(2014) 08 AP CK 0042

Andhra Pradesh High Court

Case No: Rev. Civil Miscellaneous Appeal Miscellaneous Petition No. 1083 of 2014 in Civil Miscellaneous Appeal No. 806 of 2009

J.K. Cold Tyre Retraders		APPELLANT
	Vs	
United India Insurance Company Limited		RESPONDENT

Date of Decision: Aug. 22, 2014

Acts Referred:

- Arbitration Act, 1940 - Section 30, 33
- Arbitration and Conciliation Act, 1996 - Section 11(6), 24, 26, 28, 31(c)

Hon'ble Judges: R. Subhash Reddy, J; M. Satyanarayana Murthy, J

Bench: Division Bench

Advocate: J. Prabhakar, Advocate for the Appellant; Ravi Shankar Jandhyala, Advocate for the Respondent

Judgement

M. Satyanarayana Murthy, J.

The first respondent in Arbitration Original Petition No. 247 of 2003 preferred this Appeal against the impugned Order dated 25.03.2003, passed in Arb. O.P. No. 247 of 2003 by the III Additional District Judge, Kakinada, East Godavari District, allowing the petition filed under Section 34 of Arbitration and Conciliation Act, 1996 (For short, ''the Act'') setting aside the impugned Award passed by the Sole Arbitrator, second respondent herein.

2. The appellant herein was the first respondent and the first respondent herein was the petitioner and the second respondent herein was the second respondent before the III Additional District Judge, Kakinada (For short, ''the Civil Court''). For the sake of convenience, the parties hereinafter will be referred as arrayed before the Civil Court.

3. The petitioner filed a petition before the Civil Court under Section 34 of Arbitration and Conciliation Act, 1996 (For short, ''the Act'') seeking to set-aside the

impugned award dated 21.04.2003, passed by the second respondent, in favour of the first respondent, alleging that the first respondent insured its factory with the petitioner for a total sum of Rs. 54,45,216/- on all his assets including raw materials and tyres, on various dates, by obtaining 8 policies. Subsequently, a fire accident took place on 01.07.2001 and lost major portion of the property. Thereafter, the first respondent submitted claim for Rs. 55,61,590/- towards full and final settlement, but the first respondent-appellant did not accept the amount offered by the petitioner-Insurance Company. Thereupon, the matter was referred to sole arbitrator-second respondent, who is a retired officer of the Insurance Company.

4. The sole arbitrator commenced arbitration proceedings on 11.09.2002; after following due procedure, recorded the evidence of PW. 1, marked Exs. P-1 to P-41 on behalf of the appellant, petitioner therein, examined RWs. 1 to 3 and marked Exs. R-1 to R-56 on behalf of the first respondent, respondent, before the sole arbitrator at Kakinada respectively.

5. Thereafter, the sole arbitrator passed the Award dated 21.04.2003 in favour of the first respondent-appellant and against the petitioner-first respondent.

6. Aggrieved by the impugned Award, the petitioner-Insurance Company preferred Arbitration O.P. No. 247 of 2003, before the III Additional District Judge, Kakinada, raising several grounds. The main contentions raised in the grounds of Arbitration Petition are as follows:

a) The petitioner-Insurance, company sought the relief of setting aside the Award passed by the sola-arbitrator alleging that the arbitrator committed grave error in visiting the factory premises without his knowledge and notice, and assessed the loss basing on his own assessment at Rs. 40,47,270/- together with subsequent interest;

b) The sole-arbitrator gave go-bye to the procedure prescribed under the Arbitration and Conciliation Act, Rules framed thereunder;

c) The impugned Award of the Arbitrator is not based on technical or legal basis, did not follow the procedure prescribed under Sections 24, 28 and 31(c) of Arbitration and Conciliation Act and exceeded his powers, thereby the Award is liable to be set-aside;

d) The Award of the Arbitrator is biased, the conclusions arrived by the arbitrator are based on presumptions and assumptions, not on the basis of any evidence, thus the sole arbitrator violated terms and conditions and principles of natural justice in passing the Award;

e) The Arbitrator dealt with the dispute beyond his reference and visited the factory premises without the consent and notice of the petitioner-Insurance Company, which amounts to misconduct on the part of the Arbitrator and thereby the Award is liable to be set-aside;

f) The arbitrator obtained report from M/s. S.D. Associates without giving any opportunity to the petitioner-Insurance Company and without any prior information and the procedure adopted by the arbitrator is against the principles of natural justice; even otherwise, none were examined from M/s. S.D. Associates, as witnesses providing an opportunity to the Insurance Company to cross-examine the witnesses and thereby the report of M/s. S.D. Associates cannot be the basis for passing the Award and the Award passed by the arbitrator is biased, totally in violation of Section 34 of Arbitration and Conciliation Act.

7. The first respondent-appellant filed counter totally in support of the award passed by the second respondent-sole arbitrator in all respects while contending that the visit of factory premises by the arbitrator is not without any notice, and during the course of visit of the factory on 08.12.2002, photographs were taken and they were produced. The petitioner did not raise any objection at the time of visit of the factory premises by the arbitrator, thereby it amounts to consenting the visit of the factory premises by the arbitrator and at this stage, visit of the arbitrator cannot be questioned.

8. The arbitrator not being a technical person appointed M/s. S.D. Associates to estimate the loss and damage caused to the building and a copy of the appointment order dated 25.11.2002, was sent to the Insurance Company and the first respondent, even then no objection was raised by the Insurance Company for appointing M/s. S.D. Associates. Thereby, the petitioner-Insurance Company waived its objection i.e., the right to question the validity of appointing M/s. S.D. Associates, so also the visit of factory premises by the arbitrator-second respondent.

9. Finally it is contended that the arbitrator conducted arbitration proceedings directly in accordance with the provisions of Section 24 of Arbitration and Conciliation Act, and that there are no grounds to set-aside the award under Section 34 of Arbitration and Conciliation Act.

10. The second respondent-sole arbitrator filed counter totally in support of the award passed by him pointing out several irregularities committed by the Surveyor of the Insurance Company in assessing the loss or damage caused to the building and no objection was taken at the time of his visit and appointing M/s. S.D. Associates for assessment of loss. Therefore, it is not open to the petitioner-Insurance Company at this stage to point out those irregularities, and as such the award passed by him is not in violation of principles of natural justice and not biased, prayed to dismiss the petition.

11. The Civil Court issued notice to the arbitrator calling entire record including the arbitration award. Accordingly, the sole arbitrator submitted the entire record to the Civil Court.

12. Upon hearing argument of both the counsel, the Civil Court passed the impugned order setting-aside the award passed by the Sole arbitrator on several

grounds.

13. Aggrieved by the impugned order dated 25.03.2009 passed in Arbitration O.P. No. 247 of 2003 by the learned III Additional District Judge, Kakinada, the first respondent-appellant preferred the Present Appeal mainly contending as follows:

a) The Civil Court exceeded the power conferred under Section 34 of Arbitration and Conciliation Act and set-aside the Award passed by the sole arbitrator, second respondent herein;

b) The visit of factory premises by the arbitrator and the proceeding minutes book of arbitrator clearly discloses that the parties were put to notice about the proposed visit of arbitrator, prior to his visit. Even otherwise, the learned counsel for the petitioner-Insurance Company and the Insurance Company officials were present on the spot during visit of the factory premises and no objection was raised at that time or subsequent to his visit, hence it is not a ground to set-aside the arbitration award;

c) The Civil Court failed to take into consideration Exs. C-1 to C-10, which were duly marked without any objection before the arbitrator. Merely because arbitrator filed a detailed counter, it is not sufficient to conclude that the arbitrator has violated Section 34 of Arbitration and Conciliation Act and the award cannot be set-aside on this ground;

d) The proceedings dated 25.11.2002 clearly shows that M/s. S.D. Associates was appointed as loss assessors to find out the damage caused to the building and it is within the notice of Insurance Company, but no objection was raised and it is only for the first time, when such allegation is made in the petition filed under Section 34 of Arbitration and Conciliation Act. On the other hand, the contention of the petitioner-Insurance Company is that no witnesses were examined to prove the report submitted by M/s. S.D. Associates, who admitted the loss, but this ground is not available for the reason that there is no need to examine any person from M/s. S.D. Associates as witness. Therefore, it does not amount to violation of principles of natural justice in passing the award;

e) The Civil Court cannot sit in Appeal against the award passed by the Arbitrator while deciding a petition under Section 34 of Arbitration and Conciliation Act, but erroneously exceeded its power conferred on it under Section 34 of Arbitration and Conciliation Act, thereby committed an error.

Finally prayed to set-aside the impugned order passed by the Civil Court in Arbitration O.P. No. 247 of 2003, filed under Section 34 of Arbitration and Conciliation Act, confirming the impugned Award passed by the sole arbitrator-second respondent.

14. During course of argument, learned counsel for the first respondent-appellant reiterated the grounds urged in the grounds of Appeal totally supporting the award passed by the sole arbitrator. Whereas, learned counsel for the petitioner-Insurance

Company contended that there are several irregularities committed in the arbitration proceedings conducted by the sole arbitrator during proceedings and drawn the attention of this Court to the personal visit of sole arbitrator to the factory, without notice, so also appointing M/s. S.D. Associates to estimate the loss and also filing detailed counter by the sole arbitrator itself is sufficient that the arbitration is biased and prayed to dismiss the Appeal confirming the impugned order passed by the Civil Court.

15. Considering rival contentions, perusing the material available on record, the point that arises for consideration is:

Whether the impugned award passed by the sole arbitrator-second respondent herein is without notice to the petitioner-Insurance Company and the same is liable to be set-aside under Section 34 of Arbitration and Conciliation Act, in view of the alleged irregularities pointed out by the petitioner-Insurance Company? If not, whether the Impugned Order passed by the Civil Court in Arbitration O.P. No. 247 of 2003 be sustained?

16. POINT: The specific provision under Arbitration and Conciliation Act to set-aside the Award is Section 34(2) of Arbitration and Conciliation Act, which contemplates different circumstances under which the award can be set aside, is extracted hereunder for better appreciation:

34(2) . . . An arbitral award may be set aside by the Court only if -

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

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

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

(v) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

17. Besides the statutory provisions under Arbitration and Conciliation Act, this Court laid down certain principles for setting-aside the award passed by the Arbitrator under Section 34(2) of Arbitration and Conciliation Act and a Division Bench of this Court in The Mercury Metal Corporation Vs. A.P. Backward Classes Co-Operative Finance Corporation Ltd. laid down the following principle:

"A perusal of Section 34(2) of 1996 Act would show that an award may be set aside by the Court on the grounds of procedural non compliance (let us say, procedural grounds) and/or on grounds which are of substantial nature (substantive grounds). The substantive grounds may include procedural grounds but not vice versa for obvious reasons. Section 34(2)(a)(iii) and (iv) of the Act broadly fall under the category of procedural grounds. These are non-service or improper service of notice of appointment of arbitrator or non service or improper service of notice of arbitral proceedings. In a given case, when an arbitrator is appointed under Section 11(6) of the Act without notice to a party, can also be a ground to set aside such an award. Similarly if the arbitrator proceeds without giving notice or it is proved that proper notice was not given to the Party, it is a ground to set aside arbitral award. In addition to this, Section 34(2)(a)(v) of the Act contemplates a situation where the composition of Arbitral Tribunal or arbitrary procedure is not in accordance with agreement of the parties or where the composition of Arbitral Tribunal or arbitral tribunal is in conflict with any of the provisions of Part-I of the Act. Many situations in which pre-arbitral procedure may not in accordance with agreement can be visualized like less number of members constituting Arbitral Tribunal than agreed, constituting Arbitral Tribunal at a place not agreed to by the parties and defective procedure evolved by the Arbitral Tribunal, which places one of the parties at an unfair and disadvantageous position.
"In addition to above procedural and substantive grounds for setting aside an award of arbitral tribunal, there are other grounds evolved in precedent law. These include error of fact apparent on the face of record, error of law apparent on the face of record, perversity in relation to each of these errors and bias."

18. Similarly, the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , while dealing with the phrase ''Public policy of India'' contained in Section 34 of Arbitration and Conciliation Act, held as follows:

"If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Sec. 34. However, such failure of procedure should be patient

affecting the rights of the parties".

And in the same judgment in Para 31, held as follows:

"The phrase ''Public policy of India'' used in S. 34 in context is required to be given wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ''public policy in Renusagar''s case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to:-

i) fundamental policy of Indian law; or

ii) the interest of India; or

iii) justice or morality, or

iv) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

19. In a Division Bench judgment of this Court in The Transmission Corporation of Andhras Pradesh Limited (A.P. Transco.) and Another Vs. Galada Power and Telecomunication Limited and Others, , it was held that when there are procedural lapses complained by the applicants and if they are true, the Award is vitiated and in the same judgment, this Court referred several instances of procedural lapses.

20. In view of the principles laid down in the decisions cited supra, the Award dated 21.04.2013 is liable to be set-aside only on the ground that there are procedural lapses contained in Section 34(2) of Arbitration and Conciliation Act and that the Award is against the public policy of India. Thus, the powers of the Civil Court under Section 34 are limited and the Civil Court cannot sit as a Court of Appeal and decide the validity of the Award passed by the Arbitrator.

21. In Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, , the Apex Court in Para 44 held as follows:

"44. From the resume of the aforesaid decisions, it can be stated that: (a) it is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled arbitrator to arrive 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;

(h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of wider arbitration clause such claim amount cannot be awarded as agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd. (supra) by relying upon the following passage from Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), which is to the following effect:- There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of

event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous.

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala-fide action;

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.

Even if the Award is non-speaking, jurisdiction of the Court is limited. The Award can be set-aside if the arbitrator acts beyond his jurisdiction. It is not open to the Court to speculate where no reasons are given by the Arbitrator as to what impelled the Arbitrator to arrive at his conclusion. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award."

22. According to the principle laid down by the Apex Court in the decision cited supra, even if the award is non speaking without assigning any reasons the Award is not liable to be set-aside by the Civil Court exercising power under Section 34(2) of Arbitration and Conciliation Act.

23. In the instant case on hand, the petitioner-Insurance Company pointed out several procedural lapses, which are as follows:

i) Visiting of the factory premises without prior notice to the Insurance Company;

ii) Appointing M/s. S.D. Associates, Architects and Civil Engineers, for assessing the loss sustained by first respondent-appellant in the fire accident;

iii) Accepting the report of M/s. S.D. Associates, without proving its contents by examining any witness;

iv) The sole arbitrator passed the Award against the principles of natural justice; and

v) The arbitrator acted in a biased manner.

24. In view of the specific procedural lapses pointed by the petitioner-Insurance Company, the Civil Court accepted the contentions and set-aside the award passed by the Arbitrator limiting amount of compensation to Rs. 22,10,330/- and directed to pay Rs. 10,330/- in addition to the amount already paid by the petitioner-insurance Company by way of interim award.

25. In view of the specific contentions and legal position referred supra, the scope of enquiry under Section 34(2) of Arbitration and Conciliation Act is limited. However, in the following circumstances, the Award can be set-aside:

a) When the Arbitrator mis-conducted himself;

b) Where the Arbitrator failed to follow the procedure for conducting arbitration proceedings;

c) Where the Arbitrator acted in a biased manner;

d) Where the arbitrator exceeded his power and passed an award beyond the scope of reference;

e) Where the award passed by the arbitrator is without consideration of any material; or

f) Where the award passed by the arbitrator is against the public policy of India.

26. In the instant case on hand, the main attributions made against the arbitrator amounting to misconduct in conducting arbitration proceedings and the instances of misconduct are:

a) Visit of the destroyed factory in the fire accident without informing to the petitioner-Insurance Company and visit of the premises for specific purpose of ascertaining the loss amounts to collection of evidence behind the back of the parties to the arbitrator and it amounts to misconduct;

b) Appointment of expert M/s. S.D. Associates, for assessment of loss without notice to the parties to the arbitration; and

c) The instance of bias attributed to the arbitrator is filing of a counter in a petition filed under Section 34(2) of Arbitration and Conciliation Act.

27. Considering, the specific attributions made against the arbitrator, more particularly, misconduct, the Civil Court set-aside the award. The said finding is questioned by the first respondent-appellant herein on the ground that prior intimation was given to both parties in the arbitration proceedings and in their presence only inspection was done and the signatures of the parties were obtained on intimation to the parties to the arbitration or to their agents in the proceedings of arbitration. Therefore, it does not amount to misconduct. If really, the visit is only after information to both parties to the arbitration, certainly, such visit would not amount to misconduct, but here the Civil Court found that no intimation was given to the parties to the arbitration and collected evidence behind their back. In view of the specific contentions, we must necessarily advert to the proceedings dated 13.09.2002, to find out whether any intimation about the proposed visit was given to the parties to the arbitration and to find out whether the material whatever collected and report prepared by the arbitrator was furnished to the parties to the

arbitration. The proceedings dated 13.09.2002, at page No. 16 of arbitration proceedings minutes book is extracted hereunder for better appreciation:

"Respondents were informed that the sole arbitrator wanted to inspect the scene of accident at 13.09.2002.

Inspection of the scene in order to have a clear picture of the various issues involved in arriving at a reasonable assessment of the loss and also to understand all aspects of the loss sustained by the petitioner, I felt a personal visit to the scene of accident is absolutely needed. Hence, I visited the destroyed factory on 13.09.2002. The destroyed building was empty. All the damaged machines were removed from the premises. I found a big heap of ashes outside the compound wall behind the factory. I also found another big heap of debris in the corner of the compound. When I got the debris dug up, I found several bundles of burnt out rubber under the debris. When counted, there were more than 28 bundles. I asked the petitioner to collect other bundles thrown in and around the compound and get them photographed for the records."

28. According to the procedure contemplated under the Arbitration and Conciliation Act, the Arbitrator has to inform about the proceedings in advance and obtain signatures on all the dates of proceedings. The Arbitrator obtained signatures of parties to the arbitration or their representatives, except on 13.09.2002. The endorsement dated 13.09.2002 does not disclose that the parties to the arbitration were informed in advance about the proposed visit of the destroyed premises in the fire accident, by the arbitrator. Even assuming for a moment, that endorsement dated 13.09.2002 is true, the first respondent-appellant was informed that the sole arbitrator intended to inspect the scene of accident on 13.09.2002, but not to the petitioner-Insurance Company. Therefore, the inspection done by the sole arbitrator on 13.09.2002 for arriving at reasonable assessment of loss and to have clear picture of various issues is without any intimation to the parties to the arbitration, and as such it is nothing but collecting evidence by the sole arbitrator without informing anything to the parties to the arbitration and no report was prepared by the arbitrator about his inspection; copies of the report were not furnished to the parties to arbitration. In the absence of such intimation about the proposed visit and non-furnishing copy of the report, if any, prepared, such conduct directly amounts to misconduct.

29. The Apex Court in various judgments, time and again held that an enquiry behind the back of the parties amounts to misconduct.

30. The Hon''ble Apex Court in Payyavalu Vs. Kesanna AIR 1963 SC 21, held that if the arbitrator makes enquiries behind the back of the parties, it amounts to misconduct. Similarly, taking evidence behind the back of the parties also amounts to misconduct. In Ganga Prosad Vs. Nagar Mal 13 C.L.J. 399, it was held as follows:

"Where an arbitrator takes evidence behind the back of the parties without notice to them and bases his award on that evidence, it amounts to misconduct which affords ground for setting aside the award."

31. In another judgment of Punjab and Haryana High Court in Mehar Chand and Another Vs. Magan and Another, , it was held that when an enquiry was made by the arbitrator in the absence of parties, it amounts to misconduct. It was further held therein as follows:

"A provision in the arbitration agreement that the arbitrator will have power to make any decision he likes in regard to the property of the joint Hindu family of the parties does not give him an overriding power of making enquiries in the absence of the parties, to receive evidence from one party in the absence of another or to consult others in regard to what award he should make."

32. Similarly, making secret enquiries by arbitrator also amounts to misconduct as held by the Allahabad High Court in Ashrafi Lal Vs. Ramdeo 1951 A.L.J. 674, wherein it was held as follows:

"An arbitrator has no authority to make enquiries behind the back of the parties and to base his decision thereon. An arbitrator who makes secret enquiries privately and does not give an opportunity to the parties to explain the materials thus obtained is guilty of misconduct and the award is liable to be set aside."

33. The trial Court also relied on two judgments; in Wazir Chand Karam Chand Vs. Union of India and Another, , the Delhi High Court held that in arbitration proceedings, Rules of natural justice cannot be ignored and accepting evidence behind back of a party go to show that arbitrator is guilty of legal misconduct and thereby the award is liable to be set-aside; and in Smt. Kamala Saha and Others Vs. Jogeswar Prasad Saha and Others, , the Orissa High Court also reiterated the same principle.

34. In Tyebbhai Essubhai Thanawalla Vs. Abdul Husein Tyebally, , the Bombay High Court held that conducting the meeting by the arbitrator in an arbitration proceedings without there being proper notice to the parties amounts to misconduct.

35. The sum and substance of the principle laid down by the Bombay High Court in the decision cited supra is that when the arbitrator collected any evidence behind the back of the parties to the arbitration and utilizing the same or collecting any evidence secretly utilizing the same for purpose of passing award, certainly amounts to legal misconduct.

36. In the instant case on hand, as per the arbitration proceedings dated 13.09.2002, the sole arbitrator allegedly informed about his proposed visit to the first respondent-appellant and visited the premises in the absence of petitioner-Insurance Company, but the endorsement in the proceedings dated

13.09.2002 did not bear the signatures of the petitioner, respondent or their agents, who are supposed to participate during such visit, but the arbitrator visited the premises and collected some material, utilized the same for the purpose of passing award certainly, such conduct amounts to misconduct against the principles of natural justice.

37. Similarly appointing M/s. S.D. Associates, without notice to the parties to the arbitration and utilizing the report of M/s.S.D. Associates assessing the loss amounts to misconduct. Undoubtedly, the arbitrator can take assistance of an expert under Section 26 of Arbitration and Conciliation Act, which is extracted hereunder for better appreciation:

"26. Expert appointed by arbitral tribunal.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) appoint one or more expert to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report."

38. In view of the power conferred under Section 26 of Arbitration and Conciliation Act, an arbitrator, unless otherwise agreed by the parties, may appoint one or more experts to report to it on specific issues to be determined by the arbitral Tribunal and to give the expert any relevant information before the Arbitral Tribunal and at the same time, clause (2) therein contemplates, if any party so referred or if the arbitral Tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing, where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue and shall also make available to the parties to the arbitration for examination of all documents which are the basis for his report.

39. In the instant case on hand, there is no material to show that the parties have accepted the report of the expert, M/s. S.D. Associates, who are the loss assessors,

but based on the said report without following the procedure contemplated under Section 26 of Arbitration and Conciliation Act, the arbitrator passed the impugned award, which amounts to misconduct. Since it is nothing but collection of evidence without affording any opportunity to the parties either to accept or deny the report as per the procedure contemplated under Section 26 of the Act. Thus, the sole arbitrator totally deviated the procedure under Section 26 of Arbitration and Conciliation Act by relying on the report of M/s. S.D. Associates (loss assessors) and passed the award, which conduct amounts to misconduct.

40. No doubt, every misconduct does not form the basis for setting aside the award exercising power under Section 34(2) of Arbitration and Conciliation Act, but certain tests are laid down by the Courts time and again to find out what exactly amounts to misconduct to set-aside the award in Gujarat Water Supply and Sewerage Board, Gandhinagar Vs. Unique Erectors (Guj) Pvt. Ltd. and Another, , State of Orissa Vs. Dandasi Sahu, and Food Corporation of India Vs. M/s. Veshno Rice Millers, .

41. In view of the tests laid down by the Courts in the decisions cited supra, if the arbitrator commits a mistake either in law or on fact, in determining the matter referred to the arbitrator, which mistake does not appear on the face of the award and the documents appended to or incorporated so as to form part of it, the award will neither be remitted nor set-aside.

42. But, in the instant case on hand, the basis for formation of award is the report of M/s. S.D. Associates (loss assessors) and the personal inspection done by the sole arbitrator without notice to the parties to the arbitration. Therefore, even if the tests laid down in the decisions cited supra are applied, certainly arbitrator misconducted himself in conducting arbitration proceedings. On this ground the award is liable to be set-aside.

43. The Civil Court making strenuous attempt analyzed each and every fact as to how sole arbitrator misconducted himself and how it affected the rights of the parties to the arbitration, ultimately concluded that the arbitrator is guilty of misconduct and set-aside the award.

44. Even after discerning the entire material, we find no palpable illegality in the impugned order. Hence, we find that the arbitrator is guilty of legal misconduct affirming the finding recorded by the Civil Court.

45. One of the grounds the Civil Court based its conclusion for setting-aside the award is filing of counter by the arbitrator in the Arbitration Petition under Section 34(2) of Arbitration and Conciliation Act. Admittedly, the sole arbitrator filed his detailed counter totally supporting his award but that by itself does not amount to bias in view of the principles laid down by the Apex Court in State Bank of India Vs. Ram Das and Another, , wherein it was held as follows at Para 3:

"It was not disputed that the umpire in the year 1985 himself filed the award in the City Civil Court for making the award the rule of Court and appointed a lawyer for prosecuting the proceedings. The appellant filed an objection before the city Civil Court for setting aside the award under Sections 30 and 33 of the Arbitration Act, 1940 (''the Act''). The respondent filed his counter-affidavit to the objections of the appellant. The umpire also filed an affidavit to the objection filed by the appellant. It is furthermore not disputed that the appellant did not raise any plea in its objection as regards bias against the umpire".

46. Such conduct does not amount to bias or misconduct. Therefore, setting aside the Award on the sole ground that the arbitrator filed counter in the petition filed under Section 34(2) of Arbitration and Conciliation Act does not amount to bias. Hence, the finding of the Civil Court regarding bias is hereby set-aside.

47. The learned counsel for the first respondent-appellant mainly contended that the impugned order of the Civil Court is nothing but reappraisal of each and every fact just like deciding an Appeal and the Civil Court cannot sit as an appellate authority while exercising power under Section 34(2) of Arbitration and Conciliation Act. Therefore, the approach of the Civil Court in deciding the dispute is totally contrary to law and has drawn the attention of this Court to a judgment of the Apex Court in M.P. Housing Board Vs. Progressive Writers and Publishers, wherein it was held as follows in different paragraphs:

"It is well settled that the award of the arbitrator is ordinarily final and the courts hearing applications under Section 30 of the Arbitration Act, 1940 do not exercise any appellate jurisdiction. Reappraisal of evidence by the Court is impermissible. Interpretation of a contract is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless the reasons are totally perverse or award is based on wrong proposition of law. Errors of law as such are not to be presumed.

Time is not normally of the essence of any agreement qua immovable properties and even if there was an express covenant as to time being of the essence, the overall agreement has to be looked at to determine whether time was of the essence. Whether time is of the essence of the contract would, therefore, be a question of fact to be determined in each case and merely expression of the stipulated time would not make time an essence of the contract.

In the present case, on the material available and upon appreciating the same the arbitrator arrived at the finding that time was not of the essence of the third agreement and the said agreement subsisted even after 31.10.1980. Even if time was of the essence of the agreement, the same was not insisted upon by the parties.

The arbitrator accepted the case set out by the depositor that the Board was always assuring it to furnish the correct figure and the accounts of costs incurred by the

Board but refused to do so. The arbitrator has fully discussed the issue as to how the non-payment of the amounts by the respondent depositor was on account of the Board''s action in not furnishing the accounts even at the stage of arbitration and, therefore, held that the Board could not seek to wriggle out of the third agreement. The arbitrator also found that the Board had itself waived the time clause and was willing to accept money from the depositor even after 31.10.1980, as is evident from the negotiations which continued between the parties till the year 1985-1986.

In this case, there is no erroneous application of law by the arbitrator or any improper and incorrect finding which is demonstrable on the face of the material on record. The findings given by the arbitrator cannot be said to be perverse to give rise to legal misconduct deserving intervention under Section 30 of the Act concerned. Relief given by the arbitrator is a fair and equitable one. There is nothing in the award requiring intervention by the Courts. The courts below rightly refused to interfere with the award passed by the arbitrator."

48. In another judgment of the Apex Court in Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran, it was held that when an arbitrator had taken a possible view when two views are possible, it cannot be subjected to judicial review, even if contract is capable of two interpretations.

49. In McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, the Apex Court held that the role of the Court to interfere under Section 34 of Arbitration and Conciliation Act is minimum. A provision is made for supervising role of Courts and for review of the arbitral award only to ensure fairness. This supervisory role is to be kept at a minimum level and interference is envisaged only in cases of fraud or bias, violation of principles of natural justice etc., Interference on the ground of ''patent illegality'' is permissible only if the same goes to the root of the matter, and a public policy violation should be so unfair and unreasonable as to shock the conscience of the Court, but the Court cannot correct errors of arbitrators, it can only quash the award leaving the parties free to begin the arbitration again, if it is so desired.

50. Undoubtedly in view of the principles laid down in the decision cited supra, the role of the Civil Court is only supervisory to the minimum level. If the Civil Court finds an illegality in the award or it is against the public policy, it can set-aside the award and permit the parties to start fresh arbitration proceedings, if advised, but the Civil Court cannot sit in appeal against the award passed by the arbitrator to decide the legality of the award unlike in Civil Court proceedings. But, in the instant case on hand, the Civil Court slightly transgressed its power, however, that alone will not form the basis for setting aside the impugned order passed by the Civil Court. The Civil Court also committed an error in limiting the award to a sum of Rs. 22,10,330/- as the petitioner-Insurance Company offered to pay the same, but this approach of the Civil Court in limiting the Award to the amount offered by the Insurance Company is erroneous and the same is liable to be set-aside.

51. In view of our foregoing discussion, we are of the considered view that the sole arbitrator is guilty of legal misconduct, thereby the award is liable to be set-aside. Thus, the Civil Court did commit no error in setting aside the award but committed an error while setting-aside the award limiting compensation to Rs. 22,10,330/-

In the result, the Appeal is dismissed confirming the impugned order dated 25.03.2003, passed in Arb. O.P. No. 247 of 2003 by the III Additional District Judge, East Godavari District, Kakinada, totally setting aside the Award dated 21.04.2003, passed by the sole arbitrator-second respondent, giving opportunity to both the parties to go for arbitration, afresh, if advised.

In consequence, the Miscellaneous Petitions, if any, pending in this Appeal, shall stand dismissed. No order as to costs.