2015 (0) AIJEL-HC 234598

GUJARAT HIGH COURT

Hon'ble Judges:K.S.Jhaveri and G.B.Shah JJ.

Indian Farmers Fertilizer Cooperative Limited Versus Cargo Clearing Agency (Guj)

FIRST APPEAL No. 5328 of 2007 ; *J.Date :- JUNE 24, 2015

- ARBITRATION ACT, 1940 Section - 3 , 28(2)

ARBITRATION ACT, 1940 - S.3 - S.28(2) - PROVISIONS IMPLIED IN ARBITRATION AGREEMENT - POWER TO COURT ONLY TO ENLARGE TIME FOR MAKING AWARD - APPEAL ALLOWED.

Cases Referred To :

1. Army Welfare Housing Organisation V/s. M:s. Gautam Construction & Fisheries Ltd, AIR 1998 SC 3244
2. Chairman And M.D., N.T.P.C. Ltd V/s. M:s. Reshmi Constructions, Builders And Contractors, AIR 2004 SC 1330
3. Cutts V/s. Head And Another, 1984 2 WLR 349
4. Cutts V/s. Head, 1984 1 AllER 597
5. Executive Engineer, Dhankanat Minor Irrigation Division, Orissa V/s. N.C. Budhiraj (Dead) By L.Rs., Civil Appeal No. 3586 of 1984
6. Inder Sain Mittal V/s. Housing Board, 2002 3 SCC 175
7. Jagdish Chander V/s. Hindustan Vegetable Oils Corpn. And Another, AIR 1990 Del 204
8. M:s. Hindustan Tea Co. V/s. M:s. K. Sashikant & Co. And Another, AIR 1987 SC 81 : 1987 (1) GLH 185 : 1986 (Supp1) SCC 506 : 1986 (2) Scale 756 : JT 1986 818
9. M:s. Sumitomo Heavy Industries Ltd. V/s. Oil And Natural Gas Company, AIR 2010 SC 3400
10. Mediterranean & Eastern Export Co, Ltd. V/s. Fortress Fabrics Ltd., 1948 2 AllEr 196
11. Nathani Steels Ltd V/s. Associated Constructions, 1995 Supp3 SCC 324
12. Rush & Tompkins Ltd. V/s. Greater London Council And Another, 1988 1 AllER 549
13. State Of Orissa V/s. Sudhakar Das (Dead) By L.Rs., AIR 2000 SC 1294
14. State Of Punjab V/s. Hardyal, 1985 2 SCC 629
15. Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur And Others V/s. Pratap Rai, 1978 3 SCC 113
16. Tarapore & Co. V/s. Cochin Shipyard Ltd, 1984 2 SCC 680
17. Union Of India V/s. M:s D.N Revri & Co., 1976 4 SCC 147
18. Walker V/s. Wilsher, 1889 23 QBD 335
19. Yogambai Boyee Ammani Animal V/s. Naina Pillai Markayar, 33 ILR(Mad) 15

Equivalent Citation(s):

Shri K. S. Nanavati
Sr. Advocate

2015 JX(Guj) 1469 : 2015 AIJEL_HC 234598
JUDGMENT :-
K.S.JHAVERI, J.

1 Heard learned advocates for the parties and perused the papers on record.

2 The appellant herein has challenged the judgement and decree dated 30.08.2007 passed by the Senior Civil Judge, kachchh at Gandhidham in C.M.A No. 5 of 2005 whereby the Civil Court has confirmed the award dated 30.08.2005 passed by the arbitrator.

3 The facts as per the appellant leading to the filing of the present appeal are set out in brief as under:

3.1 Pursuant to the notice dated 07.09.1993 inviting tender which was followed by the Letter of Intent dated 09.12.1993, the respondent undertook the work of clearing, forwarding, handling and stevedoring of MOP from the vessels arriving at Kandla Port and also for loading the discharged cargo through the trucks/dumpers of the respondent to be transported to the desired destination of the appellant.

3.2 On 22.12.1993 when the vessel M.V. LEON carrying about 30663.189 MTs of MOP had arrived at Outer Tuna Buoy (OTB) at approximately 1145 hours, the respondent was supposed to handle the operations of the said vessel as per the contract. The vessel had commenced its discharge on 05.01.1994 and completed the discharge on 05.02.1994.

3.3 Thereafter, the parties entered into a formal contract dated 11.02.1994 bearing No. PUR/ADV/205 for ratifying/regularising all the acts that had been agreed upon and done by the parties vis-a-vis the aforesaid scope of work (hereinafter referred to as the contract dated 11.02.1994). The appellant made all the payments to the respondent as per the bills raised by it from time to time and such payments were received by the respondent without any objection. The appellant lastly on 15.07.1994 paid an amount of Rs. 5,78,189/- to the respondent as the balance outstanding amount for which a receipt was also issued.

3.4 After receiving the aforesaid payment, the respondent raised dispute with regard to alleged non payment of certain amount by the appellant on account of alleged excess manpower/labour and additional machinery consumed during the implementation of the contract which was opposed by the appellant. An arbitrator was appointed to resolve the said dispute pursuant to application dated 22.02.1996 by the respondent by which Civil Suit No. 17 was filed before the Additional Senior Civil Judge, Gandhidham.

3.5 Thereafter, the proceedings were conducted before the Sole Arbitrator and after hearing the parties the Arbitrator passed award dated 30.08.2005 for an amount of Rs. 19,76,586/- including interest. Upon an application filed by respondent, the Arbitrator forwarded the award to the Additional Senior Civil Judge for confirmation and passing of decree which was numbered as CMA No. 5 of 2005. The Civil Court vide the impugned judgement and decree confirmed the award passed by the Sole Arbitrator which has been challenged by the appellant by way of present appeal.

Shri K. S. Nanavati
Sr. Advocate

4 Mr. K.S. Nanavati, learned Senior Advocate appearing with Mr. KK Nanavati for Nanavati Advocates for the appellant submitted that the arbitral award is void since the same was passed after the expiry of the statutory time limit of four months. In this regard he has drawn the attention of this Court to Section 3 of the Arbitration Act. 1940 read with Schedule 1, Rule 3. He submitted that the issue regarding award being time barred was raised by the appellant before the Civil Court which was not accepted by the Court on the ground of judgements of various High Courts setting out that a party participating in arbitration proceedings after completion of the statutory four month period without objection cannot subsequently raise the issue of arbitration proceedings being void on account of lapse of time.

4.1 Mr. Nanavati submitted that the Civil Court failed to consider that it is now a settled law that an arbitration award made under the 1940 Act must be made within four months where no time is stipulated by the parties in the arbitration agreement and that award made beyond the said time limit in the absence of extension granted by the Court would be void. In this connection, he has relied upon the decisions of the Apex Court in the case of State of Punjab vs. Hardyal reported in (1985) 2 SCC 629, para 13 and in the case of Inder Sain Mittal vs. Housing Board reported in (2002) 3 SCC 175, paras 11 & 12.

4.2 Mr. Nanavati further submitted that the arbitrator has ignored the express terms of contract. He drew our attention towards the express terms of the contract most notably Article 23 of the contract dated 11.02.1994, Clause 10 at page 63 and clause 24 at page 68 which are reproduced hereunder:

"ARTICLE : 23 PRICE :

i) All prices shall be fixed for the duration of the Contract and shall not be subject to escalation of any description.

ii) Unless otherwise provided in the Contract, the contract prices include all sales Taxes, Octroi, Excise Duties and any other charges by State/Central Governments or local bodies and Royalties and Licence fees, if any."

Clause 10 :

"10. During the course of discharge, as and when the contractor notices damaged/hardened cargo lying in the ship, the matter shall be promptly reported to the master of the ship under intimation to IFFCO. He shall obtain certificates from stevedore s surveyors and get colored photographs and record the same in statement of facts. Samples of such damaged cargo should be drawn jointly by shipped and stevedore s surveyor as well as Insurance surveyor and got analysed immediately. The complete analysis of the sample would be got done including fixation of price for assessing the salvage value. The analysis report to be report should be signed jointly by the surveyors and furnished to IFFCO. No extra wages shall be paid for digging hardened cargo and sea water damaged cargo and analysis jobs. Stevedore will be responsible for preferring a preliminary claim on ship owner/agent in consultation with IFFCO."

Clause 24 :

"24. The rates shall be firm for the entire duration and shall not be subject to any escalation on any account whatsoever."

4.3 Mr. Nanavati further submitted that the aforesaid provisions clearly provide that the appellant is not liable for any claim on account of escalation of prices. He submitted that the appellant also communicated to the respondent vide letter dated 31.03.1994 that it was not liable for any extra claim raised by the respondent on account of digging of hardened cargo as per the terms of Clause 10 of the contract dated 11.02.1994.

4.4 Mr. Nanavati contended that an Arbitrator cannot act arbitrarily or independent of the contract and that an award disregarding the contract or ignoring the fundamental terms of the contract goes to the root of the jurisdiction of the Arbitrator and vitiates an award rendered by him. He submitted that the Civil Court refused to accept the appellant s argument that the Arbitrator has ignored the terms of the contract on flimsy ground that the contract has not been incorporated in the award.

4.5 Mr. Nanavati contended that the endorsement of without prejudice on the contract by the respondents does not reprieve them from the terms and conditions therein. He submitted that the observation of the Civil Court that since the contract was signed without prejudice by the respondents they would not be bound by certain terms and conditions adverse to them cannot be sustained in law. In this regard he has relied upon a decision of the Apex Court in the case of Tarapore & Co. vs. Cochin Shipyard Ltd reported in (1984) 2 SCC 680, para 33.

4.6 Mr. Nanavati further contended that the respondent had accepted payment from the appellant as full and final settlement of its dues and this fact has been completely ignored by the Arbitrator as well as the Civil Court. He submitted that the respondent had issued a receipt dated 15.07.1994 for Rs. 5,78,189/- towards full and final settlement of its dues under the contract with the appellant. He has relied upon the decisions of the Apex Court in the case of M/s. P.K. Ramaiah & Co. vs Chairman & M.D., National Thermal Power Corp. reported in 1994 Supp (3) SCC 126 and in the case of Nathani Steels Ltd vs. Associated Constructions reported in 1995 Supp (3) SCC 324 and submitted that in view of the aforesaid law as clearly settled by the Supreme Court, the respondent had no right to raise additional claims under the contract dated 11.02.1994 after having accepted payment in full and final settlement of its dues in relation to the said contract.

4.7 Mr. Nanavati concluding his arguments submitted that the impugned decree as well as the award completely ignores the vital fact that the respondent had received the balance outstanding amount on 15.07.1994 as full and final payment received under the contract dated 11.02.1994 and that the entire claim raised under the dispute was a result of afterthought. He submitted that the appeal therefore deserves to be allowed and the arbitral award as well as the decree passed by the Civil Court requires to be quashed and set aside.

5 Mrs. Ketty Mehta, learned advocate appearing for the respondent has strongly supported the impugned decree and the award and submitted that the same being passed in accordance with law does not call for interference by this Court. She submitted that no doubt section 3 of Arbitration Act prescribes four months time to pass award by the Arbitrator but section 28(2)

gives specific power to the court to extend time even after the award is passed. She submitted that the court has to exercise its power to extend time judiciously and therefore this appeal being an extension of suit, this Court may exercise its discretion to extend time at this stage. In this regard, Mrs. Mehta has relied upon the decision of the Apex Court in the case of State of Punjab vs. Hardyal reported in (1985) 2 SCC 629, para 14.

5.1 Mrs. Mehta had further contended that the appellant is not estopped from raising the point of limitation before the Court, however, the court while extending time can consider the question of waiver as the appellant continued to participate in arbitration proceedings for more than two years from 2002 to 2004. She has also relied upon the decision of the Apex Court in the case of Inder Sain Mittal (supra), more particularly para 12.

5.2 Mrs. Mehta contended that the Arbitrator has considered clause 10 of Contract dated 11.02.1994 and the same has interpreted it meaningfully by considering the terms of invoice & liability of appellant consignor. She submitted that the present case was for extra work and rise in rates of labourers subsequent to contract by the respondent. She submitted that the dispute was raised by appellant even though they were properly informed by two letters of respondent and after joint survey was made with consent of appellant.

5.3 Mrs. Mehta contended that the contract dated 11.02.1994 was signed by respondent without prejudice and therefore claim for extra work was not prohibited. She submitted that there was no negative covenant regarding claim for extra work or subsequent rise in rate of labour charges which was not envisaged by parties signing the contract.

5.4 In further support of her submissions, Mrs. Mehta has relied upon the following decisions:

(i) Army Welfare Housing Organisation vs. M/s. Gautam Construction & Fisheries Ltd reported in AIR 1998 SC 3244 wherein para 5 reads as under:

"5. The award is quite elaborate. It take into account numerous details. Arbitrator framed as many as 10 issues and then went on to examine each of the claims put forward by the parties with reference to the record before him. In the objections filed by AWHO it seeks remission of the award. The objections are though under Section 15, 17 and 33 of the Act. In the course of arguments, it was submitted by Mr. Tiwari, learned counsel for the AWHO that the award be remitted back to the Arbitrator which would be under Section 16 of the Act, though in the prayer modification of the award under Section 15 is sought. AWHO submitted that though if claimed certain amounts as 'firm liability' after the contract was cancelled and there were certain 'anticipated expenses' required to complete the contract. It was submitted that the Arbitrator treated even the firm liability as in the nature of elements of anticipated expenses and disallowed, the Arbitrator committed a mathematical error. It is not the case of the AWHO that the Arbitrator did not examine or did not take into account the claim put forward by the AWHO. It is not possible for us to re-appreciate the evidence produced before the Arbitrator and then ourselves coming to the conclusion whether a certain amount claimed was towards firm liability' or in the 'nature of anticipated expenses. Once the Arbitrator had held that the claim would be in the

'nature of anticipated expenses. It is difficult for us to hold the same otherwise. It cannot be said that the award is not good on the face of it on that account. The objections of AWHO have no force and IAs 21 to 24 are rejected."

(ii) M/s. Hindustan Tea Co. vs. M/s. K. Sashikant & Co. and Another reported in AIR 1987 SC 81, para 2 of which reads as under:

"2. The Award is reasoned one. The objections which have been raised against the Award are such that they cannot indeed be taken into consideration within the limited ambit of challenge admissible under the scheme of the Arbitration Act. Under the law, the Arbitrator is made the final arbiter of the dispute between the parties. The Award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts. Strong reliance was placed by the appellant's learned Counsel on an old Madras decision in Yogambai Boyee Ammani Animal v. Naina Pillai Markayar ILR 33 Madras 15. In our view, on the facts of this case challenge to the Award is not permissible by taking the stand that the Arbitrator acted contrary to provisions of Section 70 of the Contract Act. In these premises the objection filed to the Award has to be rejected. We direct the Award to be made a rule of the Court. The parties shall bear their own costs throughout."

(iii) Jagdish Chander vs. Hindustan Vegetable Oils Corpn. And Another reported in AIR 1990 Delhi 204, wherein para 15 reads as under:

"15. Before dealing with the contentions of the learned counsel for the respondent, it is necessary to bear in mind that the jurisdiction of the Court hearing objections under section 30 of the Arbitration Act is not an appellate Jurisdiction. It is now well settled that an award can be set aside only for the reasons specified in Section 30 of the Arbitration Act. When the parties, by agreement, refer the disputes to an arbitrator then the decision of the arbitrator is not to be lightly interfered with by the Court, It is also pertinent to notice, in a case like the present, that the arbitrator who has been appointed was a serving officer of the Government of India holding a very high rank, namely, he was a Chief Engineer of the Public Works Department. The Supreme Court has had occasion to comment on the expertise of the arbitrator with respect to the subject-matter evolved in the dispute. After observing, in the case of Municipal Corporation of Delhi v. M/s. Jagan Nath Ashok Kumar and another, , that the arbitrator was a sole judge of the quality and quantity of the evidence even though, on the same evidence the Court might have arrived at a different conclusion, the Court noted with approval the following observations of Lord Goward, C.J in Mediterranean & Eastern Export Co, Ltd. v. Fortress Fabrics Ltd. (1948) 2 All Er 196 : (2) The modern tendency is in my opinion more especially in commercial arbitrations to endeavor to uphold awards of the skilled persons that the parties them selves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules the Courts should be slow indeed to set aside his award".

In the present case, the arbitrator who was chosen was a person who was, presumably, an expert or well-versed in civil engineering. The arbitrator was selected by the agreement of the parties and the selection of a Chief Engineer shows that the parties wanted to appoint a person who was an expert in the line. An award made by such a person should not, therefore, be lightly interfered with."

Shri K. S. Nanavati
Sr. Advocate

(iv) Chairman and M.D., N.T.P.C. Ltd vs. M/s. Reshmi Constructions, Builders and Contractors reported in AIR 2004 SC 1330 wherein the relevant paras read as under:

"26. Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

27. Further, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position.

31. Even correspondences marked as without prejudice may have to be interpreted differently in different situations.

32. What would be the effect of without prejudice offer has been considered in Cutts Vs. Head and Another [(1984) 2 WLR 349] wherein Oliver L.J. speaking for the Court of Appeals held:

"In the end, I think that the question of what meaning is given to the words "without prejudice" is a matter of interpretation which is capable of variation according to usage in the profession. It seems to be that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which isimmutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in Walker v. Wilsher, 23 Q.B.D. 335, and the court did not deal with it. I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs."

33. Yet again in Rush & Tompkins Ltd. Vs. Greater London Council and Another [(1988) 1 All ER 549]:

"The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy, namely the need to facilitate compromise, and partly on 'implied agreement' as Parker LJ stated in South Shropshire DC v Amos [1987] 1 All ER 340 at 343, [1986] 1 WLR 1271 at 1277. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'. The classic definition of the phrase is contained in the judgment of Lindley LJ in Walker v. Wilsher (1889) 23 QBD 335 at 337:

'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not

accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.' Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this court in Tomlin v Standard Telephones and Cables Ltd. [1969] 3 All ER 201 at 204, 205, [1969] 1 WLR 1378 at 1383, 1385 per Danckwerts LJ and Ormrod J. (Although he dissented in the result, on this point Ormrod J agreed with the majority.) The definition was further cited with approval by both Oliver and Fox LJJ in this court in Cutts v. Head [1984] 1 All ER 597 at 603, 610, [1984] Ch. 290 at 303, 313. In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning, e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (See Cutts v. Head) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particular, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will cease if and when the negotiations 'without prejudice' come to fruition in a concluded agreement."

34. Meaning the words "without prejudice" come up for consideration before this Court in Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur and Others Vs. Pratap Rai [(1978) 3 SCC 113] wherein it has been held:

"The Appellate Collector has clearly used the words "without prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term "without prejduce" has been defined in Black's Law Dictionary as follows: Where an offer or admission is made 'without prejduce', or a motion is defined or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also Dismissal Without Prejudice.

Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows:

The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment. The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs . The word is also frequently used without the foregoing implications in statutes and inter partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'. In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred."

35. The appellant has in its letter dated 20th December, 1990 has used the term 'without prejudice'. It has explained the situation under which the amount under the 'No Demand Certificate' had to be signed. The question may have to be considered

from that angle. Furthermore, the question as to whether the respondent has waived its contractual right to receive the amount or is otherwise estoppel from pleading otherwise will itself be a fact which has to be determined by the arbitral tribunal.

36. In Halsbury's Laws of England, 4th Edition, Vol.16 (Reissue) para 957 at page 844 it is stated:

"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions:

(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

37. In American Jurisprudence, 2nd Edition, Volume 28, 1966, Page 677-680 it is stated:

"Estoppel by the acceptance of benefits: Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance. This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience."

(v) State of Orissa vs. Sudhakar Das (dead) by L.Rs. reported in AIR 2000 SC 1294 wherein para 4 reads as under:

"4. So far as the award of interest for prereference period is con-cerned, it appears appropriate to us, keeping ia view the fact that the proceedings in this case have remained pending for almost one and a half decade and the arbitration started as early as in 1975, to direct that the respondent shall execute the decree relating to the award of pre-reference interest only on furnishing a bank guarantee to the extent of that amount together with an undertaking that in the event the Constitution Bench, to which this issue has been referred to in Executive Engineer, Dhankanat Minor Irrigation Division, Orissa v. N.C. Budhiraj (Dead) by L.Rs. (Civil Appeal No. 3586 of 1984), decides against the decreeholder-respondents, the State shall be entitled to encash the bank guarantee. The respondents shall keep the bank guarantee alive during the pendency of the matter before the Constitution Bench and on furnishing the bank guarantee and the undertaking the respondents can execute the decree in that behalf."

(vi) M/s. Sumitomo Heavy Industries Ltd. vs. Oil and Natural Gas Company reported in AIR 2010 SC 3400 wherein para 28 reads as under:

"28. The Division Bench has found fault with the umpire in not placing a narrow and strict interpretation on clause 17.3. Mr. Dushyant Dave learned Senior Advocate appearing for the appellant submitted that it would not be right to apply strict rules of construction ordinarily applicable to conveyances and other formal documents to a commercial contract like the present one and referred to and relied upon the judgment of this Court in Union of India vs. M/s D.N Revri & Co. reported in (1976) 4 SCC 147. As held in that judgment, he submitted that the meaning of a contract, and particularly a commercial one, must be gathered by adopting a common sense approach and not by a narrow pedantic and legalistic interpretation. The present case relates to an international commercial contract and as noted earlier the appellant and MII had agreed to subject themselves to the domestic laws of India as well as the International law and conventions. On this background the appellant wanted to safeguard itself in the event of change of law in India to which the respondent had agreed. It was submitted that any narrow interpretation of Clause 17.3 to exclude the reimbursement of the income tax liability of the sub-contractor will defeat the purpose in providing this safeguard under clause 17.3 and will make it otiose."

6 Having heard learned advocates for both the sides and having gone through the records of the case, we are of the opinion that the Civil Court has erred in law in upholding the award passed by the Arbitrator which was beyond the scope of the contract. At the outset it shall be pertinent to refer to Section 3 read with Schedule 1, Rule 3 and 28(2) of the Arbitration Act which are reproduced hereunder:

"Section 3 r/w Schedule 1 Rule 3 : The arbitrators shall make their award within 4 months after entering into reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

Section 28 : Power to Court only to enlarge time for making award.

(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

6.1 In the instant case, in terms of chronology of events in the arbitration proceedings the Arbitrator entered upon the reference by notice dated 26.07.2002 and fixed first hearing on 26.09.2002. The final award came to be passed on 30.08.2005 more than three years after the Arbitrator entered upon the reference. In the case of Hardyal (supra), the Apex Court in para 13 has observed as under:

"13. 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 cl. 3 of the Schedule can only be extended by the court and not by the 1 parties at any stage , it still 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. The arbitrator has no jurisdiction to make an award after the fixed time. If the award made beyond the time is invalid the parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period."

6.2 Thus, the contention of the respondent regarding waiver by appellant as he continued to participate in arbitration proceedings is sufficiently answered. Mrs. Mehta has relied upon para 14 of the very same judgement which reads as under:

"14. The policy of law seems to be that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the court concerned may in its discretion extend and the court along has been given the power to extend time for giving the award. As II observed earlier , the court has got the power to extend time even after the award has been-given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. The High Court in our opinion was justified in taking the view that it did. This power , however , can be exercised even by the appellate court. The present appeal has remained pending in this Court since 1970. No useful purpose will be served in remanding the case to the trial court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur, this will be a fit case , in our opinion , for the extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time."

6.3 The Apex Court has very clearly laid down that the arbitrator has no jurisdiction to make an award after fixed time and that if the award made beyond time is invalid, the parties are not stopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after expiry of the period. Even in the case of Inder Sain Mittal (supra), the Apex Court has reiterated the view by observing in paras 13 and 14 that there can be no estoppel against a statute. The same is reproduced hereunder:

"13. Learned counsel appearing for the Board heavily relied upon a decision of this Court in the case of State of Punjab vs. Hardyal, (1985) 2 SCC 629. In that case the parties participated in the arbitration proceedings, initiated with the intervention of Court, even after expiry of four months' period prescribed for submitting the award, as required by law, in the absence of extension of time granted by the Court, and an award was made. An objection was filed under Section 30 of the Act to the award on the ground that the Arbitrator had no jurisdiction to make the award after the expiry of

prescribed period of four months in the absence of any order of extension. On these facts, this Court laid down that time to be fixed for making an award is initially one of agreement between the parties to the agreement, but if no time has been specified by the parties in the arbitration agreement, then the award must be given within four months as prescribed in Section 3 read with clause 3 of the First Schedule to the Arbitration Act as time can be extended by the court and not by the parties at any stage inasmuch as since the Arbitrator is injuncted to give an award beyond the prescribed period of four months unless the same is extended by the Court, he had no jurisdiction to make an award after the expiry of specified time in the absence of any order of extension and in view of this the award made beyond time is ipso facto invalid, the same having been prohibited by law, and parties are not estopped by their conduct from challenging the same on the ground that it was made beyond time, merely because they participated in the proceedings before the Arbitrator after expiry of the prescribed period as established principle is that there can be no estoppel against a statute.

14. In view of the foregoing discussions, with reference to the provisions of the Act, we conclude thus:

(i) Grounds of objection under Section 30 of the Act to the reference made, with or without intervention of the Court, arbitration proceedings and the award can be classified into two categories, viz., one emanating from agreement and the other law.

(ii) In case the ground of attack flows from agreement between the parties which would undoubtedly be a lawful agreement, and the same is raised at the initial stage, Court may set it right at the initial stage or even subsequently in case the party objecting has not participated in the proceedings or participated under protest. But if a party acquiesced to the invalidity by his conduct by participating in the proceedings and taking a chance therein cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of reference, arbitration proceedings and/or award inasmuch as right of such a party to take objection is defeated.

(iii) Where ground is based upon breach of mandatory provision of law, a party cannot be estopped from raising the same in his objection to the award even after he participated in the arbitration proceedings in view of the well settled maxim that there is no estoppel against statute.

(iv) If, however, basis for ground of attack is violation of such a provision of law which is not mandatory but directory and raised at the initial stage, the illegality, in appropriate case, may be set right, but in such an eventuality if a party participated in the proceedings without any protest, he would be precluded from raising the point in the objection after making of the award."

6.4 Thus, we are of the view that the Civil Court has committed an error in ignoring this point.

7 The Civil Court has not considered the part of clause 10 of the contract dated 11.02.1994 which speaks about the event of the cargo either being damaged or hardened. The said clause says that no extra wages shall be paid for digging the hardened cargo and sea water damaged

cargo and analysis jobs. It is pertinent to note that the claim of CCA was based on the contention that the cargo on board was in a hardened condition and not of free flowing nature. It appears that the appellant also communicated to the respondent vide letter dated 31.03.1994 that it was not liable for any extra claim raised by the respondent on account of digging of hardened cargo as per the terms of Clause 10 of the contract dated 11.02.1994.

8 Moreover, the term without prejudice has to be interpreted in the right context and it cannot blindly be interpreted to meant that the party signing the contract without prejudice is not bound by any terms adverse to it in the contract. In the case of Tarapore & Co. (supra), where the issue was regarding interpretation of a without prejudice endorsement on an arbitration clause, it was observed in para 33 as under:

> "33. Before we conclude on this point we must take note of a contention of Mr. Pai that the respondent cannot be estopped from contending that the arbitrator had no jurisdiction to entertain the dispute as the respondent agreed to the submission without prejudice to its rights to contend to the contrary. It is undoubtedly true that in the letter dated March 29, 1976 by which the respondent agreed to refer the dispute to the arbitrator, it was in terms stated that the reference is being made without prejudice to the position of the respondent as adopted in the letter meaning thereby without prejudice to its rights to contend that the claim of the appellant is not covered by the arbitration clause. In the context in which the expression 'without prejudice' is used, it would only mean that the respondent reserved the right to contend before the arbitrator that the dispute is not covered by the arbitration clause. It does not appear that what was reserved was a contention that no specific question of law was specifically referred to the arbitrator. It is difficult to spell out such a contention from the letter. And the respondent did raise the contention before the arbitrator that he had no jurisdiction to entertain the dispute as it would not be covered by the arbitration clause. Apart from the technical meaning which the expression 'without prejudice' carries depending upon the context in which it is used, in the present case on a proper reading of the correspondence and in the setting in which the term is used, it only means that the respondent reserved to itself the right to contend before the arbitrator that a dispute raised or the claim made by the contractor was not covered by the arbitration clause. No other meaning can be assigned to it. An action taken without prejudice to one's right cannot necessarily mean that the entire action can be ignored by the party taking the same. In this case, the respondent referred the specific question of law to the arbitrator. This was according to the respondent without prejudice to its right to contend that the claim or the dispute is not covered by the arbitration clause. The contention was to be before the arbitrator. If the respondent wanted to assert that it had reserved to itself the right to contend that no specific question of law was referred to the arbitrator, in the first instance, it should not have made the reference in the terms in which it is made but should have agreed to the proposal of the appellantto make a general reference. If the appellant insisted on the reference of a specific question which error High Court appears to have committed, it could have declined to make the reference of a specific question of law touching his jurisdiction and should have taken recourse to the court by making an application under Sec. 33 of the Arbitration Act to have the effect of the arbitration agreement determined by the court. Not only the respondent did not have recourse to an application under Sec. 33 of the Arbitration Act, but of its own it referred a specific question of law to the arbitrator for his decision, participated in the arbitration proceeding invited the arbitrator to decide the specific question and took a chance of a decision. It connote

therefore, now be permitted to turn round and contend to the contrary on the nebulous plea that it had referred the claim/dispute to the sole arbitrator without prejudice to its right to contend to the contrary. Therefore, there is no merit in the contention of Mr. Pai."

8.1 Therefore, we are of the opinion that in the present case the contract terms were agreed upon and thereafter it was signed. The Arbitrator has failed to consider clause 10 of the contract dated 11.02.1994 and the fact that the terms of contract did not envisage any payment other than the one agreed between the parties and the contract did not even contain any escalation clause. Moreover, it is also borne out from the records that the contract dated 11.02.1994 had superceded all the previous terms and conditions applicable to the parties and hence the impugned claims of the respondent having been specifically barred under the contract dated 11.02.1994 ought not to have been granted by the Arbitrator and the Civil Court.

8.2 The respondent vide letter dated 20.01.1994 had appraised the appellant with regard to the alleged hardening of the cargo which it was supposed to carry, forward, handle and discharge. The respondent had also intimated the appellant that it had incurred some expenditure to remove the hardened cargo. The respondent again invited the attention of the appellant on the said issue vide reminder dated 24.01.1994 which was replied by the appellant vide letter dated 31.03.1994 that the alleged claims of the respondent were not tenable in view of Clause 10 of the contract dated 11.02.1994 entered into between the parties.

9 It is pertinent to note that the respondent had issued a receipt dated 15.07.1994 for Rs. 5,78,189/- towards full and final settlement of its dues under the contract with the appellant which is produced at page 81 of the paper book. The respondent having taken full and final payment with regard to the contract in question could not have raised further dispute. Thus, it can be said that there was no dispute in existence between the parties much less an arbitrary dispute.

9.1 The Apex Court has observed in the case of M/s. Ramaiah & Co. (supra) that when there is a voluntary and unconditional written acceptance of payment in full and final settlement of the contract, subsequent claims for further amount in respect of the same work cannot be arbitrable.

9.2 In the case of Nathani Steel Ltd (supra) also, the aforesaid view has been reiterated by the Apex Court, wherein the Apex Court has observed that once there is full and final settlement in respect of any particular dispute or difference in relation to any matter under an arbitration clause, such dispute ceases to be an arbitrable dispute.

9.3 So far as the decisions cited by learned advocate for the respondent in relation to full and final settlement are concerned, we are of the opinion that there had been an agreement between the parties which was signed by the parties. It was not in the form of a letter or communication. It was an agreement and there cannot be without prejudice clause while entering into an agreement and the same is always binding to the parties. A party may either agree to the terms of the agreement and sign the same or may not agree and refrain from signing. However, after signing the agreement, a party cannot take the plea of without prejudice clause.

> 9.4 It is very common in business correspondences to use without prejudice clause. It is required to be noted that while using without prejudice clause a party cannot stretch the without prejudice statement to the dispute resolution mechanism or regarding the invocation of the arbitration. If that were the case, all disputes resolution clauses and all agreements or communications signed by a party can be frustrated by the party claiming that its signature in the agreement cannot be used to trigger the arbitration clause, merely because it used the term without prejudice in the agreement.

10 It has also been contended by learned advocate for the appellant that the Civil Court committed an error in concluding that since the contract was not incorporated in the award it cannot be considered. In our view, the said contention is required to be accepted and even on that ground the impugned award is liable to be quashed and set aside. Moreover, there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, there could be no reference of any dispute to arbitration.

11 Mrs. Mehta requested this Court to extend the limitation period in the case of passing of award as done by the Apex Court in the case of Hardyal (supra). We are of the view that such a prayer was not made before the trial court. Even in the cross objections filed before this Court, no such prayer has been made by the respondent. Therefore, we do not think it fit to grant such a request at this stage and the same is rejected.

12 For the foregoing reasons, the appeal is allowed. The impugned judgement and decree dated 30.08.2007 passed by the Senior Civil Judge in C.M.A No. 5 of 2005 and the award dated 30.08.2005 passed by the arbitrator are hereby quashed and set aside.