REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.159-170 OF 2010

SRI K. MARAPPAN (DEAD) THROUGH SOLE LR. BALASUBRAMANIAN ...APPELLANT(S)

VERSUS

THE SUPERINTENDING ENGINEER T.B.P.H.L.C. CIRCLE ANANTAPUR ...RESPONDENT(S)

JUDGMENT

K.M. JOSEPH, J.

1. These appeals are directed against the judgment rendered by the High court in Civil Miscellaneous Appeal Nos.479, 93, 94, 480, 481 and 95 of 1990 and Civil Revision Petitions Nos.303, 304, 305, 1039, 1040 and 1041 of 1990. The appeals arise

out of arbitration proceedings conducted under the Arbitration Act, 1940 hereinafter referred to as `the Act'. By the impugned judgment, the High Court set aside the orders passed by the Sub-Court granting the decree in terms of the Arbitration Award though in a modified way in respect of certain claims raised by the appellant. The Court also rejected the petitions filed by the appellant challenging the decision of the sub-Court refusing to make the Award decree of the Court in regard to certain claim. In short, by the impugned judgment the High court found that the arbitration awards were totally unsustainable in view of Clause 59 of the Agreement.

2. A tender was invited on 18.9.1978 by the respondent- State for carrying out irrigation works. The appellant having quoted the lowest rates which ranged between about 10-12% less than the standards specified rate, appellant entered into Agreement No.10/78-79 on 10/03/1979. Equally, the appellant

entered into Agreement No. 11/78-79 on 10/03/1979. He also entered into Agreement No.14/79-80 on 28/06/1979. The work was to be completed within 18 months from the date of handing over the possession. It would appear that the site was handed over to the appellant in regard to Agreement No.10/78-79 on 16.11.1979. As far as the Agreement No.11/78-79 is concerned, the site was handed over on 21.4.1979. The site was handed over to the appellant in regard to Agreement No.14/78-79 on 28.06.1979. Under the agreements, raising various claims, the appellant originally filed claim on 28.11.1983 before a panel of three arbitrators. The panel rendered its awards. The awards came to be challenged by the appellant and the awards were set aside. An arbitrator came to be appointed on petition filed by the appellant. He entered upon reference on 26.4.1988 and passed three awards on 19.8.1988. The appellant had, in fact, raised 9 claims. The arbitrator rejected claim Nos.6 and 8 whereas he awarded various sums in regard to

the other claims. Claim No.9, no doubt, related to interest. The respondent-State filed the applications for setting aside the award under Section 30 and 33 of the Act. The appellant moved suits for making the award decree of the Court under the Act. Certain claims which were awarded by the Arbitrator, however, did not meet with approval of the learned sub-Judge and he agreed with the respondent-State. It is this judgment which generated the appeals and revision petitions before the High Court which stand decided by the High Court by completely agreeing with the contentions of the respondent-State and holding mainly that the awards are in the teeth of clause 59 of the Contract.

3. We heard Mr. Ramamoorthy, the learned senior counsel for the appellant and we also heard Ms. Prerna Singh, learned counsel for the respondent.

4. Though various claims have been raised in the appeals, the appellant has finally chosen to press before us only the contentions in regard to Claim Nos.1,3,4,7 and 9. The awards relate to 3 different agreements entered into by the appellant with the respondents but the claims are all identical in their content in regard to all the three agreements though different amounts have been awarded under the same. Therefore, we may set out the claims with which we are to deal with.

Claim No.1 - towards extra lead of 4 kms/6 kms-stone and metal.

Claim No.3 – Non-supply of food grains as per the conditions of the agreement.

Claim No.4 – Reimbursement of short supply of cement.

Claim No.7 – Claim on account of stock of materials accumulated by the contractor for work in the project.

Claim No.9 – Interest of 18% per annum under the Interest Act.

5. Learned senior counsel for the appellant would contend that the appellant is certainly entitled to the amounts as awarded by the Arbitrator under these claims. He would submit that the award of the arbitrator is immune from judicial interference unless it be that the arbitrator has misconducted himself or it be that an error apparent on the face of the record is betrayed by the award. It is for the arbitrator to construe the contract and sift the materials before him. His finding on facts cannot be rendered vulnerable in proceedings under Sections 30 and 33 of the Act. As far as Clause 59 is concerned it is his contention that the said Clause would not stand in the way of the claims as awarded and which are pressed before us being countenanced in law.

6. Per contra learned counsel for the respondent would support the judgment of the High Court and would contend that Clause 59 of the

agreement would bar the claims canvassed by the appellant. Before we deal with Clause 59 it is appropriate to appreciate what happened before the arbitrator, the sub-Court and finally in the High Court.

PROCEEDING BEFORE THE ARBITRATOR

Claim No.I-Extra lead

7. The case of the appellant was that the appellant was to quarry and take stones and metal from a specified quarry which was located at a shorter distance than from where the appellant contractor had to actually quarry the stones and metal and thereafter transport the materials to the work site. This resulted in extra rate and therefore extra expenditure. The claim of the appellant was Rs. 15 per cubic meter. The arbitrator rejected the arguments of the respondent that the appellant on his own went ahead and carried out quarrying from the quarry located further away. The arbitrator also

found that the claim was tenable under Section 70 of the Contract Act. It is accordingly that the arbitrator awarded compensation at the rate of Rs.15 cubic meter for the amounts as claimed.

Claim No.III

8. Claim No.3 related to default on the part of department in making supply of food grains. In short, under the food for work programme of the Central Government, food grains were to be made available by the respondent and part of the wages of the works was to be supplied by the appellant in food grains as part of the contractual obligation and it is the case of the appellant that the food grains were not supplied though it was available. Consequently, the appellant had to supply food grains to his workers by procuring the food grains at higher prices from the open market. The arbitrator noted the argument of the State to be that the relevant clause only contemplated making available food grains, if it was available. The arbitrator relied

on the correspondence to arrive at the conclusion that though food grains were available it was still not supplied to the appellate. The arbitrator proceeded to award various sums under the three contracts on the basis that the appellant was constrained to expend money for supplying his workers by purchasing food grains from the open market.

Claim No.IV

9. As far as claim No.4 is concerned, it related to short supply of cement. Under the contract the arbitrator noted that the department was to supply cement to the contractor. The value of the cement was fixed at Rs.416/- per tonne. It was the case of the appellant-contractor that in breach of its contractual obligation, the department however did not make sufficient supply of cement. In order to achieve progress in the works it is the case of the appellant that he procured cement from outside. He also appears to have pointed out recoveries were made as though supply of cement was effected by the

department when it was not the case. The department contended that cement was in fact supplied as per the contract and the contractor was not authorized to purchase cement from outside. Department further contended that contractor did not produce any vouchers. Department further relied on Clause 10 of the contract. Clause 10 provided that no claim for compensation for non-supply of cement would lie. The arbitrator, however, rejected all the contentions of the department and relied on Section 70 of the Contract Act. The non-production of the cement issue register and unstamped receipt by the department led the arbitrator to raise an adverse inference against the department. The arbitrator proceeded to award varying sums under the three contracts.

<u>Claim No.VII</u>

10. Claim No.7 which is pressed before us related to a claim on account of material accumulated by the appellant for the work in the project was particularly awarded by the arbitrator. The claim of

the appellant was that he had purchased various materials and stocked at the work site for carrying out the work but the department prevented appellant from carrying out the work and, therefore, the appellant was entitled to the value of the materials which he had collected at his expense. The arbitrator after excluding sand awarded certain sums under the 3 contracts.

Claim No.IX

11. Finally, under Claim No.9 which related to interest at 18% under the Interest Act, the interest was awarded at the rate of 12% per annum on all claims from the date of the claim petition namely 23.11.1983.

Proceedings before Court under Sections 30/33 and 17 of the Act.

12. The sub-Court held *inter alia* as follows:

As far as Claim No.I is concerned, namely, extra lead, the sub-Court proceeded to agree with the arbitrator that the appellant is entitled to extra lead. As far as the quantum of extra lead is concerned, the court found that the arbitrator was not correct in fixing the extra lead at Rs.15 per cubic meter. The reasoning in this regard was that there was no material in support of the same. On the other hand, the Court reasoned that there was a procedure for settling such claims for extra items. As per correspondence, the court found that the difference would only be Rs.3.23 whereas it was found that the arbitrator has awarded at the rate of Rs.15 which would amount to giving Rs.24 for extra lead of 6 kilometers. This was found to be an error apparent and having regard to the fact that the matter was pending for a long time and the present proceedings constituted the second round of litigation, the court proceeded to modify the amount and direct that the

extra lead would be calculated as per the procedure extant.

13. As far as Claim No.III is concerned namely, the breach found by the arbitrator in the matter of supply of food grains, the court proceeded to set aside the award of the arbitrator. It was found that the misconstruing the contract, the arbitrator had awarded a sum of Rs.93 lakhs in all the three contracts put together which is without any justification as the arbitrator has exceeded his jurisdiction. Contrary to the finding recorded by the arbitrator the court found that there was no evidence to show that the food grains were available. The Court reappraised A-22 and A-25 and took the view that it did not support the finding by the arbitrator that the food grains were actually available. It was further found that there is no evidence to show that the appellant had given extra wages for non-supply of food grains by the department. There is no evidence

according to the court to show that the appellant had purchased food grains at the open market rates as the appellant had not produced the register to show that he had procured and supplied food grains from outside. The appellant was bound to pay fair wages.

14. As far as the claim No.IV is concerned, which related to short supply of cement to the appellant, the Court set aside the award passed by the arbitrator.

15. It was found *inter alia* by the Court that the appellant did not mention the source through which he had obtained the cement. There was no evidence before the arbitrator to show that the appellant was permitted to bring his own cement and use it in his work. As per the terms of the agreement the appellant was not allowed to use the cement other than the cement supplied by the

Government. There is no evidence before the arbitrator to show any check/measurement taken at the time of alleged use by the Contractor. The tabular statement produced before the arbitrator by the appellant was found to be only theoretical requirement of the quantity of cement for such work.

16. The contractual provisions were ignored by the arbitrator. In none of the letters written by the officers referred to by the arbitrator in the awards, the Engineers admitted about the alleged use of cement brought from outside by the appellant.

17. There was no clause in the contract permitting the contractor to use his own cement and claim reimbursement. The arbitrator exceeded his jurisdiction.

18. As regards Claim No.VII is concerned, which related to claim for value of the material stored by the appellant at his site, the court proceeded to set aside the award. The case of the appellant appears to have been that he collected the materials on the basis of the assurance of the department that further construction work will be entrusted to him but no letter of assurance was produced. The provisions of the agreement were only for finished work. The Additional Advocate General's argument that the Government had no objection in the contractor selling away material after paying royalty charges etc. to the Government was noted. Under Section 70 of the Contract Act, the Government has got option either to pay compensation or restore the material to the contractor.

19. As far as the claim for interest is concerned, the court relying on the judgment of this Court in *Gujarat Water Supply & Sewerage Board vs.*

Unique Erectors (Gujarat) (P) Ltd. & Anr. **reported in AIR 1989 SC 973 and taking the date on which the arbitrator entered upon the reference as 26.4.1988 and the date of the awards as 23.8.1988, it was found that for the said period, the arbitrator did not have the power to grant interest on the amount found due. Therefore, the Court set aside the award of interest for the period 26.4.1988 till 23.8.1988 in regard to the rest the award of interest was sustained by the Court. The net result was the Court, partially, allowed the suits and passed modified awards in favour of the appellant whereas it also allowed the petitions filed by the respondent for setting aside the awards in the manner which we have indicated above.**

The findings of the High Court

20. In the impugned order, the Court has proceeded to allow the appeals filed by the

respondent-State and dismiss the revisions filed by the appellant.

21. As far as Claim No.III is concerned which related to non-supply of food grains, it was found as follows:

> **"Apart from the fact that there is no such total liability on the part of the Government to supply the food grains without which he could have proceeded with. The very clause which has been relied upon by the contractor for supply of the food grains reduced to the effect that clearly such supply would be made only if available, and therefore, it is not the case of the Contractor that though food grains were available it is not supplied by Government. There is no mention or any evidence in this regard let in on behalf of the contractor. Therefore, it is again the compensation which comes within the bar of Clause 59."**

22. In regard to Claim No.IV, the following is the finding by the High court:

> **"In the Claim No.4 the reimbursement of non-supply of cement is again is similar such obligation as the one stated to be in the earlier claim and even on this account, nothing has been pointed out on behalf of the contractor on facts or in details as to how it can be taken out from the claim for compensation as barred under Clause 59."**

23. As regards Claim No.I relating to extra lead, the High Court proceeded to hold as follows:

> **"The Claim No.1 relates to extra lead of 4 K.m for stone and metal is again attributable to the alleged delays, laches and breach on the department as complained by the contractor and therefore, such claim once again amounts to a compensation within the parameters of the bar as provided under Clause 59. Since we have found that the claims under item 2,5,3,4 and 1 exfacie squarely come under the bar of Clause 59 in view of the very maintainability which go to the very root itself, these claims are squarely barred under Clause 59 as held in the aforesaid decision of the Supreme Court in the case of Ramnath International Construction Pvt. Limited (2 Supra)."**

24. It is found that claim No.2,5,3,4,1 is ex-facie case under the bar of Clause 59 and finally it was held as follows:

> **"Having regard to the reasons as given, especially, the authoritative pronouncement by the Apex Court on the very question, we hold that the claims of the contractor are not sustainable and accordingly both the awards of Arbitrator dated 19-06-1985 and 19-06-1968 and the judgement and decree in O.P. No.118 of 1988 dated 07-10-1988 to the extent of awarding claims in respect of the Claims Nos.1,2,3,4,5,7 are set aside and consequently we hold since the very claim being held to be**

not entitled, question of awarding any interest does not arise."

Decisions and Findings

25. Since the impugned decision is based on Clause 59, it is now necessary to refer to the same. It reads as follows:

> **"59. Delays and extension of time: No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except, as hereinafter defined. Reasonable extension of time will be allowed by the executive Engineer or by the officer competent to sanction the extension for unavoidable delays, such as may result from causes, which, in the Opinion of the Executive Engineer, are undoubtedly beyond the control of the contractor. The Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.**
>
> **In the event of the Executive Engineer failing to issue necessary instructions and thereby causing delay and hindrance to the contractor, the latter shall have the right to claim an assessment of such delay by the superintending Engineer of the Circle whose decision will be final and binding. The contractor shall lodge in writing with the Executive Engineer a statement of claim for any delay or hindrance referred to above, within fourteen days from its commencement, otherwise, no extension of time will be allowed.**
>
> **Whenever authorized alterations or additions made during the progress of the**

> **work are of such a nature in the opinion of the Executive Engineer as to justify an extension of time in consequence thereof, such extension will be granted in writing by the Executive Engineer or other competent authority when ordering such alterations or additions."**

26. It is our view that it will not be open to a contractor to claim compensation which arises on account of the fact that the work is delayed or hindrance caused to the work from any cause whatsoever. To demystify this further, it means that should the work be delayed on account of reasons which are attributable either partially or entirely to the employer namely the respondent herein, the claim for compensation is barred. Equally, the clause interdicts raising claim for compensation by the contractor if the employer poses hindrance to the work. If work gets delayed on account of the contractor himself, it is axiomatic that he cannot claim compensation as it would amount to a person taking advantage of his own wrong. Delay from any

cause cannot found a claim for compensation. It may also happen that the work may get delayed not due to the fault of the employer. There may be natural causes such as natural calamities which may cause delay in carrying out the work. Even in such cases, in our view, Clause 59 would cast an embargo against a claim by the contractor. This interpretation gives full play to the words 'delays from any cause whatsoever'. Equally, if there is hindrance to the work from any cause whatever, a claim for compensation would not lie.

27. The heading of Clause 59 is 'delays and extension of time'. While compensation on account of delay and hindrance is impermissible, what Clause 59 provides however, is that reasonable extension of time be allowed. Request for extension of time must arise from causes beyond the control of the contractor. It is further provided in clause 59 that if delay or hindrance is caused by any written instruction by the Executive Engineer then the period

of the delay or hindrance is to be assessed at 25% in excess of the actual working period so lost. It is further provided that if delay and hindrance is caused to the contractor as a result of the Executive Engineer failing to issue necessary instructions, the contractor will have the right to claim and assessment of the delay by the Superintending Engineer of the Circle. The contractor is to lodge a statement of claim for any delay or hindrance within 14 days from its commencement, failing which no extension for time will be allowed. Still further Clause 59 declares that whenever authorised alterations or additions which are made during the progress of the work are of such a nature which justify an extension of time, extension can be granted in writing by the Executive Engineer or other competent authority when ordering such alterations or additions. In short, under clause 59 while extension of time on account of delay or hindrance can be

granted. Claim for compensation on account of delay or hindrance on account of any cause will not lie.

28. Now that we have elucidated the true scope of Clause 59, we must ponder whether the High Court was right in placing Clause 59 side by side with Claim No.I and find that claim is in the teeth of Clause 59.

29. Claim No.I as we have already noted relates to claim for extra lead for carrying out the work of quarrying stone and metal from a quarry located at a greater distance from the work site. As far as the said claim is concerned, we would think that it cannot be associated with a delay to the work for any cause whatever within the meaning of Clause 59. What is involved in the claim is the right to claim compensation by reason of the fact that the appellant-contractor though had to quarry from the

specified quarry under the contract which was located nearer to the work site was compelled to carry out the work of quarrying, both stone and metal, from a quarry located at a greater distance and to transport the same to the work site. The claim is based on the expenditure which the appellant had purported to incur on this score. Though case of delay within the meaning of Clause 59 is sought to be set up, there is no support sought to be drawn from the second limb of Clause 59 which deals with hindrance to the work from any cause whatsoever. Therefore, we can safely confine our focus on the question whether the claim stands barred by virtue of Clause 59 on account of it arising out of delay. In this case, we must further notice that, in fact, before the arbitrator apparently Clause 59 was not as such pressed or at any rate seriously pressed. Before the civil court, in the counter affidavit filed, the State did not lay store by the said contention. It is in the additional counter affidavit filed that the

contention based on Clause 59 was apparently raised by the State. Be that as it may, since the arbitrator is the creature of the contract, and therefore, he is bound by the contract, though late in the day, it may be, that the objection was raised, we cannot rule out the said contention as it is a matter that goes to the root of the matter. In fact, we would approve of the view taken by the High Court in regard to effect of Clause 59 qua Claim Nos.2 and 5. The appellant has, also, not pressed these claims before us. The only aspect which remains is the contention which is urged on behalf of the respondent that Clause 59 would be infringed as escalated amounts are given beyond original period are canvassed by the appellant.

30. We would think that while it is true that the case under Claim No.I extends to the period beyond the original period of the contract (namely 18 months from the date of handing over of site), the

claim cannot be one which is on account of delay from any cause whatsoever. The claim, on the other hand is, on account of the appellant carrying out work of quarrying from a site which was located further away than the site which was specified under the contract. Be it for the original period of the contract or for the period beyond the contract, the appellant has had to quarry from the site located further away. Necessarily in regard to expenses, he must be paid for the difference in the rate. The last area of inquiry would be whether having regard to the fact that the civil court has agreed with the arbitrator that appellant is entitled to extra lead at which rate it should be paid? It is here that we must remind ourselves of the jurisdiction to interfere with an award under the Act. In calculating compensation at the rate of Rs.15/- per cubic meter, has the arbitrator acted without any material? Has he overlooked any contractual injunction? Does the Civil Court have the power to re-appraise the

materials in substituting or modifying the award on merits?

31. In this regard, we must notice the provisions in the Act relating to the power of the court when an award is challenged. Section 15 of the Arbitration Act, 1940 reads as follows:

> **”15.Power of Court to modify award. The Court may by order modify or correct an award-**
>
> **(a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or**
>
> **(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or**
>
> **(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.”**

32. Section 16 of the Arbitration Act deals with the power to remit the matter. We may straight away rule out the question of remitting the award having regard to the efflux of time and also improbability

the arbitrator being available even otherwise for the purpose of redoing the matter. Coming to Section 15 of the Act, the power available to the Court to modify the award was available inter alia when a part of the award is not referred to arbitration and such part can be separated from the other part and clearly Clause (a) is applicable as it is not the case of either party that the matter relating to the amount to be paid by way of extra lead was not a matter which was referred to arbitration.

33. Under Clause (c), an award can be modified if it contains a clerical mistake or there is an error which arises from an accidental slip or omission. There cannot be any doubt that this is not a case where there is clerical mistake or an error arises from an accidental slip or omission. Lastly, the power of the court to modify extend to a case where the award is imperfect in form. Certainly, it is not the situation in the facts of the case. Of

course, where the award contains an obvious error which can be amended without affecting such decision. Court has power to modify. When the Sub court modified the sale at which the amount is to be calculated would affect the 'decision' of the 'arbitrator'. It is not the sale of Rs. 15/ C.M., not an essential part of the 'decision' of the arbitrator.

34. In the light of the above discussion and proceeding on the basis that there is no power to modify the award we would consider the legality and correctness of the civil court decreeing the claim in regard to Claim No.1 by modifying the award of the arbitrator.

35. In the award, it is the case of the appellant that the Executive Engineer has clearly given the rates and arbitrator has found as follows:

"2.4 the claimant has claimed Rs.15/ cu.m. The Ld. Arbitrator at vol.2 page 283 has noted:

> **"In fact the Department itself recommended to the Government vide 87 letter of C.E. to Government for sanctioning enhanced rates because of escalation of costs. The Department had not disputed correctness of extra rate claimed by contractor. On the other hand by its representation and conduct it has accepted the rate as workable rate. The claim is also tenable and legally tenable and legally grantable, applying the principles of Sec.70 of the Contract Act. Hence I find the claim of the contractor for higher rates at Rs.15/ C.M. is just reasonable and legal.."**

For Agreement No.10, Rs.7,68,825/- is awarded.

For Agreement No.11, Rs.12,38,250 is awarded and

For Agreement No.14, Rs.9,59,325 is award.

The total is Rs.29,66,400/-"

36. The further case of the appellant is that the standard rate for the period stated by the Executive Engineer is Rs.13.75 cu.m. and the contractor has claimed Rs.15/-cu.m. which is accepted by the Department. It is contended by the appellant that as per the finding of the arbitrator the sub-

Court, the extra lead would relate to beyond the agreement period.

37. He had claimed at the rate of Rs.15/- cu.m. which was accepted by the department as is clear from letter dated 23/11/1982 written by the Executive Engineer to the Superintending Engineer.

38. Appellant drew support from letter dated 23.11.1982 written by the Executive Engineer to the Superintendent Engineer. We may also notice the following statement however in the said letter.

> **"After gaining practical experience it has been found possible to utilize this quarry only for major quantities of two contracts of Sri DV. Krishna Reddy & Co., against the total No. of seven works for which the stone from that quarry is proposed to be utilized. The quarry from which the stone is being obtained by Sri K. Marappan is at a distance 3.45 KM MR + 1.447 KM CT. He is obtaining the entire metal and stone totally from this quarry."**

39. The sub Court, on the other hand, has found that the assumption made by the arbitrator about Rs.15/- cu.m. over and above the quoted rates is

without any basis. The sub-Court relied on the provisions in the agreement relating to the manner in which the rates were to be derived. The sub Court proceeded to make reference to the clause in the agreement.

The Clause reads as follows:

> **"VII. a) <u>Procedure for working out rates for supplemental items</u>:**
>
> **The contractor is bound to execute all supplemental items that are found essential, incidental and inevitable during execution of main works at the rates to be worked out as detailed below:-**
>
> **i) Supplemental items directly deducible from similar items in the original agreement:-**
>
> **The rates shall be derived by adding to or subtracting from the agreement rate of such similar items, the cost of difference in quantity of materials or labour between the new item and the similar item in the agreement worked out with reference to the schedule of rates adopted in the sanctioned estimate with which the tenders were compared plus or minus overall tender percentage.**
>
> **ii) New items (a) similar items, the rates of which cannot be directly deduced from the original agreement.**
>
> **b) Purely new items which do not correspond to any item in the agreement.**

The rates shall be estimate rate plus or minus overall tender percentage.

NOTE: The term estimate rate used in (i) and (ii) and (a) & (II) (b) above means the rate of sanctioned estimate with which the tenders were compares, or if no such rate is available in the estimate the rate derived with reference to the scheduled of rates adopted in the sanctioned estimate with which tenders are compared.

Whether the need for execution of excess quantity beyond the quantities stipulated in the agreement is noticed, the contractor should give notice in writing to the Exe. Engineer, who will in turn shall obtain orders of the competent authority before commencing execution of the excess quantity of work.

For all items of work in excess of the quantities shown in Schedule 'A' of the tender the rate payable for such item shall be either tender rate or SS rates for the items plus or minus overall tender excess accepted by the competent authority whichever is less. The SS rates means the rates with which estimate is prepared for comparing the tender.

40. Thereafter, the sub court referred to the actual calculation made in Exhibit B.3 the letter dated 23.11.1982 written by the Executive Engineer to the Superintending Engineer which is in fact relied upon by the appellant himself. The sub Court

proceeded to find that the difference in rates for 2 kms and 6 kms works out to 3.23 per cu.m. and that the cost of conveyance of material of all kinds RR stones and spass as provided in the estimate is Rs.9.81 per cu.m. which was in accordance with the standard schedule rate for 2 km. lead. The rate fixed for 6 kms lead was Rs.15/- over and above the quoted rates of Rs.8.80 which is arrived apparently after deducting actual rate by which the appellant had quoted his rates which was nearly 10-12% less than the estimated rates. The result was that the arbitrator gave Rs.24/- per cu.m. as against Rs.13.75 which is without deduction. In the written submission before us, the appellant has not questioned the applicability of the clause relating to supplemental item in regard to the extra lead. Therefore, we need not be detained by the question whether the provision as such is applicable in respect of claim based on extra lead. If that be so, the question would be whether it is a case whether

arbitrator has awarded Rs.15/- in place of Rs.13.75 in which case we would be inclined to agree with the appellant that the award in this regard should be sustained in its entirety. But the question is whether the arbitrator has actually awarded Rs.15/- cu.m. over and above the amount which the appellant already received on the basis of the actual lead in the contract.

41. The arbitrator, in fact, found that the claim of the appellant for higher rates at Rs.15/- per cu.m. is reasonable and legal and on the basis of the tabular statement which was prepared by the appellant and awarded different sums under the three different contracts. It would appear that the claim for Rs.15/- per cu.m. is based on abnormal increase in transport charges due to increase in cost of fuel, automobile spare parts etc. If escalated rates are claimed, then it may attract the wrath of Clause 59. We would think that the claim of extra lead

cannot be denied. The claim of Rs.15/- per cu.m., if it is over and above the amount which is already received will be in the teeth of the contractual provision which is relied on by the sub Court for which he has not taken any exception to in which case we would think that the amount as ordered by the sub Court is to be awarded to him under this claim. This means the amount is to be worked out as provided in the letter dated 13.11.1982. In other words, the amount must be awarded on the basis of the cost of conveyance being calculated at the rate of Rs.13.75 and the amount must be calculated and paid. Mindful though we are of the limitation under Section 15 (b) of the Act to modify, we would in the facts of the case, rely on Article 142 to sustain the decision of the Sub Court under this claim.

CLAIM NO.III

42. Coming to Claim No.III, namely, on account of non-supply of food grain, we have already found that while the arbitrator has awarded the amount of

compensation, the sub Court has set aside the award. The main contention of the State which found favour with the sub Court is that the clause actually provided for supply of food grain provided it is available. The arbitrator found that food grains were not supplied despite the fact that they were available and this finding by the arbitrator was found to be perverse. The claim of the appellant was that under the agreement, the appellant was to supply the labourers a certain quantity of foodgrains as part of the wages. The labourers were also making such demand as it would be beneficial to them also. The appellant therefore had to supply food grains from the market at the market value which led him to incur extra expenditure. The labourers according to appellant were not willing to work otherwise. It is necessary to advert to the actual contractual provisions in relation to supply of food grain. The clause in one of the contract relating to food grains reads as follows:

"FOOD GRAINS:

1.The cost of the work is estimated to be Rs.1,16,15,713/- approximately. Against this estimate 17,500 quintals of wheat at Rs.115/- per quintal, if available, will be supplied to the contractor for being issued as wages to labourers employed on the work.

2.The tenderer shall bear the transport and other incidental charges for the transportation of wheat from nearest F.C.I. Wheat godown to the site of the work. He shall be responsible for the safe custody and storage of wheat at his own cost and ensure issue to the labourers of the quantity of wheat calculated at a price not exceeding Rs.1-25 per K.G. in lieu of the amount of wages payable to them.

3.The contractor shall be responsible to produce the Accounts of receipts, distribution etc., of what to the labourers as and when required by the Engineer incharge of the work.

4.The supply of wheat to the contractor for issue to the labourers will be regulated from time to time according to the assessment of the Engineer in-charge of the work.

5.The department is not liable for any compensation on account of any fluctuation of market price of wheat or deterioration in quality of the wheat. The contractor is bound to accept the agreed quantity of wheat at the stipulated rate, if offered. Similarly, he shall have no claim for the supply of extra quantity of wheat on the ground of excess or enlarged scope of work and where the Department declines to supply extra wheat, no claim for compensation on this account shall be entertained by the Department.

6. The tender will be deemed to have satisfied himself about the availability of wheat and the rates quoted by him in the tender should take into account that aspect for completing the work according to the specifications and conditions incorporated in the agreement."

43. It was further provided that the labourers were to be supplied wheat at a rate not exceeding Rs.125 per quintal but the quantity to be supplied to the labourers and rates are subject to the approval of the Executive Engineer.

44. The appellant relied particularly on the contents under the heading 'Negotiation'. It reads as under:

"<u>NEGOTIATIONS.</u>

During further investigation I do hereby agree for the supply of rice in place of wheat. I also agree to receive either wheat or rice or both to the quantity of 17,500 quintals. I also agree for a rate of Rs.115/- per quintal of coarsed rice and Rs.130/- per quintal for fine rice. I also agree to supply coarsed rice at a rate not exceeding Rs.125/- and fine rice not exceeding Rs.140/- per quintal to the labourers. The other conditions and clauses covered by the tender relating to the supply of food grains remain unchanged.

In case of short supply of either wheat or rice compared to the quantity of 17,500 quintals, I shall have claim for compensation on this account."

45. The first thing we have to deal with is whether the High court was wrong in rejecting the said claim. The reason for rejecting the claim by the High Court are as follows:

1. There is no such total liability on the part of the Government to supply the food grains without which he (apparently the appellant) could proceeded with.

2. The very clause which has been relied upon by the contractor for supply of food grains reduced to the fact that such supply would be made only if available and therefore it is not the case of the contractor that though foodgrains were available it is not supplied by the Government.

3. There is no mention of any evidence in this regard let in on behalf of the contractor. It is thereafter that the High Court holds that therefore it is again the compensation which comes within the bar of Clause 59.

46. At first blush, the claim relating to food grain even as understood by the High court does not appear to have anything to do with compensation for delay. The case based on hindrance also does not appear to be made. We shall, however, consider the matter in some detail.

47. The High Court has not adverted to the clause in the contract under the heading 'negotiation' which we have referred to. Instead the High court has proceeded on the clause which undoubtedly contemplated supply of food grain only subject to availability. The clause after the

negotiation was carried out however brought about the following changes:

> **In place of wheat, the appellant agrees to take either wheat or rice and the price at which it was to be supplied to the workers was also stipulated. The other conditions in the contract relating to the food grain remained unchanged. This means that it could be said that it was subject to availability and we have also referred to clause which provides that appellant is bound to accept the quantity at the stipulated rate, if offered. However, a significant change which was brought about was that in case of short supply of either wheat or rice compared to a specific quantity of 17,500 quintals, the appellant was given the right to claim for compensation. Therefore, this clause, in our view, brings about the change which has not been considered by the High court. Since the sub Court has given other**

reasons, it may be necessary to consider what sub Court has held.

48. The sub Court takes note of the provisions under the heading 'negotiation' which we have referred to except the condition that in case of short supply the appellant will have the right to claim compensation on this account. The sub Court proceeds to hold the conditions are incorporated with a view to cast a duty to receive a particular quantity of food grain in lieu of cash and to supply them to labourers at a stipulated rate and it is for the benefit of the State as the State would receive the food grains under the food for work programmes under the Government of India scheme free of cost. Further, it is for the benefit of the labourers. The sub Court proceeded to further hold that the purpose of the food for work programme was to create employment and the contractor is not to get any benefit out of this condition. The contractor is bound to make record of the food grains received from

the Government and supplied to the labourers at the specified rate. He cannot sell the food grains at the market rate. He is the happiest person and need not discharge the burden cast under the condition relating to food grains if food grains are not supplied. The appellant was trying to take advantage of this. There is no promise to supply a particular quantity of food grain. The appellant has no obligation to supply food grains to the labourers if the Government did not provide him food grains. The Sub Court also did not find favour with the contention of the appellant that taking the attractive clause of supply at subsidized rate, he quoted lesser rate and, therefore, for non-supply he is entitled to be compensated. It is found that the appellant is not entitled to compensation as it is not an attractive clause. The Court further found that the arbitrator was carried away by the letters written by the Engineers wherein they have opined that the contractor quoted lesser rates on account of

this attractive clause. It would become an attractive clause only if the Engineers concerned permitted the appellant to misutilise the grain by selling the food grain by the contractor in the open market. The appellant is bound to pay fair wages under the contract (It is true that under the contract clause the appellant shall not pay less than the fair wages).

49. It is found that department officers misunderstood the food for work in their letters. The arbitrator relied on such letters as if the Engineers are the master to interpret the term of the contract. It was further found that there is absolutely no basis that food grains were in plenty with the Government. The sub Court further finds that the reliance placed by the arbitrator at Exhibit A.22 for availability was not justified. He referred to Exhibit A.22 with annexure also. The contention of the appellant was that he promised to the

labourers that he would pay a portion of their wages by way of food grain at specified rate and he had to supply the food grains at the subsidized rates as promised by purchasing the food grains at higher rates. The sub Court finds that there is no evidence produced before the arbitrator to show that he purchased food grains from the open market and supplied those food grains to the labourers at the subsidized rates. In case of supply of food grains, the appellant was bound to maintain record of proper distribution but the appellant has not produced any such register, it is reasoned by the sub Court. Next it is found that the appellant even it is true that he agreed that the workers are to be supplied a certain portion of the wages in food grains, he cannot fix wages in such a manner that the contractor would get any advantage out of it as it is not contemplated under the scheme. He has to pay the fair wages and besides fair wages he had to provide additional facilities by providing food grains at the

subsidized rates. The question of supply of food grains to worker by appellant in the event of non-supply of the same by the Government did not arise. It is further found that there is no provision in the agreement to the effect that in case of failure to supply food grains the Government is liable to compensate the loss that may be sustained on account of failure of the department to supply food grains, and the arbitrator patently exceeded jurisdiction.

50. The first thing that stands out in the reasoning of the sub-Court is the absence of any reference to the clauses specifically under the heading 'negotiation' which specifically confers a right of compensation in case of short supply of either wheat or rice compared to the quantity of 17,500 quintals (Agreement NO.11/78-79). This means that while the parties contemplated that a part of the wages was to be paid by way of supply of food grains at the stipulated price, the obligation of the appellant was to take the food grain supply from the

Food Corporation godown and carry it to the work site. He was to further supply the said food grains to the workers at a higher specified rate in view of the fact that he would incur certain expenses. This undoubtedly was subject to availability. But introduction of the clause in the contract that in case of short supply of either wheat or rice in comparison to the actual quantity which was agreed to be supplied, the appellant will have a claim for compensation on the said count has been missed by the sub Court as also the High Court.

51. The sub-court has proceeded to find that the case of the contractor appellant that the clause providing for supply of food grains was an attractive clause, was not correct. We are inclined to agree with the said finding. In the claim filed by appellant what is stated *inter alia* is as follows:

> **"(ii)……The tender documents provided for supply of wheat at the quantities mentioned above. It also provides that the charges on account of the storage, transportation, the cost of the container as fixed by the Government, and sales tax have to be borne**

by the contractor. The contract condition also further stipulates that the contractor has to supply the wheat to the labourers consistent with their requirement and at the rates not exceeding Rs.125/- per quintal. It is also mentioned in the contract that a particular quantity of wheat at Rs.115/- per quintal, will be supplied to the contractor for being issued as wages to labourers employed on the work. On the representation made by the contractor on this clause there was negotiation and agreement was arrived at between the contractor and the Department to the effect that the contractor will receive the quantity of grains to be supplied either as wheat or as rice or both, further stipulating the rate at which it is to be supplied fixing the rate at Rs.115/- per quintal for coursed rice and at Rs.130/- per quintal for fine rice and also stipulating the rates at which the contractor is to pay to the labourers, retaining the other conditions and clauses covered by the contract relating to the supply of food grains.

(iii) In short the agreement stipulates that the food grains will be supplied by the Department to the contractor at the specific rates, which of course are competitive rates as against the rates of the grains to be acquired from the open market. <u>The contractor took this important and attractive aspect into consideration and submitted his tender at the most competitive rate only on account of the advantage he would derive from the department supplying the food grains at specific rates which he would pass on to the labourers."</u>

52. A perusal of the aforesaid averments will reveal that the tender document contemplated supply

of wheat of a particular quantity at Rs. 115/- per quintal and the contractor was to supply at Rs.125/- per quintal to workers. Thereafter, it is stated that on a representation made by the contractor there was negotiation and an agreement was arrived at between the contractor and the department. The contractor was to receive the quantity of food grains either as wheat or rice or both. In other words, reference is made to the clause coming under negotiation. It is thereafter stated that in short, the agreement stipulated that the food grains will be supplied at specific rate which were competitive rates as against the rates in the open market. It is further alleged that the contractor took this important and attractive aspect into consideration and submitted his tender at the most competitive rate only on account of the advantage he would derive from the department.

53. It is to be noted that even according to the appellant, the tender documents provided for supply of wheat. The contract was settled by calling tenders. The appellant submitted his tender which turned out to be the lowest. At the time of submitting his tender the condition relating to the negotiated settlement could not have been there. If that is so, the original tender conditions contemplated supply of wheat at Rs.115/- per quintal, if available. The appellant was to supply the food grains only if the food grains were made available by the Government. Therefore, it is totally untenable for the appellant to set up a case that attracted by the clause which resulted from the representation and negotiation, he submitted his tender. May be at the time of entering into the contract following his representation and negotiation the clause was incorporated which provided for supply of rice or wheat and other terms. In other words, at the time when appellant submitted his tender which may have

been lesser than the estimated rate by about 10 to 12%, the negotiated clause was not there. On this score, the case sought to be built up around the clause being attractive cannot be accepted.

54. Secondly, as regards the supply of food grains, the appellant is not correct in having contended that the appellant was duty bound to supply food grain even if the food grains were not supplied by the department. The sub-Court is correct in concluding that appellant was duty bound to supply food grains only if it was supplied to him by the department. This is because despite the clause resulting from negotiation, the other conditions remained intact. A perusal of the clause relating to supply of food grain would show that food grains would be supplied, if available. Again, the words "if offered" is conspicuous. The words in the clause which provided that the appellant shall supply food

grain to the labourers is not to be considered in isolation.

55. The sub-Court is not correct in coming to the conclusion that the appellant was bound to pay the fair wages to the workers and he was also liable to offer food grains apart from fair wages. A perusal of the clause makes it clear that what was contemplated was if the food grains were available and supplied, the appellant was to make use of the same supplied it to the workers 'in lieu of wages'.

56. There are a few aspects which remain. Firstly, what is urged before us is that the under the negotiated clause the department agreed to supply a definite quantity of food grains. In agreement No.11, it was 17500 quintals. We proceed on the basis that in other two agreements, different quantities as claimed by the appellant was mentioned. We notice that in the claim while the appellant has

referred to the negotiated clause relating to supply of rice and also providing for the quantity, there is no reference to the clause that appellant will be entitled to compensation if there is short supply of food grains. This clause is also not considered either by the sub court or by the High Court. Very interestingly this is what the arbitrator has said.

> **"It is argued for the Department that agreement clause is that contractor is not entitled for compensation even if there is non supply of food grains. I do not agree with this submission because the words used in the agreement are 'short supply'. The agreement does not state that the contractor has no claim in case of non supply of food grains. The counsel for the contractor submits that his clause was subsequently negotiated because intention of the parties was that contractor cannot insist on wheat alone or rice alone and if there is short supply either of rice or wheat, then for that short supply contractor has no claim for compensation. I am inclined to agree with the submission of the counsel of the contractor that so called clause in the agreement does not apply and it is not a bar to the contractor claiming compensation."**

57. However, in the contractual provision which we have extracted, we notice that right to claim compensation is reserved to the contractor in case of

short supply. But then, the case of the appellant is not of short supply but of non-supply. The appellant in his written submission also in paragraph 3 stated as follows:

> **"The Agreement at Vol.3, Pg.71, 72 refers to this head. At Pg.72 after the head 'Negotiations' the clause reads as under:**
>
> > **"….In case of short supply of either wheat or rice compared to the quantity of 17,500 quintals, I shall have claim for compensation on this account."**

58. Further, it is relevant for us to notice the discussion by the arbitrator regarding the quantum of compensation. The arbitrator relies upon the Statement No.3 appended to claim No.III wherein he has shown the prevailing rate of rice in the open market during the period November 1979 to October 1982. The amount which he has paid for the labourers for purchase of food grain on the basis of rates in the open market, the price of food grain payable to labourers for purchase of food grain as per the

agreement condition and the extra amount involved due to non supply of food grain by the department. The arbitrator found that the statement shows that the extra amount paid varies between Rs.162/- and Rs.211/- per quintal in the said period. On striking an average, it came roughly to about Rs.185/- per quintal which the appellant paid to the workers for non supply, finds the arbitrator. Further the arbitrator found that the labourers cannot purchase rice from the fair price shops because they were not rice card holders. The arbitrator referred to the communication to the Executive Engineer dated 23.7.1987 wherein he has stated that 1000 to 1200 workers work daily in each works and the rates for the food grain in the open market are increasing day by day, therefore he has no hesitation in awarding price increase by restricting it to 180% though the contractor's statement shows 185%. Thereafter, the arbitrator awarded as follows:

> **"The quantity agreed to be supplied by the Department namely rice to the contractor**

under agreement No.10 is 13,200 quintals, under agreement No.11, it is 17,500 quintals and under agreement No.14, it is 20,000 quintals. In the tabular statement contractor claimed difference of rates for 15,521 quintals under agreement No.10 and 20,804 quintals under agreement No.11 and 22,195 quintal under agreement No.14. Thus he claimed higher rates for 58,520 quintals where as the Department agreed to supply him a total quantity of 50,700 quintals is multiplied by Rs.180.00 being the difference in price he has incurred an additional expenditure of Rs.91,26,0000.00. Accordingly he is entitled to compensation for Rs.23,70,000.00 under agreement No.10/1978-79 and Rs.31,50,000.00 under agreement No.11/1978-79 and Rs.26,00,000.00 under agreement No.14/1979-80."

59. The arbitrator refers to Exhibit P.1 to P.4 letters. Arbitrator also refers to Exhibit B.3 to B.7 letters wherein it is stated that contractor was suffering as he has incurred expenditure on this account as there was a condition in the agreement to give food grains as part of the wages and his aspirations and objectives were not fulfilled because he has quoted less rates. The arbitrator make reference to the negotiations where rice took the place of wheat and thereafter the arbitrator enters the finding that the rice was available. He relies

on Ex.A-27 where the Executive Engineer speaks about 1000 to 1200 workers working daily at each work and the rates for food grains in the local market was increasing day by day. According to the arbitrator, there is correspondence that abundant quantity of food grains was available but no adequate arrangements were made to supply the food grains to the contractor. In the letter written by the Chief Engineer to the State Secretary, he notes the case of the appellant that the appellant has quoted lesser rates relating to supply of food grain at stipulated issue rates. The quantum in the three contracts is noted as also the rate and the amount, the value in rupees is noted. The Superintending Engineer has agreed that the food grain could not be supplied since allotment was not received even though there is stipulation in the agreement to supply food grain if available. The aspirations of the appellant could not be fulfilled, it is stated. It is noted that the price structure of various materials is increased

from the date of tender i.e. 10.11.1978. In relation to wheat it is shown an increase of 147%. There is an increase in the case of rice to the extent of 178%. This letter is written on 30.11.1982 Exhibit B-7.

60. First letter written by appellant is dated 30/06/1979. In the said letter this is what he says:

> **"I had requested on several times for the supply of food grains but so far no food grains were supplied to me. I request to make arrangement for the early supply of food grains. In this connection, I wish to state that I had engaged labours on the term that food grains will be supplied to them as a part of their wages and I am supplying food grains to them by purchasing in the local market. Hence, urgent action may be taken for the supply of food grains early otherwise, I have to invest extra finance…"**

61. Therefore, the case set up by him is that he has purchased food grains from local market and supplied. In the letter dated 27/08/1980 he states *inter alia* that he had engaged labourers on terms

that rice or wheat will be supplied to them as a part of their wages. He complains that no food grains was supplied. Then he says on the terms agreed to by him he had paid the price of the quality of rice that was cheapest in the market. As can be seen in the second letter the case appears to be that he was paying the labourers the price of rice and he is departing from the case that he was supplying the food grains.

62. In the next letter dated 16/07/1981 he states that he had to go in for additional finance on account of non-supply of food grains. He repeats the same complaint about huge financial outlay on account of non-supply at the specific rate of Rs.115/- per quintal which was actually available, in the last letter dated 07/10/1982.

63. We are of the view that the sub Court is right in holding that the correspondence referred to by the arbitrator did not show that the food grains were actually available with the department and

department was only trying to get the food grains from the administration with which the food grains was available. As long as there is some material which substantiated appellants claim before the Arbitrator, the Court hearing the petition under Article 30 and 32 would not reappraise the material to come to the conclusion that the arbitrator went wrong in arriving at a finding of fact. At the same time, if virtually there were no material then it becomes a case of no evidence. No doubt the contractual provision which provides that the appellant is to keep accounts and produce accounts relating to receipts and distribution may assume relevance when appellant receives food grains from the department and distributes. But at the same time the appellant is putting up the claim for compensation and that too a claim which runs into a fairly large sum. There would certainly be material to evidence the actual purchase and further actual supply to the workers or payment as alleged. Even

assuming everything that the appellant says is correct about the fact of the negotiated settlement, there is virtually no material except the appellants statement that the appellant paid for the price of food grains to the workers. Further, the claim involves payment of price of rice at escalated rates for period beyond the contract also and it invites the wrath of Clause 59. We would therefore think that the award of the claim by the arbitrator cannot be sustained.

CLAIM NO.IV

64. As regards, claim No. 4 is concerned, it arises from alleged short supply of cement. First of all, we have to find as to whether it is hit by the embargo contained in Clause 59 and also advert to the finding of the High Court. In this regard, the High Court holds that the obligation is similar in nature to the earlier claim, namely, claim no. 3 and nothing is pointed out on behalf of the appellant on facts or in details as to how it can be taken out of Clause

59. We have to ascertain what exactly is the claim raised by the contractor.

65. The claim in brief is as follows:

Cement is one of the items to be supplied by the Department at specific issue rates. The appellant, accordingly, perceiving the same as attractive quoted 10 to 12% lesser than the estimate rate. Cement was to be supplied at the issue rate of Rs.416/- per metric tonne. Right from the beginning, there was short supply. The appellant had no other option but to get cement from other sources. Large quantities were so brought from other sources. The Department being aware agreed specifically and by conduct that they will recoup the cement. The appellant had no intention to give cement free to the Department. The quantity of cement used by the contractor for the project had been quantified and noted in the measurement book and the USR (Unstamped Receipt). The quantity of cement supplied by the Department is

correctly noted in the cement issue register maintained by the Department. Recoveries had been effected without the actual issue of such quantity by the Department as evidenced by the document like USR and other entries. The appellant appended a tabular statement of quantity of cement used for the work, the quantity which was issued by the Department and the balance quantity which constituted the basis of the claim.

66. The arbitrator in regard to the said claim finds inter alia that in the letter dated 17.08.1980, the Engineer had stated that there is short supply and he was bringing cement from other sources and action may be taken to return the extra quantity of cement. He notes that in the counter of the Department, there is no denial about the quantity of work done by the appellant and also the quantity of cement used by him by bringing from other sources. He further finds that it is stated that the exact short

supply of cement can be shown only after taking all measurements. The details in the claim statement which also include, apparently, the tabular details was not denied in the counter. Though, the cement issue register and the USR were called for by the appellant, they were not produced. Adverse inference was drawn. The arbitrator further noted that in the bill the quantity of cement used has been recovered, though the quantity has not been issued and in the last bill, more quantity was given representing part reimbursement. The letters of the Department were also found to support the case of the appellant. Referring to the objection in the counter that no vouchers were produced by the appellant, it was brushed aside as immaterial as it is found that it is proved that he was bringing cement from other sources to complete the work except a small quantity under Agreement No.14. Reliance is placed on Section 70 of the Contract Act. The argument without a plea in the counter by the Government pleader that the appellant

was saving cement out of the quantity supplied by the Department was found untenable on the basis that engineers would not have permitted it. As far as, clause 10 of the Agreement prohibiting any claim for compensation for non-supply or delayed supply, the arbitrator found that appellant is only asking for return of cement brought by him and used in the construction on the assurance of the Department that it will be reimbursed. In total 3790 metric tonnes of cement were found to be brought by the appellant. Rejecting the claim of the appellant for market rate and applying the departmental issue rate of Rs.416/- per tonne different amounts were awarded under the three different contracts.

67. We would think that this claim cannot be said to be hit by clause 59 as appellant is not claiming compensation for any delay. On the other hand, his case is that, contrary to the agreement that he would be supplied the cement it was not supplied and he had to use cement by spending money

from his pocket and he only wanted that cement actually used which is in excess of the cement issued to be given to him. More importantly, the amount awarded is at the rate fixed in the original contract and no escalation is given.

68. The Sub-Court, however, set aside the award. The Sub-Court finds as follows: -

Cement is a controlled commodity and it could not be purchased from outside, without valid permit. It was found that the appellant did not produce any document to show that cement was actually purchased from outside. The source was not mentioned. The appellant did not produce any permission from the Department for purchasing cement from outside. Even if purchased, it was to be checked by check measure but there was no check measurement. The tabular statement shown by the appellant, only represents the theoretical requirement in the quantity of cement. He referred to the contractual provisions in this regard

which we will refer to. In the letters of the Officers, there is no reference about the use of cement by the appellant which was brought from outside. The letters written by the appellant also complained only of inadequacy of supply of cement and there is no mention of use of cement which he brought from outside. More importantly, he referred to the contractual provision to find that the Government is entitled to recover the cost of theoretical quantity which is not used and use of any lesser amount in comparison to theoretical amount would only enure to the Department.

69. We must refer to the contractual provision which has not been referred to by the Arbitrator. The contract provides that cement will be supplied at cost by the Department inter alia and the cost of cement issued will be recovered from the contractor's bill at the rate specified. The contract also contains the theoretical requirement of important

materials which include cement which are set out. The rate of recovery is shown as Rs.416/- per metric tonne. However, the important aspects which weighed with the Sub-Court are contained in the following provisions relating to the scarce materials like cement. It reads as follows:-

> **"The contractor is expected to use the scarce materials like cement and steel as per the theoretical requirements shown above.**
>
> **A schedule of quantities of important materials like steel cement etc., required for execution in accordance with the requisite specifications is appended hereto for which recovery will be affected. If these materials drawn according to a schedule are short used, the excess quantity so drawn should be returned to the Department in good condition and no payment will be made to the contractor therefore. If they are not so returned to the department, their cost will be recovered at the market rate prevailing at the time of supply or the issue rate whichever is greater plus storage charges plus sales tax if leviable.**
>
> **If materials are drawn in excess of theoretical requirements indicated in the appended schedule, the excess quantity should be returned to the Department in good condition. If they are not so returned to the Department their cost will be recovered at issue rate plus 100% surcharge or market rate whichever is higher plus storage and sales tax if leviable.**
>
> **If materials are either short drawn or short used (though drawn according to schedule) (1) the savings due to short drawal/ use should be secured to Government by recovering the cost**

thereof at issue rate from the Contractor. In the case of materials short used, though drawn according to schedule this recovery will be in addition to the recovery to be made for the cost of materials not returned as stipulated above.

The Executive Engineer will decide the approximate requirements of explosives. If they are drawn in excess of the same, the excess quantity should be returned in the Department in good condition. If they are not so returned to the Department their cost will be recovered at issue rate plus 100% surcharge over from the contracting bill.

The Contractor should maintain separate ledgers for each of the items which are either supplied by the Department or required to be procured by the Contractor and permit the Exec. Engineer or his authorized subordinate or scrutinize the Registers any time and note in account of the materials on hand."

(Emphasis supplied)

70. Let us see what the contract has really provided for. We are doing this for the reason that the Sub-Court set aside the award in regard to this claim. The appellant filed revisions against the judgment of the Sub-Court. We have noticed that essentially, the High Court proceeded based on the Bar under Clause 59. The matter has not been dealt with as such by the High Court. Here also after finding that Clause 59 will not come in the way of

the claim, we could have remitted back the matter to the High Court for consideration of the matter. Having regard to the long efflux of time, we are undertaking the task of considering the matter.

71. A perusal of the contractual provisions which we have referred to yields the following inevitable result. Cement is a scarce material to be supplied by the Department. The appellant was to maintain separate ledger for the item for which cement was supplied by the Department. The issue price was Rs.416/- per metric tonne. The cost of cement at the said rate was to be recovered from the appellant's bill at the issue rate. Thus, if the value of the work is Rs.100/- and the value of the cement is Rs.5/-, the appellant would get only Rs.95/-.

72. The next question is the effect of the other provisions which we have quoted. We have already noted that there are theoretical requirements in regard to the use of cement. It is not unnatural for the Department to prescribe for the theoretical requirement. This is to ensure that it is used exactly as per the theoretical requirement so that the structure on the one hand is built in a safe manner and at the same time nothing in excess is used so as to avoid wastage of scarce material. There are three situations which are contemplated. In the first situation, it is provided that if materials are drawn according to the schedule and are short used then the excess quantity is to be returned to the Department in good condition and for the same the contractor will not get any payment. Furthermore, if the short-used material is not returned to the Department, their cost will be recovered at the market rate or at the issue rate which is greater plus wastage charges and sales tax. An example which we may take, would be

if the requisite specifications is that 10 metric tonnes of cement is to be drawn and he draws 10 metric tonnes but he actually used only 8 metric tonnes there will be a short use of 2 metric tonnes which he would have to return to the Department.

73. The second situation is where the materials are drawn in excess of theoretical requirements. The contract contemplates that in such a situation, the excess drawn quantity must be returned to the Department in good condition and otherwise there will be recovery at the issue rate plus 100% surcharge or market rate whichever is higher plus storage and taxes.

74. The third situation contemplated is that if the materials are short drawn or short used it is specifically provided that in such a situation, the saving due to short drawal/ use should be secured to

the Government by recovering the cost thereto at issue rate from the contractor. Thus, in the example, we have taken if 10 metric tonnes is actual quantity as per the specifications which can be drawn but if only 8 metric tonne is drawn by the contractor while he was to use 10 metric tonnes, the saving due to short drawal was secured to the Government by recovering the cost thereto at the issue rate from the contractor. This means that instead of 10 metric tonnes, if 8 metric tonnes is drawn, the contractor would still be liable for recovery from his bill for the entire 10 metric tonnes, though, he has actually drawn only 8 metric tonnes. In respect of short used material, though, properly drawn the recovery would be in addition to the recovery for the cost of materials which is returned as we have noted above. Further, the contract contemplates that if materials are required to be procured by the contractor, he must maintain separate ledger for each of the item

which are so required to be procured by the contractor.

75. This would mean that if the appellant had indeed secured cement from outside, the appellant was obliged under the Contract to maintain a separate ledger. Further the Contract contemplates that there could be recovery from the bill of the Contractor for the cost of cement which is actually not supplied to the contractor and it will be based on the theoretical requirement as we have already referred to above. Thus, the mere fact that there has been excess recovery meaning thereby that without issuing the cement to the appellant the amounts have been recovered would not mean that the appellant would be able to substantiate his claim that there was inadequate supply of cement. That is a matter which must be substantiated with reference to other material.

76. But there are two situations which can arise. Cement may be available with the Department and the Contractor draws only lesser quantity than provided in the specifications which is based on technical requirements. In such a case, undoubtedly the Clauses which we have adverted to would apply. What however would be the position if cement is not available and consequently the Contractor is not supplied and he is not in a position to draw cement. In such a scenario also, will it be a case of drawal of cement by the Contractor which is less than the specified quantum? It would be so, but it may have different implications.

77. At this juncture, we may look at the correspondence which may throw light. In the letter dated 30.06.1979 written by the appellant to the Executive Engineer, we find there is no mention even about the inadequate supply of cement. Next letter

is dated 26.07.1980. This is a letter where reference is made to all the three contracts. There is a reference in this letter no doubt about the purchase of cement from other sources. He seeks return of the cement so that extra quantity of cement may be reimbursed. There is no reference to any particular quantity and there is no reference to which the other sources are.

78. The next letter is dated 16.07.1981. Here the reference is made to Agreement No.10/78-79. In this letter there is no complaint about the cement. Finally, there is letter dated 07.10.1982 which is addressed by the appellant to the Superintending Engineer. Here the reference is made to the Agreement No.11/78-79. No doubt in the body of the letter he also adverts to the other contracts. Substantially, the letter is one where he makes various complaints and finally, he makes a claim for enhancement. Here he says in this letter that there is inadequate and irregular supply of cement which

affected his steady progress of work during 1979, 1980 and 1981. He says inadequate supply caused him substantial loss to the work done. A look at the correspondence by the departmental officers at this juncture may be not out of place. Letter dated 13.11.1982 written by the Executive Engineer to the Superintending Engineer *inter* alia reads as follows:

> **"It is a fact that there was difficulty in obtaining and procuring cement for the project. The enclosed table indicates the available cement in the division. The total cement is used on this project alone for the works of Sri K. Marappan. It can also be seen from the statement the maximum percentage of cement available was spared to the works of Sri K. Marappan. Extreme efforts have been made for additional allotment of cement with great difficulty some additional allotment have been obtained as clarified in the statement. On the face of the over all shortage of cement and the possibilities of securing the full requirement of cement being bleak, the contractor could not be forced to increase the rate of progress which he was capable of managing, since most of the work carried out upto March, 81 being at lower levels of the dam. This shortage of cement was felt continuously. Reference is invited to the letter of Superintending Engineer No. 1230 CE dt. 13.6.81 and 831 CE dt. 27.4.79 wherein request for additional quantity of cement was made to Chief Engineer.**

79. In letter dated 18.11.1982 written by the Superintending Engineer to the Chief Engineer within 5 days of letter dated 13.11.1982 Superintending Engineer recommended completion through the same contractor with enhancement. In letter dated 30.11.1982 written by Chief Engineer to the Special Secretary to Government, Irrigation Department, it is *inter alia* stated:

> **"It is a fact that there was a difficulty in procuring the cement for this project. Overall shortage of cement and the possibilities of securing the full requirement of cement being bleak, the contractor could not be forced to increase the rate of progress which he was capable of managing. The shortage of cement was felt continuously from the starting of the work till to-day."**

80. From the correspondence, it would appear that the officers proceeded on the basis that there is a shortage of cement. Therefore, this appears to be a case where sufficient cement may not have been supplied to the appellant. However, it is to be remembered under Clause 10 of the agreement no right

to compensation lies for short supply of cement. Here the case of the contractor appellant which is accepted by the arbitrator is that this is not a case where compensation for short supply of cement is made by the appellant. All that the appellant is seeking is to be given, is the quantity of cement, which he brought from other sources or the monetary equivalent.

81. We proceed on the basis that the claim for return of the cement does not involve infraction of Clause 10 which forbids compensation on account of short supply of cement. The question, however, arises whether the arbitrator has misconducted himself in arriving at the amount of cement supposedly brought from other sources by the appellant to carry out the work. As far as the monetary equivalent is concerned as we have already noted it is at the issue price fixed under the contract itself and it is not an escalated amount so

the measure of the amount of reimbursement may not attract Clause 59. The only point, therefore, which remains is whether there was any basis for the arbitrator to have found that the appellant had indeed brought the quantity of cement from other sources and used it for the works in question.

82. The arbitrator has proceeded on the basis of the admitted correspondence between the officers to find that there is shortage of cement. The sub-court on the other hand finds that none of the correspondence by the officers indicate that the appellant was given permission to buy cement from outside. There is no indication in any of the letters written by the appellant which the other sources were from which he was procuring cement. The most important obstacle for the appellant is the clause in the contract which has been referred to by us and which is referred to by the sub-Court, namely, for procuring cement by the contractor, he must

maintain ledger and which may be open to scrutiny by the officer as and when demanded. In this case, the appellant has not produced any ledger showing purchase of cement from other sources. There is no written permission produced to purchase cement from other sources. No voucher has been produced by the appellant to establish purchase of cement from outside.

83. The arbitrator, however, has found that even non-production of vouchers is not material as it is proved that appellant has purchased cement from outside. There are two things which apparently the arbitrator has taken note of. The arbitrator finds that there is no denial about the quantity of the work done by the contractor and also about the quantity of cement used for bringing from other sources. It is stated in the counter affidavit that exact short supply of cement can be shown only after taking over of measurement. It is further found that measurement was already taken. The second aspect is

arbitrator finds that as the unstamped receipt and the cement issue register though called for by the appellant was not produced, adverse inference must be drawn. If the matter as alleged is not denied or is admitted then it may not be necessary to adduce evidence to prove the same. This principle is equally applicable before the arbitrator as it is before the court of law. Perhaps it is all the more applicable in the case of proceedings before an arbitrator.

84. We are in one sense handicapped by the fact that the appellant has not produced the counter affidavit filed by the State before the arbitrator. It is true that if the case pleaded by the State amounts to admission that the cement was brought from outside by the appellant and the matter was only regarding the measurement to be carried out that may give the impression that the arbitrator particularly having regard to the non-production of the unstamped receipt and cement issue register despite being

called for had some justification for coming to the conclusion that the appellant had procured cement from outside. Then the further question would be the only quantity of cement which was purported to be bought from outside by the appellant.

85. State definitely has a case, however, that there is no evidence by the appellant having procured cement from outside sources as he has not produced vouchers as that is seen dealt with by the arbitrator. The exact quantity of cement purchased from outside is not pleaded. Instead what the appellant contended for and what was accepted by the arbitrator was that the quantum of cement which was used could be found out from the quantum of work done. This is clear from the statement even on the basis that when a particular quantum of work is done, as per the theoretical requirement for cement involved in such work, the quantity of cement actually used by the appellant has been arrived at and after deducting the quantum of cement which was

actually issued, the balance amount of cement which the appellant has used for the work from outside source has been arrived at. We have referred to the contractual provision and it would be hazardous to arrive at the amount of cement, used from other sources based on quantum of work done.

86. But arbitrator overlooks the fact that under the contract the appellant was supposed to make entries in the ledger. A party is supposed to produce the best evidence or rather the evidence which under the contract is contemplated. The failure on the part of the appellant to produce the ledger has fatal consequences. The matter becomes further aggravated by the failure on the part of the appellant to even produce vouchers or bills in support of the claim to purchase the cement from outside sources. This is even if we are to ignore the fact that there is no written permission for purchase of cement from outside. We proceed on the basis that a contractor may without written

permission but for the purpose of the work purchased cement from outside. But certainly, the fact that there are neither vouchers nor any ledger entries nor bills produced which persuades us to hold that the matter may warrant interference with the award under Section 30. We are not inclined to accept the claim.

CLAIM NO.VII

87. As regards this claim, the claim appears to be that appellant collected materials and it was lying at the site. Admittedly, the appellant has not used this material for the purpose of doing the work. Only the case set up by the appellant is that he was given an assurance that he will be permitted to carry out the work and therefore, since he has spent money for the same, he must get the amount which is claimed for having spent on the material. We are of the view that insofar as the appellant has not used any of the materials to carry out the work and sets up the claim only on the basis of assurance which has not been admitted, the action of the appellant in purchasing

the materials cannot result in establishing his claim for compensation. It is to be noticed that the appellant raised a claim for enhanced compensation. He alleged that there was delay on the part of the respondent on various grounds. This is apart from alleging other factors like breakout of malaria, unfavourable weather and delay in taking decision by the departmental officers, which contributed to escalation in cost. Correspondence was exchanged with the Executive Engineer and the Superintending Engineer, the Superintending Engineer and the Chief Engineer and finally between the Chief Engineer and the Government. It appears that at that stage appellant invoked the arbitration clause and a panel of arbitrators gave their award. In fact, the work itself was stopped. Clause 59 prevents the Court from awarding compensation on account of any factor relating to the delay which may be due to any cause whatsoever. In such circumstances, we are of the

view that the appellant has also not made out any cause for compensation in regard to this claim.

CLAIM NO.IX

88. As far as the question relating to interest is concerned, the arbitrator has awarded interest at 12% from the date of the claim but excluded interest from commencement of proceeding till date of award. The question relating to interest is no longer res integra as we find that the issue has been dealt with in a recent judgment of this Court in *Assam State Electricity Board & Ors. v. Buildworth (P) Ltd.* reported in 2017 (8) SCC 146 to which one of us was a party. As long as the agreement between the parties does not prohibit grant of interest and the matter is referred to the arbitrator, arbitrator would have power to grant interest pendente lite. The Court *inter alia* held as follows:

> **"21. The next aspect of the matter relates to the award of interest for the period from 7-3-1986 to 31-12-1997. The arbitrator awarded a lump sum of Rs.20 lakhs for a period of 11 years. The High Court set aside the award of interest on the ground that Section 29 of the Arbitration Act,**

1940 contemplates the award of interest only from the date of the decree. The issue as to whether interest could be awarded for the pre-reference period and pendente lite under the Act of 1940 is not res integra. In Irrigation Deptt., State of Orissa and Ors. v. G.C. Roy (1992) 1 SCC 508, a Constitution Bench of this Court held that: (SCC pp.533-34, para 44)

> **"44….. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount of independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes – or refer the dispute as to interest as such – to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."**

89. The sub Court set aside the award of interest for the period from 26.4.1988 till the date of the award namely 19.8.1988 which is the pendente lite interest. This is on the basis that arbitrator has no power to award interest on amounts found due.

This is purportedly followed in the judgment of this Court in *Smt. Aruna Kumari vs Government Of Andhra Pradesh And Anr.* reported in AIR 1988 SC 873. This Court took the view that entering upon reference is to be taken as the date of commencement of arbitration proceedings for calculation of interest. And this Court took the view therein that there is no power to grant interest from the date of commencement of arbitration. However, in view of the decision in *Jugal Kishore Prabhatilal Sharma vs. Vijayendra Prabhatilal Sharma* 1992 (1) SCC 508 as followed in *The National Highways Authority vs. Afcons-Apil Joint Venture* 2017 (8) SCC 146, the sub Court was not justified in setting aside interest and the interest as awarded by the arbitrator is restored.

90. Accordingly, we partly allow the appeals. The award in so far as it relates to Claim No.I, as accepted by the sub-Court is restored along with interest on the same as awarded by the arbitrator. The amount shall be calculated and paid within two

months of production of certified copy of this judgment.

……CJI.
(Ranjan Gogoi)

….J.
(Sanjay Kishan Kaul)

……J.
(K.M. Joseph)

New Delhi;
March 27, 2019