MANU/MH/0135/1998

Equivalent Citation: 1998(3)ALLMR334, 1998(2)BomCR371, 1998(1)MhLj508

IN THE HIGH COURT OF BOMBAY

Arbitration Petition No. 98 of 1997 in Award No. 196 of 1996

Decided On: 15.12.1997

Appellants: **Khemka & Co. (Agencies) Pvt. Ltd.**
Vs.
Respondent: **Polish Ocean Lines**

Hon'ble Judges/Coram:
V.R. Datar, J.

Counsels:
For Appellant/Petitioner/Plaintiff: D.C. Gomes, Adv.

For Respondents/Defendant: G.A. Rebello, S.C. Naidu, Manish Desai and Ms. F. Markar, Advs., i/b C.R. Naidu & Co.

Case Note:
a) The case debated over the grant of non-speaking award that was challenged on the ground that the amount of award should have been made in the terms of indian currency and not in the foreign currency as claimed by the respondents - It was held that prayer clause showed that the amount was claimed in foreign currency and was allowed by the arbitrators - The arbitrator were not bound to give any reasons why the award was passed in foreign currency as it was non-speaking award

b) The award involving the foreign currency was challenged on the ground of limitation - The arbitrators passed the awards without any reasons - It was held that the Court could not go into it as the award was non-speaking, but the facts showed that claim was made in time

c) The case debated the effect of extended time on the award - It was challenged that the award was null and void for being passed during the extended period - It was held that by the Court's order, only the time could be extended and in this case, the extension was made by the order of the Calcutta High Court and the award was filed well before the said date

d) The case debated on the non application of mind by the arbitrators in showing the examination of four witnesses as three - It was held not tenable - Corrigenda on the point was sent by the arbitrator and the mistake could be corrected

e) The case debated over the validity of the corrections made in the award- The award was challenged on the ground that the arbitrator could not give the corrigenda about the number of witnesses examined after passing the award and it had become functus officio - It was held not tenable as it was clerical mistake and could be corrected

ORDER

V.R. Datar, J.

1. The petitioner Khemka & Co. (Agencies) Pvt. Ltd. is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Calcutta. The petitioner has been carrying on business as protecting agents at the port of Calcutta. The respondent Polish Ocean Lines is also a company having its office at 81364 Gydnia 10, Lutego 24: P O B 265 Poland and registered under Polish Law. The respondent is having its branch office at Bharat Insurance Building, Nariman Circle, Bombay-23.

2. The respondent owns a vessel m.v. "Leningard". By an agreement of 27th March 1963 the petitioner agreed to act as protecting and safeguarding agent of the said vessel. Under 4 different bills of lading, bearing Nos. 55/T to 58/T, all dated 28th November 1988, the said vessel of respondent agreed to carry 17,997 bags (399.850 MTs) of whole yellow peas from Gdansk, Poland to the Port of Calcutta and deliver the same to the order of Shipper one Asrimpex of Hungary. Guru Ispat Ltd. was the consignee/notify party under the said bills of lading. The petitioner acted as protecting and safeguarding agent about this transaction. The goods were duly shipped on board the said vessel. The petitioner then filled an import general manifest and declared the said goods in accordance with the said bills of lading.

3. On or about 10th February 1989, the said Hungarian shipper requested the respondent who in turn requested the petitioner by telex to amend the bills of lading by inserting the name of Ship Repairers Ltd. as the notify party instead of Guru Ispat Ltd. The vessel arrived at the port of Calcutta on 8th February 1989 and completed discharge of the cargo in several lighters of the Port of Calcutta by 14th February 1989. The petitioner gave intimation about the same to Guru Ispat Ltd. Thereupon Ship Repairers Ltd. undertook to pay the boat hire charges and other charges till the actual delivery of the goods and paid the same. However, Ship Repairers Ltd. was unable to produce the original bills of lading to petitioner for delivery of the said cargo. Instead the Ship Repairers furnished an undertaking and a guarantee and/or indemnity on 9th February 1989 countersigned by State Bank of Indore. According to petitioner, as per the extant practice prevailing at the port of Calcutta, on the basis of the guarantee/indemnity, the petitioner agreed to issue and subsequently issued delivery orders in regard to the said consignments to Ship Repairers Ltd. without production of original bills of lading. On that basis, Ship Repairers Ltd. obtained delivery of the cargo. Thereafter, Ship Repairers Ltd. failed and neglected to furnish original bills of lading to the petitioner. That is how the petitioner filed Suit No. 15 of 1990 against Ship Repairers Ltd. and others for the price of the cargo covered by the bills of lading, which suit is pending disposal.

4. Asrimpex Hungarian Trading Company could not, therefore, receive the price of the cargo shipped by it through the vessel of respondent and, therefore, filed arbitration proceedings against the respondent company and obtained an award and recovered a sum of US $ 276, 235.84 (equal to Rs. 86,93,493.10). The respondent claimed this amount from the plaintiff and therefore, disputes arose between the parties to this petition. As per the clause in agency agreement dated 27th March 1963, such dispute was referable to two arbitrators. This arbitration clause was invoked by the respondent company (Polish Company) and in pursuance of that, Justice S.C. Ghose (retired Chief Justice of Calcutta High Court and) Mr, Justice B. Lentin (retired Judge of this Court) came to be appointed as Arbitrators. The parties laid their claims and submissions before the said arbitrators and, thereafter, the learned arbitrators made and published their award on 15th October 1996 and gave

intimation thereof to the parties. Later on, this award came to be filed in this Court. The petitioner company has, therefore, filed this petition on 23rd December 1996 challenging the said award under section 30 of the Indian Arbitration Act, 1940.

5. The development at the time when the award was being made and published, will have to be noticed at this stage. The petitioners filed Arbitration Petition No. 186 of 1996 in Calcutta High Court for a declaration that the award passed by the Joint Arbitrators is required to be filed in Calcutta High Court and not in any other Court. It, however, appears that by the time this petition was filed, the Joint Arbitrators had made and published the award and that is how, the learned Single Judge of the Calcutta High Court passed the order :---

> "In any view of the matter since the Joint Arbitrators have filed the award on 22nd October 1996 in the Bombay High Court, it is only proper for the petitioner, if so advised, to take appropriate steps in the Bombay High Court and I am not adjudicating on the disputes raised in the petition."

Even before that, Arbitration Petition No. 209 of 1996 was moved in Calcutta High Court for extension of time to make the award, the learned Single Judge found that the award was made on 15th October 1996 and that application being filed on 14th November 1996 there was no scope for making application for extension of time and accordingly, that application came to be dismissed.

6 . Against the decision of the learned Single Judge of Calcutta High Court in Arbitration Petition No. 186 of 1996, the petitioners herein filed Civil Application No. 3904 of 1996 in appeal. The Division Bench found no merit in the application for stay and dismissed the same and further observed that there was no question of entertaining the appeal.

7. Thereafter, petitioners filed two petitions in this Court viz.. Arbitration Petition No. 97 of 1997 and Arbitration Petition No. 98 of 1997, which is the matter under discussion. By Arbitration Petition No. 97 of 1997, the petitioners sought a declaration that the award of the Joint Arbitrators is required to be filed in Calcutta High Court alone and in no other Court. While in Petition No. 98 of 1997, the petitioners sought to set aside the said award of 15th October 1996 passed by the Joint Arbitrators and in the alternate for remission thereof for reconsideration of the matter.

The learned Single Judge of this Court, Mrs. Justice Baam by separate judgment and orders of 11th August 1997, dismissed both the petitions. Arbitration Petition No. 98 of ,1997, was dismissed at threshold holding it to be not maintainable. Against these decisions in these two petitions, two separate appeals viz.. Appeal No. 847 of 1997 and Appeal No. 838 of 1997 came to be filed before Division Bench of this High Court. The Division Bench dismissed Appeal No. 847 of 1997 arising out of Arbitration Petition No. 97 of 1997 upholding the decision of Mrs. Justice Baam that this Court had got jurisdiction to entertain the award and the arbitration petition arising therefrom. However, in Appeal No. 838 of 1997 arising out of Arbitration Petition No. 98 of 1997, the Division Bench observed and held :

> "After hearing the parties, we are of the opinion that in the facts and circumstances of the case, the learned Judge was not right in dismissing the petition at the threshold (Underlining supplied). Consequently the petition is allowed and the order dated 11th August 1997 passed by the learned Judge in Arbitration Petition No. 98 of 1997 is set aside. We direct that Arbitration

> Petition No. 98 of 1997 be and is hereby admitted and remitted back to the learned Judge taking up arbitration petitions. Mr. Rebello waives service in the petition on behalf of the respondents. The respondents to file affidavit in reply within two weeks from today. Rejoinder within one week thereafter."

At the end of para 3 of the order the Division Bench also observed "For obvious reasons, we have not discussed the merits of the matter." Accordingly, the appeal came to be allowed with no order as to costs.

8. That is how, I am seized of this arbitration petition which is finally heard on merits.

I have heard Mr. Gomes for the petitioners and Mr. Rebello for the respondent.

At the outset, Mr. Gomes for the petitioners pointed out the concession made by Mr. Rebello for the respondent before Division Bench of this Court in Appeal No. 838 of 1997 viz.,

> "Mr. Rebello, learned Counsel appearing for the respondents, without prejudice to the rights and contentions of his clients, states that the respondents will have no objection if the appeal is allowed as also the petition is allowed and the arbitration award is remitted back to the Arbitrators."

However, the Division Bench then observed "we are of the opinion that Mr. Rebello will be at liberty to put forward the suggestion before the learned Single Judge." That way the concession as made before the Appellate Court was not accepted by the Division Bench and Mr. Rebello was given liberty to make such a suggestion before this Court. However, Mr. Rebello now submitted that he is not going to make such a suggestion before this Court and in order to save time and energy etc. he had made that suggestion when the only point upon which the petitioners sought to set aside/remit the award was obvious mistake committed by the learned arbitrators in mentioning in the award that three witnesses were examined on behalf of the present petitioners before them and that they have considered the evidence of the three witnesses; when as a matter of fact, four witnesses were examined by the petitioners herein. The judgment of Mrs. Justice Baam disclosed what arguments or submissions were made on behalf of the petitioners at that time viz., not only the award mentions that three witnesses were examined but even the names of these three witnesses were mentioned. Therefore, there was an error apparent on the face of the award and it was not simply a clerical or arithmetical mistake arising out of accidental slip or omission but it goes to the root inasmuch as the same indicates non-application of mind by the learned arbitrators and obviously they have not considered the evidence of the fourth witness not named in the award. That is what Mr. Gomes for the petitioners had submitted before learned Single Judge (MRS.. Justice Baam) when the matter was heard on admission and only that aspect of the matter was considered by the learned Single Judge. Holding such mistake or error not at all affecting the award, Mrs. Justice Baam dismissed the petition of the petitioners at threshold as being not maintainable and finding no other flaw in the award. That is how the Appellate Court was mainly concerned with this aspect of the matter upon which the learned Single Judge dismissed the petition and, therefore, Mr. Rebello submitted that he had made such a concession before the Appellate Court. Since, however, the matter is now heard on merits finally, he has got his own submissions to make. Both the Counsel have argued about this clerical mistake/error relying upon certain

provisions of the Indian Arbitration Act, 1940 and decisions in support of such submissions. I would advert to that aspect little later during the course of this judgment.

9. Mr. Gomes for the petitioners raised five points for consideration in this petition and the first one is that the respondent-company had chosen to claim the amount of the claim in Indian currency in its letter dated 29th April 1994, Exhibit F-1 to the petition (page 125) and a sum of Rs. 86,93,493.10 was claimed on account of misdelivery of the cargo covered by the bill of lading referred to in the reference. That way, the respondent-company was not entitled to claim such amount in foreign currency viz., US Dollars in the claim before the arbitrators. Secondly it was submitted that the claim made before the arbitrators was barred by limitation and that aspect is not considered by the arbitrators. Thirdly it was submitted that the arbitrators have drawn up issues arising out of the claim of the respondent and reply of the petitioners thereto and under the circumstances, though not reasons, arbitrators were bound to record their findings on such issues so as to indicate how they are replied. Fourthly, though there was no extension of time for making and publishing the award after previous extension was granted and a specific date was fixed before which the arbitrators were to make and publish the award; there was no proper extension on the last occasion and, therefore, the award is a nullity. Lastly, it was submitted that when in fact, four witnesses were examined on behalf of the petitioners herein before the arbitrators, they referred in their award not only by number as three witnesses but even stated the names and even in minutes of the meetings, there is a reference to the examination of three witnesses on behalf of the petitioners herein, who were respondents before the arbitrators and this aspect not only goes to show non-application of mind by the arbitrators but it clearly indicates that the arbitrators have not taken into consideration the evidence of the fourth witness of the petitioners and, therefore, there is error apparent on the face of the award. However, Mr. Gomes made it clear that now he does not seek setting aside the award though that is the principal prayer in the petition and he only prays for remission thereof for reconsideration by the arbitrators to make fresh award after considering the evidence of the fourth witness that is left out of consideration. These submissions are replied to by Mr. Rebello for the respondent and hence it would now be proper to proceed with the points raised by Mr. Gomes.

10. In regard to choice of currency alleged to be made by the respondent-company viz., recovery of the amount in Indian currency, Mr. Gomes relied upon the decision of the Supreme Court in Forasol v. Oil & Natural Gas Commission, MANU/SC/0034/1983 : [1984]1SCR526 . This decision of the Supreme Court shows that the matter arose out of execution proceedings where decree/award was passed in foreign currency and the question that fell for consideration was the proper date for fixing the rate of exchange. The Supreme Court has stated in this decision in paragraphs 24 and 25 that in an action to recover an amount payable in a foreign currency, five dates compete for selection by the Court as the proper date for fixing the rate of exchange at which the foreign currency amount has to be converted into the currency of the country in which the action has been commenced and decided. These dates are :

(1) the date when the amount became due and payable;
(2) the date of the commencement of the action;
(3) the date of the decree;
(4) the date when the Court orders execution to issue; and
(5) the date when the decretal amount is paid or realized.

It is then stated that in a case where a decree has been passed by the Court in terms of an award made in a foreign currency, a sixth date also enters the competition, namely, the date of the award.

Then in paragraph 40 of the judgment, the Supreme Court held that the Court must select a date which puts the plaintiff in the same position in which he would have been, had the defendant discharged his obligation when he ought to have done, bearing in mind that the rate of exchange is not a constant factor but fluctuates, and very often violently fluctuates from time to time. Then in paragraph 27 of the judgment, the Supreme Court observed that the question, which one, out of the dates mentioned above is the proper date to be selected by the Court, does not appear to have been decided in this country, and no authority of any Indian Court on this point has been brought to notice. The Supreme Court then stated that the question, however, has formed the subject-matter of decisions in England. Then the Supreme Court considered the various English decisions and in paragraph 40, observed that they are of, courts of a country from which India derived its jurisprudence and large part of laws. English decisions are not binding upon the Supreme Court of India but they are authorities of high persuasive value from which assistance can be legitimately sought. Whether the rule laid down in any of the English cases can be applied by Indian courts must, however, be judged in the context of Indian laws and legal procedure and the practical realities of litigation in India.

11. Then in paragraphs 41 to 47 the Supreme Court considered the aforesaid five dates and thereafter in paragraph 48, the question of Court fees and in paragraph 50 that of pecuniary jurisdiction are considered. In paragraph 69 of the judgment, the Supreme Court observed:

> "For the reasons set out above, we are of the opinion that the rule in the Jugoslavenska case 1973(3) All E.R. 498 cannot be applied to this country and the fact that a decree is in terms of an award for a sum of money expressed in a foreign currency makes no difference to the date to be taken by the Court for converting into Indian currency the foreign currency sum directed to be paid under the award and that such date should also be the date of the decree."

12. Mr. Gomes, however, relied very strongly upon certain observations in paragraph 70 of the judgment and only that aspect is required to be considered in the present case. In paragraph 70, the Supreme Court set out the practice which ought to be followed in suits in which a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the Court. The Supreme Court, however, found it unnecessary to categorize the cases in which such a claim can be made and decreed and indicated that they have been sufficiently indicated in the English decisions referred to by the Supreme Court. It is stated that such instances can, however, never be exhaustive because the law cannot afford to be static but must constantly developed and progress as the society to which it applies, changes its complexion and old ideologies and concepts are discarded and replaced by new. Then the important observations of the Supreme Court upon which Mr. Gomes has very strongly relied are as follows:

> "Suffice it to say that the case with which we are concerned was one which fell in this category. In such a suit, the plaintiff, who has not received the amount due to him in a foreign currency and, therefore, desires to seek the assistance of the Court to recover that amount, has two courses open to him.

> He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency, (Underlining supplied) For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date of the fifing of the suit because that is the date on which he is seeking the assistance of the Court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of court-fees and the pecuniary limit of the jurisdiction of the Court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. In such a suit, the proper prayer for the plaintiff to make in his plaint would be for a decree that the defendant do pay to him the foreign currency sum claimed in the plaint subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted and that in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the defendant do pay to the plaintiff the rupee equivalent of the foreign currency sum claimed at the rate of exchange prevailing on the date of the judgment."

13. So according to Mr. Gomes the respondent herein once having chosen by issuing letter (Exhibit E-1, page 125) mentioning there the sum in Indian currency was not entitled to lay the claim before the arbitrator in foreign currency and the arbitrators equally exceeded their jurisdiction in making award in terms of foreign currency. Mr. Gomes also submitted that even if this point was not raised by the petitioners before the arbitrators (which fact he admits in his submission), yet the law laid down by the Supreme Court is binding on all and even in the absence of any pleadings, the arbitrators were bound to know this law and should have made award only in terms of Indian currency for which the respondent had expressed its choice by issuing the letter referred to above. I am unable to accept all these submissions of Mr. Gomes. May be that in a letter (like the one referred to above) the respondent may have called upon the petitioners to pay the amount of Rs. 86.93.493.10 but this letter, (Exhibit E-1) refers to earlier letter dated 3rd March 1994, which is the letter claiming the amount from the petitioner and in fact, this letter, Exhibit E-1, calls upon the petitioner to appoint his arbitrator within two weeks and in such a letter, there appears to be a passing reference to the amount of Rs. 86,93,493.10. However, copy of the statement of claim made before the arbitrators by the respondent is annexed by the petitioners themselves as Annexure F and prayer clause thereof (Para 19) reads as under :

> (a) "That an Award be passed in favour of the Claimants and against the respondents in the sum of US $ 276.235.84 being the amount paid by the Claimants under an Award as per particulars of claims shown in Ex. D and for a sum of US $ 113,718.08 being the interest as per particulars of claim shown in Ex. D by virtue of their account having been debited on 23-6-93."

This would clearly go to show that the respondent chose to sue in foreign currency before the Joint Arbitrators and after having gone through the award passed by the learned arbitrators, it would be seen that it is perfectly in accordance with the decision of the Supreme Court and in particular paragraph 70 as stated above. The respondent expressed its choice in the claim before the arbitrators by praying award in terms of foreign currency and, accordingly, the award has been made by the learned arbitrators. It would be seen from the award itself that the learned arbitrators were quite aware of this legal position and, therefore, made award in terms of foreign currency and further directed to obtain permission from the concerned authorities in accordance with FERA 1973. It is seen that the first arbitrator is the retired Chief Justice while the second arbitrator is the retired Chief Judge of this Court. Both the arbitrators are, therefore, men of eminence having great experience. Their award clearly goes to show that they were conscious of this position and, therefore, made the award.

14. Furthermore, the petitioners never raised such a contention before the arbitrators. The agency agreement which contains an arbitration clause would be found at Exhibit-A to this petition. This agreement does not provide for payment in a particular currency though certain charges payable to the petitioners as an agent are agreed to be paid in terms of Indian currency. There is, however, one clause in item 6 (page 39) of this agency agreement which reads :---

> "Any payments between the Company and the Agent to be effected in accordance with the terms of the payment agreement existing between Poland and the country of the Agent, if any, otherwise in free foreign currency."

Mr. Gomes fairly conceded that he is not able to get the terms of payment agreement existing between Poland and India. In the absence of the same the amount would be paid in free foreign currency. U.S. dollars is such a free foreign currency but not rupees.

Mr. Rebello for the respondent pointed out that in a suit filed by the petitioners against Ship Repairers Ltd. and the State Bank of Indore a decree for a sum in foreign currency has been claimed and this would go to indicate that even the petitioners were aware that the amount was to be paid in foreign currency.

The award then goes to recite:

> "At the Preliminary Meeting, by consent of the parties and their respective Advocates, it was agreed by them that we shall have summary powers and shall not be required to give reasons for our Award."

Having regard to the above recital, it is clear that the arbitrators were not bound to give reasons in support of their award and, therefore, it is a non speaking award. Further, the arbitrators were given summary powers under the consent of both the parties and their advocates.

I, therefore, find no substance in the submission of Mr. Gomes that the award made by the arbitrators in foreign currency was made beyond their scope in view of the decision of the Supreme Court and, therefore, vitiated.

15. The second and third contentions of Mr. Gomes are that since the arbitrators framed issues and when issue regarding the bar of limitation was there, the

arbitrators were enjoined to give reasons in particular about the issue of limitation and at least they ought to have recorded the findings. It was contended that the issue regarding limitation was issue of law and since the arbitrators were eminent judges, they were expected to record their reasons for holding that the claim was not barred by limitation. Mr. Gomes tried to show how the claim on the face of it is barred by limitation but it is not possible for me to examine this aspect of the matter. However, as indicated above, the arbitrators were given summary powers and were not bound to assign reasons in support of their award. Since they were to deal the case summarily, nothing is there to indicate that they were bound to record at least their findings. It is not possible for this Court to speculate what weighed with the minds of the arbitrators in holding that the claim was not barred by limitation. However, Mr. Rebello has tried to show with certain justification that the cause of action for the respondent to claim the amount from the petitioners arose when the Asrimpex Hungarian Trading Company obtained an award against the respondent-company and respondent-company was required to pay the same in Dollars. That is alleged to have occurred some time in June 1993 and that is how Mr. Rebello submits that the claim was obviously not at all barred by limitation. However, as stated above, it is not for this Court to examine the correctness of the award as an Appellate Court since the award is non speaking and the arbitrators were not bound to give reasons. No grievance, therefore, can be made by the petitioners on that ground.

16. Mr. Gomes then pointed out that the award made by the arbitrators in this case is nullity because it is not made within extended time. In this behalf, he pointed out from the minutes of meetings recorded by the arbitrators how this contentions can be made good. In the Minutes of Meeting dated 3rd June 1995, it is stated that was the day for first effective date of hearing and that parties agreed that time for making and publishing the award be and is hereby extended till 12th November, 1995. Then Minutes of 11th December 1995 would go to show that time for making and filing award was extended to 12th March 1996 (In the compilation page 7 produced by Mr. Gomes the date as 12-3-1995 appears to be wrong and it should be 12-3-1996 because the minutes are dated 11th December 1995). Then the minutes dated 2nd February 1996 would go to show that by consent, time for making and publishing the award was extended till 31st July 1996. The cross-examination of the witness unfinished on 2nd February 1996 was continued on 3rd February and the Minutes of 3rd February 1996 would go to show that the next dates of hearing were to be intimated by the arbitrators in due course. The minutes of 19th April 1996 and 20th April 1996 would go to show that the next dates of hearing were fixed on 14th and 15th June 1996 tentatively. Then minutes of 19th August 1996 would go to show the endorsement made by the arbitrators after adjourning the case to 20th August 1996 at 11 AM for arguments as follows:

> "Mr. Naidu & Mr. Addy state that time for making and publishing the Award was extended in correspondence between them till today.
>
> By consent time for making and publishing the Award is hereby extended till the 31st day of October 1996."

Thus, according to Mr. Gomes the time for making and publishing the award was last extended till 31st July 1996 and there was no further extension of time after that date and the minutes of 19th August 1996 would only go to show that the time was extended by correspondence, which is not permissible and, therefore, there was no proper extension of time. Not only that, it is pointed out that on 3rd October 1996 the time for making and publishing the award came to be extended till 31st

December 1996 by consent of the parties but before that the arbitrators made their award on 15th October 1996. According to Mr. Gomes the decision in State of Punjab v. Hardyal, MANU/SC/0002/1985 : [1985]3SCR649 would clearly go to support his contention that even though the petitioner participated in the further proceedings before the arbitrators after expiry of the period, that would not amount to extension of time on the ground of waiver so as to save the award from nullity and the principle of estoppel cannot be applied against the petitioners. It was contended by Mr. Gomes that parties cannot extend the time after the matter has been referred to the arbitrators and it is for the arbitrators to extend the time. The above minutes would go to show that the time was extended by correspondence when there being no order of the arbitrators. That is how there was no proper extension of time for making the award and that way the award made thereafter is rendered nullity. However, the decision of the Supreme Court relied upon by Mr. Gomes would go to show that the facts in that case are quite different and there, after expiry of the time for making and publishing the award, parties simply participated in the proceedings without any extension of time by the arbitrators themselves and in those circumstances the Supreme Court held:

> "Once we hold that the law precludes parties from extending time after the matter has been referred to the arbitrator, it will be contradiction in terms to hold that the same result can be brought about by the conduct of the parties. The age-long established principle is that there can be no estoppel against a statute. It is true that the time to be fixed for making the award was initially one of agreement between the parties but it does not follow that in the face of a clear prohibition by law that the time fixed under Clause 3 of the Schedule can only be extended by the Court and not by the parties at any stage, it stilt remains a matter of agreement and the rule of estoppel operates. It need be hardly emphasized that the Act has injuncted the arbitrator to give an award within the prescribed period of four months unless the same is extended by the Court."

Furthermore, this question was also raised before the Division Bench of the Calcutta High Court in an appeal referred to above and the Calcutta High Court observed :

> "Be it recorded that the date for making and publishing the Award expired on 31st of July, 1996. Admittedly in presence of the parties the next date of hearing was fixed on 19th and 20th August, 1996, and at the meeting of 19th August, 1996, the following has been recorded:
>
> "Mr. Naidu and Mr. Addy state that the time for making and publishing the Award was extended in correspondence between them till today. By consent, time for making and publishing the Award is hereby extended till 31st day of October, 1996."
>
> Subsequently two more dates were fixed at the meeting dated 20th August, 1996, viz., 3rd October, 1996 and 4th October, 1996. On 3rd October, 1996 the minutes record the following:
>
> "Mr. Gupta resumes and concludes his arguments.
>
> Arguments commenced by Mr. Rebello and to be continued tomorrow at 11 A.M. at the same venue. Time for making and publishing the Award extended till 31st of December, 1996 by consent of the parties."

The Calcutta High Court further found that in the petition made in that Court, out of which the appeal arose, there was no mention of whatsoever nature and not even a whisper about the extension of time, as recorded in the minutes of the meeting but on the contrary in paragraph 6 of the petition what was stated was:

> "Inasmuch as there was some irregularity in the matter of extension of time for the Joint Arbitrators to make and publish the Award and likelihood of the same vitiating the arbitration proceedings, your petitioner fitted an application in this Hon'ble Court under the provisions of section 28 of the Arbitration Act, 1940 for due extension of time to make and publish the Award by the Joint Arbitrators."

Further the Calcutta High Court also observed in regard to certain motive attributed to the applicant in filing application under section 28 of the Arbitration Act before the Calcutta High Court as follows:

> "Incidentally be it recorded that the motive attributed by Mr. Kapur, in any event, does not seem to be wholly unwarranted in the contextual facts. The parties themselves were present together with Solicitors and Advocates and the extension of time was duly recorded by their Advocates in the presence of the Arbitrators so as to enable the Arbitrators to make and publish the Award and relying upon such a situation the Arbitrators made and published the Award and filed the same in Bombay High Court on 22nd October, 1996 - can the action of the Arbitrators be said to be in any way not in consonance with the known principles of law ?"

Mr. Rebello further pointed out that in grounds (a) to (i) raised in the present petition, there is no such point or ground raised by the petitioners about the award being nullity since the same was made beyond the time which was agreed by the parties within which the arbitrators were to make and publish the award. I have gone through the grounds (a) to (i) in the petition raised by the petitioners and also the contentions raised in earlier paragraphs but the petitioners have not raised this point in the petition and, such a point is raised at the time of hearing of this petition. I find no force in the submission of Mr. Gomes on this score.

17. The last point urged by Mr. Gomes for the petitioners is that the arbitrators have mentioned in their award as well as some portion of the minutes that only three witnesses are examined on behalf of the respondent i.e. petitioner herein while in fact four such witnesses have been examined and the minutes which mention the examination of three witnesses recorded by the arbitrators would go to show that it was fixed in their mind that only three witnesses have been examined on behalf of the respondent i.e. petitioner herein. That is how the arbitrators proceeded to consider the matter and this show total non application of mind by the arbitrators. This also goes to indicate that the evidence of the fourth witness examined on behalf of the respondent i.e. petitioner herein has not at all been considered by the arbitrators, and, therefore, this is a fit case for remission of the award. It is not that some simple or arithmetical or accidental error has been committed by the arbitrators but this would go to show total non application of mind by the arbitrators.

As against this Mr. Rebello for the respondent has relied upon the provisions of section 13(d) and section 15(c) of the Arbitration Act, 1940. The said sections so far as relevant read as follows:

> Section 13. Power of arbitrator---The arbitrators or umpire shall, unless a

different intention is expressed in the agreement have power to---

(d) correct in an award any clerical mistake or error arising from any accidental slip or omission;"

Section 15. Power of Court to modify award---The Court may by order modify or correct an award-

.....

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

Mr. Rebello submits that although the arbitrators in the above award and some portion of the minutes have stated that three witnesses were examined on behalf of the respondent i.e. petitioner herein yet the notes of arguments prepared by the arbitrators would go to show that they have considered the evidence of all the four witnesses examined on behalf of the respondent i.e. petitioner herein. Mr. Rebello further pointed out that in the minutes regarding the evidence of the witnesses recorded, it would be clearly seen that the evidence of the fourth witness is also stated to be recorded. It has been pointed out how the error crept in the minds of the arbitrators in stating that only three witnesses were examined. It was pointed out that first witness was examined at Bombay and his cross-examination was inconclusive, and further, for the purpose of completion of the cross-examination, certain documents at Calcutta were required and furthermore some more witnesses were to be examined at Calcutta and that is how the matter came to be adjourned and while recording that the witness was still under cross-examination, the arbitrators recorded that three more witnesses are required to be examined on behalf of the respondent and this would go to indicate that the arbitrators were quite alive to the fact that four witnesses were to be examined. Furthermore, Mr. Rebello pointed out that after the award was made and published and forwarded, the arbitrator Mr. Justice Lentin has forwarded a corrigendum stating that mistake has been committed in the award and the same should be corrected by inserting figure 4 in the place of three in regard to witnesses and wherever such mistake is there it should be, accordingly, corrected.

18. Mr. Gomes takes exception to the legality of this letter signed by one arbitrator Mr. Justice Lentin (Retired) and according to him, there is no signature of other arbitrator upon the said letter. It was also pointed out that after the arbitrators prepared and made their award, as per the rules, they forwarded the award along with all record and proceedings and papers and nothing was left with the arbitrators. As such, there was no reason for arbitrator Mr. Justice Lentin (Retiredl) to recollect all of a sudden that such a mistake has crept in and as such some third agency must have brought this mistake to the notice of the arbitrator, who offered to correct the same by way of a corrigendum. It was submitted by Mr. Gomes that it is the respondent who must have brought this fact to the notice of the arbitrators and otherwise no other person could have done so. This would go to indicate that the arbitrator is guilty of misconduct. I am not at all impressed by these submissions. It is a matter of guess only as to how the arbitrator Mr. Justice Lentin (Retired) recollected about this mistake when all the record and proceedings were already despatched to the Court as required by the rules. So the matter depending upon the guess cannot be considered and no definite averments are made in the petition in this behalf. As such, 1 am not much impressed by the submissions of Mr. Gomes. So far

as the error or mistake, which is referred to above, Mr. Rebello has supported his submissions relying upon certain decisions of the Supreme Court as well as of Nagpur High Court. In Chouthmal Jivrajjee Poddar v. Ramchandra Jivrajee Poddar, A.I.R. 1955 Nag 126 this is what Nagpur High Court held in regard to section 13 of the Arbitration Act:

> There can be no doubt that once an arbitrator has given his decision, he becomes functus officio and he cannot add to it or vary it in any way except to correct any clerical mistake or error arising from accidental slip or omission.

According to Mr. Gomes this cannot be said to be a mistake or error arising from any accidental slip or omission.

19. However, having regard to all the circumstances, I tend that the mistake which is relied upon by the petitioners to urge that it was an error apparent on the face of the award going to the root of the matter and showing non application of mind, cannot be accepted.

Mr. Rebello has pointed out two more decisions where it has been held that every error on the face of the award is not sufficient to vitiate the award and where the correction made by the arbitrator were in respect of patent errors and did not amount to any change of substance in the award, such corrections were permissible. In this behalf he relied upon the decisions in Juggilal Kamlapat v. General Fibre Dealers Ltd., MANU/SC/0007/1961 : AIR1962SC1123 and that of Calcutta High Court in Union of India v. M.L Dalmiya & Co. Ltd. MANU/WB/0070/1977 : AIR1977Cal266 .

20. The contention of Mr. Rebello that the arbitrators have referred in their notes of argument to the evidence of all the four witnesses and in fact that matter was argued before the arbitrators is not controverted by Mr. Gomes for the petitioners. I am fully convinced therefore that the error in the form of omission on the part of the arbitrators in mentioning three witnesses (instead of four) being examined on behalf of the petitioner and stating the names of these three witnesses (instead of four) was merely an accidental one and that it could not be said that the arbitrators did not apply the mind or that they omitted from consideration the evidence of the fourth witness on that ground. I am of the opinion that such accidental errors can always be corrected by the arbitrators under section 13(d) as well as by the Court under section 15(c) of the Arbitration Act. I, therefore, do not find any substance in this contention of Mr. Gomes.

21. Lastly, it was submitted that if this Court would take a contrary view, that would have effect of nullifying the decision given by Division Bench in appeal. It was pointed out that before the Division Bench a concession was made by my Mr. Rebello that the matter may be remitted to the arbitrators for reconsideration and on that basis the Division Bench allowed the appeal and sent back the matter to this Court. Equally this submission is devoid of any merit. What the Division Bench found is that in view of the point raised viz., omission to mention number of witnesses as four and mentioning three witnesses was a point which required consideration and the learned Single Judge (Mrs. Justice Baam) was not justified in rejecting the petition at the threshold. It is to be seen from the judgment of Division Bench that the question on merits was not at all considered by the Division Bench and matter was sent back for hearing by directing the petition to be admitted. Often times petitions are summarily rejected holding that there is no substance but in further appeals, after it is pointed

out that there were substantial points which required consideration and summary dismissal was not justified, such dismissals are set aside and matters are sent back for consideration. That does not, however, mean that the Court to which the matter is remitted is not entitled to record same decision after full hearing which would annul the effect of decision of the Appellate Court. I, therefore, find that even though the Division Bench in this case directed the petition to be admitted, that decision would not amount to holding that the same cannot be dismissed by this Court after fully hearing on merits.

As a result of the above discussion, I am of the opinion that there is no merit in this petition and same deserves to be dismissed. Accordingly, the petition is dismissed. No order as to costs.

22. At this stage Mr. Rebello for the respondent makes oral application under Rule 787(5) of High Court (OS) Rules for drawing decree in terms of the award since the petition is dismissed. As such, the award is directed to be made a rule of the Court and the decree in terms of the award be drawn.

Drawing up of decree and issue of certified copy expedited.

23. Petition dismissed.