High Court of Madhya Pradesh
Bench at Gwalior

DIVISION BENCH : Hon.Shri Justice Sanjay Yadav &
Hon.Shri Justice Vivek Agarwal

Arbitration Revision No.4/2009

State of M.P. & Ors. …...Petitioners

Vs.

M/s. SEW Construction Ltd. …..Respondent

Shri Pratip Visoriya, learned Govt. Advocate for the petitioners/State.
Shri V.R.Rao, learned senior counsel with Shri Nitin Agrawal , counsel for the respondent.

Whether approved for Reporting :

O R D E R
(Passed on this 3rd day of May, 2019)

Per Justice Vivek Agarwal :

State of Madhya Pradesh through its instrumentalities has filed this Arbitration Revision being aggrieved by award dated 26.11.2008 passed in Reference Case No.6/08 by M.P. Arbitration Tribunal, Vindhyachal Bhawan, Bhopal, in the case of M/s. S.E.W. Construction Ltd. Vs. State of M.P. (Water Resources Department), whereby on the ground of expenditure incurred by the respondent in bringing sand from Mahuar river as per the terms and conditions of sanction granted by the Superintending Engineer in terms of the provisions contained in clause 3.11(A), Reference Case has been allowed and Arbitration Tribunal has directed to pay such difference amount on account of cost incurred by the

contractor in bringing sand for the purpose of construction from a distant lead alongwith interest at the rate of 9% from the date of filing of the reference petition.

2. Learned counsel for the State submits that State had issued tender notice No.1/1992-93 for the construction of Masonry Dam from RD 80M to 543M of Madikhed Dam. The tender of the respondent/contractor was accepted on 6.11.1993 for an amount of Rs.1,22,81,86,600/-. Thereafter a contract was entered into between the parties and as per para 4.3.29.2 of the agreement for any kind of dispute, the respondent was to first approach petitioner No.3 and in terms of such clause respondent/Contractor submitted an application dated 10.11.2006 raising claims for extra payment and same was rejected vide memo dated 14.12.2006. It is submitted that though the limitation for preferring his claim was 28 days as per the agreement, but the respondent approached the Tribunal on 10.12.2007, thus, the entire claim of the contractor is time barred.

3. It is also submitted by learned counsel for the State that whole controversy hinges on interpretation of clause 3.11(A) which reads as under :-

> "3.11(A) The quoted rates of the contractor shall be inclusive of the leads and lifts and in no case separate payment for leads or lifts to any materials including water shall be payable. Similarly no leads or lifts for the materials issued by the department as prescribed in the tender documents shall be payable. The contractor shall bring approved quality of materials. Different quarries are shown in Annexure

> C. The details shown in the Annexure C are only as a guide to the contractor but the contractor before tendering should satisfy himself regarding the quantity and quality available and all other details of Annexure C and provide for any variation in respect of leads, lifts, place and method of quarrying, type of rocks to be quarried and all such other aspects in his tendered rate. Later on any claim whatsoever shall not entertained except where any quarry is changed for circumstance beyond the control of contract under the written order of Superintending Engineer in-charge of work."

4. Thus, placing reliance on clause 3.11(A) of the agreement, it is submitted that the details of different quarries are shown in Annexure C which are to be used only as a guide. The claimant/contractor had entered into contract with open eyes after satisfying himself and had accepted the quarry. Therefore, plea of the contractor in his reference petition that as lot of water had flown through the *Nala* in past rainy season eroding the sand quarries necessitating the contractor to approach the competent authority in terms of the clause 3.11(A) with a request to transport sand from Mahuar river quarry (Chandrapetha) and demanding extra expenditure incurred in extra lead in transportation of sand could not have been permitted by the Arbitration Tribunal. It is submitted that learned Tribunal erred in shifting the entire burden on the State for such extra lead having failed to appreciate the fact that principle of *pari materia* is attracted because the terms and conditions of the contract agreement and other factual and legal aspects have not been changed. It is submitted that the interpretation which has been given to various clauses of the

agreement by the Tribunal is arbitrary and cannot stand on its own leg.

5. It is also submitted by the learned counsel for the State that earlier the contractor had filed a claim on similar grounds before the Arbitration Tribunal for a different period claiming reimbursement of the extra expenditure for execution of the same work and that was rejected by the learned Tribunal by a detailed and speaking order dated 16.10.2007 passed in Reference Petition No.38/03, and therefore, Tribunal should have applied same interpretation while dealing with the present reference petition which is subject matter of this Arbitration Revision, rather than taking a different view.

6. It is also submitted that once award passed in Reference Petition No.38/03 had attained finality, then principles of *res judicata* being applicable, the subsequent reference petition from which this Arbitration Revision originates should not have been allowed and on this ground alone, present revision petition deserves to be allowed. It is submitted that as per the terms and conditions of the agreement, contractor is not allowed to claim extra payment for extracting sand from another quarry which was permitted taking into account the factual situation, but Tribunal has erred in giving different interpretation to clause 3.11(A). It is submitted that respondent/claimant has wrongly claimed extra lead at the rate of Rs.7.22/- per kms and inadequate data has been

produced by the claimant and the same has been accepted by the Tribunal unnecessarily burdening the public exchequer. It is submitted that rate of interest per annum from the date of institution i.e. 10.12.2007 is also on the higher side and interest ought not to have been awarded and even this award of interest has vitiated the whole award. Placing reliance on such submissions, it is prayed that impugned award be quashed and this Arbitration Revision be allowed.

7. Shri V.R.Rao, learned senior counsel for the respondent, in his turn submits that petitioners/State are trying to give a very narrow interpretation to the provisions contained in clause 4.3.29.2, so also to the provisions contained in clause 3.11(A).

8. It is also submitted by learned counsel for the respondent that provisions contained in Section 7-B of the M.P. Madhyastham Adhikaran Adhiniyam 1983 (hereinafter shall be referred to as "the Adhiniyam of 1983") provides for period of duration for approaching the final authority, has to be given full play. It is submitted that the cause of action to the contractor had arisen on 10.11.2006 when a quantified claim was referred to the final competent authority for its decision and finally accrued on 14.12.06 when such quantified claim was rejected by the final authority. Since claim petition was filed on 10.12.2007 within one year of rejection of quantified claim by the final competent authority, the reference petition was within the prescribed period

of limitation as has been prescribed under Section 7-B of the Adhiniyam of 1983.

9. It is further submitted that principles of *res judicata* will not apply because there are two distinct cause of actions. Reference petition No.38/03 was filed claiming expenditure incurred by the contractor upto June, 2002 for bringing sand entailing extra lead when there was no sanction by the competent authority i.e. Superintending Engineer as is provided under clause 3.11(A), whereas Reference Petition No.6/08 was filed claiming compensation for such extra lead after permission was granted by the Superintending Engineer in terms of the provisions contained in clause 3.11(A), and therefore, rightly the Tribunal taking into consideration all provisions contained in Section 11 CPC has rejected plea of *res judicata* because the issue in the later reference petition became different from the earlier issue by virtue of there being absence of such sanction by the competent authority when earlier Reference Petition No.38/03 was filed, whereas in the present case, such sanction of the Superintending Engineer was extended to the contractor as can be seen from the correspondence between the contractor and the Executive Engineer, Executive Engineer and the Collector of the District and thereafter between the Executive Engineer and the Superintending Engineer. It is pointed out that contractor had sent letter dated 24.1.2002, Ex.P/3, with reference to allotment of sand quarries at villages Jughai,

Ganiyar, Chandpata and Lamkana upon which the Executive Engineer had requested the Collector vide communication dated 25.1.2002, Ex.P/4. The Collector in turn had reserved such quarries vide communication dated 29.1.2002 in regard to such reservation of sand quarries. Thereafter on 19.3.2002 Executive Engineer had requested the Superintending Engineer to permit transportation of sand from Mahuar river due to inadequacy of available sand at Barua *Nala*. Vide Ex.P/16 an agenda note was sent highlighting necessity of permitting transportation of sand from Mahuar river and such sanction was granted by the Superintending Engineer vide Ex.P/17 dated 20.10.2002. It is pointed out that earlier allotted quarries were within the periphery of 20 kms but since contractor was forced to transport sand from a distance beyond 20 kms from Mahuar river for the circumstances beyond the control of contractor, therefore, claim for excess lead has been rightly awarded by the Arbitration Tribunal.

10. It is submitted by the learned counsel for the respondent that rate of interest too does not call for any interference inasmuch as it is a commercial transaction and contractor is required to deploy capital after making arrangements for the same from commercial banks at commercial rates which are at any given point of time much higher than the rate of interest awarded by the Tribunal i.e. 9%.

11. After hearing learned counsel for the parties and perusing

the record, we would like to first advert to the argument put forth by the learned counsel for the State that principle of *para materia* is attracted. In fact, the correct word is *pari materia* and not para materia as has been mentioned in ground B of the Arbitration Revision. The meaning and import of *pari materia* is that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in *pari materia* i.e. the statutes dealing with the same subject matter or forming part of the same system. In his book 'Principles of Statutory Interpretation, 31st Edition, Hon'ble Justice G.P.Singh has referred to case of **A.G. v. HRH Prince Ernest Augustus of Hanover, (1957) 1 ALL ER 49** wherein Viscount Simonds conceived it to be a right and duty to construe every word of a statute in its context and he used the word context in its widest sense including "other statutes in *pari materia*". In the case of **United Society v. Eagle Bank, (1829) 7 Connecticut 457** it has been held that statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the word *simlis*. It is used in opposition to it-intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. In the case of **State of Punjab v. Okara Grain Buyers Syndicate Ltd., Okara, AIR 1964 SC 669** it has been held that when two pieces of

legislation are of differing scopes, it cannot be said that they are in *pari materia*.

12. As per clause 2.25 of the agreement it was agreed that the material to be used on work specified in contract will be only from the quarries specified in Annexure C. If the changes of quarries from those mentioned in Annexure- C are necessitated due to any reasons during execution of work such changes will be made only with the approval of the Superintending Engineer given in writing. Any alterations of items, affected by change of such quarry will be governed by clauses 4.3.13.1, 4.3.13.2 and 4.3.13.3 of the agreement in form B.

13. Annexure C stated thus :

Annexure C
Statement of Quarries

S.No.	Description of	Name and Location of Quarry
1.	Masonry Stone	Stone Quarry on upstream or downstream of dam site about 2 Kms.
2.	Rubble	- do -
3.	Metal	- do -
4.	Sand	Barua Nalla about 20 Kms from site
5.	Casing	About 2.5 Km from Dam site
6.	Hearting	About 2.5 Km from Dam site
7.	Useful rubble and spall will also be available from excavation of foundation. It will be compulsory on part of contractor to use it on work as per issues made by the department at the rates indicated in Annexure- I	

> Note: This Statement is only for the guidance of the contractor. The tenderer should satisfy himself regarding availability of the required quantity and quality of materials."

14. Clause 3.11(A) when read in totality leads to a conclusion that it was obligatory on the part of the contractor to bring approved quality of materials. Different quarries shown in the Annexure C were only to be used as a guide to the contractor and the contractor before tendering should have satisfied himself regarding the quantity and quality available and all other details of Annexure C and provided for any variation in respect of leads, lifts, place and method of quarrying, types of rocks to be quarried and all such other aspects in his tendered rate i.e. the contractor should have satisfied himself of the quantity, quality, distance (leads) and lifts etc. before tendering on the basis of quarries indicated in Annexure C and failure to do so would not have given rise to unaccountable claim to be entertained at the end of employer.

15. The later part of clause 3.11 (A) provides that later on any claim whatsoever shall not be entertained except where any quarry is changed for circumstance beyond the control of contract under the written order of Superintending Engineer in-charge of work. Thus, there being a caveat provided in clause 3.11(A) that if there is any change of quarry for circumstances beyond the control of the contractor under the written orders of the Superintending

Engineer of the work, then it cannot be said that provisions contained in clause 3.11(A) are *pari materia* with each other. In fact, as per the law laid down in the case of **Okara Grain Buyers Syndicate Ltd. (supra)** the scope of two clauses forming part of clause 3.11(A) cannot be said to be in *pari materia*, and therefore, this argument of *pari materia* deserves to be rejected and is rejected.

16. Another ground which has been raised to assail the impugned award is in regard to limitation. It is submitted that the reference petition as was filed by the contractor was barred by time as it was filed beyond the period of 28 days as is stipulated in clause 4.3.29.2. Section 7-B(1) of the Adhiniyam of 1983 provides that :

> The Tribunal shall not admit a reference petition unless -
>
> (a) the dispute is first referred for the decision of the final authority under the terms of the works contact; and
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> (b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority:
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> Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the tribunal shall be made within one year of the expiry of the said period of six months."

In the present case, admitted facts are that for the first time a quantified claim was preferred to the Superintending Engineer (final authority) on 10.11.2006 and such cause of action for filing

the claim had accrued for the first time on 17.2.04. Thus, within a period of three years claim was referred to the final authority i.e. the Superintending Engineer on 10.11.2006. Superintending Engineer had rejected this claim filed by the respondent on 14.12.2006 and thereafter reference petition was filed before the Arbitration Tribunal on 10.12.2007 i.e. within one year of the final decision of the final authority as per the stipulation provided in Section 7-B(1)(b). Clause 4.3.29.2 though provides for limitation of 28 days for referring a dispute to the Arbitration Tribunal constituted under the Adhiniyam of 1983 from the date of final decision of the Superintending Engineer, but the statutory limitation as provided under Section 7-B shall have overriding effect over the provisions of the agreement and since statute itself provides limitation of one year, that will have overriding effect over the contract agreement because a fresh cause of action arises in favour of the respondent when dispute is decided by the final authority, therefore, as far as issue of limitation is concerned, we are of the opinion that Arbitration Tribunal was justified in holding the reference petition to be within period of limitation as stipulated in Section 7-B of the Adhiniyam of 1983. For authority, please see judgment of this High Court in the case of **Ramla Construction, New Delhi v. State of M.P.** as reported in **2006(1) MPLJ 234.**

17. As has been discussed above, even plea of *res judicata* is

not available to the State inasmuch as reference petition No.38/03 was filed before the Tribunal for a period where later part of clause 3.11 (A) had not come into play i.e. because earlier claim was filed seeking extra lead without there being any sanction of the Superintending Engineer as there was no written order of the Superintending Engineer in-charge of the work permitting change of quarry recording circumstances beyond the control of contractor, whereas present reference petition which is subject matter of this Arbitration Revision was filed seeking non-compliance of written order of the Superintending Engineer in-charge of the work who had permitted the change of quarry for the circumstances beyond the control of the contractor after forming a three men committee and taking their report as can be seen from Annexure P/8.

18. Coming to the claim for extra lead at Rs.7.22 per kms. which is the core issue. The same as observed supra revolves around clause 3.11 (A) of the Agreement. The Tribunal taking into account the factual aspect in paragraphs 58, 59 and 60 upheld the claim by the Contractor holding that the permission granted to the Contractor by the Competent Authority i.e. the Superintending Engineer was without any condition, such as that the cost is to be borne by the Contractor. Even otherwise, it is a factual issue and it was within the competence of the revision petitioners to have produced evidence as to the correct calculation after drawing data

as to the cost of POL (petrol, oil and lubricants) etc. at the relevant point of time, but from perusal of their written statement filed before the Arbitration Tribunal, it appears that no such attempt was made by the authorities of the State to delve into this issue and dispute the rate in its true spirit. Therefore, at this stage when we are hearing revision petition and scope of which is to be largely governed by the provisions contained in Section 115 of CPC which provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

> (a) to have exercised a jurisdiction not vested in it by law, or
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> (b) to have failed to exercise a jurisdiction so vested, or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit, therefore, in view of such provisions as discussed above dealing with scope of Section 115 CPC in the State of M.P., this Court is of the opinion that issue of rate being purely a factual issue does not call for any detailed analysis or deliberation in a revision petition, therefore, this argument of rate also deserves to be rejected.

19. It is to be appreciated that whether later part of clause

3.11(A) provides for any variation in the contract or not. As per Hudsons's 'Building and Engineering Contracts' 11th Edition by I.N. Duncan Wallace Volume 1 the word “variation” can be used in a number of different senses. Thus it is frequently used by lawyers for an agreed alteration or modification by the parties of the terms of a pre- existing contract between them. Even in construction contracts it may occasionally be used by the draftsman for an agreed alteration or extension of the contract completion date, or for compensatory provisions which may alter the contract price, such as fluctuations or “variation of price” clauses, or “changed circumstance”. The term “variation as normally used in the present chapter denotes an alteration which has been duly authorized or instructed by the owner or his A/E, and for the cost of which the owner will prima facie be responsible to the contractor. It has been further provided that there are reasons for providing variation clauses which have been summarized in chapter 7 para 7.005, dealing with reasons for variation clauses, as under :-

> “7.005 These are inserted into nearly all construction contracts at the present day for two principal reasons. In the first place, they give the owner the power to require a variation of the work, unilaterally and as of right, as opposed to relying on the willingness of the contractor to agree to the variation, which would otherwise enable the contractor to exert unacceptable pricing or other pressures on the owner in return for his agreement to carry out the variation. In the second place, it has already been seen that an architect has no implied authority to contract on behalf of his employer. In the absence of such a provision,

> therefore, the contractor will not be able to recover payment for any additional or varied work which he has done on the A/E's instructions, unless he can show a separate contract with the owner that he should do it and be paid for it (as, for example, where the owner knows of the architect's instruction and does not countermand it, provided that it is realised or ought to be realised by the owner that a change of price is intended or probable as a consequence of the instruction). With such a provision the contractor, provided he complies with any requirements of form, is protected from any denial by the owner of the A/E's authority to order the variation. A third and subsidiary reason for variation clauses is that they enable the parties to agree in advance on the basis for valuing and pricing the varied work."

Similarly, para 7.043 which deals with power to order variations reads as under:-

> "7.043 For some reason, modern draftsmen of variation clauses tend to make rather laborious lists of matters where the power to vary may be exercised. So far as the permanent work is concerned, all that is in fact necessary is a power to add, omit, or substitute different work (the last, on analysis, usually representing a combination of omissions and additions). As previously noted, most contracts do not deal expressly with the controversial question of temporary works of working methods, although the post-1973 ICE conditions do include a power to order "changes in the specified sequence method or timing of construction (if any)." Such provisions, although highly desirable in the owner's interest, require careful draftsmanship to avoid confusion and confrontation.
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> No doubt in some of the older cases there was a tendency to construe the range of matters as to which an order might be given somewhat strictly if the language was ambiguous, but it may be doubted whether this will be so at the present day. The following early case, for instance, probably turned, at least partly, on the then strict rules of pleading, and it is suggested that virtually any alteration of the permanent work will be covered at the present day by a clause giving a power to add or omit work."

20. In this regard, provisions of Section 70 of the Indian Contract Act are relevant to the contract and it reads as under:-

> "**S.70. Obligation of person enjoying benefit of non-gratuitous act**.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Thus, section 70 of the Contract Act deals with obligation of person enjoying the benefit of non-gratuitous act. For authority, please see judgment rendered by the Supreme Court in the case of **Mulamchand v. State of Madhya Pradesh** as reported in **AIR 1968 SC 1218** and **Pilloo Dhunji Shaw Sidhwa v. Municipal Corporation of the City of Poona, AIR 1970 SC 1201**.

21. There are three ingredients to support the cause of action under Section 70 of the Indian Contract Act and these are; First the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously". Third the person to whom the goods are delivered "enjoys the benefit thereof." It is only when these ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. It has been held that if any plaintiff pleads the three ingredients and proves the three features, the defendant is then bound to make compensation in respect of word to restore the things so done or delivered. For authority,

please see judgment in the case of **Union of India vs. Sita Ram Jaiswal** as reported in **AIR 1977 SC 329**. In the case of **Governor-General in Council, represented by the General Manager, South Indian Railway vs. The Municipal Council, Madura, AIR (36) 1949 PC 39** the word "lawfully" has been held to be understood as bonafide.

22. While discussing the scope of Section 70, the Supreme Court in the case of **Pannalal v. Dy. Commissioner, Bhandara and anr., AIR 1973 SC 1174** has held that the real basis of the liability under Section 70 is the fact that the person for whom the work has been done, has accepted the work and has received the benefit thereunder. This section prevents unjust enrichment and it applies as much to individual as to Corporation and Government. In the case of **Mulamchand (supra)** it has been held that obligation under Section 70 is not founded upon any contract or tort, but upon a third category of law, namely, quasi contract or restitution. In the case of **West Bengal Vs. B.K.Mondal** as reported in **AIR 1962 SC 779** it has been laid down that between the person claiming compensation and persons against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word "lawfully" in this section. But the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the

former has been accepted and enjoyed by the latter. In the case of **State of Punjab Vs. Hindustan Development Board Ltd.** as reported in **AIR 1960 Punj 585** it is held that "a person who does work or supplies goods under a contract, express or implied, for which no price is fixed, is entitled to be paid a reasonable sum for his labour and the materials supplied. If the work is outside the contract, the terms of the contract can have no application; and the contractor, in the absence of any new agreement is entitled to be paid a reasonable price for such work as was done by him. It is, however, necessary in all such cases, that the extra work outside the contract should have been ordered or accepted by the defendant. If it is a kind of additional or varied work contemplated by the contract, the contractor must be paid for it, and will be paid for it according to the prices regulated by the contract. If, on the other hand, it was additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all, one of the two courses must have been open to him, he might have said: 'I entirely refuse to go on with the contract, *non haec in foedera veni*: I never intend to construct this work upon this new and unexpected footing, or, he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract and if I do it, I must be paid a *quantum meruit* for it." Therefore, principles enunciated under Section 70 of the Contract Act when

read in consonance with the provisions contained in clause 3.11 (A), it is apparent that once there was sanction of the Superintending Engineer of the works to change the quarry for the circumstances beyond the control of the contractor, then after giving such sanction for change of quarry, authorities of the State were precluded from saying that the contractor was bound by the provisions contained in clause 3.11(A) providing for escalation from the quarries mentioned in Annexure C attached to the agreement.

23. Trite it is that the scope of interference with the award is limited. In **Sharma & Associates Contractors Private Limited Vs. Progressive Constructions Limited, (2017) 5 SCC 743** (though in context to section 30 of the Arbitration Act, 1940), it is held:

> "12. In support, the learned counsel referred to the following judgments of this Court:
> 12.1. B.V. Radha Krishna vs. Sponge Iron India Ltd.[1997) 4 SCC 693:
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> "11. The disposal of the matter by the High Court in the manner shown above does not come within the ambit of Section 30 of the Arbitration Act. This Court, time and again, has pointed out the scope and ambit of Section 30 of the Act. In State of Rajasthan v. Puri Construction Co. Ltd. after referring to decisions of this Court as well as English cases, the Court observed as follows: (SCC p. 492, para 12)
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> "12. On the scope and ambit of the power of interference by the court with an award made by an arbitrator in a valid reference to arbitration, various decisions have been made from time to time by Law Courts of India

including this Court and also by the Privy Council and the English Courts. Both the parties have referred to such decisions in support of their respective contentions. The factual contentions of the respective parties are proposed to be scrutinised and then the facts are proposed to be tested within the conspectus of judicial decisions governing the issues involved."

This Court again observed in paras 26-28 as follows: (SCC pp. 500-501)

'26 The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. State of Kerala (1989) 2 SCC 38 it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. *"Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."* Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as

well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator."

12.2 Ispat Engineering & Foundry Works v. SAIL, (2001) 6 SCC 347:

"4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (Arosan Enterprises Ltd. v. Union of India [(1999) 9 SCC 449]) upon consideration of decisions in Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd. [AIR 1923 PC 66 : 1923 AC 480], Union of India v. Bungo Steel Furniture (P) Ltd. [AIR 1967 SC 1032 : (1967) 1 SCR 324], N. Chellappan v. Kerala SEB [(1975) 1 SCC 289], Sudarsan Trading Co. v. State of Kerala [(1989) 2 SCC 38], State of Rajasthan v. Puri Construction Co. Ltd. [(1994) 6 SCC 485] as also in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan [(1999) 5 SCC 651] has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. This Court in Arosan Enterprises [(1999) 9 SCC 449] categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in Champsey Bhara [AIR 1923 PC 66 : 1923 AC 480] stand accepted and adopted by this Court in Bungo Steel Furniture [AIR 1967 SC 1032 : (1967) 1 SCR 324] to the effect that the court had no

jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

12.3 Indu Engineering & Textiles Ltd. v. DDA, (2001) 5 SCC 691:

"5. The scope for interference by the court with an award passed by the arbitrator is limited. Section 30 of the Arbitration Act, 1940 (for short "the Act") provides in somewhat mandatory terms that an award shall not be set aside except on one or more of the grounds enumerated in the provision...

xxx xxx xxx

7. This Court, while dealing with the power of courts to interfere with an award passed by an arbitrator, had consistently laid stress on the position that an arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with...

8.As noted earlier, the Division Bench in appeal filed under Section 39 of the Act, reversed the order passed by the Single Judge and set aside the award holding that there was no material before the arbitrator for accepting the claim of the appellant. The Division Bench exceeded the limits of its jurisdiction in entering into the facts of the case and in interpreting the agreement between the parties and correspondence which was a part of the said agreement. What was the price of the commodity to be paid by the respondent to the appellant was essentially a question of fact. Even assuming that the arbitrator had committed an error in coming to the conclusion that the appellant was entitled to the claim of the escalated price of the commodity (hard coke) under the terms of the agreement and the Division Bench felt that the conclusion should have been otherwise, it was not open to it to interfere with the award on

that score."

24. In view of such legal position authorizing the employer to provide for variation clauses and since there exists a variation clause in later part of clause 3.11(A), this Court is of the opinion that once such variation was sanctioned by the employer (Superintending Engineer) and contractor was permitted to entail extra lead to bring sand from Mahuar river, such variation having been sanctioned by the employer, contractor is entitled to be compensated for such variation as it was made in the interest of the work so to facilitate the contractor to complete the work. Therefore, there is no illegality or arbitrariness in the impugned award calling for exercise of revisional jurisdiction of this Court, therefore, Arbitration Revision fails and is dismissed.

Parties to bear their own costs.

(Sanjay Yadav)
Judge

(Vivek Agarwal)
Judge

ms/-