IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-07-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE N. KANNADASAN

O.S.A.Nos.7 & 8 OF 2000
and
CROSS OBJECTION No.73 OF 2000

The Government of Tamil Nadu,
Rep. by the Chief Engineer,
M/s. National Highways
(Pamban Bridge Project),
Chennai 600 005. .. Appellant in both OSAs and 1st Respondent in Cross objection 73/2000.

Vs.

1. M/s. Nilakantan & Brothers
Construction Pvt. Ltd.,
Chennai 600 018.

2. Mr.Justice S.Padmanabhan,
(Arbitrator), Retired Judge,
High Court, Madras. .. Respondent in OSA.7/2000 and Respondents 1 & 2 in OSA.No.8/2000 and Cross Objector and 2nd Respondent in Cross Objection No.73 of 2000.

Appeals and Cross Objection filed under Clause 15 of the Letters Patent and Order XXXVI Rule 11 and 1 of the O.S. Rules against the common order passed in Application 3200/98 in O.P.Nos.558 of 1995 and 328 of 1996 dated 24.12.1998 & 17.2.99.

For Appellant in both Appeals & R1 in Cross Objections : Mr.R. Muthukumaraswamy
Addl. Advocate General
assisted by
Mr. Senthil Nathan,
A.G.P (C.S) and
Mrs. Dakshiani Reddy
Govt. Advocate (C.S.)

For Respondent & Respondent-1 : Mr.R. Murari
in both OSAs and
for Cross Objector

COMMON JUDGMENT

P.K. MISRA, J

These two appeals have been filed by the State Government under Section 39 of the Arbitration Act, 1940. O.S.A.No.7 of 2000 is directed against the order in O.P.No.558 of 1995, which has been filed by Respondent No.1, for filing the award and making it a Rule of Court. O.S.A.No.8 of 2000 is filed against the order in O.P.No.328 of 1996 dismissing the application of the appellant under Section 30/33 of the Act to set aside the award.

2. The relevant facts are narrated hereunder :-

By agreement dated 10.10.1974, Respondent No.1 was awarded the contract relating to construction of a bridge across Pamban Strait. Value of the contract was Rs.5,13,08,000/- and the work was to be completed within 48 months from 17.11.1974, the date on which the site was handed over. The period for completion of the work was extended by the Government from time to time and was last extended till 31.12.1980. On account of a severe cyclone on 24.11.1978, Respondent No.1 suffered heavy loss in the shape of damage to the machineries. Respondent No.1 filed C.S.No.765 of 1980 to resolve the dispute. On 29.12.1980 the contract was terminated by the Government. Learned single Judge passed order on 19.8.1983 appointing the Chief Engineer as Arbitrator, to resolve the disputes. However, Respondent No.1 filed O.S.A.No.21 of 1984 and the Division Bench by order dated 27.11.1986 appointed Respondent No.2, a retired Judge of the High Court, to decide the disputes. Respondent No.1 filed Claim Petition on 31.12.1986 claiming various amounts under different heads. The substance of the claims is as follows:-

" Claim No.1 : Compensation for loss suffered on account of overheads and profits due to breach of contract including termination – Rs.226.351 lakhs.

Claim No.2 : Compensation for loss due to Cyclone – Rs.29,92,166.08

Claim No.3 : Compensation for taking over the infrastructure and materials at site – Rs.76,36,090/- corrected later to Rs.89,23,722.45

Claim No.4 : Compensation for loss on account of idle labour machinery equipment – Rs.82,12,000/-

Claim No.5 : Settlement of final bills – Rs.22,98,976/-

Claim No.6 : Payment of design fee Rs.15,83,784/-
Claim No.7 : Interest
Claim No.8 : Cost"

3. The present appellant apart from resisting the aforesaid claim, made a counter claim for Rs.11,41,27,936/-, which included the additional costs of Rs.10 crores in getting the work completed through another contractor.

4. The arbitrator by award dated 16.12.1988, while rejecting Claim No.4, passed award in respect of Claim Nos.1,2,3,5 & 6. The Arbitrator awarded Rs.2,26,35,000/-, Rs.78,94,672/- and Rs.15,83,784/- under Claim Nos.1, 3 and 6 respectively. The arbitrator has also awarded interest at the rate of 16.5% and costs under Claim Nos.7 & 8. The counter claim made by the Government was rejected in toto.

5. The appellant filed O.P.No.275 of 1989 to set aside the award. Learned single Judge by order dated 14.6.1994 confirmed the award in respect of Claim Nos.2 and 5 and set aside the award relating to Claim Nos.1, 3 and 6 and remitted the matter to the arbitrator for fresh consideration on these three claims. Thereafter, the arbitrator has passed a fresh award in respect of these three claims as under :

Claim No.1	–	Rs.2,26,35,000/-
Claim No.3	–	Rs. 78,94,682/-
Claim No.6	–	Rs. 15,83,784/-
Total		Rs.3,21,13,466/-

The arbitrator has also directed payment of interest at the rate of 16.5% from the date of reference till the date of award. Thereafter, the learned single Judge while confirming the award in respect of Claim Nos.1, 3 and 6, reduced the rate of interest to 12% in respect of Claim Nos.1, 3 and 6. Appeals have been filed by the Government against the said decision of the learned single Judge.

6. Cross Objection has been filed by Respondent No.1 claiming that reduction of rate of interest from 16.5% to 12% is illegal and not justified.

7. Learned Additional Advocate General appearing for the appellant has raised the following contentions :-

(1) The decision rendered by the learned single Judge on the earlier occasion setting aside the award being appealable and no appeal having been filed against the said decision, the conclusions reached by the learned single Judge in the earlier decision became final and the arbitrator committed error of law apparent on the face of record in coming to the contrary decision ignoring the findings rendered by the learned single Judge.

(2) Even assuming that no appeal was maintainable against such decision of the single Judge, the observations made by the single Judge in the judgment were binding on the arbitrator and the arbitrator has committed errors of law apparent on the face of record by ignoring such findings.

(3) Even otherwise, the arbitrator has committed errors apparent on the face of record in passing the award in respect of Claim Nos.1,3 and 6.

8. Learned counsel appearing for Respondent No.1 has supported the award of the arbitrator and the subsequent decision of the learned single Judge. However, he has also submitted that the arbitrator having awarded 16.5% as interest, as in the previous occasion, there was no scope for the learned single Judge to reduce the rate of interest and to that extent, the cross objection should be allowed.

9. The first question which is to be decided is whether the earlier decision of the learned single Judge in remitting the award to the arbitrator for fresh consideration in respect of Claim Nos.1, 3 and 6 was appealable.

7. Section 39(1) of the Arbitration Act is as follows:-

> "(1) An appeal shall lie from the following orders passed under this Act and from none others to the court authorised by law to hear appeals from original decrees of the court passing the order:
>
> An order--
>
> (i) to (v) omitted
>
> (vi) setting aside or refusing to set aside an award:
>
> Provided that the provisions of this section shall not apply to any order passed by a Small Causes Court."

Under this specific terms of section 39(1)(vi), the order of the Court, setting aside or refusing to set aside the award, is thus made appealable.

10. Section 16 of the Arbitration Act empowers the Court to remit the award to the arbitrator for reconsideration of such terms as it thinks fit under three circumstances :-

> (a) where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

Section 16(1)(c) therefore contemplates remitting the award to the arbitrator for fresh consideration where the objection to the legality of the award is apparent upon the face of it.

11. Section 30, which contemplates the grounds for setting aside the award and is as follows :-

(a) an arbitrator or umpire has misconducted himself or the proceedings;

(b) an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section-35;

(c) an award has been improperly procured or is otherwise invalid.

12. While interpreting Section 30(a) and 30(c), it has been universally accepted that the court can interfere with the award if it is found that there is error of law apparent on the face of the award. Such a ground is considered in the light that the arbitrator has misconducted the proceedings as contemplated in Section 30(a) or the award is otherwise invalid as contemplated in Section 30(c). When the court finds an error of law apparent on the face of the award, the court sets aside the award. Under Section 19, where the award is set aside, the court by order may supersede the reference and thereby the matter is concluded. On the other hand, the court may remit the award for fresh consideration under Section 16(1)(c) where the objection to the legality of the award is apparent on the face of it. To this extent, the scope of section 16(1)(c) and Section 30(a) or 30(c) are overlapping.

13. There cannot be any doubt that when the award is remitted to the arbitrator for fresh consideration on the basis of the conclusions contemplated in Section 16(1)(a) or 16(1)(b), such order is not appealable under any of the Clauses in Section 39. The question is whether an order remitting the award to the arbitrator for fresh consideration coming under Section 16(1)(c) on the ground that there is an error apparent on the face of the award is appealable or not. The contention of the learned Advocate General is to the effect that since the learned single Judge, on the earlier occasion, had set aside the award, such portion of the order of the learned single Judge must be taken to be appealable under Section 39(1)(vi), even though the learned single had ultimately remitted three claims for fresh consideration. Learned counsel appearing for the respondent has submitted that since the award was remitted for fresh consideration as contemplated under Section 16(1)(c), such order was not appealable.

14. Learned Additional Advocate General has placed strong reliance upon the decision of Nagpur High Court reported in A.I.R. 1956 NAGPUR 245 (JAYANTILAL KESHAVLAL DAVE v. SURENDRA GANGSA JOHRAPURKAR). In the said case, after the award was passed, the trial court accepted certain part of the award and remitted for reconsideration only on certain other points. Such order accepting part of the award was challenged in appeal. A preliminary objection was raised to the effect that since the award had been remitted for fresh consideration, such order of the court was not appealable. The Division Bench of the Nagpur High Court observed as follows :-

> " In our opinion, the preliminary objection raised by the learned counsel for the respondent is not tenable. The contention of the learned counsel for the respondent would have been well founded had the award in its entirety been remitted by the learned Judge for reconsideration. But the contention loses its force when, as in the instant case, the award is accepted in part and is remitted for reconsideration for the remaining part. ...
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> When an award is accepted on certain points and is remitted for reconsideration only on the remaining points, then, in our opinion, the order would amount to a refusal to set aside an award on the points the award is accepted and, as such, will be appealable. The term "setting aside or refusing to set aside" occurring in Section 39(1)(vi) of the Act, in our opinion, will include setting aside or refusing to set aside an award in part as well.
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> Where the Court accepts the award in part and in effect the Court refuses to set aside the award in its entirety which according to the contention of the appellant the Court should have done, the appeal is covered by Section 39(1)(vi)."

15. A perusal of the aforesaid decision makes it clear that the appeal was construed to be an appeal against that portion of the order of the trial court by which the trial court had accepted in part the award. In other words, the court observed that such portion was coming within the expression "refusing to set aside" the award. By extending the said analogy to the present case, it can be held that it would have been open to the State Government to file appeal against that portion of the decision of the learned single Judge, under which he had confirmed the part of the award as he had refused to set aside the award. Similarly, when part of the award is set aside, the aggrieved party can file appeal against that portion of the order by which the award is set aside. The ratio of the Division Bench decision of the Nagpur High Court is not directly applicable to the present case where the single Judge had not only set aside the part of the award but also remitted that part of the award for fresh consideration.

16. In this connection, the decision reported in AIR 1968 DELHI 188 (MEHTA TEJA SINGH AND CO., v. FERTILIZER CORPORATION OF INDIA LTD. AND

ANOTHER) is sought to be distinguished by the learned Additional Advocate General. In the said case, the questions referred to the Division Bench were (i) Whether under Section 16 of the Arbitration Act it is open to the Court to remit a part of an award; and (2) whether in such a case, an appeal lies under Section 39(1)(vi) of the Act. The Chief Justice Dua, as His Lordship then was, observed :-

> "We are thus inclined, as at present advised, to hold that an order remitting a part of an award and affirming a part, does not necessarily amount to an order setting aside or refusing to set aside an award within the contemplation of Section 39(1)(vi) of the Act and it would thus not be appealable. We are not unmindful of the fact that a provision of law permitting appeals to the higher Courts, deserves to be liberally construed, but this liberal construction must not involve stretching of the language, for it has to be remembered that right of appeal is statutory, and, but for a statutory affirmative provision, no inherent right of appeal is claimable by an aggrieved suitor. In the case in hand, the language of Section 39(1)(vi) read in the light of Section 30, seems to us to be clear and the present case does not fall under this clause. There is no other clause in Section 39(1) which can reasonably be held to provide for an appeal against an order remitting or declining to remit an award. The decision of a learned Single Judge of the Punjab High Court in the State of Patiala and East Punjab States Union v. Messrs. Puran Chand Rangi Ram, 1966-68 Punj L.R. 694, would thus seem to lay down a correct rule of law. The learned Single Judge of the Punjab High Court agreed with the view taken in R.T.Perumal v. John Deavin, AIR 1960 Mad 43. It is true that in the Madras case, it was conceded by Mr.Nambiar at the Bar that there was no right of appeal against the order of the Court remitting the award to the arbitrator and the point was not decided on a discussion of the scheme of the Act, but, in our opinion the concession was rightly made. Clause (c) of Section 30, when it refers to the improper procurement of the award, would prima facie seem to us to contemplate the improper procurement of the award as a whole and not a part of it and if that be so, then the invalidity of the award otherwise would also seem to us to refer to the award as a whole and not to a part of it, for, both parts of this clause would get colour and content from each other. Looking at the scheme of the Act we are also inclined to think that Section 16 of the Act dealing with the power of the Court to remit the award, should be construed independently and the remission of the award or any matter contemplated by this section is not intended to include within its fold setting aside of the award or a part of it as contemplated by Section 30, which is apparently an exhaustive provision specifically dealing with setting aside of awards. We are also aware of a decision of the Supreme Court in B.S.Madhava and Co. v. Kapila Textile Mills, Ltd. Civil Appeal No.1094 of

1963 decided by Subba Rao, J (as he then was) and J.C.Shah, J on 9.9.1964, in which it was observed that an order under Section 16 (1)(c) of the Act refusing to remit an award to the arbitrators or the umpire is not appealable under the Act. Now, if refusing to remit an award cannot be construed as a refusal to set aside an award and, therefore, not appealable, the remission of an award or any matter would also seem to us, on parity of reasoning, not to amount to setting aside the award or a part of it. If that be the correct way of looking at things, then obviously an order remitting to the arbitrator or umpire for reconsideration an award or any matter referred to arbitration, cannot be deemed to include an order setting aside an award or a part of it and then remitting the award or the matter, as the case may be. Before closing discussion on this point, we may point out that on behalf of the appellant Shri.T.P.S.Chawla actually conceded that if the entire award is remitted by an order, then that order would not be open to appeal. The only point which was sought to be made out was that in case there is a partial remit, then that order would clearly be appealable. For this distinction, we find no basis in law."

17. The observations made by the Division Bench seem to suggest that no appeal can be filed even if a part of the award is set aside and remitted for fresh consideration.

18. In the said decision, reference has been made to the observations of the Madras High Court reported in AIR 1960 Madras 43 (R.T. PERUMAL v. JOHN DEAVIN AND ANOTHER). It was observed as follows :-

"7. Mr. Nambiar, however, contended that the order of remittal cannot be questioned in these appeals even if they were competent. He relied on a ruling of this Court in Subbiah Iyer v. Subramania Iyer, ILR 31 Mad 479, which was followed by the Lahore High Court in Baland Baksh v. Ram Chandra, 84 Ind Cas 693 (1): (AIR 1925 Lah 267). There were also other decisions cited to us, namely, George v. Vastian Soury, ILR 22 Mad 202 and Vengu Iyer v. Yegyam Iyer, 1950-2 Mad LJ 642: (AIR 1951 Mad 414), but in our opinion these decisions do not materially help us in this case because they all related to a different set of facts. In those cases the arbitration was in a pending suit but there are observations in the decision, ILR 31 Mad 479, which prima facie appear to support the contention of Mr.Nambiar namely,

> "It was not contended that an appeal would lie against a decree passed by the court in accordance with the award on the ground that the Court had improperly refused an application for an order of remittal under S.520, C.P.C. and the policy of the law appears to be to refuse to allow appeals

against decrees in accordance with awards on the ground either that an order under S.520 C.P.C. was improperly made or improperly refused."

Much of the force of the observations is lost by the obvious fact that it was practically conceded that an appeal would not lie against a decree passed by the court in accordance with the award on the ground that there had been an improper refusal of an application for an order of remittal. Mr.Nambiar conceded that there was no right of appeal against the order of the Court remitting the award to the arbitrator. He also had to admit that the Court would have jurisdiction to remit an award only on one of the grounds specified in S.16 and under no other ground. If, therefore, the Court remitted an award on any ground other than those specified in that section such an order would be without jurisdiction. We than asked Mr.Nambiar what was the remedy of the party aggrieved by such an invalid remittal. Mr.Nambiar frankly stated that there was no remedy so far as he could see. We do not think that we could subscribe to this result unless we are forced to. In our opinion one of the grounds on which a revised award can be sought to be set aside is that it was the result of an invalid order of remittal. That was the first objection which the appellants took in their counter affidavits."

The Delhi High Court has observed that the decision was based on a fair concession.

19. Even though not cited at the bar, we have come across a decision of a learned single Judge of the Orissa High Court in A.I.R. 1984 ORISSA 217 (DURYODHAN MOHAPATRA v. EXECUTIVE ENGINEER, IRRIGATION DIVISION), wherein it was observed :-

"3. A preliminary objection was taken by the Additional Standing Counsel to the effect that this appeal is not maintainable. It was urged that the award has been remitted to the Arbitrator under Sec.16 of the Act and no appeal is provided under Section 39 thereof. Section 39 of the Act enumerates the orders passed under the Act which are appealable. It is submitted that an order remitting the award being not appealable under Sec.39 of the Act, this appeal is incompetent. Mr.Misra appearing for the appellant contends that an appeal shall lie from an order setting aside or refusing to set aside an award and as the order remitting the award in this case amounts to setting aside the award an appeal shall lie. Admittedly, S.39 does not provide an appeal against an order of the court remitting or refusing to remit an award. The Additional Standing Counsel relied on a decision reported in AIR 1976 Orissa 149, Chowdhury and Co. v. Govt. of Orissa, wherein it has been held that in a simple case of remission of the award no appeal as such would lie. It has, however, been observed in the said decision that

where the award has been made a rule of the Court in part and with respect to certain items of claim the court has refused to set aside the award and directs a remand, an appeal would lie on the ground that the court has refused to set aside the other part of the award. Mr.Misra, on the other hand, relies on a Full Bench decision of the Patna High Court reported in AIR 1967 Patna 407, Makeshwar Misra v. Laliteshwar Prasad Singh in support of the proposition that where the order passed by the court amounts to setting aside an award, appeal would lie against such an order.

.....

It is clear from a plain reading of the section that the Court may, in its discretion, remit the award to the Arbitration for reconsideration under any of the grounds mentioned in Clauses (a), (b) and (c) of sub-section (1) of Sec.16.

4. All cases of remittance under Section 16 of the Act may not involve setting aside of the award in its entirety or even in part. Where the court shall set aside the award either in whole or in part the same becomes appealable under Section 39 (vi) of the Act. The decision reported in AIR 1978 Orissa 149 was a case where the appeal was against the decision of the learned Sub-Judge refusing to remit the award made by the Arbitrator. Thus the facts of that case are distinguishable and cannot be applied to this case. I, therefore, conclude that this appeal is maintainable under Section 39(vi) of the Act. "

20. Learned counsel appearing for the respondent on the other hand has placed specific reliance upon the decision of the Supreme Court reported in (1974) 2 SCC 151 (IFTIKHAR AHMED AND OTHERS v. SYED MEHARBAN ALI AND OTHERS). In the said decision, a controversy relating to title arising under U.P. Consolidation of Holdings Act, 1953 was referred to the Civil Judge by the Consolidation Officer and in his turn the Civil Judge referred the dispute to an arbitrator appointed under the said Act. The Arbitrator held that an earlier decision of the High Court of Allahabad operated as res judicata between the parties with respect to title of the parties to the properties. Both parties filed objection to the award before the trial court. The trial court held that the earlier decision of the High Court relied upon by the arbitrator did not operate as res judicata as regards the title, and therefore, the decision of the arbitrator was manifestly wrong and vitiated by an error of law apparent on the face of the award. The trial court therefore set aside the award and remitted the case to the arbitrator for a fresh decision. Thereafter the arbitrator decided the matter afresh and came to the conclusion that the judgment of the High Court was not res judicata as regards the title of the parties. An objection was filed by the original appellant in the Civil Court. However, the trial court confirmed the award. The original appellant thereafter preferred appeal before the District Judge and during pendency of such appeal, on his death, his legal representatives were substituted. The appellate court, namely, the District Judge, held that

the award suffered from an error of law apparent on the face of the record and the arbitrator ignored the judgment of the High Court which operated as res judicata as regards the title of the parties, and therefore, he allowed the appeal and set aside the decree and remitted the matter to the arbitrator for a fresh decision. In the revision filed by the respondents against such appeal, the High Court reversed the decision of the District Judge and restored the decree passed by the Civi Judge confirming the award obviously on the footing that the earlier decision of the High Court did not operate as res judicata. Against such decision of the High Court in revision, appeal was taken to the Supreme Court by the legal representatives of the original appellant. The Supreme Court, while reversing the decision of the High Court, upheld the decision of the District Judge and however concluded the matter by saying that since the principle of res judicata was applicable, it would be an empty formality to remit the matter to the arbitrator, and therefore, the Supreme Court confirmed the original award. It was observed:-

> "17. It might be recalled that the II Civil Judge set aside the first award and remitted the case to the Arbitrator for passing a fresh award under Section 16 of the Arbitration Act. That was only on the basis that the arbitrator committed an error of law in relying upon the judgment of the High Court as finally determining the title to the properties. As no appeal under Section 39 of the Arbitration Act lay from an order remitting an award to an arbitrator under Section 16of the Arbitration Act, Ishtiaq Ahmed could not have challenged the order. There is, therefore, no reason why the appellants should be precluded from challenging the correctness of that order in this appeal and getting relief on that basis."
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> (Emphasis supplied)

21. Learned Additional Advocate General appearing for the appellant has tried to distinguish the aforesaid decision by submitting that under the first order, the Sub Judge had set aside the entire award and remitted the entire matter for fresh consideration by the arbitrator, and therefore, such order was not appealable, whereas, in the present case, part of the award was set aside and remitted for fresh consideration and therefore appealable.

22. In principle, we do not find any difference between a case where the award is set aside in its entirety and thereafter remitted for fresh consideration and where the award is set aside in part and that part is remitted for fresh consideration. It may be that where a part of the award is confirmed and the court passes a decree, such order would be appealable and it is not necessary to consider as to whether the decision of the Delhi High Court is applicable or not. It is of course true that the observation made by the learned single Judge of the Orissa High Court in AIR 1984 ORISSA 217 (cited supra) lays down that when an award was set aside in part and that part is remitted to the arbitrator for fresh

consideration, an appeal can be filed. However, in our opinion, in view of the observation of the Supreme Court in (1974) 2 SCC 151 (cited supra) the ratio of the decision of Orissa High Court cannot be followed.

23.It seems that the matter is now settled in view of the subsequent decision of the Supreme Court in (2002) 10 SCC 506 (RAM CHANDRA TRADING CO. v. STATE OF U.P. AND ANOTHER). In the said case, in a dispute, the arbitrator, in its award, had given relief in respect of Agreements 1 and 2, but held that the contractor was not entitled to any relief in respect of Agreements 3 and 4. When the award was filed in the court, objections were made and the trial court remitted the matter in respect of Agreements 3 and 4 as it took the view that the arbitrator has not decided the matter. The question of maintainability had been raised before the District Judge, who held that the trial court had directed the arbitrator to make a fresh award in the light of the directions given in that judgment and had virtually set aside the award with a direction to the arbitrator to give a fresh award and, therefore, fell within the scope of Section 39 of the Arbitration Act. Thereafter the matter was taken to the Supreme Court by Special Leave. The Supreme Court observed as follows:-

> "3. This Court in Iftikhar Ahmed v. Syed Meharban Ali (1974 (2) SCC 151) held that no appeal is provided by the Act against an order of the court remitting the award under Section 16 of the Act. Section 39 of the Act opens with a clause that an appeal shall lie from the orders passed as enumerated therein and from no others. The orders enumerated are as follows:
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> (i) superseding an arbitration;
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> (ii) on an award stated in the form of a special case;
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> (iii) modifying or correcting an award;
>
> (iv) filing or refusing to file an arbitration agreement;
>
> (v) staying or refusing to stay legal proceedings where there is an arbitration agreement; and
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> (vi) setting aside or refusing to set aside an award;
>
> Each of the modes in which a proceeding is disposed of by the court is dealt with in clauses (i) to (vi) but not an order remitting the matter to the arbitrator under Section 16 of the Act, the principle being that such a decision would mean referring the matter back to the arbitrator or it is a case for reconsideration of the matter and no appeal lies in such cases under Section 39 of the Act."

24. In view of the aforesaid observation, whatever lingering doubt, if any {inspite of the decision of the Supreme Court in (1974) 2 SCC 151 (cited supra)}, must be taken to have been dispelled by this judgment. In view of this, it must be taken that even where an award is partly confirmed and another part of the award is remitted for fresh consideration, such part of the order of the trial court remitting the matter for fresh consideration is not appealable under Section 39 of the Act. This position also seems to be clear on a careful reading of a

subsequent decision of the Supreme Court in (2003) 8 SCC 193 (K.K. JOHN v. STATE OF GOA).

25. In spite of the aforesaid conclusion that the earlier order of the learned single Judge setting aside the part of the award in respect of Claim Nos.1, 3 and 6 and remitting such claims for fresh consideration was not appealable, we are unable to appreciate the observations made by the learned arbitrator regarding the binding effect of any observation made while remitting the matter for fresh consideration. If the court concludes any part of the controversy, to that extent, such conclusion would be binding on the arbitrator, when the arbitrator reconsiders the matter. The analogy given by the learned Arbitrator regarding the opinion of the court in a reference to the Court under Section 13 of the Act, is not at all appropriate. It is correct that the opinion of the Court in a reference is not binding and has only advisory value unless the opinion is annexed as the award itself, if specifically so referred, in which event, such opinion forms part of the award. However, the directions given and the conclusions arrived at by a Court while considering the validity of an award, would obviously stand on a different footing.

26. It is of course true that a court, dealing with the matter under Sections 15, 16, 17, 30 and 33 of the Act, does not sit as an appellate authority over the award of the arbitrator and the scope for interference is circumscribed by the provisions contemplated in Section 30 itself, but nevertheless the Court must be considered as a superior authority vis-a-vis the arbitrator notwithstanding the fact that the scope for interference is very limited. Therefore, to the extent that the Court gives any particular direction or comes to any particular conclusion even while remitting the award for fresh consideration, the arbitrator is not only expected to follow such direction, in our opinion, he is bound to follow such directions or conclusions. It is of course true that the conclusions or the directions of the Court while remitting cannot be immediately challenged in appeal, but like the matters remanded under the Civil Procedure Code by the appellate authority, the ultimate decision can be challenged in a higher Forum. Whether certain directions are given or conclusions have been reached finally (for that stage at least) or not would obviously depend upon the nature of the directions and the nature of the discussions, but as a general rule it cannot be said that in no case when the matter is remitted to arbitrator for fresh consideration, he is bound by any of the conclusion or direction made in the remittal order. At this stage it is also necessary to make it clear that since any direction or conclusion made by the learned single Judge is not appealable at that stage and ultimately the matter has come to the higher Forum, it would be appropriate to consider at the relevant stage whether there was any "conclusion or direction" by the learned single Judge on the earlier occasion. It would be also appropriate to consider the validity of the directions and conclusions as the present appellant had no other opportunity to challenge such direction or conclusion.

27 Learned counsel appearing for the respondent has however invited our attention to a decision of this Court reported in 1997 (1) Arb.L.R. 334 (THE U.P. STATE BRIDGE CONSTRUCTION v. STATE OF TAMIL NADU AND ANOTHER). In the said case, the award was set aside by the learned single Judge on the ground that the arbitrators had not given any reason in support of the award. A preliminary objection was raised that the appeal was not maintainable as the case had been remitted under Section 16 of the Arbitration Act, even though the learned single Judge had made reference to Section 30 of the Act. The Division Bench observed :-

> "4. No doubt, the learned Judge has referred to Section 30 of the Arbitration Act in paragraph 16, but on a perusal of the entire judgment, we find that the learned Judge has exercised his power only under Section 16(1)(c) of the Act. Under that section a court may remit the Award or any matter to arbitration for reconsideration, where objection to the legality of the Award is apparent on the face of it. The learned Judge has found, as a matter of fact, that on the fact of it the Award suffers from illegality inasmuch as it has not give any reasons to support the conclusions. It is only on that one ground, the entire Award has been set aside and the matter has been remitted. Hence, we cannot construe the judgement of the learned Judge as one falling under Section 30 of the Arbitration Act, which enables the court to set aside an Award on any of the three grounds including misconduct of the arbitrator set out therein. In this case, the only ground is illegality apparent on the face of the record inasmuch as the Award has failed to contain reasons. Hence, we hold that the order of the learned Judge falls under Section 16(1)(c) of the Act and it is only the order remitting the matter for fresh consideration and passing of Award.
>
> ....
>
> 8. The Arbitrators are directed to dispose of the matter and pass an Award within four months from this date. It is needless to add that any observation made by the learned Judge in his order of remittal does not bind the Arbitrators and they shall consider the matter independent thereof and afresh on the materials on record."

28. The latter part of the observation to the effect that it is needless to add that any observation made by the learned Judge in his order of remittal does not bind the Arbitrators and they shall consider the matter afresh on the materials on record, is pressed into service by the learned counsel for the respondent in support of his contention that when a matter is remitted to the arbitrator, he is bound by any observation made by the Court. We do not think that the aforesaid observation made by the Division Bench is meant to lay down an universal proposition of law that in every case when the matter is remitted to the arbitrator, such arbitrator is not bound by any direction or conclusion of

the court because Section 16 itself contemplates issuance of directions. It is made clear in the peculiar facts of that case that when the single Judge had remitted the matter as the arbitrator had not given any reason, even though he was required to do so, the Division Bench clarified by saying that the arbitrator is to decide the matter afresh without being influenced by the observations made by the learned single Judge. In our opinion, to the extent there is any specific conclusion or direction by a Court while remitting the award to arbitrator, the latter is bound by such conclusion and direction.

29. Stage is now to consider whether the arbitrator has committed any error of law apparent on the face of record in deciding Claim Nos.1, 3 and 6. As apparent from the award itself, Claim No.1 relates to claim on account of illegal termination of the contract and the consequential claim for reimbursement of the loss sustained by the contractor. The award itself makes it clear that the arbitrator considered the matter on three heads.

30. The first head relates to loss of overhead profit suffered during the original period of contract and the second head relates to loss of overheads and profits suffered during the extended period of contract as ultimately the contract was terminated. The third head relates to loss of business profits for six years from the date of termination of the contract till the date on which reference was made for arbitration. In the original award, before it was remitted, the arbitrator had granted the amount claimed without disclosing on what basis such amount had been granted.

31. The learned single Judge on the earlier occasion had confirmed the finding that the termination of the contract was illegal. Learned single Judge had observed:-

> "19. The contractors claimed the compensation of Rs.226.351 lakhs towards the loss suffered on account of over-heads and profits due to the termination of the contract. The claim has been allowed as claimed by the contractors. The above figure has been arrived at on the basis of the alleged loss under three heads namely the net loss suffered during the period of contract till the original contract period – Rs.76.77 lakhs (2) net loss suffered during the extended period of contract till termination Rs.60.33 lakhs and (3) loss of business profit for six years Rs.89.25 lakhs. So, on the basis that the contractors had suffered loss in the execution of the work both in the original period of contract and also in the extended period of contract and also in the extended period of contract to the tune of Rs.137.10 lakhs, the learned arbitrator has awarded this amount and added another Rs.89.29 lakhs as loss of profit in the execution of the work for six years.
>
> ....

As the learned arbitrator has found that the termination of the contract is not legal, certainly the contractors are entitled to claim compensation for the loss of profit for the unfinished balance of the contract work. In this case, it is the allegation of the Department that only 36% of the work was completed by the contractors and there was balance of 64% unfinished. Therefore, even according to the decision relied upon by the counsel for the 1st respondent contractors, the contracts are entitled to claim 15% of the value of the unfinished work. But, in this case, the contractors have claimed loss of 137.10 lakhs till the date of termination of the contract and they claimed this amount in addition to the loss of profit of Rs.89.25 lakhs from the Department.

.....

When the balance-sheet Ex.C-153 and R.527 prove the gross profit relating to the business, I am not able to understand how huge loss of Rs.76.77 lakhs is shown by the contractors. Secondly, even if the contractors had incurred loss of Rs.76.77 lakhs in the original period of contract and another Rs.60.33 lakhs during the extended period of the contract, it is not explained, why the Department has to compensate this loss of the contractors for the period before the termination of the contract. If the contractors had incurred loss in the transaction, the loss has to be borne by the contractors and there is no clause in the agreement that the Department has to compensate the loss. The Department was in no way responsible for the loss incurred by the contractors during the period prior to 29.12.1980. Even according to the decision relied upon by the learned counsel for the contractors (A.I.R. 1984 Supreme Court page 1703) damages can be claimed only for the loss of profit in the balance of the incompleted work due to the breach of contract. Therefore, the learned arbitrator allowing the entire claim of Rs.226.351 lakhs on the basis that the contractors had incurred loss, appears to be error apparent due to the non-application of mind. ..."

Ultimately it was concluded :-

" Therefore, in the fixation of the quantum of compensation, there is error apparent on the face of the award as compensation has been awarded for the alleged loss in the work already completed. This is beyond the scope of the tender document which has to be treated as a legal misconduct on the part of the learned arbitrator. Therefore, the award fixing the compensation at Rs.226.351 lakhs has to be set aside."

32. In the subsequent award, the arbitrator has given the break-up and the basis on which the calculation had been made. In the revised award, the Arbitrator has observed that Claim No.1 consists of,

(i) loss due to overheads during the original period of contract - Rs.76.77 lakhs.

(ii) Loss due to overheads during the extended period of contract – Rs.60.33 lakhs
(iii) Loss of business for six years – 89.25 lakhs

Thereafter the arbitrator has proceeded to consider each sub-head. The Arbitrator has observed :

> "... The illegal termination of the contract by the Department has had the effect of preventing the contractors from completing the work and thereby earning the expected amount, which they would have normally earned if the contract had been fully performed."

It was further observed :-

> "20. Normally in claiming compensation or damages for breach of contract, loss of overheads and profits are clubbed together and a percentage of 20% i.e. 10% on each head has been found to be appropriate. But that is not an absolute rule and may vary from place to place."

33. While considering the question of loss of overheads and profits in first item of Claim No.1, the arbitrator has considered the expected profit and came to the conclusion that if the contract would have been completed during the stipulated period, the contractor would have earned profit of Rs.76.77 lakhs. We have already referred to the observations made by the learned single Judge. A careful study of the observations makes it clear that the learned single Judge had not rendered any categorical conclusion but had expressed doubt regarding the basis on which the amount had been claimed. The arbitrator has now given sufficient basis for arriving at the figure of Rs.76.77 lakhs in respect of sub-head (i) of Claim No.1. Even though there may be a different method of calculation, it cannot be said that the method of calculation adopted by the arbitrator is illegal on the face of it. It is of course true that the arbitrator at one point of time observed that normally loss of overhead and profits are clubbed together and profit of 20% i.e., 10% on each head, is found to be appropriate, but, as rightly observed by the arbitrator, it is not an absolute rule and may vary from place to place. In the present case, the arbitrator has referred to some materials on record to come to the conclusion that the contractor was entitled to get more. Keeping in view the limited scope for interference in such matters, since the Court dealing with the matter under Sections 30 and 33 of the Act and obviously the appellate court dealing with such matter under Section 39, do not sit as an appellate authority over the award of the arbitrator, the award in respect of sub-head (1) of Claim No.1 has to be accepted willy-nilly.

34. Under sub-head (2) of Claim No.1, the arbitrator had considered the loss due to overheads and profit during the extended period and has come to the conclusion that the contractor was entitled to a sum of Rs.60.33 lakhs under the aforesaid head of claim by taking into account

the amount of work completed and the proportionate overhead. The award prima facie appears to be on the higher side going by the normal rule, yet, in view of the restricted scope for interference in such matters, we are unable to accept the submission of the learned Additional Advocate General, and therefore, the award on this head is sustainable.

35. The appellant however seems to be on a stronger footing so far as sub-head (iii) of Claim No.1 is concerned. Under this sub-head, the contractor claimed a sum of Rs.89.25 lakhs on account of "loss of business for six years" at Rs.15 lakhs per annum minus the amount mitigated. Apparently, this claim is on account of the fact that the machinery belonging to the contractor had been taken over by the State. While deciding this matter, it is necessary to consider Claim No.3 made by the contractor. Such Claim relates to claim of Rs.76,36,09,045 towards the value of infrastructure and materials taken over by the State. In respect of this claim, the contention by the Department was to the effect that even though the Department is liable to pay the value of the machinery, such value had to be determined with reference to the depreciated value as indicated by the contractor in his own books of accounts. The right of the contractor to get the value, whether the market value fixed by the arbitrator or the depreciated value as contended by the Department, is not in dispute. Learned Additional Advocate General has therefore contended that since the value of the machinery as calculated on the date of seizure of the machinery is being paid, the Department cannot be asked to pay for the so called user of the machinery. In other words, it is contended that since the Department is being asked to pay the value of the machinery, it must be taken that the machinery vested with the Department and award of a further sum on account of the so called loss of business from the date of termination of the contract till the date of reference is only a clever way of making the same claim in a different manner.

36. Learned counsel appearing for the respondent on the other hand has submitted that since the machinery was illegally taken over, the Department is required to pay compensation for such illegal taking over and since the Department had used the machinery, they must pay for such usage. It is further submitted that in case the machinery would not have been taken over by the Department, the contractor could have used the machinery for some other work and similarly if the Department would not have taken over the machinery, they would have been forced to hire the machinery from some other source and, therefore, in either case the compensation should be calculated for those six years.

37. In our opinion, the claim made by the contractor on this head and granted by the arbitrator can aptly be described as ingenious. There is no dispute that the machinery had been taken over by the Department. There is also no dispute that the contractor has never asked for return of the machinery. On the other hand, if the contractor claims the value of the machinery as on the date of the seizure, it would be obvious that the title to the machinery would vest with the Government.

It is to be emphasised once again that the contractor has claimed the value of the machinery as on the date of inspection by the expert, which was soon after the seizure. In our opinion, since the contractor has claimed value of the machinery from the date of seizure, it must be taken that the machinery vested with the Government. It is of course true that the Government was liable to pay the amount immediately, but such amount was ascertained and awarded at a later date. However, it was always open to the contractor to claim interest on the said value, if he has not done so. It may be his misfortune, but having claimed the value of the machinery on the date of seizure, he cannot be heard to say that even thereafter he would be entitled to a further sum.

38. In this connection, it is also to be remembered that it is not the case of the contractor that he had other works to be performed and because of the non-return of the machinery or non-payment, he could not undertake other work. In our opinion, the claim on Sub-head (iii) is too remote and since the contractor is entitled to the value of the machinery, he is not entitled to the amount claimed under sub-head (iii) of Claim No.1. To this extent, the award of the arbitrator suffers from an error apparent on the face of the award, which is required to be set aside.

39. In this connection, the contention raised by the appellant relating to value may be considered. According to the learned counsel appearing for the appellant, since in the books of accounts the value of the machinery had been shown, which was much lower figure, the arbitrator had committed an illegality in awarding a sum of Rs.76,36,090.45 towards the value of the infrastructure and the materials wrongfully seized by the Department.

40. It is of course true that in the books of accounts much lower figure has been indicated towards the value of such machinery. However, the Arbitrator, on the basis of the report of the expert regarding the market value of the machinery, has made the award. It cannot be said that the value indicated in the books of accounts always reflects the market value of a property, and therefore, the award of the Arbitrator, by accepting the report of the Expert/Commissioner, cannot be said to be vitiated by any error of law apparent on the face of the award. Out of the two methods available, the arbitrator has chosen one method. Merely because of adopting such method an higher amount is payable to the contractor, the same cannot be a ground to set aside the award.

41. Next question relates to awarding a sum of Rs.15,83,784/- towards design fee under Claim No.6. In the earlier award, no basis had been indicated by the arbitrator. When the matter came before the learned single Judge, it was observed :-

> " .. This claim has also been straightaway allowed by the learned arbitrator without any discussion or assigning any reason. The learned Addl. Government Pleader argues that when the contractors have claimed damages under claim No.1 for all the loss sustained by them on account of the termination of the

contract they are not entitled to claim design fees of Rs.15 lakhs and odd separately and this will amount to double claim in respect of the same cause of action and this is also an error apparent in the award of the learned arbitrator. But the learned counsel appearing for the contractors contended that under Claim No.1, the loss of profit alone is claimed, but under Claim No.6, as the Department had utilised the designs prepared by the contractors, the Department is bound to pay the design fee and therefore, this claim will not amount to double claim in respect of the same cause of action. I feel that this stand taken by the contractors does not appear to be sound or acceptable. The designs prepared by the contractors were approved by the Department and therefore, the contractors were bound to execute the work, according to this design, approved by the Department. Now the learned arbitrator has held that for the illegal termination of the contract, the contractors are entitled to claim the loss of profit which they would have earned, as if the contract was not terminated. Even, if those designs prepared by the contractors were utilised in the execution of the work, the contractors would have earned only the profit. Now the profit which they would have earned, will be awarded by the arbitrator after calculating the percentage of the profit in the unexecuted part of the work. Therefore, when the contractors are going to receive the expected profit, they cannot claim the design fee also as it will amount to double benefit for the same work. Some how, this aspect was not taken into consideration by the learned arbitrator and as the compensation which has been fixed under Claim No.1 includes all the losses sustained by the contractors, the award for a sum of Rs.15,83,784/- to the contractors towards the design fee on the ground that the design was utilised by the Department, is an error on the face of it. Therefore, the award on this claim also has to be set aside."

42. From the above discussion made by the learned single Judge it is apparent that the learned Judge came to the categorical conclusion, (and not mere observation) that the contractor was expected to supply the design for the work and value of the design was already quoted in the lumpsum value of the contract and since the contractor is entitled to get the compensation on account of termination of the contract, obviously, he cannot claim any further amount towards the fee for design. The arbitrator, after fresh consideration, has came to the conclusion that the contractor had paid Rs.10 lakhs for the special design to M/s.Stupp Consultants and such amount was never contemplated in the original value of the work. The Arbitrator further concluded that since the design supplied by the contractor was used by the subsequent contractor, the contractor is also entitled to fee for that.

43. In course of hearing on this aspect, to a pointed query, the learned counsel for the respondent submitted that if the contractor

would have completed the work and would have been paid the entire amount, he could not have claimed any separate fee at the rate of 4% as the original quotation included such amount.

44. Having regard to the facts and circumstances of the case, we feel that in view of the finding of the arbitrator, which obviously cannot be interfered with, to the effect that Rs.10 lakhs paid to M/s. Stupp Consultants was not a part of the original quotation and not a part of the original contract, the contractor is entitled to such amount of Rs.10 lakhs. However, since the contractor is being paid compensation for the illegal termination of the contract, which also included the so called fee for the design, award for a sum of Rs.5,83,784/- would amount to duplication, and therefore, such part of the award cannot be sustained. Since this portion of the award is severable from other portion of the award directing payment of Rs.10 lakhs paid to M/s.Stupp Consultants, the award relating to this claim is required to be modified. In other words, in respect of Claim No.6, the contractor is entitled to a sum of Rs.10 lakhs and the other portion of the award of the arbitrator directing payment of Rs.5,83,784/- is not payable. To that extent, the award is required to be modified.

45. In view of the above discussion, the appeals preferred by the State are allowed in part. The award of the arbitrator in respect of Claim No.1(iii) and award of Rs.89.25 lakhs on that score is liable to be set aside. Similarly, out of the award of Rs.15,83,784/-, relating to Claim NO.6, only a sum of Rs.10,00,000/-(Rupees ten lakhs only) is payable and the award is modified to that extent.

46. Next comes the question of cross objection filed by the contractor. Learned counsel for the respondent has submitted that the arbitrator had awarded interest at the rate of 16.50% on the principal amount awarded by the arbitrator. On earlier occasion when the award was upheld in part, the learned single Judge had also upheld the award of interest at the rate of 16.5% in respect of the claims then accepted, namely, Claim Nos.2 & 5. In the present case, after the revised award was submitted in respect of Claim Nos.1, 3 and 6, the learned single Judge, while upholding such award in respect of Claim Nos.1, 3 and 6, has illegally and without any justification reduced the amount of interest payable to 12%.

47. In the order of the learned single Judge, no special reason has been indicated as to why he has modified the award of the arbitrator on this score. In the present case, after reaffirming the award relating to Claim Nos.1, 3 and 6, the learned single Judge has simply observed :-

> "However, this Court has to differ with the arbitrator on the question of rate of interest as far as Claim Nos.1, 3 and 6 by considering the amount of compensation under various claims awarded by the arbitrator and also the other circumstances of the case by keeping the ends of justice in

mind. Accordingly, the rate of interest as far as Claim Nos.1, 3 and 6 are concerned is modified at 12% per annum from 27.11.1986 to 31.5.1995. From 1.6.1995 till the date of realisation, this Court has to pass the decree which includes the interest."

48. It is also interesting to observe that the learned single Judge also referred to Claim Nos.2 and 5 and held that as the earlier award had not been set aside, the contractor is entitled to draw the interest at the rate of 16.5% so far as claim Nos.2 and 5 are concerned till 31.5.1995, the date of present award. Thereafter in respect of Claim Nos.2 and 5 the rate of interest would be at 12% per annum till the date of realisation.

49. A perusal of the aforesaid portion makes it clear that the contractor is entitled to get interest at the rate of 16.5% in respect of Claim Nos.2 and 5 for the period from 27.11.1986 till 31.5.1995. However, the contractor as per the direction of the learned single Judge is entitled to 12% per annum from 27.11.1986 to 31.5.1995 in respect of Claim Nos.1, 3 and 6. It is also clear that in respect of all the claims, the contractor is entitled to receive 12% from the date of judgment till the date of payment. The latter direction is obviously in accordance with Section 29 of the Act. Such direction is obviously a matter of discretion, and therefore, the discretion of the learned single Judge in awarding 12% interest from the date of the award till the date of realisation is not liable to be interfered with. However, there is no reason as to why the learned single Judge has interfered with the award of interest at the rate of 16.5% in respect of Claim Nos.1, 3 and 6 from the date of reference i.e., 27.11.1986, till 31.5.1995. To this extent, the cross objection filed by the respondent should be allowed and in modification of the order of the learned single Judge it is directed that in respect of the amount now found payable in respect of Claim Nos.1, 3 and 6, the respondent / contractor is entitled to interest at the rate of 16.5% from 27.11.1986 till 31.5.1995, i.e., pendentlite interest, before the arbitrator. So far as interest thereafter is concerned, the direction of the learned single Judge that the entire principal amount would carry interest at the rate of 12% from 1.6.1995 till the date of payment is however confirmed.

50. In the result, the appeals as well as the cross-objection are allowed in part to the extent indicated. Both the parties shall bear their own costs of the present appeals.

dpk

Sd/- Asst.Registrar,
Dt/-4.8.2005.

Corrected Order as per the
Being Mentioned Order
dated 16.9.2005 in OSA.7 & 8
of 2000 and Cross Objection
No.73/2000.
Sd/- Asst. Registrar,
Dt/-21.9.2005.

/true copy/

Sub Asst.Registrar

TO

1. THE SUB ASSISTANT REGISTRAR,]
ORIGINAL SIDE,]
HIGH COURT, MADRAS.]
]
2. Mr. JUSTICE S.PADMANABAN,]
ARBITRATOR, (RETIRED JUDGE)]TO BE SUBSTITUTED TO THE
NO.20, SECOND STREET,]ORDER ALREADY DESPATCHED
WALLACE GARDEN,]ON 16.8.2005.
CHENNAI 6.]
]
+ 1 cc to Mr.R.Murari,]
Advocate SR No.39172]
]
+ 1 cc to Addl Government]
Pleader (CS) SR No.38868]

PV(CO)SR/4.8.2005
GP/21.9.05

COMMON JUDGMENT IN
OSA.Nos.7 & 8 OF 2000 &
Cross Objection 73 of 2000