(1976) 03 BOM CK 0051

Bombay High Court

Case No: O.C.J. Appeal No. 3 of 1974 and Arbitration Suit No. 1162 of 1973

New Consolidated Construction Co. Ltd.		APPELLANT
	Vs	
Glaxo Laboratories (India) Ltd.		RESPONDENT

Date of Decision: March 25, 1976

Acts Referred:

- Arbitration Act, 1940 - Section 20

Citation: (1976) 78 BOMLR 441

Hon'ble Judges: Vaidya, J; Maridul, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Vaidya, J.

The appellants, New Consolidated Construction Company Limited, filed on November 6, 1973, a petition tinder Section 20 of the Arbitration Act, 1940, praying: (a) that it may be declared that there was an arbitration agreement between them and the defendants, Glaxo Laboratories (India) Limited, as per Clause 43 of the general conditions of the contract mentioned in the petition, and that the said agreement applied to the dispute and differences which had arisen between the plaintiffs and the defendants as set out in the correspondence to the petition and also in the para. 8 of the petition; (b) that it may be ordered that the said agreement be filed in Court and the disputes be referred to arbitration in accordance with the arbitration agreement; and (e) that the defendants be ordered to pay to the plaintiffs costs of the petition.

2. The allegations made in the petition may be briefly summarised as under:

The appellants, referred to as the plaintiffs, in the petition, numbered as arbitration Suit No. 1162 of 1973, on the Original Side, arc the building contractors. In or about November 1969, the defendants wanted to construct warehouses and godowns at

their factory premises at Thana. The defendants appointed Messrs. Pheroze Kudianavala and Associates as their architects. The R.C.C. Designs for the said work was prepared by Mr. Kuton J. Dubash of DUBON Engineering Company, Consulting Engineer appointed by the said architects. The defendants gave a contract to the plaintiffs for the construction of the godowns at a total cost estimated at Rs. 24,66,228. The work was to be completed on or before July31, 1970.

3. The building contract contained among others, Clause 23, relating to removal of improper work and materials; Clause 42, relating to the matters to be finally determined by the architect, and Clause 43, relating to settlement of Disputes, which were as under:

Clause 23:

23. Removal of improper work and materials:

The Architect shall, during the progress of the works, have power to order in writing from time to time the removal from the works, within such reasonable time as may be specified in the order, of any materials which, in the opinion of the Architect, are not in accordance with the Specifications or the instructions of the Architect, and the substitution of proper materials and the removal and proper re-execution of any work, which has been executed with materials or workmanship, not in accordance with the Drawings and Specifications or instructions, and the Contractor shall forthwith carry out such order at his own cost. In case of default on the part of the Contractor to carry out such order, the Employer shall have power to employ and pay other persons to carry out the same and all expenses consequent thereon or incidental thereto shall be borne by the Contractor, and shall be recoverable from him on behalf of the employer, or may be deducted by the Architect from any moneys due or that may become due to the Contractor.

In lieu of correcting work not done in accordance with the Contract, the Architect may allow such work to remain, and in that case may make allowance for the difference in value, together with such further allowance for damages to the Employer, as in his opinion may be reasonable.

Clause 42:�Matters to be finally determined by Architect:

42, The Architect''s decision, opinion, direction, Certificate (except for payment) with respect to all or any of the matters under Clauses 2, 7, 9, 17, 23, 30(a), (b), (c), (d), (f) and 39 hereof and as to the exercise by him under Clause 12 of the right to have any works opened upon, (which matters are herein referred to as the excepted matters) shall be final and conclusive and binding on the parties and shall be without appeal. Any other decision, opinion, direction, Certificate or Valuation of the Architect or any refusal of the Architect to give any of the same shall be subject to the right of Arbitration and review in the same way in all respects (including the provision as to opening the reference) as if it were a decision of the Architect under the following

Clause, (italics supplied)

Clause 43: Settlement of Disputes: Arbitration:

All disputes and difference of any kind whatsoever arising out of or in connection with the Contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and settled by the Architect who shall state his decision in writing. Such decision may be in the form of a Final Certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without Appeal as stated in the proceeding clause. But if either the Employer or the Contractor be dissatisfied with the decision of the Architect on any matter, or dispute of any kind (except any of the excepted matters) or as to the withholding by the Architect of any Certificate to which the Contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may within twenty eight days after receiving notice of such decision give a written notice to the other party throwing the Architect, requiring that such matters in dispute be arbitrated upon.

Such, written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single Arbitrator being a Fellow of either the Royal Institute of British Architects or the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator, to the arbitration of two Arbitrators both being Fellows either of the Royal Institute of British Architects or the Indian Institute of Architects, one to be appointed by each part which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators, or the Umpire shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice, save in regard to the excepted matters referred to in the proceeding clause, and to determine all matters in dispute which shall be submitted to him or them of which notice shall have been given as aforesaid. Upon every or such reference, the cost of and incidental to the Reference, and Award respectively shall be in the direction of the Arbitrator, or Arbitrators, or the Umpire who may determine the amount thereof, or direct the same to be taxed as between attorney and client or as between party and party and shall direct by whom and to whom and in what manner the small shall be borne and paid. This submission shall be deemed to be a submission or Arbitration within the meaning of the Indian Arbitration Act 1940, or any statutory modification thereof the provision of which shall govern all proceedings and decisions resulting from such submission. The Award of the Arbitrator or Arbitrators or the Umpire shall be final and binding on the parties.

Such reference except as to the withholding by the Architect of any Certificates under Clause 40 to which the Contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with the written consent of the Employer and the Contractor. Provided always that the Employer shall not withhold the payment of a Certificate under Clause 36, nor the Contractor, except with the consent in writing of the Architect, in any way delay the carrying out of the works by reason of any such matter, question or dispute being referred to Arbitration, but shall proceed with the work all due diligence and shall, until the decision of the Arbitrator or Arbitrators or the Umpire be given, abide by the decision of the Architect and no Award of the Arbitrator or the Arbitrators or the Umpire, shall relieve the Contractor of his obligations to adhere strictly to the Architect''s instructions with regard to the actual carrying out of the works. The Employer and the Contractor hereby also agree that Arbitration under this clause shall be a condition precedent to any right of action under the Contract. (italics supplied).

4. The work was completed in or about October 1970. Three buildings were constructed viz. T3, T4 and T5. The building T5 had a folded plate roof (V-shaped). On October 23, 1970, Messrs. Pheroze Kudianavala & Associates issued the progress payment certificate for Rs. 1,71, 000 out of which Rs. 1,00,000 was directed to be retained as it was alleged that a deflection was noticeable in the said folded plate. The defendants then through their architects instructed that R.C.C. Columns with saddles be provided at misspend below each plate; they also directed later that the gap between R.O.C. plate and saddle in all cases be grouted, and in addition that lateral ties be provided between columns.

5. This work was carried out by the plaintiffs as suggested by the consulting engineer of the defendants. The plaintiffs carried out the work of grouting also and provided lateral tie. According to the plaintiffs, after fixing the slab and carrying out this work, there was no leakage of water during the monsoon; and by their letter dated March 7, 1972, the plaintiffs wrote to Mr. Pheroze Kudianavala:

This is to remind you to please fix up an Arbitrator to give an opinion on the folded slab constructed by us for Glaxo. Your immediate action will be highly appreciated.

In reply to this letter what was asked by letter dated March 22, 1972, was:

Before any further action can be taken by us, we would like to know the exact grounds on which you propose to refer the matter to arbitration, clearly spelling out the terms of reference.

The plaintiffs'' representative had a talk with the architects, in connection with this and it was arranged to appoint either Mr. Bodhe or Mr. Divecha, two of the leading architects of Bombay, as an arbitrator.

6. Then by the plaintiffs'' letter dated March 23, 1972, addressed to M/s. Pheroze Kudianavala & Associates, the architects of the defendants, it was clearly and unequivocally stated:

We propose to refer the matter to arbitration to determine whether the R.C.C. design has been responsible for the deflection in the slab. It will be appreciated if immediate action is taken in this matter since it has dragged on for a very long time.

On April 4, 1972, the plaintiffs pointed out to the architects that the amount of Rs. 1,00,000 had been retained by the architects against the work of folded plate slab, and suggested that the quantum of the retention amount may also be referred to the arbitrator.

7. On May 2, 1972, the plaintiffs'' representative wrote to Srinivasan, a representative of the defendants, that an arbitrator should be appointed as early as possible to settle the issue of the folded plate slab, which had been pending for over a year. It is thus clear that by May 2, 1972, the differences between the parties had crystalised into: one, relating to the question as to whether the R.C.C. design was responsible for the deflection in the plate; and two, relating to the question as to whether the amount of Rs. 1,00,000, which was retained by Messrs. Pheroze Kudianavala & Associates:, against the work of folded plate, was excessive.

8. The plaintiffs alleged that instead of proceeding to appoint an arbitrator, as required by Clause 43 of the contract, suddenly, on August 10, 1972, the architects, Messrs. Pheroze Kudianavala & Associates, Bombay, in purported exercise of powers under Clause 43, referred to above, gave what they called their opinion and decision as follows:

Re.: In the matter of construction of laboratory chemical stores (Bldg. T5) at Thana by New Consolidated Construction Co. Ltd. for Glaxo Laboratories India Ltd.

Our opinion and decision under Clause 23 of the General Conditions of the Contract.

1. Reference is made to the Conditions, Specifications and Designs etc. embodied in the Contract Agreement dated 3rd July 1970 executed between Glaxo Laboratories (India) Ltd. (the employer) and New Consolidated Construction Co. Ltd. (the Contractor) for carrying out:

Controlled reinforced concrete grade M 200 as per detailed specifications, at all heights, including shuttering, centering, curing, hacking, the surface closely as directed to receive plaster, vibrating, relating to 12,339 s. ft. Q" thick folded plate and diaphragm and beams so far as they relate to the said folded plate. This is hereinafter referred to as the said item of work.

2. The concreting for the folded roof slab of building T5 was carried out between 22nd and 30th May 1970, both days inclusive. Cubes for testing the quality of concrete were taken out by the contractors as usual on all the concreting days,

except on the 26th May 1970. Cubes for five days out of a total of 9 days of concreting, gave results lower than the strength of 200-kgm. per sq. cm. specified in the above contract.

3. Having examined:

(i) the quality and workmanship of the item of work.

(ii) The report of the test carried out by the Indian Institute of Technology, Powai, at the instance of Contractor.

(iii) The report on the safety of the folded plate roof structure obtained by the contractors from Dr. Vasant S. Kelkar. f

(iv) Various letters and report submitted by the structural consultants, Dubon Engineering Co.

(v) Correspondence and representations from the Contractors.

We are of the opinion that the said work executed by New Consolidated Construction Co. Ltd. was not in accordance with the contract and that the workmanship and quality were and are defective and the concrete of the folded plate roof slab did not gather the strength as required by the said contract.

4. Having regard to all the circumstances, it is our opinion and decision that the aforesaid work be allowed to remain and it is Our opinion and decision that the Employers Glaxo Laboratories India Ltd. are entitled to recover from the Contractors M/s. New Consolidated Construction Co. Ltd. a sum of Rs. One Lakh as allowance for difference in value inclusive of allowance for damages. We have taken into consideration the fact that the structure is now not a columns free structure and several columns have been put up to support the said roof.

9. It is submitted on behalf of the plaintiffs that Messrs. Pheroze Kudianavala & Associates, architects, were not competent as architects and technically qualified to give the said decision on the validity of the E..C.C. design of the folded plate of the godown, as the design was prepared by the R.C.C. specialists, appointed by the defendants after consulting Dr. Vasant S. Kelkar, whose opinion was relied upon for the design. The plaintiffs averred in para. 6 of the petition :

...that in the said report Dr. Vasant S. Kelkar has inter alia observed that ''the increase in the deflection observed in the past year is due to creep of concrete which has been probably higher in the present case due to very high compressive stress at the crown.

Relying on this observation, the plaintiffs submitted in the petition that this showed that the design was defective as the stresses in longitude directions on the crowns of interior fold were inadequate. The plaintiffs, therefore, submitted that the defect in the work was due to advice of the architect, who made the design, according to

which the plaintiffs had carried out the construction.

10. By their letter dated August 7, 1973, the plaintiff''s pointed out to the defendants that an arbitrator must be appointed under Clause 43 of the contract; and suggested that a Fellow of the Indian Institute of architects may be appointed by common consent; and in case of disagreement between the parties, the plaintiffs will appoint one such architect; and the defendants may appoint another such architect, so that the matter may be disposed of by the domestic forum. The defendants were also requested to inform the plaintiffs, if they did not agree to this proposal, within a fortnight.

11. The defendants did not send any reply, as requested, but sent a letter dated October 16, 1973, through their legal adviser, stating, inter alia, as follows:

With regard to your suggestion for arbitration, as you have pointed out in your letter, the architects have given their opinion and decision under Clause 23 of the Contract. This opinion and decision, therefore, is binding on the parties, and we too have accepted it as such. In the circumstances, there is no question of referring matters to arbitration, and we regret we cannot agree to your suggestion in that behalf.

12. The plaintiffs, therefore, filed the petition on November 6, 1973, as stated above, setting out the differences between the parties in para. 8 of the petition, as follows:

The plaintiffs say that there is a dispute relating to the original Design of the Works and the folded plate and whether for the said defective design which was of an unusual nature, the plaintiffs were responsible for the deflection in the slab as the said Dr. Kelkar observed that the stresses of the crowns of the interior fold of the plate were very high. The plaintiffs submit that the Architects were not competent to judge the R.C-C. design of the folded plate and to put the blame on the plaintiffs as they purported to do. The plaintiffs say that if the original R.C.C. design of the folded plate was of an usual type and the R.C.C. specialist did not use the conservative design procedure in this case as is Visual in case of long span folded plates, the plaintiffs cannot be blamed for the deflection. The plaintiffs submit that there is a valid arbitration clause under Clause 43 of the general conditions of the Contract for referring the said disputes to Arbitration. The petitioners therefore submit that the said disputes are referable to Arbitration under Clause 43 of the said Contract.

13. In reply to the petition, the defendants relied on an affidavit-in-reply filed by one Girdhari Kishanchand Menda, who, we are told, is an officer of Glaxo Laboratories (India) Limited, familiar with the facts of the case and able to depose to the facts. In that affidavit, two preliminary objections were made out viz. (1) that the only remedy available to the plaintiffs was to file a suit for recovery of Rs. one lakh; and the work was completed in or about October 1970; the plaintiffs'' remedy, if any, by way of filing a suit was barred by limitation ; and their endeavour to circumvent the law of limitation by filing the arbitration petition, must be defeated by dismissing the

plaintiffs'' suit; (2) that the petition was misconceived inasmuch as under Clause 42 of the contract entered into between the plaintiffs and the defendants, the architect''s decision, opinion, direction, certificate (except for payment) with respect to all or any of the matters under Clauses 2, 7, 9, 17, 23, 30(a), (b), (c), (d), (f) and 39 thereof and as to the exercise by him under Clause 12 of the right to have any works opened upon is final and conclusive and binding on the parties; and it was contended that the architect''s opinion and decision given under Clause 23 of the contract, could not be the subject-matter of the arbitration and on this ground also the Arbitration Suit was liable to be dismissed with costs.

14. So far as the merits were concerned, it was contended in the said affidavit-in-reply that prior to the contract being given to the plaintiffs, inspection was given to the plaintiffs of the drawings, design and specifications in respect of the said work; and the said defect was noticed before the completion of the work, at the time of issuing the progress payment certificate on October 23, 1970. According to the defendants, the defects were noticed in the "V" shaped roof and were pointed out by the architects as resulting from improper execution and materials used by the plaintiffs, after careful survey of the construction work. The defendants denied that at any time it was arranged to appoint either Mr. Bodhe or Mr. Divecha, as an arbitrator to look into the matter, as alleged or otherwise. The defendants further contended that the plaintiffs'' re quest to the said architects was improper and unjustified; and the fact as to leakage of water is irrelevant and immaterial.

15. It is further contended in the affidavit-in-reply that the design of the said folded plate roof provided that the said structure would be column free. The defendants contended that on account of the defective workmanship the said structure was not now a column free" structure but that several columns had been put up to support the said roof. It was contended that the certificate given by Messrs. Pheroze Kudianavala under Clause 23 of the contract was proper and binding on the parties under Clause 23; and the architects based their report not only on the report of Dr. Vasant S. Kelkar, but also after examining the following:

(i) The quality and workmanship of the item of work mentioned in para. 1 of the Architects'' opinion dated 10th August 1972;

(ii) The Report of the test carried out by the Indian Institute of Technology, Powai, at the instance of the plaintiffs;

, (iii) Various letters and reports submitted by the Structural Consultants, Dubon Engineering Co.;

(iv) Correspondence and representations from the plaintiffs.

According to the defendants, the design was not defective for the reasons mentioned by the plaintiffs. The defendants, therefore, contended that the architects'' certificate dated August 10, 1972, was validly issued under Clause 23 was

conclusive and binding on the parties and barred the reference to arbitration under Clause 43, while admitting the correspondence between the parties in the affidavit-in-reply and the rest of the points relating to the design challenging the allegations made in the petition.

16. A plain reading of the petition and the affidavit-in-reply would convey to a common man the necessity of the arbitration in view of the existence of differences which had to be referred to arbitrator u/s 20 of the Arbitration Act. We are, with greatest respect to the learned Judge, unable to understand how the petition could be dismissed by the learned Judge, before whom the petition was heard on January 18, 1974, without even a speaking order. The appellants- plaintiffs have challenged the said order and have produced a certified copy of the minutes of the order, which are as under:

PC: Petition dismissed with costs.

Petition as framed does not even disclose the cause of action. Neither of the two points that was sought to be argued before me appear in the petition, namely (1) that the architect had no authority under Clause 42 to order a payment, or (2) that the architect''s certificate under Clause 23 overlooks the fact that the petitioners-plaintiffs had been asked to correct the work and had done so. The petition, therefore, fails.

17. We find it difficult to understand how in view of what is stated above, with regard to the contents of the petition, the learned advocate appearing for the plaintiffs could argue before the learned Judge that the architect had no authority under Clause 42 of the contract to order payment.

18. Mr. G.E. Vahanvati, who appeared for the plaintiffs before the learned Judge, had made a statement at the Bar that what he had argued before the learned Judge was as follows:

(1) The defendants claim that the dispute cannot be referred to arbitration in view of Clause 42 of the General Conditions of Contract. It is submitted that even if the decision of the Architect is a decision under Clause 23, it is not a matter excepted under Clause 42 of the Contract since it relates to and/or is for payment of a sum of Rs. 1 lakh, and such decision, opinion, directions and certificates for payment are not final and conclusive under the Said clause.

(2) Under Clause 23 of the Contract, (even if it is to be assumed that the said clause applies to the decision of the Architect) the Architect can either order removal of improper work and materials and direct the contractor to take remedial measures, or in lieu of correcting work, he may allow work to remain and order allowance for difference in value. The Architect can make allowance for difference in value only in lieu of correcting work done. In this case, admittedly the Architect had ordered corrective and remedial measures to be carried out and that work was carried out

by the Contractor. In that view of the matter, the Architect had no authority and/or power to order allowance for difference in value.

19. Whatever might have happened before the learned Judge, with utmost respect, it was, in our opinion, not open to the learned Judge to dismiss the petition on the ground that the petition did not even disclose the cause of action when it was not pleaded so in the affidavit-in-reply. The pleadings on the original side of this Court are supposed to be schematically or forensically complete, traditionally full and legally not to be departed from at the time of hearing, without necessary amendments. All that was contended in the affidavit-in-reply has been summarized above and it is clear that there was no averment whatsoever in the affidavit-in-reply to the effect that the petition did not disclose a cause of action.

20. We have grave doubts, whether it is open to Court to read the words: "cause of action" in the context of the provisions of Section 20 of the Arbitration Act, which does not refer to such words and which simply says in Clause (7) :

Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter, II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

All that we find in Sub-section (1) of Section 20 is that (1) the petitioners should establish first that they had entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it; and (2) the differences had arisen to which the agreement applies, as stated already.

21. A common man, who understands simple English, would have had no difficulty in understanding on reading, the petition, the affidavit-in-reply, the correspondence which preceded the petition, and the terms of the building con- tract, that both these conditions of Section 20 were fully satisfied. The plaintiffs had specifically and unequivocally pleaded in very clear terms how the plaintiffs were entitled to refer the disputes to arbitration u/s 20, as mentioned in para. 8 of the petition, which has been quoted above.

22. In these circumstances, with profound respect, we are unable to agree with the learned Judge in holding, even assuming that some sort of cause of action was to be mentioned u/s 20 in the petition, that there was no cause of action in this matter. Here there is a clear undissolved dispute between the parties relating to the matter of Rs. one lakh, claimed by the plaintiffs from the defendants and retained by the architects, who have tried to prevent the arbitration by a snap sudden decision, which he was not called upon to give by any of the parties.

23. The learned Judge, with respect, was also not right in assuming that the plaintiffs had not pleaded in the petition that the architect had no authority, when in terms in the petition it is stated in paras. 6 and 7 that the architect had no power to give a decision on the design of the slab and the matters in dispute were not covered by Clause 23 of the General Conditions of the Contract. Besides the plaintiffs pleaded very clearly, as already stated in para. 8 of the petition, that there was a valid arbitration clause under Clause 43; and the disputes between the plaintiffs and the defendants were referable to arbitration under Clause 43 of the contract.

24. Mr. Cooper, the learned Counsel for the defendants-respondents strenuously tried to support the order passed by the learned Judge by contending that in the first instance what was excepted under Clause 42 was only the certificate; and the words "except for payment" to be found in Clause 42, quoted above, do not apply to any decision, opinion, and direction. This is a typical kind of over technical argument, which appears to have been urged in respect of a building contract, as shown by Monmouth C.C. v. Costello & Kemple Ltd (1965) 63 L.G.R. 429 discussed in Hudson''s Building And Engineering Contracts, 10th edn., at p. 820. In that case, Harman L.J., laid down: "words of this kind needed to be construed strictly since they could have the effect of shutting out the right to go to the courts." In our opinion, the words "except for payment" must govern the words decision, opinion, direction as well as the certificate.

25. This becomes further clear, if we refer to the various clauses referred to in the general contract between the parties. Thus, Clause 2 relates to the scope of contract and the architect''s instructions in regard thereto, viz.:

(a) The variation or modification of the design, quality or quantity of works or the addition or omission or substitution of any work.

(b) Any discrepancy in the Drawings or between the Schedule of quantities and/or Drawings and/or Specifications.

(c) The removal from the site of any material brought thereon by the Contractor and the substitution of any other material therefore.

(d) The removal and/or re-execution of any works executed by the Contractor.

(e) The dismissal from the works of any person employed thereupon.

(f) The opening up for inspection of any work covered up.

(g) The amending and making good of any defects under Clause 23.

The clause requires the contractor to forthwith comply with the instructions and empowers the architect to issue a certificate for payment in certain circumstances, which the employer is bound to pay.

26. Clause 7 similarly refers to what was agreed between the parties regarding what the contractor should provide in respect of the contract. Here also the architect has to determine the drawings, specifications and quantities, lighting by night as well as by day etc., and various other measures, while the construction was going on; and also provide for water supply in respect of which the architect has also to certify for payment in certain circumstances. Clause 9 again empowers the architect to direct the supply of materials and workmanship to conform to description and supply invoices, accounts, receipts and other vouchers for this purpose, at his own cost. Here again, the architect may disallow some costs incurred by the architect on some ground.

27. Clause 17 deals with the prohibition of assignment or sub-letting and does not necessarily involve any question of payment under Clause 23, which is quoted above, deals not only with removal of improper work and materials, but also reliefs by way of correction of work not done in accordance with the contract, or in regard to payment or withholding the payment. Clause 30(a), (b), (c), (d) and (f) similarly relate to delay and extension of time, which involve not only decision, opinion, direction, but also issuing of certificate, which may not necessarily be in respect of any payment.

28. Clause 39 deals with termination of contract by the employer, and also involves several directions with regard to it. That the agreement itself makes a distinction between certificate and payment is clear from Clause 36 which deals with certificate and payment. In other words, as far as we can understand, the intention of the parties which should be inferred from these clauses is clear. The parties intended that any decision, opinion, direction and certificate with respect to all or any of the matters under the aforesaid clauses, must be binding on the parties, except with regard to the payments. Similarly, Clause 12 did empower the architect to open up works and certify in certain circumstances the expenses and opening and covering it up to be borne by the employers.

29. Having carefully considered these clauses, we have no doubt that out of due regard for the skill and knowledge of the architect, the decisions of the architect were made final and conclusive under Clause 42 of the contract with regard to all such matters; but that his decisions or orders or certificates or directions to make payment or withholding payment could not bind the parties. That is the only fair and reasonable way of interpreting the building contract, because it is not disputed that the architect himself was personally interested in the matters of payment, as his remuneration varied according to the value of the work in respect of which he issues a certificate or makes a decision, opinion and direction.

30. It is, however, contended by Mr. Cooper that in the present case, even assuming that the words "except for payment" go with the words "decision, opinion, direction and certificate" in Clause 42, it cannot be said that the direction or opinion that Rs. 1,00,000 should be retained by the defendants in view of the defective construction

of the roof, can be described as a decision, opinion, direction or a certificate for payment. The contention must be rejected because the word "for" in the context of Clause 42 must be read along with the words, "decision, opinion, direction, certificate"... "with respect to" the excepted matters, and ''in respect of any of them. The direction to retain Rs. 1,00,000 instead of paying to the plaintiffs is nothing but a direction, or an opinion, or a decision in respect of or ''for'' payment. Mr. Cooper then submitted that it was in the nature of a set off and not payment; but in effect a direction or decision for set off also, in all cases, results in payment. It is a direction and decision for payment within the meaning of Clause 42.

31. If any authority was necessary in support of this conclusion about the interpretation of the words ''for payment'' it is useful to refer to the Full Bench decision in Keshar Sugar Works v. B.C. Sharma [1951] IA.I.R. All. 182, F.B. At page 138, Agarwala J. has rightly observed in connection with the interpretation of words: "time requisite for obtaining- a copy" within the meaning of Section 12(2) of the Limitation Act, 1908, as follows:

Those who take a narrower view, read the word ''for'' as if it was ''in, though they may do so unconsciously. If the expression were ''time taken in obtaining a copy'', the narrower view was the only view possible. But the expression ''time requisite for obtaining a copy'' is not the same thing as ''time taken by the appellant in obtaining a copy.'' The word ''for'' implies ''for the purpose of or ''in respect of. And, therefore, time necessarily taken before a copy can be issued, may legitimately be said to be ''time requisite'' for the purpose of acquiring a copy.

32. The Concise Oxford English Dictionary gives meaning of the word "for" as a preposition as "representing, in place of, in exchange against, as price or penalty of, in requital of." It is, therefore, clear that Mr. Cooper''s interpretation of the words "for payment" as not including the retention of Rs. 1,00,000 or other such amount as having no relevance to payment, is too narrow an interpretation of the word "for" in the context of Clause 42.

33. It was next contended by Mr. Cooper that even under Clause 43, if either the employer or the contractor be dissatisfied with the decision of the architect on any matter, or dispute of any kind (except any of the excepted matters) or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then, and in any such case either party (the employer or the contractor) may within twenty eight days after receiving notice of such decision give a written notice to the other party through the architect, requiring that such matters in dispute be arbitrated upon.

34. Mr. Cooper submitted that in the present case after the decision of Messrs. Kudianavala, on August 10, 1972, no notice was given to the architect within twenty eight days, as required by Clause 43; and, therefore, the right of referring the matter in dispute to arbitration was lost by the plaintiffs. As already stated above in this

case, the plaintiffs wanted the arbitrator to be appointed as early as March 7, 1972, after carrying out the grouting and other work, as suggested by the consulting engineer of the defendants. The conduct of the architect in suddenly coming down on the plaintiffs with a decision on August 10, 1972, could not be anticipated by the plaintiffs, particularly when it is stated in the petition that there was some sort of talk of appointing either Mr. Bodhe or Mr. Divecha as an arbitrator; and the plaintiffs had repeatedly told the architect, Messrs. Pheroze Kudianavala and Associates that an arbitration was necessary for determining the question in dispute; and the plaintiffs had further represented to the defendants on May 2, 1972, that it was necessary to refer the matter to the arbitration.

35. It is contended by Mr. Cooper that the decision of August 10, 1972, is a decision under Clause 23 latter part and that decision is binding on the plaintiffs, as they did not challenge the decision within twenty eight days. Clause 43 has prescribed a notice and a period of twenty eight days only with a view to show that the arbitrators are appointed as early as possible, and not with a view to deprive the right of the plaintiffs to challenge a decision with regard to payment or non-payment in respect of the work done by the plaintiffs.

36. The principles which should guide the Court in such cases, are very neatly summed up in para, 1298 at p. 663 of Halsbury''s Laws of England, fourth edn., vol. 4, as follows:

How far certificate clause controlled by arbitration clause. Where a building contract contains a clause by which the determination or certificate of the architect is made final and conclusive between the parties, or is made a condition precedent to any right of the contractor to payment, and the contract also contains a clause by which all disputes are to be referred to arbitration, a question arises as to how far the arbitration clause affects the certificate clause.

Where the arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters except by agreement, and, in the absence of an allegation of fraud, neither the court nor the arbitrator has jurisdiction to review the determination of the architect as to those matters.

On the other hand, where there is no express restriction of the scope of the arbitration clause, the jurisdiction of the arbitrator does not apparently extend to review the correctness of measurements and valuations were they are made conclusive between the parties, or conditions precedent to a right to payment. Where, however, the architect has power to issue a certificate which is neither made conclusive between the parties, nor is a condition precedent to payment, such a certificate would be subject to an arbitration clause in the contract.

37. Applying the above principles to the facts of the present case, we find that the decision of the architect dated August 10, 1972, was excepted from Clause 42, as

already stated above, in so far as it was a decision, directing the defendants to retain Rs. 1,00,000. Clause 43 says that the arbitrator, the arbitrators, or the umpire shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice, save in regard to the excepted matters referred to in the preceding clause, and to determine all matters in dispute which shall be submitted to him or them of which notice shall have been given, as provided in Clause 43.

38. In other words, they are express words, which show that the decision of the architect in so far as it directed retention of Rs. 1,00,000 could be completely reviewed by the arbitrators appointed under Clause 43. The provisions of Clause 43 which provide for a notice within twenty eight days, do not expressly state that if such notice is not given, the decision of the architect on a matter on which his decision is not made conclusive is also binding on the parties and will destroy the right of the parties to go to arbitration.

39. Moreover, in the facts of the present case, we are inclined to hold that the requirements as to notice is directory and not mandatory; and they have been substantially complied with by the plaintiffs inasmuch as the plaintiffs had approached the architects immediately after the architects progress payment certificate was issued on October 23, 1970; and the correction and modification were made as per the instructions of the consulting engineer of the defendants; and from March 7, 1972, they were insisting on the reference to arbitration of the two questions: viz. (1) whether the R.C.C. design was responsible for the deflection in the plate; and (2) whether an amount of Rs. 1,00,000, which was retained by the defendants against the folded slab, was excessive.

40. The architect was again given a clear notice to refer the above disputes in the letter dated April 4, 1972. Requirement of a notice is a requirement for the benefit of the architect so that the architect would know what matters are to be referred to the arbitration under Clause 43 and so that the other party also would not blame the architect alleging that the matter in dispute should not have been referred to the arbitrator by him. The purpose of the notice is to confine the matters in dispute to be referred to the arbitration and not to destroy the right of the parties to go to arbitration, in the event of a party failing to give such notice.

41. That purpose, in our opinion, was substantially complied with by the plaintiffs in the present case, as they wanted the matters in dispute to be referred to arbitration. They have referred to the correspondence with the architect; and they were suddenly surprised with the decision dated August 10, 1972, by the architect, without being called upon by the plaintiffs to give decision on the point. In these circumstances, the argument of Mr. Cooper that the claim for arbitration made by the plaintiffs was barred under Clause 43, must be rejected.

42. It may also be noticed that even this point was not taken in the affidavit-in-reply filed by the defendants; and we have considered it because Mr. Cooper laid great

stress on this point; and argued strenuously that for want of notice the arbitrators could not be appointed under Clause 43; and it is possible that other party''s right to sue any other person in connection with this dispute might have been lost. The argument of Mr. Cooper is most unfair to the plaintiffs, as the plaintiffs had done everything in their power to move the architect to refer the matter to the arbitration and had also informed the defendants that the differences between them should be referred to the arbitration. In these circumstances, we are satisfied that the argument of Mr. Cooper is not tenable in view of the conduct of the defendants and the architect, as well as the conduct of the plaintiffs in this case.

43. In the result, the appeal is allowed. The order, dated January 18, 1974, dismissing the petition with costs is set aside; and the plaintiffs'' petition is allowed in terms of prayers (a) and (b) of the petition. The respondents should pay the costs of the appeal and also the costs in the trial Court. For the purpose of costs of the petition counsel certified.

44. There shall be an order of reference u/s 20(4) of the Arbitration Act, 1940, to an arbitrator, to be named by the parties, who shall determine and arbitrate upon the dispute and differences which have arisen between the plaintiffs and the defendants, "as set out in the correspondence annexed in the petition and also in para. 8 of the petition."

45. The appeal is allowed to stand over till Monday, March 29, 1976, to enable the parties to arrive at an agreement as to the names of the arbitrator or arbitrators, failing which the Court will proceed to appoint an arbitrator or arbitrators.

46. By consent, Mr. K.T. Divecha of Messrs. Syke Patkar and Divecha appointed sole arbitrator to decide the disputes between the parties as referred to in prayer (a) of the petition. The respondents have agreed to the appointment of Mr. K.T. Divecha, without prejudice to their right to appeal against our judgment.