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March 24

SETH THAWARDAS PHERUMAL

v.

THE UNION OF INDIA

(and connected appeal)

[VIVIAN BOSE, JAGANNADHADAS and SINHA, JJ.]

Arbitration Act, 1940, (Act X of 1940), s. 16(1)(c)—Arbitration —Award—Legality thereof—When can be challenged—Arbitrator—Condition precedent for his jurisdiction—Award—When final—Both parties specifically referring a question of law for the decision of arbitrator—Cases where question of law specifically referred and cases where decision incidentally material (however necessary) in order to decide the question actually referred—Distinction between —Wrong construction of contract—Error of law—Interest awarded—Contract not providing for it—Requirements of Interest Act, 1839 *(Act XXXII of* 1839) *not fulfilled—Specific type of loss actually contemplated by the parties—Express stipulation that no damage will be payable—Parties bound down to the agreement—Agreement on which suit based not found in the written contract but implied under s. 9 of the Indian Contract Act,* 1872*—Matter not covered by the arbitration clause—Error of law apparent on the face of the award.*

The appellant, a contractor, entered into a contract with the Dominion of India for the supply of bricks. A clause in the contract required all disputes arising out of or relating to the contract to be referred to arbitration. Disputes arose and the matter was duly referred. The arbitrator gave an award in the contractor's favour. The Union Government, which by then had displaced the Dominion of India, contested the award on a number of grounds.

Held: (1) that it is not enough for the contract to provide for arbitration; more is necessary. An arbitrator only gets jurisdiction when either, *both* the parties *specifically* agree to refer specified matters or, failing that, the court compels them to do so under the arbitration clause if the dispute is covered by it;

(2) the legality of an award cannot be challenged on facts, but it can be challenged on questions of law provided the illegality is apparent on the face of the award: s. 16(1)(c) of the Arbitration Act;

(3) the only exception is when *both* parties *specifically* refer a question of law for the decision of the arbitrator. In that event they are bound by his decision on that particular question as well as by his decision on the facts. But a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision is incidentally material (however necessary) in order to decide the question actually referred. The law about this is the same in India as in England. 1923 A.C. 395 and 1933 A.C. 592, followed. 54 C.W.N. 74 at 79, 50 I.A. 324 at 330 &

331, 54 I.A. 427 at 430, 29 I.A. 51 at 60, 1942 A.C. 356 at 368 referred to and 1950 S.C.R. 792 at 798, explained;

Quaere:—Whether the courts will interfere when a question of law is specifically referred if the arbitrator acts illegally in deciding it, such as deciding on inadmissible evidence or on principles of construction which the law does not countenance. 1923 A.C. 395 at 409, referred to;

(4) a wrong construction of the contract is an error of law and can be challenged provided the error appears on the face of the award;

(5) so is the awarding of interest when the contract does not provide for interest and the requirements of the Interest Act are not fulfilled: 65 I.A. 66, referred to.

Quaere: whether the Interest Act applies to arbitrations;

(6) when a specific type of loss is directly contemplated by the parties to a contract and they expressly stipulate that no damages will be payable in respect of it they must be bound down to their agreement and any claim for damages in respect of such loss must be dismissed;

(7) when the agreement on which the suit is based is not to be found in a contract which has been reduced to writing but has to be implied under s. 9 of the Contract Act then the matter is not covered by an arbitration clause of the kind referred to above because the dispute in such a case arises out of and relates to the implied agreement and not to the written contract; 1942 A.C. 356 at 371, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 260 of 1953 and connected appeal (C.A. No. 12 of 1954).

Appeals from the Judgment and Decree dated the 11th day of May 1951 of the High Court of Judicature at Patna in Miscellaneous Appeal No. 253 of 1950 and in appeal from Original Order No. 252 of 1950 arising out of the order dated the 11th day of May 1951 of the Court of Subordinate Judge, Dhanbad in Suit No. 34 of 1949 and in Title Suit No. 27 of 1949 respectively.

Mahabir Prasad, Advocate-General for the State of Bihar (*S. P. Varma* and *M. M. Sinha*, with him), for the appellant (In Civil Appeal No. 260 of 1953).

Mahabir Prasad, Advocate-General for the State of Bihar (*M. M. Sinha* for *R. C. Prasad*, with him), for the appellant (In Civil Appeal No. 12 of 1954).

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C. K. Daphtary, Solicitor-General for India (*Porus A. Mehta* and *P. G. Gokhale*, with him), for the respondent (In both the Appeals).

1955. March 24. The Judgment of the Court was delivered by

BOSE J.—This appeal and Civil Appeal No. 12 of 1954, which will also be governed by this judgment, raise the same points though there are some differences in the facts. We will deal with Civil Appeal No. 260 of 1953 first.

The suit there related to an arbitration matter. The appellant before us, whom it will be convenient to call the contractor, entered into a contract with the Dominion of India through an Additional Chief Engineer of the C.P.W.D. on 1-11-1945 for the supply of bricks to the C.P.W.D., a department of the Dominion Government. Disputes arose about a number of matters. Clause 14 of the agreement provided that all disputes arising out of or relating to the contract should be referred to the Superintending Engineer of the Circle for the time being. Accordingly, there was a reference on 21-1-1949 and an award followed on 8-5-1949. It was filed in the Court of the Subordinate Judge, Dhanbad, and the contractor prayed that it be accepted and that a decree be passed in terms of it. The Dominion of India filed objections under section 30 of the Arbitration Act, 1940 and prayed that the award be set aside and alternatively that it be modified or corrected. The contractor's application was registered as a suit under section 20(2) of the Act and a decree was passed in terms of the award on 18-3-1950.

By that time the Constitution had come into force and the Union of India replaced the Dominion of India as a defendant. The Union of India filed an appeal to the High Court. The appeal was allowed in part. The contractor thereupon appealed to this Court.

The dispute that was referred to the arbitrator consisted of 17 heads of claim but only three of them are contested here, namely items 5, 8 and 17.

In the 5th head of claim the contractor claimed Rs. 75,900 as the price of 88 lacs of katcha bricks that were destroyed by rain. These bricks were not the subject-matter of the contract but the contractor put his claim in this way.

The contract was for the supply of $2\frac{1}{2}$ crores of pucca bricks which had to be delivered according to the following schedule—

30 lacs by 25-1-46
50 lacs by 25-2-46
55 lacs by 25-3-46
55 lacs by 25-4-46
60 lacs by 25-5-46.

Delivery was to be at the kiln site. In order to keep to this schedule the contractor had to think ahead and work to a particular time table. First, he had to prepare katcha or unbaked bricks and place them in his kilns for baking. While this lot was baking he had to prepare and stock another lot of katcha bricks ready to take the place of the baked bricks as soon as they were removed. It was the duty of the C.P.W.D. to remove these bricks as soon as they were ready for delivery, that is to say, as soon as they were fully baked. At a certain stage of the contract the C.P.W.D. failed to remove the backed bricks which were ready for delivery and removal. This caused a jam in the kilns and prevented the contractor from placing a fresh stock of unburnt bricks in the kilns, and in the meanwhile his stock pile of katcha bricks ready for baking kept on mounting up. Had everything been done to time the $2\frac{1}{2}$ crores of bricks would have been delivered before the rains set in. But owing to the default of the C.P.W.D. in not removing the burnt bricks which were ready for removal, delay occurred in the time table and the rains set in with the result that 88 lacs of katcha bricks were destroyed by the rains. As this loss was occasioned by the default of the C.P.W.D. the contractor claimed that he should be paid their price.

The reply of the Union Government was two-fold. First, it contended that the katcha bricks formed no part of the contract and even if it was at fault in not

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taking delivery of the burnt bricks in time all that it could be held liable for would be for breach of that contract; and said that the loss that was occasioned by the damage caused to the katcha bricks which formed no part of the contract was too remote. Secondly, that compensation for this loss could not in any event be claimed because this kind of situation was envisaged by the parties when the contract was made and they expressly stipulated that the Dominion Government would not be responsible. The Union Government relied on additional clause 6 of the agreement which is in these terms:

"The department will not entertain any claim for idle labour or for damage to unburnt bricks *due to any cause whatsoever*".

The arbitrator held that this clause was not meant "to absolve the department from carrying out their part of the contract" and so he awarded the contractor Rs. 64,075 under this head.

We are clear that the arbitrator went wrong in law. Government departments have their difficulties no less than contractors. There is trouble with labour, there is the likelihood of machinery breaking down in out of the way places and so forth; there was also the danger of thunder storms and heavy showers of rain in the month of May: it will be remembered that the last date of delivery was 25-5-46. If, with that in view, Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair. But having contracted he cannot go back on his agreement simply because it does not suit him to abide by it. This is not to say that Government is absolved from all liability, but all it can be held responsible for is for damages occasioned by the breach of its contract to remove the pucca bricks which it had undertaken to remove. But what would such a breach entail?

The contractor had a duty under section 73 of the Contract Act to minimise the loss, accordingly he would have had the right to remove the bricks himself and stack them elsewhere and claim compensation for the loss so occasioned; and indeed two of his heads of claim (not in dispute here) relate to that. He has been awarded Rs. 11,744-11-0 under claim No. 4 for the extra load in connection with the stacking of 1 crore 7 lacs of bricks due to the accumulation at the kiln site owing to the department's failure to work to its part of the time table, and in addition, he has been given Rs. 15,500 under claim 13 for the cost of levelling and dressing land to enable him to stack these extra bricks.

Alternatively, he could have sold the bricks in the market and claimed the difference in price, but ordinarily he could not have claimed compensation for damage done to the katcha bricks unless he could have shown that that kind of damage, ordinarily too remote, was expressly contemplated by the parties when the contract was made: section 73 of the Contract Act. Here it is clear that this was in their express contemplation and they chose to provide against such a contingency by making clause 6 an express clause in their contract. There can therefore be no doubt that the arbitrator was wrong in his law. His construction of the terms of the contract was at fault. The question now arises whether his decison on this point is final despite it being wrong in law.

In India this question is governed by section 16(1) (c) of the Arbitration Act of 1940 which empowers a Court to remit an award for reconsideration.

"where an objection to the legality of the award is apparent upon the face of it".

This covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. If a question of law is specifically referred and it is evident that the

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parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he has decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature. See the speech of Viscount Cave in *Kelantan Government* v. *Duff Development Co.*(1) at page 409. But that is not a matter which arises in this case.

The law about this is, in our opinion, the same in England as here and the principles that govern this class of case have been reviewed at length and set out with clarity by the House of Lords in *F. R. Absalom Ltd.* v. *Great Western (London) Garden Village Society* (2) and in *Kelantan Government* v. *Duff Development Co.*(1). *In Durga Prasad* v. *Sewkishendas*(3) the Privy Council applied the law expounded in *Absalom's case*(2) to India: see also *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.*(4) and *Saleh Mahomed Umer Dossal* v. *Nathoomal Kessamal*(5). The wider language used by Lord Macnaghten in *Ghulam Jilani* v. *Muhammad Hassan*(6) had reference to the revisional powers of the High Court under the Civil Procedure Code and must be confined to the facts of that case where the question of law involved there namely limitation, was specifically referred. An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Courts provided his error appears on the face of the award. The single exception to this is when the parties choose *specifically* to refer a question of law as a separate and distinct matter.

(1) [1923] A.C. 395.
(2) [1933] A.C. 592.
(3) 54 C.W.N. 74,79.
(4) 50 I.A. 324, 330 & 331.
(5) 54 I.A. 427, 430.
(6) 29 I.A. 51, 60.

Reference was made to a decision of this Court in *A. M. Mair & Co.* v. *Gordhandass Sagarmull*(1) where Fazl Ali, J. quoted a passage from Viscount Simon's speech in *Heyman* v. *Darwins Ltd.* (2) where the learned Lord Chancellor (Viscount Simon) in turn quoted from Lord Dunedin in another case. It was argued on the basis of this that if you have to have recourse to the contract to establish your case, then the dispute must fall within the arbitration clause. That is undeniable but it is not enough that the dispute should fall within the clause. It is also necessary that the parties should define what the dispute is and agree to refer the dispute so set out and defined to arbitration, or, if they do not, that the Court should compel them to do so: (see Lord Macmillan in *Heyman's case*(2) just cited at pages 369 and 370). If, therefore, no specific question of law is referred, either by agreement or by compulsion, the decision of the arbitrator on that is not final however much it may be within his jurisdiction, and indeed essential, for him to decide the question incidentally. Lord Russell of Killowen and Lord Wright were both in the earlier case, *F. R. Absalon Ltd.* v. *Great Western (London) Garden Village Society* (3), as well as in *Heyman's case*(2) and they would have pointed to any distinction had there been a likelihood of conflict; but in fact there is none and we do not read Fazl Ali J.'s judgment as a decision to the contrary.

We have next to see whether the arbitrator was *specifically* asked to construe clause 6 of the contract or any part of the contract, or whether any question of law was *specifically* referred. We stress the word "specifically" because parties who make a reference to arbitration have the right to insist that the tribunal of their choice shall decide their dispute according to law, so before the right can be denied to them in any particular matter, the Court must be very sure that *both* sides wanted the decision of the arbitrator on a point of law rather than that of the Courts and that they wanted his decision on that point to be final.

(1) 1950 S.C.R. 792 at 798. (2) 1942 A.C. 356 at 368. (3) 1933 A.C. 592.

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The clause in the contract that requires disputes about the contract to be referred to arbitration is clause 14 and is in the following terms:

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specification and instructions hereinbefore mentioned and as to quality of materials or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, specification, instructions, orders or these conditions, or otherwise concerning the supplies whether arising during the progress of delivery or after the completion of abandonment thereof shall be referred to the arbitration of the Superintending Engineer of the Circle for the time being in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to the contract".

The dispute sprang out of a series of claims made in a number of letters written by the contractor to the Additional Chief Engineer, C.P.W.D. and culminated in a petition, Ex. B(1), in which the contractor summarised his claims. The document is not dated. On receipt of this, someone on behalf of the C.P.W.D. invoked the jurisdiction of the arbitrator. That letter has not been filed. The arbitrator then wrote to the contractor and asked him to submit a statement of claim. That letter has not been filed either but reference is made to it in Ex. C(1), the statement of claim which the contractor filed in response to that letter. As the material documents setting out the terms of reference are not here, we were asked by both sides to infer what the terms were from this statement of claim and the recitals in the award. The learned counsel for the contractor relied on the following:

In the statement of claim—

"*Item* 5.—Loss of katcha bricks.....Rs. 75,900.

. . . . . .

The chief reason of the destruction of these bricks was the failure of the department to lift the

monthly quota of bricks.....The argument of the department that they are not liable to compensate us on this account because of clause 6 of the agreement is not correct.

Clause 6 refers to only such cases over which the department has no control. But if the department would have lifted the bricks (this was entirely under their control) then no such loss would have occurred. Also be it noted that clause 6 refers only to 'damage' and not to 'destruction'.....Damage means only partial loss.....it cannot mean total destruction".

The award states—

"The statement of claims *submitted by the contractor* contains seventeen items in respect of which the contractor claimed a total payment of Rs. 4,76,138-12-0 plus interest.....i.e., approximate total amount claimed: Rs. 5,03,803-12-0 as detailed below".

Then follow the seventeen items of which item 5 is—

"Payment for katcha bricks destroyed by rain: Rs. 75,900".

The body of the award deals with this as follows:

" *Claim No. 5*

Payment for 88 lacs of katcha bricks destroyed by rain.

The contractor argued etc.....

The Executive Engineer stated.....The C.P.W.D. moreover were safeguarded by clause 6 of the contract.....

The contractor maintained that clause 6 of the contract could not be invoked when the department was at fault as in this case. Clause 6 was meant to cover contingencies which were not of the department's own making.

I hold that the removal of the bricks in such a manner or to prevent accumulation in excess of 60 lacs was an implied contractual obligation on the part of the C.P.W.D.....I further hold that the C.P.W.D. cannot take shelter behind clause 6 of the contract. This clause is not, in my opinion, meant

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to absolve the department from carrying out their part of the contract. It is impossible not to admit this without offending the rudiments of common sense reasoning".

We are of opinion that this is not the kind of specific reference on a point of law that the law of arbitration requires. In the first place, what was shown to us is no reference at all. It is only an incidental matter introduced by the Dominion Government to repel the claim made by the contractor in general terms under claim No. 5. In the next place, this was the submission of the contractor alone. A reference requires the assent of *both* sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either, agreement by *both* sides about the terms of reference, or an order of the Court under section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction. Therefore, when a question of law is the point at issue, unless *both* sides *specifically* agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceedings is not enough. The language of Lord Wright in *F. R. Absalom Ltd.* v. *Great Western (London) Garden Village Society* (1), a case similar to this so far as this point is concerned, is apposite here—

"There is here no submission of any specific question of law as such and as a specific question of law; no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission of the

(1) [1933] A.C. 592, 616.

true effect of the contract on the basis of undisputed facts, as in the *Kelantan case*(1) or as a separate and distinct matter on facts to be separately assumed or found, as in *In re King and Duveen*(2)..... The arbitrator was not being asked simply and specifically to decide, upon some agreed or assumed basis of fact, the true interpretation of either clause 26 or clause 30 of the conditions or of both together; he was being required to make an award on the two matters submitted on whatever questions of fact and law might emerge".

Clause 32 of the contract in the House of Lords case was the equivalent of clause 14 in ours. It ran—

"Provided always that in case any dispute or difference shall arise.....as to the construction of the contract or as to any matter or thing arising thereunder.....such dispute shall be and is hereby referred to the arbitration and final decision of etc." The arbitrator relied on that to invest him with jurisdiction to determine, as a matter of law, the construction of clauses 26—30 of that contract. The House of Lords held that in the absence of a *specific* reference about the construction of the contract the jurisdiction of the Courts was not taken away. Lord Russell of Killowen put it this way at page 610—

"No specific question of construction or of law was submitted. The parties had, however, been ordered to deliver pleadings, and by their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued etc.....It is at this point that the question of the construction of condition 30 arose as a question of law, *not specifically submitted*, but material in the decision of the matters which had been submitted. This question of law the arbitrator has decided; but if upon the face of the award he has decided it wrongly his decision is, in my opinion, open to review by the Court".

That is exactly the position here. Simply because the matter was referred to incidentally in the plead-

(1) [1923] A.C. 395. (2) [1913] 2 K.B. 32, 36.

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ings and arguments in support of, or against, the general issue about liability for damages, that is not enough to clothe the arbitrator with exclusive jurisdiction on a point of law.

The next question is whether the error is apparent on the face of the award. That, in our opinion, is clear from the passages we have quoted from the award.

We hold that clause 6 expressly relieves the Union Government of all liability under this head of claim and that the arbitrator was wrong in awarding any sum on that account.

The next head in dispute is item No. 8 in the statement of claim:

"Cost of additional wages paid to the coolies on account of non-supply of ration and cloth—Rs. 51,495".

Here again no specific question of law was referred, so all we have to see is whether there is an error of law apparent on the face of the award.

The contractor put his case as follows in the statement of claim:

"At the time when this work was allotted to us there was rationing system in the locality. As per conditions of contract we were bound not to employ local labour and we had to import coolies from far off places. We had in our employ about 1800 coolies and it was an impossibility to arrange their ration from open market. This difficulty was brought to the notice of the *authorities concerned*, and they *promised us to supply ration*. It was only after this promise that we signed the agreement.....From a perusal of these letters it is clear that *the department promised us to supply ration*.....These *circumstantial evidences* are sufficient enough to show that there was a mutual *understanding* between the parties that ration will be supplied. In the eyes of law even circumstantial evidence is sufficient to prove that such a promise was made. Any breach of *that promise* makes the department legally liable to compensate for that loss.....Apart from the legal responsibility it was also a *moral responsibility* for the department to supply ration".

This claim, therefore, was not grounded on any clause of the contract, nor was it said to be implied in the contract. What was relied on was a collateral promise evidenced, not by the contract, but by two letters written by "the department" and a promise by "the authorities concerned"; and later this promise is turned into a "mutual understanding" and to a "moral responsibility" in addition to a legal one.

The arbitrator dealt with this as follows. He began by saying—

"The contractor stated that when he submitted his tender on 25-9-45 he did so in the *bona fide* belief that the department would make the necessary arrangements, etc."

Then he sets out the following dates. On 1-11-45 the contractor was told that his tender had been accepted. On 9-11-45 the contractor "warned" the Executive Engineer about his "immediate *requirements* in respect of rations". The contract was finally accepted and signed on 22-11-45.

Now it is admitted that the contract contains no clause about rations and it is also evident that the question was not raised when the tender was accepted on behalf of the Dominion Government. The question was raised in a letter to the Executive Engineer and the contractor signed the contract *without waiting for a reply*.

It is well settled that governments can only be bound by contracts that are entered into in a particular way and which are signed by the proper authority. A reference to the agreement, Ex. A(1), will show that it was accepted on behalf of the Dominion Government by the Additional Chief Engineer and not by an Executive Engineer. A letter written to the Executive Engineer would therefore have no effect and even if it be assumed that the letter was forwarded to the Additional Chief Engineer for consideration, what does it amount to? A tender embodying certain terms is submitted and is accepted on 1-11-45. Both sides are agreed on all matters contained in it and their conduct shows that both sides indicated that the contract should be reduced to writing. Re-

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fore the agreement is signed, one party wants to include a further condition in the contract. We will assume that the request was made to the other contracting party. But without waiting for the assent of the other side, both sides accept and sign the contract *as it existed before the fresh suggestion was made.* It is an error in law to deduce from this that there was acceptance of the fresh proposal. On the contrary, the legal conclusion is that the new suggestion was dropped and that the contractor was content to accept the contract as it was without this condition. In any case, a person cannot be bound by a one-sided offer which is never accepted, particularly when the parties intend that the contract should be reduced to writing. That is the whole point of insisting on a document. It excludes speculation as to what was and what was not agreed to however much the matter might have been raised by one of the parties during the stage of negotiation.

The arbitrator continues that the *contractor* stated that—

"it was a well known and established fact that Sindri was a rationed area; that the C.P.W.D. were giving rations at controlled rates to their employees and contractors through arrangements with the local Civil Supply Authorities; that nobody working under the C.P.W.D. was allowed to make independent arrangements or approach the Civil Supply Authorities direct"

and the *contractor* contended that the very fact that he tendered such low rates showed that *he expected* to supply his labourers with rations at controlled rates. The arbitrator then sets out some more of the *contractor's* contentions and from them concludes that

"there was an implied contractual obligation for the C.P.W.D. to make available controlled rations to the contractor and that this obligation was not fulfilled with due diligence and care".

He accordingly awarded Rs. 40.000 as compensation under this head.

The error is apparent. Facts must be based either on evidence or on admissions; they cannot be found to

exist from a mere contention by one side especially when they are expressly denied by the other. The inference from the facts stated above is that the contractor entered into the agreement with his eyes open and whatever his one-sided hopes may have been he was content to enter into the agreement as it stood without binding the other side to the new conditions and without even waiting to ascertain the reaction of the other side to his further proposals.

It has to be remembered that rationing was not a matter that was under the direction and control of the Dominion Government. It was a local matter handled by the then Provincial authorities and under their direction and control. The C.P.W.D., as a department of the Dominion Government, was not concerned with rationing except that its employees had to submit to rationing like everybody else in the Sindri area. This confusion between the Dominion Government and the Provincial Government occurs in the arbitrator's opening sentence under this head where he sets out the contractor's contention that

"commodities such as rations and cloth which were absolutely essential for the maintenance of his labourers and *which were under Government control*". As the arbitrator bases solely on the contrator's contentions it is evident that he failed to appreciate the fact that the Dominion Government and the Provincial rationing authorities were separate entities distinct from one another. The position accordingly reduces itself to this: two persons, neither of which is a part of the Provincial Government or has any control over rationing, chose to enter into an agreement for work in a rationed area. They insisted that their contract should be reduced to writing, and that indeed was essential, this being a contract with the Dominion Government which was incapable of contracting in any other way; they agreed upon and concluded all their terms; then, at the last minute, one side raised a point about rationing but without waiting for a reply and without having the term entered in the contract, he signed the contract as it stood before the point was raised even during the negotiation. It is

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an error in law to hold that any contractual obligation can be inferred or implied from these circumstances.

Then there is still another error. If this implied agreement about rations and cloth does not spring out of the written contract but is to be inferred collaterally as a distinct and subsidiary contract, and we gather that that is the finding, especially as reference was made to section 9 of the Contract Act, then that is not a contract to which the arbitration clause can apply. Wide though it is, clause 14 is confined to any matter relating to the written contract and if ration and cloth are not covered by the written contract, they are not matters that relate to it. If parties choose to add a fresh contract in addition to or in substitution for the old, then the arbitration clause cannot cover the new contract. See Lord Macmillan in *Heyman* v. *Darwins Ltd.*(1).

The last item in dispute in this appeal is claim No. 17 about interest. The statement of claims sets out—

"Item 17—Interest on the amount of money involved in this claim at the rate of Rs. 6 per cent.—Rs. 27,665.

This work was finished in May 1946 and it was proper for the department to have decided all our claims at least by 31st December 1947..... But this was not done. Due to this a heavy amount remained blocked up and we were compelled to take money from our bankers on interest. We therefore pray for interest for 16 months from 1-1-48 to 31-4-49".

The arbitrator held—

"The contractor's contention that his claims should have been settled by January 1948 is, in my opinion, reasonable. I therefore award interest at 6% for 16 months on the total amount of the awards given *i.e.*, Rs. 17,363".

Then the arbitrator sets out the amounts awarded under each head of claim. A perusal of them shows that each head relates to a claim for an unliquidated sum. The Interest Act, 1839 applies, as interest is

(1) [1942] A.C. 356 at 371.

not otherwise payable by law in this kind of case (see *Bengal Nagpur Ry. Co.* v. *Ruttanji Ramji* (1)), but even if it be assumed that an arbitrator is a "court" within the meaning of that Act, (a fact that by no means appears to be the case), the following among other conditions must be fulfilled before interest can be awarded under the Act:—

(1) there must be a debt or a sum certain;

(2) it must be payable at a certain time or otherwise;

(3) these debts or sums must be payable by virtue of some written contract at a certain time;

(4) There must have been a demand in writing stating that interest will be demanded from the date of the demand.

Not one of these elements is present, so the arbitrator erred in law in thinking that he had the power to allow interest simply because he thought the demand was reasonable.

It was suggested that at least interest from the date of "suit" could be awarded on the analogy of section 34 of the Civil Procedure Code, 1908. But section 34 does not apply because an arbitrator is not a "court" within the meaning of the Code nor does the Code apply to arbitrators, and, but for section 34, even a Court would not have the power to give interest after the suit. This was, therefore, also rightly struck out from the award.

We pause to note that there was only a delay of five days at the outside in the over-all picture. The last date for removal of the last instalment of bricks was 25-5-46 and the contractor says under this head that the whole contract was completed by the end of May, 1946. It is difficult to see how 88 lacs of bricks could have been damaged by rain in the last five days of May, and if the damage occurred before it would have occurred anyway, for on the contractor's case he had to have a large stack of unbaked bricks on hand ready to enter the kilns in order to keep pace with his time table. However, that was a

(1) 65 I.A. 66.

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matter within the jurisdiction of the arbitrator and is not a matter in which the Courts can interfere.

That concludes Civil Appeal No. 260 of 1953 and we now turn to the other appeal, Civil Appeal No. 12 of 1954. Only two items are in dispute here. Heads 4 and 17 of the claim.

The overall pattern of the claim is the same as in the other case. There was a contractor and he entered into an agreement containing the same terms and conditions, except about the details of supply. It was signed on the same day as the other and by the same authority on behalf of the Dominion Government, and the matter went before the same arbitrator and the award in this case was given on 1-5-1949, one week before the other award. Here also, no specific question of law was referred and we need not cover the same ground. Our decision is the same here as there.

The fourth head of claim is about cloth and rations. The claim here, and the Dominion Government's reply, is the same as in the other case, but the award in this case is not based on an implied contractual obligation but on "a moral and implied obligation". The error here is even greater than before. The sum claimed was Rs. 51,495 and the amount awarded was Rs. 30,000.

The seventeenth head of claim was about interest. The contractor claimed Rs. 27,665 and the arbitrator awarded Rs. 9,954. There is the same error of law apparent on the face of the award.

The High Court was right in dismissing the claims made under the heads in dispute here. The two appeals fail and each is dismissed with costs in this Court.

Appeals dismissed.