

STEEL AUTHORITY OF INDIA LTD. A

v.

J.C. BUDHARAJA, GOVERNMENT AND MINING CONTRACTOR

SEPTEMBER 1, 1999

[D.P. WADHWA AND M.B. SHAH, JJ.] B*Arbitration Act, 1940: Section 30.*

Misconduct—Jurisdictional error—Contract stipulated that no claim would be tenable for delay in handing over the work site—Contract only provided extension of time for completion in case of such delay—Despite such prohibition, award given for losses due to delay in handing over work site—Held: Arbitrator has to function within the limits of the agreement and cannot exceed his jurisdiction—Whether or not the arbitrator has so functioned would be a jurisdictional fact and required to be gone into by the court—Arbitrator may have jurisdiction to entertain a claim but does not have jurisdiction to pass award in respect of prohibited items of contract—If he does so it will be a jurisdictional error—Hence, the said award is, on the face of it, illegal. C
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Arbitration—Disputes—Reference to—Period of limitation—Cause of action—Arising of—Contractor gave notice on 29-8-1979 demanding a certain sum—No response and no payment from company—Contractor's right to receive damages not kept alive in subsequent supplementary agreement—Instead contractor agreed to complete work within the stipulated time on a higher rate—Company wrote letter in [on 3.9.1983] repudiating the claim made by the contractor—No action to refer the dispute for arbitration taken by contractor within 3 years from 29-8-1979—When dispute with regard to second agreement [dated 20.12.1980] arose in 1985 contractor gave notice for appointment of arbitrator and the matter was referred to arbitration—In that reference contractor raised the dispute pertaining to the first agreement—Arbitrator appointed in December 1985 with reservation that the claim was barred by the period of limitation—Held: Cause of action arose on 29-8-1979, the date of notice of demand—Hence, Claim before the arbitrator in December 1985 barred by period of limitation—Letter written in 1983 would not give fresh cause of action because on that date cause of action for recovering the amount was barred by the period of three years prescribed under Art. 137 of the Limitation Act—Under S. 3 of the Limitation Act it was E
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A *the duty of the arbitrator to reject the claim as it was, on the face of it, barred by limitation—Limitation Act, 1963, Art. 137 and S.3.*

B *Arbitration—Award—Speaking or non-speaking—Contractor claimed damages for delay in handing over the work site—Arbitrator awarded damages and also gave reasons for it—Held: The reasons clearly reveal that the award is a speaking award—Hence, court can go behind it.*

C The predecessor of the appellant executed a contract with the predecessor of the respondent for certain construction within a wild life sanctuary. The agreement stipulated that no claim for delay in giving the entire site or giving it gradually would be tenable and in such cases the appellant was only obliged to extend the time for completion of the work.

D The respondent raised a dispute on 29-8-1979 for losses incurred due to delay in handing over the work site but there was no response from the appellant and no payment was made. Thereafter a supplementary agreement was executed between the appellant and the respondent in which it was nowhere stated that the respondent's alleged right of getting payment for damages or losses suffered was kept alive. On the contrary, the respondent had agreed to complete the work within the time stipulated in the second agreement by charging some higher rate. The respondent had not sought any reference of the aforesaid dispute within three years from the date when cause of action arose i.e., 29-8-1979. However, the appellant wrote a letter in 1983 repudiating the respondent's claim on account of damages or losses suffered by him.

F When a dispute arose with regard to the second agreement the respondent gave a notice on 2-12-1985 to appoint an arbitrator and the matter was referred to arbitration. In that reference, the respondent raised certain claims relating to the work done under the first agreement. The appellant appointed an arbitrator with a specific reservation regarding the tenability, maintainability and validity of reference as also on the ground that the claim was barred by the period of limitation and it pertained to excepted matters in the terms of the general conditions of the contract.

H The arbitrator awarded damages for losses incurred by the respondent "for the reasons" of delay in handing over the work site to the respondent under the first agreement. The award was made rule of the Court and the appeal filed against it was dismissed by the High Court. Hence this appeal.

On behalf of the appellant it was contended that the award passed by the arbitrator was without jurisdiction and that the claim made by the respondent was barred by the period of limitation. A

On behalf of the respondent it was contended that the award was non-speaking and, therefore, the courts below rightly refused to interfere with it. B

Allowing the appeal, the Court

HELD: 1.1. It is settled law that arbitrator derives his authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. Further, the Arbitration Act, 1940 does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. [165-G-H; 166-B-C] C

1.2. To find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretations of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. Arbitrator may have jurisdiction to entertain the claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. [166-F-H; 167-A] D E F

Continental Construction Co. Ltd. v. State of M.P., [1988] 3 SCC 82; *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation*, [1997] 11 SCC 75; *H.P. State Electricity Board v. R.J. Shah and Company*, [1994] 4 SCC 214 and *Associated Engineering Co. v. Government of A.P.*, [1991] 4 SCC 93, relied on. G

1.3. In the instant case, the award passed by the arbitrator is against the conditions agreed by the contacting parties and is in conscious disregard H

A of stipulations of the contract from which the arbitrator derives his authority. His appointment as a sole arbitrator itself was a conditional one. Despite this he has ignored the stipulations and conditions between the parties. Hence, the said award is, on the face of it, illegal. [168-G-H; 169-A-B]

B 2. Right to refer the dispute to the arbitrator arose in 1979 when the contractor gave a notice demanding the amount and there was no response from the appellant and the amount was not paid. The cause of action for recovery of the said amount arose from the date of the notice. The contractor cannot wait indefinitely and is required to take action within the period of limitation. Hence, the claim before the arbitrator in December 1985 was barred by the period of limitation. Letter written in 1983 by the appellant repudiating the respondent's claim on account of damages or losses sustained by him would not give a fresh cause of action. On that date cause of action for recovering the said amount was barred by the period of three years prescribed under Article 137 of the Limitation Act, 1963. Under Section 3 of the Limitation Act, it was the duty of the arbitrator to reject the claim as it was, on the face of it, barred by the period of limitation.

[171-G-H; 173-C-D]

State of Orissa v. Damodar Das, [1996] 2 SCC 216 and *Panchu Gopal Bose v. Board of Trustees for the Port of Calcutta*, [1993] 4 SCC 338, relied on.

Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, [1988] 2 SCC 338, referred to.

F 3. The reasons, which are specifically mentioned in the award for granting damages, clearly reveal that the arbitrator has passed a speaking award. Hence the Court could go behind it.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 507 of 1992.

G From the Judgment and Order dated 11.9.91 of the Patna High Court in M.A. No. 621 of 1990.

Dhruv Mehta and M.P. Vinod for the Appellant.

G.L. Sanghi and Raj Kumar Mahta for the Respondent.

H The Judgment of the Court was delivered by

SHAH, J. This appeal is filed against the judgment and order dated 11th September, 1991 passed by the Patna High Court, Ranchi Bench in Miscellaneous Appeal No.621 of 1990 under Section 39(1)(vi) of the Arbitration Act, 1940 (hereinafter referred to as "the Act"). The High Court dismissed the appeal filed by the appellant and confirmed the order dated 2nd April, 1990 passed by the Subordinate Judge, Ist Court, Chas in Arbitration Suit No. 28 of 1988 by which award is made rule of Court with 8 per cent per annum interest from the date of the decree. A B

It is undisputed that the National Mineral Development Corporation, predecessor of the Steel Authority of India Limited on 1.8.1977 executed a contract with the respondent for construction of tailing-cum-storage reservoir at Kundi for Megha Taburu Iron Ore Project. As per the terms of the contract, the work was to be completed within a period of two years. During this period, Public Sector Iron and Steel Companies (Re-structuring and Miscellaneous Provisions) Act, 1978 was passed and Steel Authority of India Limited became the employer in place of National Mineral Development Corporation. Further, the contractor, N.C. Budharaja also died and was succeeded by the present respondent. C D

After two years of contract period, on 29th August, 1979, respondent raised the claim of about 18 lakhs as damages for delay in handing over work sites and allied reasons. On 20th December, 1980, a supplementary agreement was executed between the appellant and the respondent for the same work at an increased rate. The relevant part of the said agreement is as under: E

"The Supplementary agreement made this twentieth day of December, 1980 between Steel Authority of India Limited having its registered office at Hindustan Times House, 18/20, Kasturba Gandhi Marg, New Delhi — 110 001 and having one of its units at Bokaro Steel Plant at Bokaro Steel City (hereinafter referred to as the (Employer) which expression shall include its successors and assigns) of the one part and M/s N.C. Budharaja Govt. and Mining Contractor, at Jharpada, P.O. Budheswari Colony, Bhubaneswar (hereinafter referred to as the "Contractor") which expression shall include its successors and assigns of the other part. F G

WHEREAS the contractor entered into an agreement dt. 1st August 1977 with M/s National Mineral Development Corporation Limited in regard to the work of "Constructions of Tailing-cum-Storage Reservoir" at Meghahatuburu Iron Ore Project relating to their Meghahatuburu H

A Iron Ore Project.

B AND WHEREAS the said unit of the National Mineral Development Corporation Limited after the coming into force of the Public Sector Iron and Steel Companies (Restructuring and Miscellaneous Provisions) Act, 1978 was transferred to Steel Authority of India Limited and declared as a captive unit for the Bokaro Steel Plant of Steel Authority of India Limited.

C AND WHEREAS pursuant to the provisions of Section 23 of the Restructuring Act aforesaid, the agreement entered into by and between M/s National Mineral Development Corporation Ltd. in respect of Meghahatuburu unit of M/s National Mineral Development Authority Ltd. became fully enforceable and effective against or in favour of Steel Authority of India Limited.

D AND WHEREAS the Contractor is yet to execute a considerable portion of the work more particularly described in the schedule to this agreement.

E AND WHEREAS the contractor has agreed to complete the said balance work as on 12.3.80 the estimated quantity of which is set out in document specified at 2(d) on the terms and conditions hereinafter enumerated."

Further clauses 3 and 4 of the said agreement read as under:

F "3. In consideration of the payments to be made by the employer to the Contractor as hereinafter mentioned the contractor hereby covenants with the employer to construct, complete and maintain the works in conformity with the provisions of contract in all respect.

G 4. The employer hereby covenants to pay to the contractor in consideration of the construction, completion and maintenance of the works the contract price *at the time and in the manner prescribed by the contract.*"

H Despite the aforesaid fact that the supplementary agreement was executed for the same work at an increased rate, it is stated that the appellant wrote letter dated 3.9.1983 repudiating claim of 18 lakhs on account of damages for any loss sustained by the contractor as claimed by him by his letter dated 29th August, 1979.

Thereafter, dispute arose in the year 1985 for the work with regard to second agreement dated 20th December, 1980 and the matter was referred to arbitration. In that Reference, respondent raised certain claims relating to the work done under the first agreement. On 2nd December, 1985, the appellant raised an objection that the claim could not be decided by the Arbitrators as the same was pertaining to previous agreement. Thereafter respondent gave notice dated 2nd December, 1985 to the appellant to appoint sole arbitrator as provided for under the first agreement. On 10th December, 1985, the appellant appointed sole arbitrator "with reservation regarding the tenability, maintainability and validity of the Reference as also on further grounds that the claim was barred by the period of limitation and that it pertained to excepted matters of general conditions of the contract".

On 11th July, 1986, the arbitrators gave an award pertaining to the dispute under the agreement dated 20.12.1980. Against the claim of Item No.1 of Rs.17 lakhs and odd pertaining to first agreement, the arbitrators awarded 'Nil'; this award has been made rule of the Court by the High Court of Delhi.

Meanwhile, the appellant challenged the jurisdiction of the sole arbitrator by filing Miscellaneous Case No. 22 of 1987. Finally, the High Court dismissed the Revision Application on 22nd August, 1988. Thereafter on 18th November, 1988, the sole arbitrator made an award granting damages to the tune of Rs.11,26,296 as principal sum (unliquidated damages) and a further sum of Rs.12,06,000 as interest on the above principal amount from 29th August, 1979 till the date of the Reference, i.e., 15th December, 1985. The arbitrator also awarded future interest at the rate of 17 per cent from the date of the award to the date of payment or the date of decree whichever is earlier. By order dated 2nd April, 1990, the learned Sub-Judge made the award rule of the court with a modification for the payment of interest from the date of the decree at the rate of 8 per cent on the principal amount or unpaid part till the date of actual payment. The appeal filed before the High Court against the said judgment and decree was also dismissed. Hence this appeal.

At the time of hearing, the learned counsel for the appellant submitted that the award passed by the arbitrator is

- (a) without jurisdiction,
- (b) The claim made by the respondent was on the face of it barred by the period of limitation, and
- (c) Award of interest is wholly unjustified and illegal.

A The learned counsel for the respondent supported the order passed by the High Court. He submitted that:

(1) The award is non-speaking. Hence, courts below rightly refused to interfere with.

B (2) The question, whether claim made by the contractor was within period of limitation or not, was required to be decided by the arbitrator, and

(3) There is no prohibition for awarding interest from the date of the claim till the date of reference and thereafter.

C For deciding the controversy, it would be necessary to refer to the material part of the award dated 18th November, 1988 which is as under:

“The claimant has put forth a claim amounting to Rs.18,10,014.48 plus interest on the same amount at 30 per cent per annum from 29.8.79 till date of payment.

D The amount of interest at the above rate on the claim amount from 29.8.79 till 18.11.88, i.e., date of “AWARD” worked out to Rs.33,39,351.00 (Rupees Thirty three lakhs thirty nine thousand three hundred fifty one only).

E Thus the total amount of claims including interest up to the date of “AWARD” works out to Rs.51,49,365.48 (Rupees fifty one lakhs forty nine thousand three hundred sixty five and paise forty eight only).

F On perusal of all documents filed by both parties and relied upon by the parties and keeping in view oral and written submissions and chain of arguments of both parties relating to factual and legal, *I am convinced that the claimant sustained losses on account of the following reasons:-*

G (a) The work site is located in the wild-life sanctuary of Saranda Reserve forest. The project authorities issued work order without completing the departmental formalities in obtaining permission of the Forest Department for executing the work inside wild-life sanctuary.

H (b) The project authorities could not obtain permission of Forest Department to take men and machinery to the work site as and

when necessary for executing the work. A

- (c) The project authorities could not obtain permission of Forest Department in time for making hutments at work site and could not hand over the site in time.
- (d) The project authority could not remove forest growths from the working area before issue of work order. B
- (e) The project authorities could not obtain permission of Forest Department for transporting the required machinery and materials for blasting operation and executing drilling and blasting work inside the wild-life sanctuary till March 1979. C
- (f) Delay in payment of legitimate dues of the claimant for more than nine years.

After recording the aforesaid reasons, the arbitrator held that in consideration of the documents, submissions and arguments of both the parties, contractor was entitled to be paid by the Steel Authority of India Limited a sum of Rs.11,26,296 as principal amount and a sum of Rs.12,06,000 as interest from 29th August, 1979 till 15th August, 1985, in all Rs.23,32,296. The Arbitrator also awarded future interest at the rate of 17 per cent on the principal sum of Rs.11,26,296 from the date of award till the date of payment or the date of decree whichever is earlier. D E

Learned counsel for the appellant submitted that the award is a speaking one and the Arbitrator has awarded the damages for the reasons that department failed to obtain various permissions from the forest department. The reasons which are specifically mentioned in the award for granting damages clearly reveal that the arbitrator has passed a speaking award. He pointed out the terms of the contract and submitted that it is apparent that arbitrator has awarded the amount for the items for which there is prohibition in the contract and thereby he has travelled beyond his jurisdiction. For this purpose, learned counsel for the appellant referred to conditions which are referred to by the learned Single Judge and the trial court. They are as under: F G

“Clause 25: No claim if work is abandoned or postponed—

The successful tenderer shall have no claim whatsoever against the Corporation if the work or any part thereof covered by these tender documents *if postponed to any later date* or abandoned in the overall interest of the Corporation or for any other reason. The H

A Corporation's decision in the matter shall be final and binding on the contractor.

Clause 32: Site for execution of work:

B Site for execution of work will be available as soon as the work is awarded. In case it is not possible for the Corporation to make the entire site available on the award of work the contractor will have to arrange his working programme accordingly. *No claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable.*

C *Clause 39: (Force majeure):*

D *No failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the contractor, one against the other, if such failure omission arises from an act of God, which shall include natural calamities such as fire, flood, earthquake, hurricane or any pestilence, or from civil strike, compliance with any statute or regulation of Government, lockouts and strikes, or from any political or other reasons beyond the control of either the Corporation or the Contractor, including war whether declared or not, Civil war or state of insurrection.*

E *Clause 5 (iv): General Conditions of Contract (Time for Completion of work covered by the Contract):*

F *Failure or delay by the Corporation to hand over to the contractor possession of the lands necessary for the execution of the work, or to give the necessary drawings instructions or any other delay by the Corporation which due to any other cause whatsoever shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damage or compensation therefor provided that the Corporation may extend the time for completion of the work by such period as it may consider necessary and proper.*

G Before the learned Sub-Judge and the High Court, it was submitted that in view of the aforesaid conditions which are laid down in the contract which prohibited award of damages or compensation, it was not open to the arbitrator to award damages for the alleged losses sustained on account of not obtaining or delay in obtaining various permissions required to be taken under the law
H or rules from the Forest Department.

Re: Lack of Jurisdiction of the Arbitrator

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From the Award quoted above, it is apparent that damages are granted by the arbitrator for delay in obtaining permission from the Forest Department:

- (a) for executing the work inside the wildlife sanctuary;
- (b) to take man and machinery to the worksite in the forest;
- (c) for making hutments at the work site and failure to hand over site in time;
- (d) failure to remove Forests growths from working area before issue of work order; and
- (e) for transporting the required machinery and materials for blasting operation and executing the drilling and blasting work inside the wild-life sanctuary till March, 1979.

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Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the contractor is required to arrange his working programme accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of Government or other reasons beyond the control of either the Corporation or the Contractor. Obtaining permission from Forest Department to carry out the work in wild life sanctuary depends on statutory regulations. Clause (vi) of General condition of the contract also provides that failure or delay by the Corporation to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation which due to any other cause whatsoever would not entitle the contractor to damage or compensation thereof ; in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his

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A part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs. 11 lakhs and more for the alleged lapses or delay in handing over work site is, on the face of it, against the terms of the contract.

B Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. In *Continental Construction Co. Ltd. v. State of Madhya Pradesh*, [1988] 3 SCC 82, this Court considered the clauses of the contract which stipulated that contractor had to complete the work in spite of rise in the prices of materials and also rise in labour charges at the rates stipulated in the contract. Despite this, the arbitrator partly allowed contractor's claim. That was set aside by the Court and the appeal filed against that was dismissed by this Court by holding that it was not open to the contractor to claim extra costs towards rise in prices of material and labour and that arbitrator misconducted himself in not deciding the specific objection regarding the legality of extra claim. In that case, the **D** Court referred to the various decisions and succinctly observed:

E "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. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the court provided his error appears on the face of the award."

F It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. **H** Arbitrator may have jurisdiction to entertain claim and yet he may not have

jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. Dealing with similar question this Court in *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation*, [1997] 11 SCC 75 held thus:

“It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellants on that account”.

However, the learned Counsel for the Respondent submitted that the award being non-speaking one, the learned Sub-Judge and the High Court have rightly refused to go behind the award or interfere with. In our view, this submission is without any substance. It is apparent that the Arbitrator has awarded Rs. 11,26,296 for the losses sustained for the reasons stated therein which we have incorporated in the previous paragraph. These reasons only pertained to non-obtaining or delay in obtaining permission from the Forest Department as the work site was located in the wild-life sanctuary of Saranda reserve forest. The Arbitrator in his award in terms mentioned “*I am convinced that the claimant sustained losses on account of following reasons*” and thereafter reasons are recorded. Therefore, it cannot be said that the award is a non-speaking one.

Further even if such reasons are not recorded, the claim itself for such prohibited items was not entertainable by the Arbitrator. In the agreement between the parties, there is specific bar to raising of such claims. Hence the decision of the arbitrator is without jurisdiction. This aspect is also dealt with by this Court in *H.P. State Electricity Board v. R.J. Shah and Company*, [1999] 4 SCC 214. In paragraph 26, the Court held as under:

“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 the arbitrator. If the answer is in affirmative, then it is clear that 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

A the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is 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.”

B The Court further held that in order to find out whether the Arbitrator has acted in excess of the jurisdiction, the Court may have to look into some documents including the contract as well as the reference of the dispute made to the Arbitrator limited for the purpose of seeing whether the Arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.

C Further dealing with the similar condition in the contract, such as no claim for price escalation other than those provided therein shall be entertained and “the Contractor will not be entitled for any extra rate due to change in selection of quarries”, this Court in *Associated Engineering Co. v. Government of Andhra Pradesh and Anr.*, [1991] 4 SCC 93, observed that four claims mentioned therein were not payable under the contract, in fact, it prohibited such payment and for this purpose. The Court held “this conclusion is reached not by construction of the contract but by merely looking at the contract”. The Court further observed that the Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract; his sole function is to arbitrate in terms of the contract. The Court further held thus:

E “An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.”

G In view of the aforesaid settled law, the award passed by the arbitrator is against the conditions agreed by the contracting parties and is in conscious disregard of stipulations of the contract from which the arbitrator derives his authority. His appointment as a sole arbitrator itself was conditional one and H he was informed that the same was “with reservation regarding the tenability,

maintainability and validity of the Reference as also on further grounds that the claim was barred by the period of limitation and that it pertained to excepted matters of general conditions of the contract". Despite this he has ignored the stipulations and conditions between parties. Hence, the said award is, on the face of it, illegal. A

Re: LIMITATION B

Our next question is of limitation. The period of limitation is required to be considered on the basis of the arbitration clause between the parties which is as under:

"All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution meaning operation or effect thereof or to the rights or liabilities of parties or arising out of or in relation thereto, whether during or after completion of the contract, or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them and to the M.D./Chairman of the Corporation (who will be the appointing Authority) be referred for adjudication to be sole Arbitrator to be appointed as hereafter provided. C D

The Appointing Authority will send within thirty days of the receipt of notice a panel of three names of persons not directly connected with the work of the contractor who will select any one of the persons named to be appointed as a sole Arbitrator within thirty days of receipt of the names. If the Contractor fails to select the name from the panel and communicate within 30 days, the appointing authority shall appoint one out of the panel as sole Arbitrator. E F

If the Appointing Authority fails to send to the contractor the panel of three names, as aforesaid, within the period specified, the Contractor shall send to the Appointing Authority a panel of three names of persons who shall all be unconnected with the organisation by which the work is executed. The Appointing Authority shall on receipt of the names as aforesaid select any one of the persons named and appoint him as the Sole Arbitrator, if the appointing authority fails to select the person and appoint him as the Sole Arbitrator within 30 days of receipt of the panel and inform the contractor accordingly, the Contractor shall be entitled to invoke the provisions of the Indian Arbitration Act, 1940 and any statutory modification thereof." G H

A In view of the aforesaid arbitration clause, even though the claim made by the contractor was time barred, the dispute was required to be referred to the arbitrator. However, the reference was subject to the condition that it was barred by the period of limitation. In that context, the learned counsel for the appellant submitted that it is settled law that application under Section 20 or notice for appointment of arbitrator is to be filed within three years from the date when 'cause of action' arises as provided in Article 137 of the Limitation Act, 1963. The application filed by the contractor in December 1985 was, on the face of it, time barred because the cause of action to recover the amount arose, according to the contractor, in August 1979 when he demanded the alleged damages for loss suffered by him because of the delay in handing over the worksites. He further submitted that, in the present case, in year 1980 for the same work, the Contractor has executed a supplementary agreement for the completion of the work within the stipulated time and at a higher rate. This would also show that Contractor waived his alleged right of asking for appointment of Arbitrator as provided in arbitration clause. He referred to the arbitration clause and pointed out that within 30 days of the receipt of the notice, arbitrator is required to be appointed by the Managing Director. If arbitrator is not appointed then Contractor has option to send the panel of three names from which arbitrator is required to be appointed. He contended that after the supplementary agreement, there was no question of adjudicating the so-called demand made by the contractor in the year 1979. In any case, he submitted that the Contractor ought to have approached the Court under Section 20 or ought to have demanded arbitration within three years from the date of the notice demanding the amount for loss suffered by him. As against this, learned Counsel for the respondent submitted that the cause of action to refer the matter to the arbitrator arose only in 1983 when respondent denied contractors' claim.

F For deciding this controversy, we would first refer to the decision of this Court in the *State of Orissa & Ors. v. Damodar Das*, [1996] 2 SCC 216 wherein this Court held that Section 3 of the Limitation Act, 1963, enjoys the power to consider the question of limitation whether it is pleaded or not. The Court in paragraph 5 held as under:

G "Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require an arbitration take place upon the dispute

H

concerned. *The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued.* A

“Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.” B

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.” C

The Court also referred to the earlier decision in *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*, [1993] 4 SCC 338, where the Court observed as under: D

“The Period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned. E

Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.” F

Applying the aforesaid ratio in the present case, right to refer the dispute to the arbitrator arose in 1979 when Contractor gave a notice demanding the amount and there was no response from the appellant and the amount was not paid. The cause of action for recovery of the said amount arose from the date of the notice. Contractor cannot wait indefinitely and is required to take action within the period of limitation. In the present case, there was supplementary agreement between the parties. *Supplementary agreement* nowhere provides that so-called right of the contractor to recover damages H

A was in any manner saved. On the contrary, it specifically mentions that contractor was yet to execute a considerable portion of the work more particularly described in the schedule to the agreement. And that the contractor has agreed to complete the said balance work on the terms and conditions enumerated in the agreement. Now, in this set of circumstances, contractor cannot wait and approach the authority or the court for referring the dispute to the arbitrator beyond the period of limitation. Section 37 of the Arbitration Act specifically provides that provisions of the Indian Limitation Act shall apply to the arbitrations as they apply to proceedings in the Court.

C Learned counsel for the respondent relied upon the decision of this Court in *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*, [1988] 2 SCC 338 for contending that cause of action for referring the claim arises only when the appellant disputed the right of the respondent to recover the damages claimed by him. In the said case, the Court has observed that on completion of the work, the right to get payment would clearly arise, but wherein the final bills have not been prepared and when the assertion of the claim was made on 28th February, 1983 and there was non-payment, the cause of action arose from that date. In that case, application under Section 20 was filed in January 1986. The Court also observed that:

E "it is true that the party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. *See Law of Arbitration by R.S. Bachawat, first edition, page 354.* There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. *Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.*"

H In the present case, as stated above, on 29th August, 1979, the contractor wrote letter making certain claims. Thereafter, the supplementary agreement was executed on 20th December, 1980. In that agreement it is nowhere stated that contractors alleged right of getting damages or losses suffered by him

was kept alive. On the contrary, he has agreed to complete the work within the time stipulated in the second agreement by charging some higher rate. Contractor has not sought any reference within three years from the date when cause of action arose, i.e., from 29th August, 1979. Only in 1985 when dispute arose with regard to the second agreement, respondent gave notice on 2nd December, 1985 to appoint sole arbitrator. The sole arbitrator was appointed with a specific reservation regarding the tenability, maintainability and validity of reference as also on the ground that claim was barred by the period of limitation and it pertained to excepted matters in terms of general conditions of the contract. From these facts, it is apparent that claim before the arbitrator in November-December 1985 was apparently barred by period of limitation. Letter dated 3rd September, 1983 written by the appellant repudiating the respondent's claim on account of damages or losses sustained by him would not give fresh cause of action. On that date cause of action for recovering the said amount was barred by the period of three years prescribed under Article 137 of the Limitation Act, 1963. Under Section 3 of the Limitation Act, it was the duty of the arbitrator to reject the claim as it was on the face of it, barred by the period of limitation.

In the present case, in view of the aforesaid findings, it is not necessary to discuss the contention with regard to the award of interest prior to coming into force of the Interest Act, 1978 or that no interest could be awarded on the unliquidated damages. It is also not necessary to discuss whether arbitration agreement provided in first agreement executed in 1977 would survive after execution of the second agreement in December, 1980.

In the result, the appeal is allowed with costs. The impugned order passed by the Patna High Court, Ranchi Bench in Miscellaneous Appeal No. 621 of 1990 and the order dated 2nd April, 1990 passed by the Subordinate Judge, 1st Court, Chas in Arbitration Suit No. 28 of 1988 are quashed and set aside.

V.S.S.

Appeal allowed.