quote the total price along with its breakdown between Indian Currency portion and the foreign currency indicating the specific currency.

The bidder shall also indicate the nature of payments which it intends to cover foreign exchange payments, viz., whether it is towards acquisition/hiring of equipment/ services, payments of personnel or acquisition of sub-assemblies, spare parts or purchase of raw materials or for any other purpose.

A bidder who would not need any foreign exchange for completion of the order should state this categorically.

In case the bidder would require any assistance/ certification from ONGC to help him secure the required foreign exchanges it should be so stated."

"1.16.3 *Price preference for supplies :*

Domestic manufactures are entitled to get price preference over the foreign supplier.

The price preference is admissible over the CIF price of the lowest technically acceptable foreign offer received in international competition.

The criteria for giving price preference is domestic value added. Domestic value added to an indigenous offer will be as follows : A

CIF price of lowest Acceptable foreign Tendered	Direct import requirement of raw material components & consumable of Indian bidder	B

Domestic value = ----------

CIF price of lower acceptable foreign tender

C

The price preference admissible to indigenous manufacturer will be as under :

Extent of domestic Value	Extent of price preference	D
1. Upto 20%	Nil	
2. More than 20% upto 50%	upto 15%	E
3. More than 50% and upto 70%	upto 25%	
4. More than 70%	upto 35%	

2.6 Bidder shall quote a firm price and they shall be bound to keep this price firm without any escalation for any ground whatsoever until they compete the work against this tender or any extension thereof. F

2.7 The prices shall be given in the currency of the country of the bidder. If the bidder expects to incur a portion of this expenditure in currencies other than those stated in his bid, and so indicates in his bid payment of the corresponding portion of the prices as so expended will be made in these other currencies. G H

A 6.2 In case the price quoted by two or more domestic bidders are within the price preference limits and only Indian bidders remain in contention for award of contract, then the foreign exchange component of their bid would be loaded by a factor of 25% for the purpose of relative compensation of
B such domestic bids. Domestic bidders are required to quote the prices in the price schedule and indicate the import content in their offer. If there is no import content in the offer then it should be specifically stated as NIL".

C "12. (i) Commission shall pay for Helium at the rate of Rs.149 per M3 all inclusive for offshore supply as indicated in Anneuxre II.

(ii) The invoice with the following support documents, should be submitted in triplicate immediately after
D receipt of material by Commission to DGM (F&A) 712 B, Vasudhara Bhavan, Bandra (E), Bombay-400 051.

a) The quantity of gas received duly certified by Commission's representative.

E

b) The computer analysis of the gas chromatograph showing the purity of the gas."

"21. Arbitration

F If any dispute, difference or question shall at any time arise between the parties herein or their respective representative or assignees in respect of these present or concerning anything hereto contained or arising out of these present or as to the rights liabilities or duties of the said parties hereunder which cannot be
G mutually resolved by the parties, the same shall be referred to arbitration, the proceedings of which shall be held at Bombay, India within thirty (30) days of the receipt of the notice of intention of appointing arbitrators.

Each party shall appoint an arbitrator of its own choice and inform
H the other party. Before entering upon the arbitration, the two

arbitrators shall appoint the Umpires. In case either of the parties fail to appoint its arbitrator within thirty (30) days from the date of receipt of a notice from the other party in this behalf or the two arbitrator fail to appoint the Umpire, the Chief Justice of the Supreme Court of India shall appoint the arbitrator and/ or the Umpire as the case may be.

The decision of the arbitration and in the event of the arbitrators failing to regain an agreed decision then the decision of Umpire shall be final and binding on the parties hereto.

The arbitration proceedings shall be held in accordance with the or provisions of Indian Arbitration Act, 1940 and the rules made thereunder as amended from time to time.

The arbitration or the Umpire as the case may be shall decide by whom and what proportions the arbitrators or Umpire fee as well as costs incurred in arbitration shall be borne.

The arbitrator or the Umpire may with the consent of the parties enlarge the time, from time to time to make and publish their or his award. Arbitration will be conducted in English language and either party may be represented by persons not admitted to practice law in India."

"23. In the event of any change or amendment of any Act or law including Indian Income Tax Acts, rules or regulations of Govt. of India or Public Body or any change in the interpretation or enforcement of any said Act or law, rules or regulations by Indian Govt. or public body which becomes effective after the date as advised by the Commission for submission of final price bid for this contract and which results in increased cost of works under the contract, through increased cost by the Commission subject to production of documentary proof to the satisfaction of the Commission to the extent which is directly attributable to such change or amendment as mentioned above. Similarly, if any change or amendment of any Act or law including Indian Income Tax Acts, Rules or Regulation of any Govt. or Public Body or any

A change in the interpretation or enforcement of any said Act or law, rules or regulations by Indian Govt. or public body becomes effective after the date as advised by the Commission for submissions of final price bid for this Contract and which results in any decrees in the cost of the project through reduced liability
B of taxes, (other than personnel taxes) duties, the Contractor shall pass on the benefits of such reduced costs, taxes or duties to the Commission.

Notwithstanding the abovementioned provisions, Company shall not bear any liability in respect of:
C

i) Personnel taxes, customs, duty and corporate tax".

RELEVANT PARAGRAPHS OF STATEMENT OF CLAIM OF THE APPELLANT :

D In its statement of claim, the appellant, *inter alia*, contended :

"...The claimant has reason to believe that the Bombay Regional Office of the respondent had recommended that the respondent be made such payments as they rightly believed that such payments
E were legitimately due to the claimant under the terms of contract.

That apart from the reason that the said amounts were due to the claimant under the contract terms itself, the same is also supported by virtue of a notification of the Government of India setting out
F internal guidelines as contained in Notification No. D-19011/7/87-ONG-UA(EO) dated 25th of September 1989 issued by the Ministry of Petroleum and Natural Gas. A copy of this notification is placed at Document No. 27 and its relevant contents are reproduced hereinbelow :-

G "It has now been decided that...the Indian bidder's foreign exchange component may be allowed to be quoted in foreign currency for purposes of actual payment and the actual payment made in rupee equivalent to the foreign exchange component as per the BC selling rates on the date of actual payment for the
H imported supplies."

Subsequently, the respondent issued a circular No.74/89 dated 8th November, 1989 in compliance of the abovesaid Ministerial Notification, a copy of which is Documents. This Circular was to be implemented in all regions and be applicable to all contracts."

The appellant in the said statement of claim, *inter alia*, made the following submissions before the arbitrator :

"2. It is submitted that the foreign exchange rate fluctuations did not and cannot result into a price variation/increase. It is submitted that the firm price relative to this contract was a composite price stated in Rupees and Dollars and it was that which was and has been held firm, by the claimant. The claimant is not seeking additional benefit or profit but is merely seeking to recover a specified contract consideration.

3. That the ministry notification dated 25.09.1989 has the force of law and the respondent is not entitled to act in violation of the same.

5. That it is further submitted that this very respondent has in other suppliers entered into prior to the conclusion of this contract applied this notification in the manner in which it ought to have been applied and has given due benefit to various other suppliers. It is also significant that the respondent has had no hesitation in applying the said notification to the claimant's benefit in a subsequent contract.

6. That without prejudice to what is stated above, it is further submitted that the contract between the claimant and respondent was concluded subsequent to the issuance of the notification and, therefore, any endeavour on the part of the respondent to construe the effective date of the notification as subsequent thereto is misconceived and factually incorrect.

7. It is submitted that exchange rate fluctuations brought into effect in exercise of powers conferred on the Reserve Bank of India under Section 40 of the Reserve Bank of India Act

1934 and upon directions given by the Government of India has the complete force of law. That being the position, any change arising therefrom is clearly covered under clause 23 of the Tender Document. Being so, the respondent is bound under the contract to compensate the claimant as to such increased costs arising out of such exchange rate fluctuations. It is further submitted that refusal on the part of the respondent to compensate the claimant without disclosing any reasons itself is arbitrary.

8. ...Any interpretation of the contract wherein foreign suppliers would be paid in foreign currency at the current rate while Indian suppliers would be paid at the rate of exchange prevailing on the date of the submission of the Price Bid would discriminate against the Indian suppliers in as much as any increase in the value of the dollar against the Indian rupee would destroy the costing of the Indian suppliers. The claimant states that this interpretation of the contract is discriminatory against the Indian suppliers, violative of public policy and against stated government guidelines, objectives and intentions."

ISSUES BEFORE THE ARBITRATORS :

The respondent in their rejoinder having joined issues with the aforementioned contentions of the appellant, the following issues which were raised by the appellant herein, fell for consideration by the learned arbitrators.

"1. Whether the proper interpretation of terms of the contract entitle the claimant to be compensated for all consequences arising out of exchange rate variations between the date of the submission of the Price Bid and the completion of all supplies.

2. Whether, in addition or in the alternative, the claimant is, under clause 23 of the Tender Document entitled to be compensated for all exchange rate variations between the

date of the submission of the Price Bid and the completion of all supplies. A

3. Whether, in the alternative, the respondent is bound to effectuate in favour of the claimant notified State policy as contained in the Ministerial notification dated 25.09.1989. B

4. Whether, the respondent's circular No. 74/89 dated 8th November, 1989 estoppes the respondent from any interpretation of the contract contrary thereto."

AWARD : C

By reason of the impugned award, the learned arbitrators held :

"1. We hold that the Claimants are entitled to be compensated for increase in cost arising out of Foreign Exchange Rate Fluctuations in respect of payment made by the Respondents D to the Claimants on the from the respective date of devaluation of the Indian Rupee, namely 8.7.1991 and 28.2.1998 and not on payments made before the said dates. Accordingly we direct that the Respondent do pay to the Claimants a sum of Rs.1,03,41,309 only (in words Rupee One crore three lakhs E forty one thousand three hundred and nine) Rs. 24,97,905 under Invoice dt. 9.10.1991, Rs. 25,20,160 under Invoice dt. 15.1.1998 and Rs. 53,23,241 under Invoice dt. 22.6.1998) in full and final settlement of their claim under their aforesaid three invoices. F

2. Respondents do further pay to the Claimants interest at the rate of 185 per annum on the aforesaid three amounts awarded to them under the said invoices from the respective dates of those invoices till the date of this Award." G

OBJECTIONS TO THE AWARD BY THE RESPONDENT :

(1) The subject-matter of the arbitration was not arbitrable in view of the terms of the contract;

(2) The appellant was not entitled to any escalation in price. H

A *IMPUGNED JUDGMENT :*

The Division Bench of the High Court set aside the award holding that the same was without jurisdiction wherefor two questions were framed.

B (a) Whether a claim of the nature preferred by the respondent is specifically barred under the contract?

(b) Whether there is any clause in the contract, under which such a claim could be preferred?

C *OUR CONCLUSION :*

The questions framed are self-contradictory and inconsistent. Whereas in framing question (a) a right approach had been adopted by the Division Bench, a wrong one had been adopted in framing question (b). It is not D in dispute that there were three different nature of bids; which were required to be made in terms of the notice inviting tenders : (i) by foreign bidders; (ii) by Indian bidders quoting Indian price with the foreign exchange component therefor as import was required to be made; (iii) payable only in Indian rupee without foreign exchange component.

E

Before the arbitrators apart from construction of the contract agreement, the questions which, *inter alia*, arose were : (a) the effect and purport of circular letter dated 25.9.1989 issued by the Central Government: (b) the conduct of the respondent in making the payments to the persons similarly situated.

F

Construction of a deed sometimes pose a great problem.

Justice Frankfurter said : "there is no surer way to misread a document than to read it literally." *Massachusetts B. & Insurance Co.* v. *U.S.* [1956] G 352 US 128 at p. 138.

We, however, as discussed in details a little later are strictly not concerned as regard true import and purport of the relevant clauses of the contract agreement. Our concern is merely to see as to whether the learned H arbitrators exceeded their jurisdiction in making the award.

The learned arbitrators, as noticed hereinbefore, in making the award took into consideration the documentary as well as circumstantial evidence including rival pleadings of the parties. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract.

In *Khardah Company Ltd.* (supra), this Court held :

> "...We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used herein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances...."

Construction of the contract agreement, therefore, was within the jurisdiction of the learned arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, thus, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties as also the circumstantial evidence.

A dispute as regard the construction of clause 23 of the contract *vis-à-vis* the notification issued under Section 40 of the Reserve Bank of India Act also fell for their consideration. Such a question of law, it is trite, is also arbitrable and was specifically raised by the appellant. The learned arbitrators were further entitled to consider the question as to whether the appellant had been discriminated against insofar as similar claims have been allowed by the respondent.

A *CASE LAWS ON THE POINT :*

In *State of U.P.* v. *Allied Constructions,* [2003] 6 SCALE 265, this Court held :

B "...Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see *M/s Sudarsan Trading Co.* v. *The Government of Kerala,* AIR (1989) SC 890. Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a C Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based D on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. One it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering..."

E In *K.R. Raveendranathan* (supra), the law was laid down in the following terms :

"2. The learned counsel for the appellant points out that the question in issue in the present appeals is squarely covered by the F decision of this Court in *Hindustan Construction Co. Ltd.* v. *State of J&K,* [1992] 4 SCC 17. In particular, it drew our attention to para 10 of the judgment and the portion extracted from the decision in Sudarsan Trading Co. case *Sudarsan Trading Co.* v. *Govt. of Kerala,* [1989] 2 SCC 38 wherein it was said that by purporting to construe the contract the Court could not take upon G itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. That is exactly what the Court has done in the instant case..."

K.R. Raveendranathan (supra) has been followed by this Court in H *P.V. Subba Naidu* (supra) stating :

"4. The entire thrust of the judgment is on examining the terms of the contract and interpreting them. The terms of the arbitration clause, however, are very wide. The arbitration clause is not confined merely to any question of interpretation of the contract. It also covers any matter or thing arising thereunder. Therefore, all disputes which arise as a result of the contract would be covered by the arbitration clause. The last two lines of the arbitration clause also make it clear that the arbitrator has power to open up, review and revise any certificate, opinion, decision, requisition or notice except in regard to those matters which are expressly excepted under the contract, and that the arbitrator has jurisdiction to determine all matters in dispute which shall be submitted to the arbitrator and of which notice shall have been given.

5. In the present case all the claims in question were expressly referred to arbitrator and were raised before the arbitrator. The High Court was, therefore, not right in examining the terms of the contract or interpreting them for the purpose of deciding whether these claims were covered by the terms of the contract."

The same view has been reiterated in *H.P. State Electricity Board* (supra). Upon taking into consideration a large number of decisions and referring to *K.R. Raveendranathan* (supra), this Court held that the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator had exceeded the jurisdiction in making the award, when the arbitrator is required to construe a contract, only because another view is possible. It was stated :

"26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a

A specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference B of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings."

Yet again in *Sushil Kumar Kayan* (supra), it was held :

C "...In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant can raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar D in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction..."

Some of the aforementioned decisions have been considered by us in *Bharat Coking Coal Ltd.* v. *M/s Annapurna Construction,* [2003] 7 E SCALE 20.

Rajasthan State Mines & Minerals Ltd. (supra) whereupon Mr. Rohtagi placed strong reliance, this Court held that the dispute to the arbitrator could not be termed as without jurisdiction but proceeded to F consider the question as to whether he will have authority or jurisdiction to grant damages or compensation in the teeth of the stipulation providing that no escalation would be granted and that the contractor would only be entitled to payment of the composite rate as mentioned and no other or further payment of any kind or item whatsoever shall be due and payable G by the Company to the contractor.

It was concluded :

"(a) It is not open to the Court to speculate, where on reasons are given by the arbitrator, as to what impelled the arbitrator to arrive H at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction."

With respect we agree with the conclusions arrived at in *Rajasthan State Mines & Minerals Ltd.* (supra).

A Clause (g) of the conclusion in the said case, as quoted supra, is not applicable in the instant case inasmuch as there does not exist any provision which does not permit or give the arbitrator the power to decide the dispute raised by the claimant nor there exist any specific bar in the contract to raise such claim.

B

To the same effect is the decision of this Court in *Food Corporation of India* v. *Surendra, Devendra & Mahendra Transport Co.,* [2003] 4 SCC 80.

C In *Shyama Charan Agarwala* (supra), this Court observed :

"19. Testing the case on hand on the touchstone of well-settled principles laid down by courts, we are unable to hold that the High Court exceeded its jurisdiction in interfering with the award or
D failed to exercise the jurisdiction vested in it to set aside the award. The approach of the High Court cannot be said to be contrary to the well-settled principles governing the scope of interference with an award of the arbitrator under the old Act. As regards the first item, the question was whether the contract contemplates the
E use of stone aggregate and stone metal from the local sources only, the source of supply being silent in the relevant clause. The arbitrator was of the view that the unprecedented situation of the Contractor being put to the necessity of procuring the stone material from far-off places was not visualized and the parties proceeded on the basis that such material was available locally.
F He further noted that the sample kept in the office of the Engineer concerned admittedly pertained to the material procured from local sources. A letter addressed by the Chief Engineer in support of the Contractor's claim was also relied on in this context. Hence, in these circumstances, the arbitrator can be said to have taken a
G reasonably possible view and therefore the High Court rightly declined to set aside the award insofar as the quantity of stone aggregate/stone metal brought to the site up to 24-1-1994 is concerned. The arbitrator acted within the confines of the jurisdiction in making the award on this part of
H the claim."

ANALYSIS OF THE CASE LAWS :

The principles of law laid down in the aforementioned decisions leave no manner of doubt that the jurisdiction of the court in interfering with a non-speaking award is limited.

The upshot of the above decisions is that if the claim of the claimant is not arbitrable having regard to the bar/prohibition created under the contract, the court can set aside the award but unless such a prohibition/ bar is found out, the court cannot exercise its jurisdiction under Section 30 of the Act. The High Court, therefore, misdirected itself in law in posing a wrong question. It is true that where such prohibition exists, the court will not hesitate to set aside the award.

In the instant case, the appellant did not ask for any enhancement in the price. It only asked for the difference in price occurred owing to fluctuation in the rate of dollar.

It is true that by taking recourse to the interpretation of documents, the appellant did not become entitled to claim a higher amount than Rs.149 but, thereby the appellant had not unjustly enriched itself. Had the price of the dollar fallen, the respondent would have become entitled to claim the difference therefor.

The appellant quoted the foreign exchange component in its bids in terms of the notice inviting tenders. The same was asked for by the respondent itself for a definite purpose. A contract between the parties must be construed keeping in view the fact that the fluctuation in the rate of dollar was required to be kept in mind by the respondent having regard to the fact that the tender was global in nature and in the event the respondent was required to pay in foreign currency, the same would have an impact on the cost factor.

Clauses 2.6 and 2.7 aforementioned must be construed in such a manner so that effect to both of them may be given. Whereas Clause 2.6 prohibits escalation; Clause 2.7 makes the bidder liable for exchange fluctuations which does not amount to an escalation of the price or disturb their cost evaluation. The bid of the appellant had two components, namely, Indian currency component and US Dollar component. The

A appellant claimed $ 4.60 within the total price of Rs. 149 which was to be paid in Indian currency. In any manner, the claim did not violate clause 2.6. The appellant merely claimed foreign exchange component at the rate of $ 4.60 and no more.

B The very fact that three different types of quotations were invited from the bidders itself is suggestive of the fact that each one of them was required to be construed in such a manner so as to apply in different situations. The submission of Mr. Rohtagi, the learned Additional Solicitor General to the effect that if such a factor was to be taken into consideration, the person who had quoted only in terms of Indian rupee would be at a C disadvantage is stated to be rejected. The question as to whether suppliers quoting their bid in Indian currency alone would face disadvantage or not will depend upon the question as to whether they were similarly situated. One bidder may have to import the raw-materials; other may not have to. This itself will lead to a difference. In fact, those who did not bid with D the amount of foreign exchange component cannot be placed on equal footing to those who in their bid pursuant to the notice inviting tender disclosed that they would have to make import wherefor only the foreign exchange component in the price had to be disclosed.

E Furthermore, the circular letter dated 25.9.1989 issued by the Government of India itself clearly shows that a decision had been taken to make such payments. The contract having not been entered into by the parties herein as on the said date, the decision to include the said term would mean that the same shall be incorporated in the contracts which were to be executed in future.

F

It is further not in dispute that the respondent is bound by the directives issued by the Union of India. In fact from the letter dated 21.5.1990 it is evident that even for the purpose of entering into the contract approval of the Central Government was sought for and granted. G Such a directive of the Central Government was not required to be made by way of a notification nor the same was required to have the force of law as the matter involved a contract between the parties.

Mr. Rohtagi is not correct in his contention that such condition was required to be incorporated in the NIT inasmuch as from a plain reading H of the said letter, it is evident that such a clause was to be incorporated

in the notice inviting tenders *ex majori cautela.* A

As regard the contention as to whether the notification issued under Section 40 of the Reserve Bank of India would be rules or regulations having an impact in the cost factor is concerned, the arbitrator had jurisdiction to decide the same, subject of course to application of correct principles of law in relation thereto. B

Even assuming that the arbitrators faulted in that regard, it must be borne in mind that such a contention was raised on behalf of the appellant, only for the purpose of showing that several aspects of the matter arose before the learned arbitrators for making the award and any-one of them would be sufficient to uphold the award. C

The court, having regard to the proposition of law that the jurisdiction of the arbitrator will be ousted only in the event that there exists a specific bar in the contract as regard raising of a particular claim must necessarily hold that the award was sustainable. As in the instant case there did not exist any such bar, it is enforceable in law. Furthermore, in the event the ratio of the decision of the High Court is accepted, the same would amount to re-hearing of the entire arguments once over again by the court as regard construction of a contract which is impermissible in law. D

E

The arbitrators were called upon to determine a legal issue which included interpretation of the contract. The arbitrators, therefore, cannot be said to have been travelled beyond jurisdiction in making the award.

CONCLUSION : F

We, for the reasons aforementioned, are of the opinion that the judgment of the High Court is not sustainable.

However, one aspect of the matter which requires our consideration. The respondent rejected the claim of the appellant as far back as on 14.7.1992 whereafter the disputes and differences between the parties were referred to the arbitrators. The arbitrators entered into the reference on 1.3.1993 and passed an award on 13.8.1993. The said award was set aside by the High Court. If the award is to be satisfied in its entirety, the respondent will have to pay a huge amount by way of interest. G H

A In order to do the complete justice to the parties, in exercise of our jurisdiction under Article 142 of the Constitution of India, we think it appropriate to direct that the award shall carry interest at the rate of 6% per annum instead and in place of 18% per annum. This order shall, however, not be treated as precedent.

B For the reasons aforementioned, the impugned judgment is set aside. The appeal is allowed with the aforementioned modifications. However, in the facts and circumstances of the case, there shall be no order as to costs.

B.K.M. Appeal allowed.