(2001) 09 DEL CK 0127

Delhi High Court

Case No: Suit No. 1038-A/96 and is No. 6093/96

M/s H.J. Baker and Bros. Inc. — APPELLANT

Vs

M.M.T.C. — RESPONDENT

Date of Decision: Sept. 5, 2001

Acts Referred:

- Arbitration Act, 1940 - Section 30, 33
- Contract Act, 1872 - Section 2, 56, 73

Hon'ble Judges: A.K. Sikri, J

Bench: Single Bench

Advocate: Mr. V.P. Singh and Ms Sandhya Kohli, for the Appellant; Mr. C.M. Oberoi, for the Respondent

Judgement

A.K. Sikri, J.

The petitioner herein, M/s. H.J.Baker & Bors. Inc., New York (for short ''M/s Baker'') entered into long term agreement dated 14th January, 1986 with respondent herein viz. The Minerals and Metals Trading Corporation Ltd. (for short ''MMTC'') for sale/purchase of sulphur of US origin. Under this agreement, MMTC was to buy on annual basis 60000 MT. (5 per cent for shipping convenience). This agreement was to be operated for three years from 1st January, 1986 and thereafter was to be executed annually on evergreen basis unless terminated by either party by six months'' written notice. Annexure-II to this agreement contained terms and conditions of purchase. Clause-6 related to Wharfage and Demurrage and by Clause 7 Force Majeure was incorporated. These two clauses read as under:

"Clause 6: Any wharfage or demurrage at the port of loading shall be accounted to the Sellers. If any wharfage or demurrage results at the port of discharge due to the negligence of the Sellers or their nominee by reason of failure to send correct documents in time connected with the shipment of goods under this contract and if in consequence thereof, clearance of consignment by the Buyers or delivery of

goods to it is delayed resulting in wharfage or demurrage, such wharfage or demurrage shall to be the account of sellers. Wharfage or demurrage for any other reason at the port of discharge shall be to Buyers'' account."

Clause 7: i) If at any time during the continuance of this contract either party is unable to perform the whole or in part any obligation under this contract because of war, hostility, civil commotion, sabotage, quarantine restriction, acts of God and acts of Government (including but not restricted to prohibition of export or import), fires, floods, explosions, epidemics, strikes, embargoes, then the date of fulfillment of any engagement shall be postponed during the time when such circumstances are operative.

ii) Any waiver/extension of time in respect of the delivery of any Installment or part of the goods shall not be deemed to be waiver/extension of time in respect of remaining deliveries.

iii) If operation of such circumstances exceeds three months each party shall have the right to refuse further performance of the contract in which case neither party shall have the right to claim eventual damages.

iv) The party which is unable to fulfill its engagement under the contract must within 15 days of occurrence of any of the causes mentioned in this clause shall inform the other party of the existence or termination of the circumstances preventing the performance of the contract. Certificate issued by the Chamber of Commerce in the country of the seller or buyer shall be sufficient proof of the existence of the above circumstances and their duration."

2. Annexure-III to this provided shipment terms and Clause 3 thereof reads as under:

"Vessel nominated by Buyers to be dry and clean before tendering notice of readiness duly supported by a certificate from a recognised agency."

3. As per this contract, MMTC purchased the material up to 1991. On 20th December, 1991 MMTC sent a telex to M/s Baker confirming for supply/price for period January-June, 1992. However, as no vessel was nominated for this purpose fax dated 27th January, 1992 was sent by M/s Baker to MMTC requesting nomination of vessel. In reply MMTC sent fax dated 31st January, 1992 that it would nominate its vessel only in March, 1992 for 25000 MT in May-June, 1992. Some correspondence thereafter was exchanged between the parties over the nomination of vessel. Fact remains that the quantity of 50000 MT meant for January-July, 1992 was not lifted by MMTC. Instead MMTC sent telex dated 8th April, 1992 informing M/s Baker that import of sulphur was decanalised by Government of India on 29th February, 1992 and hence it would not be possible for MMTC to nominate vessel against balance quantity in contract. M/s Baker did not accept this ground for not nominating its vessel and lifting the balance quantity and kept on requesting for lifting the desired

quantity and also stated that because of inaction of the MMTC, M/s Baker was incurring storage expenses as well. MMTC replied vide letter dated 21st-22nd May, 1992 stating that import of sulphur directly form Gulf was at lower landed cost and because of changed scenario, namely, the decanalising the import of sulphur by Government of India, importing sulphur from USA/Canada was not competitive. MMTC requesting for C&F prices mentioning that it was eager to continue relations with M/s Baker. M/s Baker maintained that decimalization would not affect the contract between the parties and MMTC was required to purchase the quantity on agreed prices. Some further correspondence was exchanged between the parties both parties sticking to their respective stand. Ultimately M/s Baker sent legal notice dated 12th July, 1993 through their Advocates to MMTC claiming damages for the past three half years i.e. January-June, 1992, July-December, 1992 and January-June, 1993. It was also stated that MMTC should perform its contract and in so far as request of MMTC to negotiate the price in line with Canadian Producers is concerned, it could be discussed from July, 1993 onwards. It was followed by another legal notice dated 19th July, 1993 from M/s Baker to MMTC demanding US $ 5195121.65 with interest at that rate of 18 per cent per annum. By this legal notice lawyers of M/s Baker also invoked the arbitration by intimating that M/s Baker would file statement of claim before Indian Council of Arbitration (for short ''ICA'') as per the arbitration agreement between the parties. This resulted in arbitration proceedings. As per the arbitration agreement, both the parties nominated their arbitrators and Chairman of the Bench was appointed by ICA.

4. Mr. Justice P.N.Khanna (Retd.) was nominated by MMTC, Mr. Justice Charanjit Talwar (Retd.) was the nominee of M/s Baker and Mr. Justice H.L.Aggarwal (Retd.) was appointed as Chairman by the Registrar of ICA. The proceedings started before these three arbitrators. M/s Baker field its statement of claim to which MMTC replied and M/s Baker rejoined. Evidence was also led by both the parties and witnesses cross-examined. Parties argued their cases through their lawyers orally followed by written submissions. After considering the entire material, arbitral tribunal made and published its award dated 3rd February, 1996. It is an unanimous award as per which the arbitrators have directed MMTC to pay the following amount to M/s Baker.

a) US $ 2,00,000.00 in respect of the first half of 1992.

b) US $ 3,00,000.00 in respect of the second half of 1992.

c) US $ 10,215.77 in respect of dispatch and Demurrage in connection with the foreign ships.

d) Indian Rupees 5,48,620.55 in respect of dispatch and Demurrage in connection with the Indian ships.

5. Interest at the rate of 12 per cent per annum on the total amount is awarded w.e.f. the date of entering upon the reference i.e. 7th February, 1994.

6. The said award Along with original proceedings was filed by ICA in this court. Notice of filing of this award was issued to both the parties. Whereas M/s Baker has no objection to this award and wants the award to be published and made rule of the court, MMTC has filed objections (IA No. 6093/96) under Sections 30 and 33 of the Indian Arbitration Act, 1940 for setting aside the impugned award by the Bench of arbitrators constituted by ICA.

7. Mr. C.M. Oberoi, learned counsel for MMTC/objector pressed his objections in the impugned award by paraphrasing these objections in the following manner:

1. An analysis of various terms of contract dated 14th January, 1986 would indicate that the agreement was operative for three years from st January, 1996 and was to be extended annually on evergreen basis unless cancelled by either party by six months, written notice. No price was agreed or settled nor was any price specified in the agreement. As per Clause-6 of the agreement, parties were to indicate a price at the beginning of every six month for quantities to be supplied during each last period and no prices settlement was agreed then quantity for said period of three years to lapse/reduced and the parties were to indicate against for such period. This clearly implies that unless there was an agreement on price in respect of a particular half yearly period, no contract came into existence. This long term contract dated 14th January, 1986 was Therefore not an agreement enforceable at law and was not a contract as per Section 2 of the Indian Contract Act, 1872. Since most essential and fundamental term as to price was left to be settled by the parties by negotiations form time to time, it was Therefore an agreement to indicate a contract and Therefore further agreement which could not itself be an enforceable contract. Price was a matter which was fundamental to the contract and in the absence of this essential element, it was too uncertainty have any binding force.
2. Clause-7. of Annexure-1 to the agreement embodied force majeure provisions and it clearly stipulated that if at any time during the continuation of the contract either party is unable to perform the whole or in part or obligation under the contract because of ''acts of Government (including but not restricted to prohibition of export or import)'' the date of fulfillment of the agreement was to be postponed during the time when such circumstances are operative with further stipulation that if such circumstances exceeded three months each party had the right to refuse further performance of the contract in which case neither party had any right to claim eventual damages. Relying upon this clause, it was submitted that the act of the Government in decanalising the import of sulphur on 29th February, 1992 was an act because of which MMTC was unable to perform its obligation under the contract. The submission was that prior to 29th February, 1992 MMTC was appointed by the Government of India as canalising agency of import of sulphur. Therefore, it was the only body in India which could import sulphur and after import it was selling the same in intending consumers. However, when the era of liberalisation started, Government of India decided to decanalised import of sulphur and the

result thereof was that not only MMTC but others could also import this item. Under this changed scenario, importing sulphur from USA/Canada did not remain competitive. The MMTC had fixed the prices with M/s Baker earlier on the basis that it was the sole agency to import the sulphur. Therefore, it was not possible for MMTC to import the sulphur at higher rates as in the international market the prices of sulphur went down and the import of sulphur directly from Gulf could be at lower landed cost.

3. In the absence of any price negotiations for price settlement, there was no contract beyond the period January-June, 1992 and Therefore no breach could be alleged on the part of the MMTC and M/s Baker were not entitled to any damages for the period beyond June, 1992. In so far as period from January-June, 1992 is concerned, M/s Baker were not entitled to any damages firstly on the ground that it was covered by force majeure clause and secondly on the ground that in any case M/s Baker had not suffered any losses. It was submitted that the approach of the arbitrators in awarding damages for this period was clearly erroneous as the market price at that time was same as contract price and there being no difference between the two, it could not the said that M/s Baker suffered any losses for not lifting the quantity of 50000 MT for the period from January-July, 1992.

4. Commenting on the award, it was submitted that the findings in the impugned award regarding termination of the contract were erroneous and in disregard to the provisions of contract and Therefore without jurisdiction. The arbitrators had erroneously treated letter dated 8th April, 1992 as the letter of termination whereas the bare reading of the letter would suggest that it was in relation to force majeure and was not intended to be a termination notice as envisaged in clause-5 of the agreement. In fact it was not the case of either M/s Baker or MMTC that notice dated 8th April, 1992 be construed as termination notice. Likewise, criteria for damages adopted by the arbitrators were also erroneous and contrary to the provisions of contract as well as the settled law on damages as contained in Section 73 of the Contract Act. It was also submitted that the criteria adopted for different six months monthly period for award of damages was self-contradictory as well. The damages were awarded on the assumption that MMTC was under obligation to lift the entire 50000 MT for each half yearly period and that there was a specific contractual price agreed to between the parties even in the absence of agreement and that there was a specific market price. These assumptions were totally erroneous and resultantly the award was perverse. By ignoring the specific causes in the contract as well as the position in law, the arbitrators had committed legal misconduct and such an award could not be sustained. The learned counsel concluded his submissions by citing the following judgments in support of his submissions:

1. K.P. Poulose Vs. State of Kerala and Another, holding that misconduct u/s 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent

conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. (Para 6). It was also held in this case that the Arbitrator has misconduct the proceedings by ignoring the two very material documents to arrive at a just decision to resolve the controversy between the Department and the contractor. Even if Department did not produce those documents before the Arbitrator it was incumbent upon him to get hold of all the relevant documents including the two documents in question for the purpose of a just decision. Further, he arrived at an inconsistent conclusion even on his own finding. The award suffered from a manifest error apparent ex facie. (Paras 4 and 5)

2. Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . The law laid down in this case is that the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. 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. If he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. (Paras 24 and 25)

If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But it he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. A deliberate departure from contract amount to only manifest disregard of his authority or a misconduct on is 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. (Paras 27, 26 and 25)

A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. Therefore, evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. It that is no clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself. (Para 26)

3. Union of India (UOI) Vs. Jain Associates and Another, .

4. State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, Para 30 was relied upon reading as under.

"A court of competent jurisdiction has both right the duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parties. It does not, Therefore, stand to reason that the arbitrator''s award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a Judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By the large the courts have disfavored interference with arbitration award on account of error of law and fact on the scope of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of ''legal misconduct'' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law Constituting the very basis of the award and improper and incorrect findings of fact, which without close and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible view points, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award

is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error or law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the Judge deciding the problem, is bound to creep in an influence the decision. By long training in the art of dispassionate analysis,such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject."

5. Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, . Learned counsel referred to para 42 which is reproduced below:

"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 aced 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 in 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 M/s Alopi Parshad V. Union of India (1960) 2 SCR 703 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 form 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 or 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 set 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 has part but it may tantamount to mala fide action.

(ii) 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."

8. The learned counsel also argued that written note of arguments was submitted before the arbitrators highlighting the aforesaid points.

9. Mr. V.P. Singh, learned senior counsel appearing for M/s Baker refuted each and very submission advanced by the learned counsel for MMTC by articulating his submission in the following manner:

1. At the outset, it was submitted that the Bench of arbitrators consisted of three retired Judges of High Court. These included the arbitrator appointed by MMTC also. These arbitrators had gone into the entire gamut of the dispute and had examined the material on record in all its length and breadth and had also considered all the submissions advanced by both the parties. After considering that impugned award given by the arbitrators which was not only unanimous in nature but a reasoned award. This court Therefore should not lightly interfere with such an award as the court was not sitting as an appellate authority over the findings of fact, or for the matter determination of law points, between the parties which resulted into the impugned award.

2. In so far as argument of force majeure was concerned, learned senior counsel submitted that the so-called act of the Government, namely, decimalization of the import of sulphur was not an act which could be covered under Clause 7 of Annexure-III. It was submitted that the act of Government should be of a nature which renders a party unable to perform its part of the contract. Before decimalization, MMTC was the sole canalising agency to import and after decimalization it did not remain the sole agency. That does not mean that this act of the Government made it impossible for the MMTC to perform its contract. ''Inconvenience'' was to be distinguished from ''inability'' to perform the contract. On the other hand, as per its own showing MMTC had been purchasing the same material during same period from other sources which would clearly show that MMTC could still import this material. Therefore, such a clause could not be made applicable and in support following judgments were cited replying on the principles contained in Section 56 of the Contract Act.

1. Satyabrata Ghose Vs. Magneeram Bangur & Co. & Anr. reported in 1954 SCR 310.

2. M/s Alopi Prashad & Sons Ltd. Vs. Union of India reported in AIR 1960 SC 688.

3. The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, .

4. Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others, .

5. Raja Dhruv Dev Chand Vs. Harmohinder Singh and Another, .

3. The interpretation of Clause 6 as suggested by learned counsel for MMTC was challenged on the ground that interpretation of this clause would clearly show that it was an evergreen contract which was to remain in force unless termination by giving six months'' notice as suggested in the contract. Thus the obligation under the contract was to purchase the quantity of 50000 Mt in every six months/half yearly period. The agreement on price before the start of each half yearly period was for negotiations during that period for which ''utmost efforts'' were to be made by the parties. It was only after such efforts that the parties are enable to agree at a price. The consequence would be that for that half yearly period no supplies were to be made. However, by no stretch of imagination this clause could be treated as a

shield by the defaulting party to cover its breaches by not making any such efforts and showing ''inability'' to buy but at the same time alleging that there was no contract as price was not agreed upon. If this is accepted any party could get out of the contract. It was not the intention of the contract. In any case, it was for the arbitrators to interpret that clause and if the arbitrator arrived at a particular conclusion/opinion, it was not the domain of the court to interfere with the said opinion or to interpret the said clause/contract in a different manner. Even when two interpretations were possible, one suggested by the arbitrators was final and court was not substituting its own view with the one taken by the arbitrators. What was important was to notice that relevant clause was in fact ''considered'' by the arbitrators and was not ''ignored''. It is only when the arbitrators ignored such a clause which could have bearing on the aspect, that it could be stated that the arbitrator had misconducted and not otherwise.

4. Referring to the interpretation of fax dated 8th April, 1992 of MMTC which was treated as termination notice, it was submitted that arbitrators were aware of the fact that it was not a termination notice in stricto sensu. However, the arbitrators interpreted the document in a particular manner to deny the claim of M/s Baker for subsequent period which was the course of action adopted favoring MMTC. Because of such an interpretation, M/s Baker was given damages only for six months from 8th April, 1992 i.e. for one half yearly period only after June, 1992. Otherwise M/s Baker had claimed damages for three such terms. In fact, it was also submitted, the fax dated 8th April, 1992 was intended to terminate the contract also because by invoking force majeure, MMTC had intended not to make further purchases. The subsequent conduct of the parties whereby M/s Baker were insisting on the lifting of the material by MMTC and MMTC was refusing to do so on the ground that because of the Government of India policy of decimalization it was not possible for MMTC to make purchases clearly proves that the findings of the arbitrators treating fax dated 8th April, 1992 as termination of the contract is supported by subsequent conduct of the parties as well. There was nothing wrong in treating it as termination after the arbitrators held that force majeure clause, namely, Clause 7 was not applicable. Thus it was no more a case of ''inability'' to perform but ''refusal'' to perform.

5. Coming to the question of fixing of damages. Learned senior counsel submitted that once the breach of contract on the part of MMTC was proved, the approached adopted by the arbitrators, in the given circumstances, was perfectly justified and it was open to the arbitrators to have such an approach. In so far as period of January-June, 1992 is concerned, price had been settled. The arbitrators took into account various ''Fertecon'' reports truly reflecting the position of sale of sulphur in the international market and the arbitrators made these prices as yardstick for arriving at market price and calculating damages at the difference between the contract price and the market price. Likewise, for second half of 1992 while calculating the damages, in the peculiar facts of this case the arbitrators had to assume some contract and there was nothing wrong in fixing the price of US $64.50

per MT which was the price agreed upon between the parties for first half of 1992. Market price was fixed from the copies of Fertecon reports and on that basis the damages were calculated for this period also. It was submitted that contention of MMTC that criteria adopted by the arbitrators for computing damages for first half of 1992 and second half of 1992 being inconsistent, was meritless. The record shows that the arbitrators had considered the material/arguments/evidence/pleadings/submissions of the parties put on record before them while computing the damages for both the halves the particulars Along with relevant documents attached herewith also make it clear that while computing damages the arbitrators had considered and applied their mind after considering the entire record before them. In fact M/s Baker had computed damages on the basis of loss of profit. In cases covering a ''loss volume seller'' where supplies exceeds demand and there is no available market and the subsequent sales are to additional buyers and no substituted buyers, the courts have recognised and accepted ''loss of profit'' as the correct method for computation of damages.

10. At the end, re-emphasizing that with such a reasoned award after considering all material aspects and without ignoring any clause or contract or documents/materials or record, the court would not sit as an appellate authority over the impugned award and following case law in support was cited:

1. Raghupati Dutt and Others Vs. Ram Gopal Dutt and Others, the court held that mere fact that arbitrators have erred in law for ground of interference-wrong construction of will be arbitrator parties are bound by that decision.

2. State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., , the court held that in proceeding to set aside award appellate court cannot sit in appeal over the conclusion of the arbitrator by re-examining and re-appraising the evidence considered by the arbitrator and hold that the conclusion reached by the arbitrator is wrong.

3. Hindustan Tea Co. Vs. K. Sashikant Co. and Another, the court held that award cannot be set side on the ground that arbitrator reached wrong conclusion or he failed to appreciate facts.

4. Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, it was held that reasonableness of reasons given by an arbitrator in making his award cannot be challenged in court.

5. Puri Construction Pvt. Ltd. Vs. Union of India (UOI), it was held that court cannot examine correctness of award on merits.

6. Sudarsan Trading Co. Vs. Government of Kerala and Another, , the court held that interpretation of contract is matter for arbitration and court cannot substitute its own decision.

7. Food Corporation of India Vs. Joginderpal Mohinderpal, it was held that court has no jurisdiction to modify award, Court cannot sit in appeal over views of arbitrator by re-examining and reassessing the materials.

8. R.K. Khanna & Ors. Vs. International Airport Authority of India reported in 1995 I AD (Del) 85, the court held that no error apparent on the face of record cannot be challenged.

9. Special Organising Committee Vs. Meeto reported in 1996 V AD (Del) 1 the court held that court cannot substitute its opinion for that of arbitrators.

10. M/s. Duggar Fiber Pvt. Ltd. Vs. M.C.D. (DESU), it was held that arbitrator has not ignored any evidence further enquiry to examine correctness of award on merits impermissible-when court is called upon to decide objections raised by party against arbitration award, jurisdiction of court is limited-it has no jurisdiction to sit in appeal-award made rule to court.

11. M/s Anant Raj Agencies Vs. DDA reported in 2001 III AD (Del) 386, it was held that it was not open to reassess the evidence to find out whether the arbitrator has committed any error or to decide the question of adequacy of evidence.

12. Paradip Port Trust and Ors. Vs. Unique Builders reported in 2001 (1) A.L.R.505 : Arbitration Act (10 of 1940) Sections 30 and 33-Agreement for sale-disputes referred to arbitrator-lump sum and non-speaking award-alleged that award passed in violation of principles of natural justice and arbitrator passed the award beyond the scope of the agreement-High Court allowed the appeal and made the award rule of the court subject to modification-Held, award neither be said in excess of terms of reference nor arbitrary.

13. After reproducing the arguments of counsel on either side, I am inclined to agree with the submissions made by the learned counsel for M/s Baker Reasons for this conclusion are indicated hereinafter while dealing with various objections of MMTC.

14. As far as the argument of fore majeure as advanced by MMTC is concerned, it would be appropriate to first peruse as to how this issue is dealt with by the learned arbitrators. While rejecting this objection of MMTC, the arbitrators in their impugned award have observed as under:

"Taking up MMTC''s first objection, we do not agree with its contention that the Baker''s claim cannot be sustained just on the ground of Force Majeure, as the decimalization of the import of sulphur was an act of the Government, resulting in MMTC having the right to refuse further performance. Baker may or may not be aware of the position of MMTC as a canalising agent under a Government Notification, but he has denied his knowledge about it and there is no rebuttal. We are unable accordingly to hold otherwise. There is nothing in the contract or in any other document to show that MMTC was acting as a canalising agent. On the other

hand it is still buying sulphur in the market. And decimalization had not rendered the contract impossible of performance. MMTC had continued to purchase sulphur in the market. The contract with MMTC was a contract between a businessman to businessman. This objection of MMTC, Therefore, has not force."

15. The arbitrators have thus rejected this argument on the following grounds:

a) M/s Baker did not have even the knowledge about MMTC being canalising agent under the Government notification.

b) There was nothing in contract or in any other document to show that MMTC was acting as canalising agency.

c) decimalization had not rendered the contract impossible for performance as MMTC had continued to purchase sulphur in the market.

d) Contract with MMTC was a contract between a businessman to businessman.

16. No fault can be found in the aforesaid reasoning given by the arbitrators. The arbitrators were at liberty to interpret the clause in a particular manner and to decide as to whether such a clause is applicable in the given circumstances or not.

17. It is not a case where the arbitrators have ignored the force majeure clause. On the contrary it is specifically referred to and dealt with and for reasons recorded by the arbitrators, they have held that such a clause is not applicable, and Therefore, contract remained in force. In view of this position in law elaborately dealt with at the later part of the judgment, although no further exercise is required to be done by this court, it would be seen that even otherwise the contention of the MMTC on force majeure is fallacious. The learned counsel for M/s Baker rightly argued that decimalization did not make it impossible for the MMTC to perform its contract. ''Inconvenience'' was to be distinguished from ''inability'' to perform the contract. On the other hand, as per its own showing MMTC had been purchasing the same material during same period from other sources which would clearly show that MMTC could still import this material. Therefore, such a clause could not be made applicable. Interestingly putting the case of the MMTC at highest is that under this changed scenario, importing sulphur from USA/Canada did not remain competitive. The MMTC had fixed the prices with M/s Baker earlier on the basis that it was the sole agency to import the sulphur. Therefore , it was not possible for MMTC to import the sulphur at higher rates as in the international market the prices of sulphur went down and the import of sulphur directly from Gulf could be at lower landed cost. Therefore, even according to MMTC it was not an impossibility but uneconomic to continue to perform the contract. By no stretch of imagination such a situation can be treated as on coming under force majeure either u/s 56 of the Contract Act or under Clause 7 of the Agreement between the parties.

18. Coming to the argument of learned counsel for MMTC based on clause 6 of the agreement as per which it is contended that there was no enforceable contract

unless price for a particular period was fixed, the award would show that this contention is dealt with in the following manner:

"The main contract is a long term contract dated 14.1.1986, on ever green basis, which stipulates certain terms and conditions for the supply of 1,00,000 MTs. of sulphur annually. The price was left to be mutually settled by the parties half yearly and was to be in line with Canadian producer''s prices to their long term contract customers. For supplies during January-June, the price was to be settled by 15th January and for the period July-December, by 15th July of that year. If no settlement was possible for a semester the quantity allotted Therefore was to stand lapsed and parties were to negotiate for subsequent period.

19. The consequences of non-settlement have been specifically mentioned in clause 6 of the agreement which reads as follows:

"The price will be settled half yearly and shall be in line with Canadian producers prices to their long terms contract customers. Both parties will make utmost efforts to settle the prices for supplies during January-June by 15th January and for supplies during July-December by 15th July of that year. In case no settlement on price for deliveries during a semester is possible, the quantity allocated for that period may stand lapse or reduced and both parties shall meet again to negotiate prices for subsequent period."

20. Parties had also stipulated that the sellers shall give due consideration to Buyer''s request to promote export or products from India either directly or through their associates.

21. The position of the "Canadian producers prices to their long term contract customers" has first to be understood. These prices were not to be adopted as the price for this contract. They were to be "in line" with them. For if they were to be adopted, there was then nothing for the parties to settle. Both parties on the other hand were required to make efforts to settle the prices. Even this was considered to be insufficient. They were required to make "utmost" efforts. The word "utmost" is significant. The other words are "in line" with Canadian producers'' prices. The Canadian prices are to be a mere guide. The ultimate settled price may or may not be the same.

22. Clause 6 of the contract and its interpretation are important. The Clauses lays emphasis on settlement of prices for which purpose the responsibility has been laid on both parties, who are required to make "utmost efforts" for this purpose."

23. Thus even this argument of the MMTC that in the absence of price having been settled between the parties for second half of 1992, no contract came into existence, the arbitrators dealt with it at length and gave their interpretation to clause 6. Here one may refer to the judgment of Court of Appeal in England in the case of Foley Vs. Classique Coaches, Ltd. reported in (1934) All E.R. 88. That was a case where by an

agreement in writing the plaintiff agreed to sell and the defendants agreed to purchase certain freehold property adjoining the land belonging to the plaintiff on which he had erected a petrol filling station. The agreement for sale was made subject to the condition that the defendants would enter into a supplemental agreement with the plaintiff for the sale of petrol to them for the purposes of their business as motor coach proprietors. That second agreement provided that the defendants would purchase from the plaintiff all petrol which should be required by the defendants for the running of their business " at a price to be agreed by the parties in writing and form time to time," and further, that the plaintiff should deliver the petrol to the defendants from the plaintiffs'' pumps, which were on his land, and that the defendants should not purchase any petrol form any other person so long as the plaintiff was able to supply them with sufficient petrol. The agreement also contained an arbitration clause: "If any dispute or difference shall arise on the subject-matter or construction of this agreement the same shall be submitted to arbitration, in the usual way in accordance with the provisions of the Arbitration Act, 1889." The land was conveyed to the defendants, and for three years the parties acted on the agreement as to the supply of petrol. Disputes having arisen between them, the plaintiff brought an action claiming a declaration that the petrol agreement was valid and binding and an injunction. The court held that there must be implied in the contract a term that the petrol was to be supplied at a reasonable price and should be of reasonable quality; the arbitration clause would apply to any failure to agree the price; and, Therefore, the contract was enforceable although no definite price was fixed for the petrol at the time the contract was made. One also cannot ignore the well established principle: No one can take advantage of his own wrong. The maxim ''Ab abuse ad usum non-valet consequential- No valid conclusion as to the use of a thing can be drawn from its abuse'' would thus apply in the present case with all force. Clause 6 of the contract would have been applicable only when the parties had made ''utmost efforts'' to settle the price but fail to agree thereon. It would not be applicable in a case like this where one of the parties does note negotiate for settling the price and on the contrary refuses to even make the purchase.

24. Moreover, as already observed, fax dated 8th April, 1992 of MMTC was treated by the arbitrators as termination of contract by the MMTC and it is on that basis that the damages for second half of 1992 have been awarded. While this aspect as to whether this fax dated 8th April, 1992 could be treated as termination notice or not is being dealt with separately, it needs to be emphasized at this stage that once this was the approach adopted by the arbitrators and on that basis damages are awarded for second half of the year 1992 and in respect of first half of 1992 price having admittedly been settled, the argument of MMTC on clause 6 in any case losses its force.

25. Now I deal with the challenge of MMTC to the approach adopted by the learned arbitrators in treating fax dated 8th April, 1992 as termination notice. I agree with

the submissions of the learned counsel for M/s Baker. In fact this approach has been adopted to favor MMTC and to limit the damages to six monthly period after June, 1992 when the six months notices was expiring from 8th April, 1992. But for this approach, the consequence would have been to treat the contract as still alive and award the damages for three half yearly periods after June, 1992 as claimed by M/s Baker and it could have even led to further claim for subsequent period by M/s Baker in the absence of so-called formal termination notice. Therefore, it is clear that this argument is advanced by learned counsel for MMTC to somehow challenge the impugned award by hook or by crook even when a particular approach adopted by the arbitrators has favored the MMTC. It is a perilous and suicidal attempt of MMTC clearly out of desperation. In any case, the conclusion of the arbitrators that fax dated 8th April, 1992 can be treated as termination of the contract is in line with the sequence of events and conduct of parties, and Therefore, is perfectly valid on the facts of this case as well as in law. Even if the fax dated 8th April, 1992 did not say in so many words that it terminated the agreement by invoking clause 5 thereof, it was perfectly permissible for the arbitrators to gather the intention behind such a fax notice whereby the MMTC had in unequivocal terms conveyed its intention not to buy the material any further although intention was sought to be justified on the ground of force majeure which did not favor with the arbitrators. Had the ground of force majeure been clicked with the arbitrators, the result would have been that MMTC could have got away from their act of non-performance of the contract by justifying it on this ground. Not able to do so has resulted into awarding to damages against them. That is a different aspect altogether.Fact remains that by fax dated 8th April, 1992 MMTC intended not to buy and arbitrators were within their right to treat it as a notice of termination of the contract.

26. If any person, it is M/s Baker who could be aggrieved against such an approach when M/s Baker have accepted this approach. At least, it does not lie in the mouth of MMTC to challenge this approach which has been adopted to favor them.

27. This brings us to the last limb of argument i.e. award of damages. The impugned award deals with this aspect in the following manner:

"MMTC''S responsibility, Therefore, is for the six months with effect from April 8, 1992 up to September 30, 1992. The liability for the notice period of April to June is covered by the second quarter of the first half of 1992. It''s liability for the remaining three months of the notice spills over into the second semester, wherein another 50,000 MTs. had to be lifted. MMTC is thus liable to pay damages to Baker for breach of its commitment of purchase 50,000 MTs of sulphur during the first half of 1992 and further for its liability to lift 50,000 MTs of sulphur during the second semester during which the notice expired.

XXXX

XXXX

XXXX

28. Taking up the first half of 1992, the parties had fixed the contract price at $ 64.50 per MT. For fixing the market price we have in evidence copies of "Fertecon", which as stated earlier reflect the position of prevailing market prices. According to reports in Fertecon, prices ranged from $ 60.00 per MT to $63.00 per MT during January to June, 1992. (As per the chart giving these prices during the first half of 1992 filed on behalf of Baker on page 116 as chart No.9 in File No.2). Fixing the market price at $ 60.50 per MT, the difference in the contract price and the market prices comes to $ 4.00 per MT. The damages for the first half of 1992 thus work out as follows:-

```
Contract Price    - $ 64.50 per MT

Market Price   - $ 60.50 per MT

Damages            - $ 4.00 per MT

For supplies of 50,000
MTs = 50,000 X 4 =         $ 2,00,000/-
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29. MMTC has itself cancelled the contract by notifying Baker that it will no longer nominate vessels against further supplies "in the contracts". This notification has to be of a six months duration, MMTC cannot escape its liability during this period. We have, Therefore to compute the amount of this liability, which being in dispute, has to be resolved and fixed by us. We find support for this view from the judgment of the House of Lords in Foley Vs. Classique Coaches (1934) 2 K.B.I. Canadian prices to long term contract customers have been provided as a guide in the contract itself. Baker in his claim petition puts $ 55.00 per MT as the contract price, which we adopt as the contract price. Sale prices in this semester have been shown as ranging from $ 37 per MT to $ 55.00 per MT as per some invoices filed on behalf of Baker. Chart No.9 however, shows Fertecon prices ranging from $ 58.00 to $ 63.00 during the second half of 1992. We however, fix the sale price at $ 49.00 per MT during this semester, as reflected by the various invoices filed by the Baker for the months of July to September, 1992.

30. The damages for the second semester will, Therefore, work out as follows:

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  Estimated contract price         = $ 55.00 per MT

Estimated sale price              = $ 49.00 per MT

For supplies of
50,000 MTs=50,000 x 6             = $ 3,00,000
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31. I do not feel that the approach adopted by the arbitrators is erroneous or would call for interference while examining the award within the four corners of Sections 30 and 33 of Arbitration Act, 1940.

32. Before concluding, it may be stated that the aforesaid detailed exercise in examining the validity of the award had to be undergone only because of the argument of learned counsel for MMTC alleging that the award was perverse and contrary to the provisions of the contract and implying thereby that the arbitrators have committed misconduct. The attempt was to show that this contention of the learned counsel is clearly fallacious. It cannot be disputed that the arbitrators while deciding the disputes/claims, cannot disregard the provisions of the contract as held in various judgments cited by the learned counsel. However, that is not the position here. The award in no unambiguous terms demonstrates that all the relevant Clauses of the contract as well as provisions of law pressed into service by the parties, were considered and dealt with in the impugned award. A fine distinction is to be made between the case where the arbitrator gives an award ignoring the provisions of contract and where arbitrator consider the provisions of contract and gives his interpretation to the same. Whereas the award would suffer from legal misconduct in the first type of case, it would be not so in the second category of case. If such an interpretation as given by the arbitrator is possible and keeping in view position in law, then further scrutiny by the court is impermissible. After all there is another line of cases also decided by the Apex Court itself cited by the learned counsel for M/s Baker and reference to which has already been made above. As per these cases, court is not to sit in appeal over the conclusion of the arbitrator by examining and reappraising the evidence considered or to hold that conclusion reached by the arbitrator is wrong. Award cannot be challenged on the ground of reasonableness of the reasons given by the arbitrator. Interpretation of the contract is a matter for the arbitral tribunal and even if two views are possible, court is not supposed to substitute its own decision/interpretation for that given by the arbitrator. Without multiplying the judgments to support this view, our purpose would be served by referring to the recent judgment of Supreme Court in the case of M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, wherein the Supreme Court had the occasion to scan through all relevant case law on this subject which emanated in last fifty years and after analysing the same, the court held:

"Turning attention on to the other focal point, namely the interference of the court, be it noted that Section 30 of the Arbitration Act, 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The use of the expression ''shall'' in the main body of the Section makes it mandatory to the effect that the award of an arbitration shall not be set aside excepting for the grounds as mentioned therein to wit: (i) arbitrator or umpire has misconduct himself; (ii) award has been made after the supersession of the arbitration or the proceedings becoming invalid; and (iii) award has been

improperly procured or otherwise invalid.

33. The above noted three specific provisions u/s 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature obviously had in its mind that the arbitrator being the Judge chosen by the parties, the decision of the arbitrator has such ought to be final between the parties.

34. Be it noted that by reason of a long catena of cases, it is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise or power by the court of reappraise the evidence in unknown to a proceeding u/s 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

35. The common phraseology ''error apparent on the face of the record'' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot, substitute its evaluation and com to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined. In this context, reference may be made to one of the recent decisions of this court in the case of State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, wherein this court relying upon the decision of Sudarsan Trading Co. Vs. Government of Kerala and Another, observed in paragraph 31 of the Report as below:-

"A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parties. It does not, Therefore, stand to reason that the arbitrator''s award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades,

judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavored interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of ''legal misconduct'' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced of mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law Constituting the very basis of the award and improper and incorrect findings of fact, which without close and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without with necessity of carefully weighing the various possible view points, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for ''such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error or law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the Judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject."

36. Of the same period is the another judgment of the Supreme Court which also needs a mention. In this case entitled Himachal Pradesh State Electricity Board Vs.

R.J. Shah and Company, , the court laid down the decisive test in the following words:

"The case where there is want of jurisdiction has to be distinguished from the case where there is error in exercise of jurisdiction. The award is liable to be set aside if there is error of jurisdiction but not if the error is committed in exercise of jurisdiction. When the arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award.

In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction do deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect there of would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some document including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings".

37. Even after applying the expanded connotation of ''legal misconduct'' it is not a case where it can be said that the learned arbitrators applied any erroneous application of law Constituting the very basis of the award or gave any improper and incorrect findings of fact rendering the award invalid. After dispassionately analysing the entire case, for which detailed reasons are given already, this court is of considered view that the MMTC has failed to make out a case for interference with the impugned award.

38. The result of the aforesaid discussion is that the objections contained in is No. 6093/96 filed by MMTC fail and are dismissed.

39. S.No. 1038-A/96

40. Judgment in terms of the award is passed. Award is made rule of the court. The plaintiff shall be entitled to interest at the rate of 12 per cent per annum from the date of decree till payment. The plaintiff shall also be entitled to cost of these proceedings.

41. Suit stands disposed of.