CASE NO.:
Appeal (civil) 1874 of 2007

PETITIONER:
FOOD CORPORATION OF INDIA

RESPONDENT:
M/S.CHANDU CONSTRUCTION & ANR

DATE OF JUDGMENT: 10/04/2007

BENCH:
TARUN CHATTERJEE & D.K. JAIN

JUDGMENT:
J U D G M E N T
CIVIL APPEAL NO. 1874 OF 2007
[Arising out of S.L.P. (Civil) No. 3335 of 2006)

D.K. JAIN, J.:

Leave granted.

2. Challenge in this appeal, by the Food Corporation of India (for short "FCI"), is to the final judgment and order dated 14th October, 2005 passed by the Division Bench of the High Court of Judicature at Bombay, affirming the judgment of the learned Single Judge in Arbitration Petition No.334 of 2004. By the impugned order, the award of an amount of Rs.8,23,101/- by the sole arbitrator against claim No.9 has been upheld.

3. A brief factual background giving rise to the appeal is as follows:
The FCI undertook construction of godowns at Panvel, District Raigad and issued notice inviting tenders for construction of 50000 MT capacity conventional godowns in 10 units alongwith ancillary work and services. Pursuant thereto, the respondents (hereinafter referred to as the claimants) submitted tender, which was accepted by the FCI. A formal contract was executed between the FCI and the claimants on 19th September, 1984. As per the terms of the contract, the work was to be completed within 10 months from 30th day of issue of the orders and the time was deemed to be of the essence of the contract.

4. As the claimants could not complete the work within the stipulated time, which was once extended, the FCI issued a show cause notice to them seeking to terminate the contract. Ultimately the contract was terminated vide order dated 15th November, 1987. The claimants invoked the arbitration agreement and requested the FCI to appoint an arbitrator. Since there was no response from the FCI, the claimants filed a suit in the High Court for appointment of an arbitrator. An arbitrator was appointed, who gave his award on 27th August, 1998. As payment in terms of the award was not made, the claimants again moved the High Court. The FCI, in turn, filed a petition in the High Court for setting aside of the award. With the consent of parties, the award was set aside and the matter was remitted to the Arbitrator for fresh adjudication.

5. In fresh proceedings before the Arbitrator, the stand of the claimants, qua Claim No.9 was that the rate quoted

by them for filling the plinth under floors including watering, ramming, consolidation and dressing in terms of item No.1.7 of the Schedule of rates was only for labour and did not cover "providing or supplying" sand for the said purpose and yet they were required to supply sand for filling. As such the claimants were entitled to be paid extra for supply of sand. Accordingly, they made a claim of Rs.8,23,101/- for providing and supplying 5487.34 cubic meters of sand.

6. The claim was resisted by the FCI on the ground that the scope of work, specifications and the item rates was governed by the terms of the contract and as per clause (2) of the agreement dated 19th September, 1984, the claimants were to be paid the "respective amount for the work actually done by him at the 'Schedule of rates' as contained in the appended Schedule and such other sums as may become payable to the contractor under the provisions of this contract". The contract clearly stipulated that the work was to be carried out as per specifications contained in Volume I and II of C.P.W.D. manual, para 2.9.4 whereof provided that the "Rate" includes the cost of materials and labour. Therefore, the claimants were not entitled to any extra amount for supply of sand. The arbitrator gave his award on 31st December, 2003 accepting the said claim. For reference, the relevant portion of the award is extracted below:

"According to defence under the provision of 1967 CPWD specification Vol.I & II, the nature of the item includes sand also and not merely the labour charges, similarly the rate of sand filling is for consolidated thickness or loose thickness or voids to any extent and this claim is denied into to. Now here the dispute between the two parties is over the words supplying and providing and in respect of this item the particular words are missing whereas as observed earlier they were being found in respect of certain other items. According to the Claimants since these words were missing in respect of this item of work, they took it that the material i.e. sand would be supplied and, therefore, they quoted only the labour rate. The tender of M/s Gupta and Co. as pointed out to me, shows that in respect of this item of work, these words providing and supplying were used. It is submitted that there can't be two different phrapavlogies in respect of the same item and as observed earlier, nothing prevented the FCI from using those words and not giving rise of any confusion. Comparative statement showing contents and details of schedule items based on tender working with PWD Bombay which clearly provides for rates for quantity of work for schedule items. The Claimants here are trying to establish that their quotations were based without including the cost of materials supplied. If we see the figures in respect of the items, we find substantial force in the say of Claimants that the rate quoted by them is so low that it could not be in respect of price

inclusive of cost of sand. If we see the wording of specification with Contractor M/s. Gupta & Co., we find additional words supplying and providing have been added under similar items of the schedule. Why these words were missing in case of Claimants is difficult to follow. The Respondents content that 1967 CPWD's specification in Vol.I & II covers the specifications not only for labour charges but also for providing and supplying of the materials required. It is very difficult to understand this defence, for if we look at the figures quoted in the tenders it would make it absolutely clear that the inclusion of cost of sand could not have to be in the mind of the Contractor Claimants. The figures are very low and I may be permitted to say that these figures do not cover the cost of sand. There is force in the say of the Claimant that he did not vouch that he himself was to supply sand. Of course, I must say that there is no very satisfactory evidence about the quantity of sand used, its price and amount paid by the claimant to his suppliers but when the work was done the FCI was bound to take upon it to make the payment though it may appear to be somewhat arbitrary. I allow this claim of 8,23,101/- (Rupees Eight lacs twenty three thousand and one hundred and one only)."

7. Being aggrieved, the FCI filed objections against the award under Section 30 of the Indian Arbitration Act, 1940 praying for setting aside of the award on claim no.9, but without any success. The learned Single Judge affirmed the view taken by the Arbitrator that the rate quoted by the claimant did not include the cost of the material. The FCI carried the matter in appeal before the Division Bench. Before the Division Bench, the FCI also attempted to raise the issue of award of interest by the Arbitrator, which was not permitted on the ground that the issue was neither taken up before the Arbitrator nor was raised before the learned Single Judge. As noted above, the Division Bench has dismissed the appeal. Hence, the present appeal.

8. Learned counsel for the petitioner has submitted that the claim for supply of sand against Claim No.9 was patently opposed to the terms of the contract between the parties. It is urged that the relevant clause of the contract is clear, unambiguous and admits of no such interpretation as has been given by the arbitrator. It is, thus, pleaded that the arbitrator has misconducted himself in awarding additional amount of Rs.8,23,101/- in favour of the claimants, which part of the award deserves to be set aside.

9. On the other hand, learned counsel for the claimants submitted that it was within the domain of the arbitrator to construe the terms of contract in the light of the evidence placed on record by the claimants, particularly the terms of similar contracts entered into by the FCI with the other contractors. It is asserted that the view taken by the arbitrator being plausible the High

Court was justified in declining to interfere with the award.

10. While considering objections under Section 30 of the Arbitration Act, 1940 (for short 'the Act"), the jurisdiction of the Court to set aside an award is limited. One of the grounds, stipulated in the Section, on which the Court can interfere with the award is when the arbitrator has 'misconducted' himself or the proceedings. The word "misconduct" has neither been defined in the Act nor is it possible for the Court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word "misconduct" in Section 30 (a) of the Act does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result. (Union of India Vs. Jain Associates and Anr. .

11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see: Associated Engineering Co. Vs. Government of Andhra Pradesh and Anr. and Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises & Anr. ).

12. In this context, a reference can usefully be made to the observations of this Court in M/s. Alopi Parshad and Sons, Ltd. Vs. Union of India , wherein it was observed that the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a Court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath , this Court had observed that where there is an express term, the Court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13. In Continental Construction Co. Ltd. Vs. State of Madhya Pradesh , it was emphasised that not being a conciliator, an arbitrator 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 court provided his error appears on the face of the award.

14. In Bharat Coking Coal Ltd. Vs. Annapurna Construction while inter alia, observing that the

arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus:
"There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action [Also see: Associated Engineering Co. Vs. Government of Andhra Pradesh & Anr. (supra)].

16. Thus, the issue, which arises for determination, is whether in awarding Claim No.9, the arbitrator has disregarded the agreement between the parties and in the process exceeded his jurisdiction and has, thus, committed legal misconduct?

17. For deciding the controversy, it would be necessary to refer to the relevant clauses of the contract, which read thus:
"1. GENERAL SPECIFICATIONS:
1.1 The civil sanitary, water supply and road works shall be carried out as per Central Public Works Department specification of works at Delhi 1967 Volume I & II with correction slips upto date\005\005In the case of civil, sanitary, water supply and road works and electrical works should there be any difference between the Central Public Works Department specifications mentioned above and the specifications of schedule of quantities, the latter i.e. the specification of schedule of quantities, shall prevail. For items of work not covered in the C.P.W.D. specifications or where the C.P.W.D. specifications are silent on any particular point, the relevant specifications or code of practice of the Indian Standard Institution shall be followed.
1.2 Should any clarification be needed regarding the specifications for any work the written instructions from the Engineer-in-Charge shall be obtained."

18. Paragraph 2.9.4 of the C.P.W.D. specifications insofar as it is relevant for the present appeal, reads as follows:
"Rate:- It includes the cost of materials and labour involved in all the operations described above'."

19. From the above extracted terms of the agreement between the FCI and the claimants, it is manifest that the contract was to be executed in accordance with the C.P.W.D. specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turn key project. It is to be borne in mind that filling up of the plinth with sand under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19th September, 1989, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. Claimants' claim had to be adjudicated by the specific terms of their agreement with the FCI and no other.

20. Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has out-stepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of claim No.9, on the face of it, is beyond his jurisdiction; is illegal and needs being set aside.

21. Consequently, the appeal is allowed and the impugned judgment of the High Court, to the extent it pertains to claim No.9 is set aside. However, on the facts and circumstances of the case, there shall be no order as to costs.