CASE NO.:
Appeal (civil) 2789-2790 of 1997

PETITIONER:
M/S SIKKIM SUBBA ASSOCIATES

Vs.

RESPONDENT:
STATE OF SIKKIM

DATE OF JUDGMENT: 01/05/2001

BENCH:
CJI, R.C. Lahoti & Doraiswamy Raju

JUDGMENT:

RAJU, J.
L...I...T.....T.....T.....T.....T.....T.....T..J

A skeletal reference to the facts, without much emphasis on the details of merits of the case, would help to appreciate certain submissions, at the time of actual consideration of the claims projected before us.

The respondent, State of Sikkim, and the appellant, M/s Sikkim Subba Associates (referred throughout as appellants), claimed to be a firm of Partnership, entered into an agreement on 22.1.1991 under which the appellants have been appointed as the organising agents for its lotteries enumerated therein subject to the terms and conditions more fully set out therein regulating the rights and obligations of the parties. It needs to be kept in view that since running of private lotteries would constitute a criminal offence, some of the States have allowed parties to put on the apparel of the State in return for a stipulated fee to mobilise funds, in public interest to undertake public works. Disputes and misunderstanding arose which led to the termination of the agreement resulting in the appellants seeking recourse to litigation by getting an Arbitrator appointed invoking the powers under Section 8 of the Arbitration Act, 1940 (hereinafter referred to as the 'Act).

As against the order dated 24.10.1992 of the District Judge, Gangtok (Sikkim), appointing the sole Arbitrator, the respondent challenged the same before the High Court by filing an appeal which came to be dismissed on 23.11.1992. The matter was pursued further before this Court in SLP (C) No.26 of 1993 and by an order dated 26.4.1993 the same was, by the agreement of parties, dismissed subject to the observation that the Arbitrator shall give a speaking order and, therefore, there was no need to go into the controversy raised. The appellants filed their statement of claim before the Arbitrator for a sum of Rs.81,84,679.45 with further relief for the refund of Rs.76 lacs, said to have

been realised by the State by encashing two bank guarantees, with interest at 18% p.a. from 23.9.1992, the date of encashment. The respondent-State filed its reply opposing the claims made by the appellants and asserted a counter claim against the appellants for a sum of Rs.8,64,81,445/- with future interest and costs. Both parties marked documents and adduced oral evidence. Thereupon, the Arbitrator made an Award on 8.2.1994 determining the amount payable by the State to the appellants at Rs.37,75,00,000/- and the amount payable by the appellants to the State by way of counter claim at Rs.4,61,35,242/- and after adjusting the amounts due to the State towards its counter claim, determined the net amount payable to the appellants by the State at Rs.33,13,54,758/-. Proportionate costs were awarded and future interest was also granted at the rate of 12% p.a. on the sum of Rs.33,13,54,758/-.

Aggrieved, the State filed an application under Section 30 of the Act to set aside the Award. The District Judge by his decision dated 27.10.94 overruled the objections of the State and made the Award the rule of court by passing a decree in terms of the Award. The State challenged the same before the High Court by filing an appeal under Section 39 of the Act. The matter was heard in the High Court by a Division Bench consisting of the learned Chief Justice (Justice S.N. Bhargava) and Justice R. Dayal. In a judgment dated 29.9.1995 the learned Chief Justice agreed with the contentions raised on behalf of the State and sustained the challenge made to the Award by setting aside the Award as well as the Judgement of the learned District Judge, thereby allowing the appeal with costs. Dayal, J. rendered a separate dissenting judgment by coming to the ultimate conclusion that the quantum of damages arrived at by the Arbitrator suffered an illegality apparent on its face and, therefore, in his view the matter required to be remitted for reconsideration of the matter afresh to the Arbitrator. In view of the above, the Court passed the following order :-

There is a difference of opinion between us. Chief Justice has come to the conclusion that the appeal should be allowed with costs whereas Justice Dayal has come to the conclusion that the matter may be remitted back to the Arbitrator for determining quantum of damages. As such, the matter may be placed before the Honble Chief Justice/Judge as soon as he assumes charge.

Sd/- Sd/-

(Ripusudan Dayal) (S.N. Bhargava)

Judge

Chief Justice

29/09/1995

29/09/1995

Thereafter, Dayal, J. ceased to be Judge of the Sikkim High Court and was transferred to the Allahabad High Court and in his place Justice M. Sengupta assumed office. Though the date for hearing of the matter was fixed by the said learned Judge, on the said date it was mentioned that Sikkim Subba Associates, the appellants, has filed an

application in CMA No.11/96 invoking powers under Sections 98 and 151,CPC, opposing the hearing of the appeal in view of Section 98(2). The State also filed CMA No.15/96 invoking Sections 11, 98 and 151, CPC, questioning the very maintainability of the application filed by Sikkim Subba Associates. The said applications though initially were before Sengupta, J., due to inadvertence came to be listed before the new Chief Justice (Justice K.M. Agarwal) and when the learned Chief Justice asked the counsel as to whether they wanted the case to be made over to Sengupta, J., both sides wanted the same to be heard by the Chief Justice himself. The learned Chief Justice was of the view that the order of reference made on the judicial side by the Division Bench cannot be upset either on the administrative side or on the judicial side while hearing the appeal as a third Judge pursuant to the order of reference. Consequently, by an order dated 14.8.96 the application filed by the appellants came to be dismissed and the one filed by the State came to be allowed to the extent of challenge made to the maintainability of the application filed by the appellants. These appeals came to be filed in this Court challenging those orders.

On 3.3.1997 when SLP (C) Nos.3232-3233 of 1997 came up for hearing, this Court (Honble the Chief Justice and Honble Mrs. Justice Sujata V. Manohar) passed the following order, after briefly noticing the circumstances in which the appeals have been filed :-

Against the said order of 14.8.96 made by Agarwal Chief Justice, the petitioners filed the present Special Leave Petitions. When these petitions were came up for hearing on the last occasion a technical objection was raised that the per Court order of 29.9.95 had not been challenged by the petitioners and, therefore, the petitions were not maintainable. To overcome this technical objection by way of abundant caution the petitioners have sought amendment of the petition with a view to challenging the said per Court order of 29.9.95. The amendment is opposed on the ground that it is barred by 400 days. However, in the aforementioned circumstances, we conclude that there was no deliberate delay on the part of the petitioners, but it was only because they thought that it was not necessary to challenge the order of 29.9.95 as they had challenged the subsequent order of 14.8.96. We, therefore, condone the delay and allow the amendment.

We would also like to make it clear that we do not propose to go into the merits of the matter except to consider whether in the aforesaid factual background was it permissible to the learned Chief Justice to hear and pass the order of 14.8.96. In other words, was the learned Chief Justice entitled to hear the matter in view of the per Court order passed on 29.9.95. If yes, the question is whether the per Court order of 29.9.95 itself was a correct order. If no, what order this Court should pass in the matter. This is the limited question which we may be required to consider at the initial stage unless we find it necessary to enter into the merits of the matter.

We direct the learned counsel appearing for the contesting parties to file their brief written submissions within two weeks from today. The matters may thereafter be fixed for final disposal. Permitted to mention before the learned Chief Justice.

On 11.4.1997 when the SLPs came up once again before the very Bench of this Court, it was ordered as follows :-

In order to avoid multiplicity of the proceedings which may be the consequence if this Court first decides only the legality of the order dated 14.8.1996 passed by the learned third Judge in the High Court, we consider it appropriate to treat these special leave petitions as ones against the judgment of the High Court even on merits. Irrespective of the view taken by this Court on the question of the legality of the order of the learned third Judge, these matters would be heard as appeals even on merits of the case. This is clarified in view of the earlier order dated 3.3.1997 which had indicated that this Court did not propose then to go into the merits of these matters. Learned counsel for both sides agree that this would be the more appropriate course to avoid any further delay in the decision of the matters on merits and it would also avoid multiplicity of proceedings because in either view taken on the question of legality of the learned third Judges order, the aggrieved party would be required to then challenge the decision on merits. It is clarified accordingly.

Leave granted.

No stay.

Shri B. Sen, learned senior counsel for the appellants, submitted that having regard to the fact that the Sikkim High Court, at the relevant point of time, had only two judges, inclusive of the Chief Justice, and they have chosen to differ from each other - the learned Chief Justice taking the view that the appeal of the State has to be allowed and the Award of damages in favour of the appellants was unwarranted as well as unsustainable in law and the other learned Judge (R. Dayal J.,) expressing the view that the award suffered from an error of law apparent only in the manner of determination of the quantum of damages and that for purposes of re-determination afresh of the quantum of damages alone, the matter has to be remitted to the Arbitrator, the Award ought to have been confirmed under Section 98 (2) C.P.C., particularly when rules 149 & 150 of the Sikkim High Court (Practice & Procedure) Rules, 1991 came to be deleted with effect from 12.3.92, the date of enforcement of the original rules. Reliance has been placed in this regard on the decision of this Court reported in Tej Kaur & another vs Kirpal Singh & Another (1995 (5) SCC 119) and that of the Assam High Court in Abdul Latif vs Abdul Samad (AIR 1950 Assam 80). In traversing the said claim, Shri V.A. Bobde, learned senior counsel for the Sikkim State, contended that the words Court consisting of in juxtaposition to the words Constituting the Bench, in proviso to sub-Section (2) of Section 98 will only have relevance and has to be construed with reference to the sanctioned strength alone - which at all relevant points of time was only three so far as Sikkim High Court is concerned and whenever there is a third judge, even on the vacancy being filled up on such vacancy arising for any reason in respect of any one of the two, the matter should be referred to and heard by the third judge and neither any exception could be taken for the same nor could it be claimed that the judgement under appeal before the High Court should only be confirmed. Since retrospective deletion of a statutory rule

could not have been legitimately made by a notification by the rule-making authority in the absence of a specific statutory provision conferring any such power in this case, it is contended that the deletion could be only of prospective effect and the case before us would be governed by those rules, as if it existed.

In our view, the decision in AIR 1950 Assam 80 (Supra) has no application to this case where unlike the Assam Case, the very Division Bench, as part of their judicial order also made a consequential order of reference to a third judge and inasmuch as there was no appeal challenging the same. We are of the view that rules 149 & 150 of the Sikkim High Court (Practice & Procedure) Rules, 1991, which governed the situation, were very much in force on the date when the Division Bench exercised their power and the order of reference passed in this case could not therefore be said to be bad in law. Apart from the axiomatic principle of law that a subordinate legislation in the form of Rule or Notification could not be made/unmade retrospectively unless any power in that regard has been specifically conferred upon the Rule-making Authority , a mere retrospective deletion could not per se have the effect of nullifying or destroying orders passed or acts already performed, when such powers were available in the absence of any specific statutory provision enacted to destroy all such rights already acquired or obligations and liabilities incurred. The decision in 1995 (5) SCC 119 (supra) will have no application to this case, in view of rules 149 & 150 noticed above and also for the reason that unlike in the present case, the case considered therein, concedingly involved only a question of fact over which the dissenting views came to be expressed. That apart, the words Consisting of shall mean and also considered to have relevance only to the sanctioned strength. Therefore, taking into account the fact that for the time being, there were only two Judges in position and that the learned judges, who constituted the Division Bench, expressed different views and at the same time thought fit to refer the matter to the opinion of a third judge, the matter should await till the arrival of a third judge. Not only such a contingency also fructified in this case but the matter also came to be actually posted before the third judge for hearing. The amplitude of powers of this Court under Articles 136 and 142 of the Constitution of India for doing complete justice in any cause or matter brought before it, cannot also be otherwise disputed. As a matter of fact, in the teeth of the Orders passed by this Court on 11.4.97 to treat the appeals as having been filed even on the merits of the case and be heard as such, and that too, on the agreement expressed by the counsel on both sides, to be also the appropriate course, in these matters, it is not permissible for the appellants to take a stand to the contrary to avoid or stall an hearing and disposal of these appeals on the merits of the matters involved therein.

The respondent-State, though at some point of time, seems to have pressed into service Article 299 of the Constitution of India, to contend that no valid contract between parties came into existence as envisaged therein and consequently neither the Arbitrator could have entered upon reference nor can the State be held bound by such an agreement, the same was not pursued before us realising the futility of the same, having regard to the peculiar facts of this case. We are not called upon, in such circumstances, to decide this issue and the parties have also proceeded on

the footing that there was a valid and binding contract between the appellants and the State, in this case, without prejudice to their contentions in respect of their rights under the agreement.

On behalf of the appellants, it has been strenuously contended that the Arbitrators award cannot be challenged in proceedings under Section 30 of the Act, as if on an appeal and that the Award in this case has been rightly upheld by the District Judge, since it did not disclose any misconduct on the part of the Arbitrator and no other ground for any such an interference within the parameters of Section 30, having also been substantiated by the respondent-State. It is, therefore, contended that the decision of Chief Justice Bhargava, for the same reason, could not be sustained and that the learned Chief Justice committed an error in directing the Award, as affirmed by the District Judge, to be set aside for any one or other of the reasons assigned by him. At the same time, while strongly defending the decision of the learned Chief Justice, it was urged for the respondent- State that the numerous errors apparent ex facie on the Award have been not only meticulously enumerated but found to have been substantiated succinctly, by adverting to the materials in support thereof for justifying Courts interference. It was also submitted for the respondents that Dayal J., having found the Award to suffer from serious infirmities in awarding damages, erred in directing a remand to the very Arbitrator for consideration afresh, to re-determinate the damages and instead there should have been only a supersession of the arbitration agreement itself under Section 19 read with Section 16 (c) of the Act. The learned senior counsel on either side invited our attention to voluminous case law on the scope and ambit of powers of Courts exercising jurisdiction under Section 30 as well as Section 39 of the Act for interference with the award of an Arbitrator, which, on a closer scrutiny, would disclose that the observations in each of such cases came to be made, invariably and ultimately in the context of the peculiar facts and circumstances of the cases dealt with therein and having regard to the particular class or category of mistakes or nature of errors found highlighted in those cases. It is appropriate, before undertaking an adjudication on the merits of the claims of parties, to advert to the salient and overall peripheral parameters, repeatedly re- emphasised by this Court, in justification of interference with an Award of the Arbitrator by different Courts at various levels exercising powers under the Act as well as by this Court, without unnecessarily multiplying the number of authorities by making reference to only some relevant out of the same, for our purpose.

Relying upon the ratio in Champsey Bhara & Company vs Jivraj Balloo Spinning & Weaving Company Ltd. (AIR 1923 P.C. 66) this Court in M/s Alopi Parshad & Sons Ltd. vs Union of India (AIR 1960 SC 588) observed that the award may be set aside on the ground of an error on the face thereof, when in the award or in any document incorporated with it, as for instance, a note appended by the Arbitrator(s) stating the reasons for the decision wherein the legal propositions which are the basis of the award are found to be erroneous. A specific question submitted to the Arbitrator for his decision, even if found answered wrongly involving an erroneous decision in point of law also, was considered not to make the award bad on its face so as to

call for interference. While emphasising the position that misconduct in Section 30 (a) of the Act comprises legal misconduct, this Court held it to be complete in itself when the Arbitrator was found to have, on the face of the award, arrived at a decision by ignoring very material and relevant documents which throw abundant light on the controversy to help a just and fair decision or arrived at an inconsistent conclusion on his own finding (K.P Poulose vs State of Kerala & Anr. - AIR 1975 SC 1259). In M/s Chahal Engineering and Construction Company vs Irrigation Deptartment., Punjab, Sirsa, (1993 (4) SCC 186), this Court held that the words is otherwise invalid in clause (c) of Section 30 of the Act would include an error apparent on the face of the record. In Trustees of the Port of Madras vs Engineering Constructions Corporation Ltd., (1995 (5) SCC 531) after adverting to the ratio of the Constitution Bench of this Court in Raipur Development Authority & Ors. vs M/s Chokhamal Contractors & others (1989 (2) SCC 721), this Court held that the error apparent on the face of the award contemplated by Section 16 (1) (c) and Section 30 (c) of the Act is an error of law apparent on the face of the award and not an error of fact and that the Arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. In The President, Union of India & Another vs Kalinga Construction Co. (P) Ltd. (AIR 1971 SC 1646), it was held that the Court, in a proceeding to set aside the award cannot exercise jurisdiction, as if on an appeal by re- examining and re-appraising the evidence considered by the Arbitrator and come to the decision that the Arbitrator was wrong (See also AIR 1989 SC 268; 1989 SC 777 and 1989 SC 890).

In Union of India vs M/s Jain Associates & Another (JT 1994 (3) SC 303), this Court held as follows:

7. In K.P. Poulose vs State of Kerala & Anr. [(1975) Supp. SCR 214)], this Court held that misconduct under Section 30(a) does not connote a moral lapse. It comprises of legal misconduct which is complete if the arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own finding, by ignoring material documents which would throw abundant light on the controversy and help in arriving at a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in the case. In that case the omission to consider the material documents to resolve the controversy was held to suffer from manifest error apparent ex facie. The award was accordingly quashed. In Dandasi Sahu vs State of Orissa (1990 (1) SCC 214), this Court held that the arbitrator need not give any reasons. The award could be impeached only in limited circumstances as provided under Section 16 and 30 of the Act. If the award is disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case of non application of mind amounting to legal misconduct and it is not possible to set aside only invalid party while retaining the valid part. In other words the doctrine of severability was held inapplicable in such a situation. It is, therefore, clear that the word misconduct in Section 30(a) does not necessarily comprehend or include misconduct of 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 or the like circumstances

which tend to show non application of the mind to the material facts placed before the arbitrator or umpire. In truth it points to fact that the arbitrator or umpire had not applied his mind and not adjudicated upon the matter, although the award professes to determine them. Such situation would amount to misconduct. In other words, if the arbitrator or umpire is found to have not applied his mind to the matters in controversy and yet, has adjudicated upon those matters in law, there can be no adjudication made on them. The arbitrator/umpire may not be guilty of any act which can possibly be construed as indicative or partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilt of any moral turpitude, that is, in the sense of non-application of the mind to the relevant aspects of the dispute in its adjudication. In K.V. George vs Secretary to Government, Water & Power Department, Trivandrum & Anr. [(1989) 4 SCC 595], this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter claim made by the respondent. In Indian Oil Corporation Ltd. vs Amritsar Gas Service and Ors. [(1991) 1 SCC 533 & 544], the counter claim was rejected on the ground of delay and non consideration of the claim, it was held, constituted an error on the face of the award.

It is also, by now, well settled that an Arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider it to be fair and reasonable. Arbitrator was held not entitled to ignore the law or misapply it and cannot also act arbitrarily, irrationally, capriciously or independently of the contract (See 1999 (9) SCC 283 : Rajasthan State Mines and Minerals Ltd. vs Eastern Engineering Enterprises & Anr.). If there are two equally possible or plausible views or interpretations, it was considered to be legitimate for the Arbitrator to accept one or the other of the available interpretations. It would be difficult for the Courts to either exhaustively define the word misconduct or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of Law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of Arbitration, when on the face of the Award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational that no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere. So far as the case before us is concerned, the reference to the Arbitrator is found to be a general reference to adjudicate upon the disputes relating to the alleged termination of the agreement by the State and not a specific reference on any particular question and consequently, if it is shown or substantiated to be erroneous on the face of it, the award must be set aside.

The Award under challenge, in our view, stands vitiated on account of several serious errors of law, apparent on the face of it and such infirmities go to substantiate the claim of the State that not only the Arbitrator acted arbitrarily and irrationally on a perverse understanding or misreading of the materials but also found to have misdirected himself

on the vital issues before him so as to render the award to be one in utter disregard of law and the precedents. Although the award purports to determine the claims of parties, a careful scrutiny of the same discloses total non-application of mind to the actual, relevant and vital aspects and issues in their proper perspective. Had there been such a prudent and judicious approach, the Arbitrator could not have awarded any damage whatsoever and, at any rate, such a fabulous and astronomical sum on mere conjectures and pure hypothetical exercises, absolutely divorced from rationality and realities, inevitably making law, equity and justice, in the process, a casualty. The Arbitrator has acknowledged when recording a finding on the basis of indisputable facts that except for the first set of draws in respect of eight lotteries in groups A & B, the prize money obliged to be deposited seven days before the draw (since the winners have to be paid only out of such deposits, after draw) as well as the agency fee running to crores was not deposited/remitted in time constraining thereby the State to mobilise funds to distribute prize money from State funds in order to preserve and protect the fair name and reputation of the State, the lotteries being run as that of and for and on behalf of the State. Even, as late as 8.2.94 when the award came to be passed the appellants were in arrears, due to non-deposit of prize money within the stipulated time, a sum of Rs.1,37,47,026/- besides non-remittance of agency fee of Rs.3,72,87,884/-. Despite this, the Arbitrator tried to find an alibi for the defaulter appellants in the fact that the State, in spite of warnings and threats, did not actually stop either those draws or the further subsequent draws and allowed the lotteries to go on without any break. From the above, the Arbitrator as well as the learned District Judge chose to infer that the respondent-State had condoned or waived the lapses and defaults completely overlooking the vital fact that the Arbitrator is not dealing with any claim for damages from the respondent-State against the appellants who defaulted in respect of such defaults but on the other hand a claim from the defaulter appellants itself for damages against the State for not willing to put up any longer with a recurrent and recalcitrant defaulter. The Arbitrator, grossly omitted to give due weight to such defaults committed by the appellants and further misdirected himself in not drawing the legal inferences necessarily flowing from them. Even if it is assumed for purposes of consideration that the State had waived past lapses, it cannot be compelled to condone the persistent and continuous wrongs and defaults and continue to perform their part of the contract to their disadvantage and detriment and also further penalise them with damages for not doing so, when even dictates of common sense, reason and ordinary prudence would commend for rejecting the claim of the appellants as nothing but a gamble and vexatious. The Arbitrator, who is obliged to apply law and adjudicate claims according to law, is found to have thrown to winds all such basic and fundamental principles and chosen to award an astronomical sum as damages without any basis or concrete proof of such damages, as required in law.

Though the entire award bristles with numerous infirmities and errors of very serious nature undermining the very credibility and objectivity of the reasoning as well as the ultimate conclusions arrived at by the Arbitrator, it would suffice to point out a few of them with necessary and relevant materials on record in support

thereof to warrant and justify the interference of this Court with the award allowing damages of such a fabulous sum, as a windfall in favour of the appellants, more as a premium for their own defaults and breaches :-

a) The conclusions in the award are found seriously vitiated on account of gross misreading of the materials on record as well as due to conspicuous omission to draw necessary and lawful inferences, inevitably flowing from the indisputable materials as well as findings recorded by the Arbitrator himself. Conclusions directly contrary to the indisputable facts placed on record are shown to have been drawn on the question of alleged waiver throwing over board the well-settled norms and criteria to be satisfied and proved before the plea of waiver, can ever be countenanced leave alone, the basic and fundamental principle that a violator of reciprocal promises cannot be crowned with a prize for his defaults. Chief Justice Bhargava has taken great pains to enumerate them. Neither the Arbitrator, nor the District Judge or even the learned Judge who has chosen to differ from the view of the Chief Justice appear to have applied their mind judiciously or judicially to these aspects before countenancing the claim of damages made by the appellants. Even a cursory reading of the contents of Ex. R-14, R- 16 to R-19, R-21, R-22 to R-25 and R-26 to R-34 as well as R-80 would belie the claims based upon the plea of condonation or waiver forever so as to entitle the appellants to still insist upon the State alone, notwithstanding its own continuing wrongs, to perform its part of the obligations under the contract or to claim damages from the respondent for not doing so. To illustrate R-25 dated 7.8.91 written to the appellants may be usefully extracted :-

I have been repeatedly reminding you for sending Government dues of Agency fees and prize money but it seems that you are not bothering to care for it. Since three months have passed you have not yet paid any instalments of Agency fees. As regards prize money you have paid only for the five draws and remaining ten draws are still outstanding. Now Govt. has taken a very serious view for the lapses on your part. I am, therefore, directed to inform you that if we do not receive Agency fees together with 18% interest and prize money by the end of the next week, we shall be constrained to stop all your lottery draws without any further notice which may please note:

This may be treated as our final reminder and we shall not be held responsible if any thing goes wrong against you.

R-39 dated 12.2.92 also reads as follows :

In continuation of our Telegram dated
8.2.92, a detailed statement of Agency fee due
upto 31st January, 1992 is enclosed herewith:-

1st. lot of eight lotteries -
Agency Fee - 1,09,36,924
Interest - 10,64,272

2nd. lot of eight lotteries -
Agency fee - 1,15,09,517
Interest - 5,25,534

3rd. lot of eight lotteries -
Agency fee - 48,46,154
Interest - 1,15,324

Total Rs. :- 2,89,97,725

(Rupees two crores eighty nine lakhs ninety seven thousand seven hundred twenty five only).

Please clear the dues before 25th of Feb 92 positively so that money could be credited in time in the Govt. A/c.

Besides this, draw expenses of Rs.6,00,000/- in respect of 3rd. lot of eight lotteries may be sent expeditiously and prize money in respect of all the 24 lotteries should be cleared immediately so that all the pending claims could be settled early in order to keep the prestige of the Sikkim State Lotteries.

R-45 dated 31.3.92 addressed to the appellants reads thus :

Please refer to our various letters and telegrams requesting you to settle the dues as mentioned below :-

(1) Telegram No.452/Fin./Lott. Dated 28.10.91
(2) Telegram No.572/Fin/Lott. Dated 19/11/91
(3) Letter No.484/Fin/Lott. Dated 27/11/91
(4) Letter No.902/Fin/Lott. Dated 17/1/92
(5) Telegram No.1062/Fin/Lott. Dated 8/2/92
(6) Letter No.1066/Fin/Lott. Dated 12/2/91

As per your requests we have given sufficient time to settle the dues but because of your failure we have been compelled to stop printings of Tickets from 16/4/1992 onwards to avoid further liabilities. Further you have also failed to give assurance or proper response to our various letters. In view of your failure to settle the huge amount of dues your request to continue Seven Weekly Lotteries from 16/4/92 onward has not been considered by the Government.

The dues based on draws upto 15/4/92 works out as under :-

1. Agency Fees - Rs.3,72,87,824/-
2. Interest - Rs. 28,80,621/-

Total Rs.4,01,68,505/-

Besides above you have also failed to deposit the prize money from time to time as a result of which we have not been able to settle the claim.

I am therefore directed to give you this notice to settle the entire dues before 15th April, 1992 failing which Government will be compelled to take action and also invoke the guarantees.

Waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known, existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, the party would have enjoyed. The agreement between parties in this case is such that its fulfilment depends upon the mutual performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that one party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming even damages for non-performance by the other party. He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future good conduct and adherence to the promises of the defaulter, the so-called waiver cannot be considered to be forever and complete in itself so as to deprive the State, in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of the appellants continued till even the passing of the Award in this case. So far as the defaults and consequent entitlement or right of the State to have had the lotteries either foreclosed or stopped further, the State in order to safeguard its own stakes and reputation has continued the operation of lotteries even undergoing the miseries arising out of the persistent defaults of the appellants. The same cannot be availed of by the appellants or used as a ground by the Arbitrator to claim any immunity permanently for being pardoned, condoned and waived of their subsequent recurring and persistent defaults so as to deny or denude forever the power of the State as other party to the contract to put an end to the agreement and thereby relieve themselves of the misfortunes they were made to suffer due to such defaults. Once the appellants failed to deposit the prize money in advance within the stipulated time, the time being essence since the prizes announced after the draw have to be paid from out of only the prize money deposited, the State was well within its rights to repudiate not only due to continuing wrongs or defaults but taking into account the past conduct and violations also despite the fact that those draws have been completed by declaration or disbursement of prize amounts by the State from out of its own funds. The conclusion to the contrary that the State has committed breach of the contract is nothing but sheer perversity and contradiction in terms.

b) The mere reference to the documents or material on record, or a cryptic observation that all those materials have been considered is no substitute by itself for proof of such positive consideration, which should otherwise be apparent from only the manner of consideration disclosed from the award and reasonableness of the conclusions arrived at by the Arbitrator. That the contents of Ex. R-52 and R-43 have been patently misread is obvious from the fact that the Arbitrator has merely chosen to fall back on the word postpone totally ignoring the following words there will be no draw of these weekly lotteries w.e.f. 16.4.1992 and onwards, taking together with the further fact that no re-scheduled date on which they propose to hold the draw for the so-called postponed lotteries have been given. Likewise, Ex.C-3 another vital document has also been misconstrued by ignoring the vital and relevant portions contained therein. Similar instances in respect of other relevant documents also are rampant, as could be seen from the award, appropriately pointed out by the Chief Justice in his judgment.

c) The manner in which the Arbitrator has chosen to arrive at the quantum of damages alleged to have been sustained by the appellants not only demonstrates perversity of approach, but per se proves flagrant violation of the principles of law governing the very award of damages. The principles enshrined in Section 54 in adjudicating the question of breach and Section 73 of the Contract Act incorporating the principles for the determination of the damages, are found to have been observed more in their breach. Despite the fact that M.K. Subba, who had been all along corresponding and dealing with the matter directly, has without any justification whatsoever, not only been withheld from the witness box but despite the oral evidence of RW-1, facts which could only be denied or proved by M.K. Subba have been taken for granted. No one from the appellants side who could speak for as to what is the usual course of things in lotteries was examined and no material about similar lotteries making consistent profit at 7.51% throughout all years regardless even of stoppage of lots and absence of sale of all the tickets and other relevant factors highlighted in the course of cross examination of CW-1 and CW-2 were produced to prove the profit range claimed. Merely relying upon CW-1, the Chartered Accountant, who, admittedly, was unaware of the actual functioning of the business and who had not looked into or shown any accounts, records or was in the knowledge of the state of affairs of the lottery business in question, the Arbitrator appears to have relied upon some hypothetical calculations worked out on mere surmises and conjectures as though it constituted substantive evidence even in utter disregard of the specific admissions contained in the letter of the appellants marked as R-46, against the very claims now put forward on behalf of the appellants. The Award also suffers from obvious and patent errors of law in calculating damages on the footing that all the lotteries continued for their full term, ignoring the real facts.

d) Clause 2 of the Agreement reads as follows:-

2. Except on the detection of the default or fraudulent conduct in lotteries or of any act of malfeasance or misfeasance on the part of the Organising Agents, the Government shall not rescind or modify this agreement. Provided that the Organising Agents shall be given an opportunity of being heard in person before any decision regarding rescission or modification is taken.

Even a cursory reading of the clause would show that the Arbitrator has adopted a narrow, pedantic and perfidious construction of the clause not only doing violence to the language but defeating the very object of introducing such a clause reducing it to a mere dead letter by holding that apparent, obvious and admitted defaults of the nature will not fall within the said clause, but instead only defaults which are and could be found out or unearthed after detection alone would answer the situation envisaged therein. By such construction, the Arbitrator has chosen to deny the powers of the State to put an end to the contract on account of the defaults of the appellants, which as observed by the Arbitrator himself could have under general law of the contract provided grounds for the respondent (meaning thereby the State) to terminate the contract. This misconstruction and misdirection alone is sufficient to scrap the Award of the Arbitrator.

e) The Award of an Arbitrator cannot be opposed to law and what is not permissible in law cannot be granted or even approved by Courts merely because it was an Arbitrator who granted it. Section 54 of the Contract Act is a complete answer to the claim at the instance of the appellants for either performance of the contract or for asserting a claim for compensation/damages for the alleged non-performance arising out of repudiation by the State. The Arbitrator could not have been oblivious of the fact that it was the defaults, violations and breaches committed by the appellants that necessitated the termination of the contract by the State, left with no other option for it, in law. Even a cursory reading of the Award in the light of the materials on record, as rightly pointed out in the judgment of Chief Justice Bhargava, with particular reference to the indisputable facts disclosed on the basis of the correspondence between parties would disclose that no reasonable or prudent person could have ever either reasonably, fairly or justly arrived at such findings as have been recorded by the Arbitrator in this case by any known or proclaimed process of consideration and judicious reasoning. The errors which could be noticed in the form of obvious and conspicuous mistake of facts vital and essential aspects and misapplication of law are found to so extensively and deeply pervade the entire adjudicatory process undertaken by the Arbitrator as to render it impossible to save the Award except at the expense rendering the ends of justice, a casualty. It would be no exaggeration or meaning any disrespect to place on record as to how appropriately the following observations of Lord Halsbury, L.C. in Andrews Vs. Mitchell (1904-7 All E R 599 at 600 E) fits in with the manner of disposal given by the Arbitrator :

I should be anxious myself, as I have no doubt that all your Lordships would be, to give every effect to their decisions. On the other hand, there are some principles which it is impossible to disregard, and, after giving every credit to the desire on the part of this arbitration court to do justice, I think it manifest that they proceeded far too hastily in this case; and without imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole question was raised and was disposed of, was so slipshod and irregular that it might lead to injustice.

Consequently, we have no hesitation to set aside the Award of the Arbitrator, as affirmed by the District Judge, insofar as it purports to award damages to the tune of Rs.37,75,00,000/- in favour of the appellants, as wholly uncalled for and illegal.

On behalf of the State of Sikkim, a strong plea has been made in pursuit of its counter-claim by contending that it is always permissible for this Court to set aside the bad or vitiating part of the Award and retain and affirm the valid portion, alone and, therefore, the Award to that extent may be allowed to stand and the same be made a rule of Court. No doubt this Court in M. Chelamayya Vs. M. Venkataraman (AIR 1972 SC 1121); Upper Ganges Valley Electricity Supply Co. Ltd. Vs. U.P. Electiricty Board (1973(3) SCR 107) and Union of India Vs. M/s Jain Associates & Anr. (JT 1994(3) SC 303) has held so. The Arbitrator has allowed a sum of Rs.5,39,15,531/- in favour of the State and after

adjusting against the same, the sum admittedly due to the appellants, the counter-claim to the tune of Rs.4,61,35,242/- was awarded to them. The various facts adverted to supra would go to show that though the initial default was committed by the appellants, the respondent-State was also not adhering strictly to the time schedule and other stipulations contained in the agreement. The lotteries agreed to be run through the appellants have since been closed, once and for all. Due to certain supervening difficulties said to have been encountered by the appellants, their business adventure did not proceed on the expected lines and it is not also the case of the State that the appellants have made any undue profit or enriched themselves at the expense of the State. We cannot completely ignore the fact that the initial preparations to float and publicise the scheme of lotteries in question involving considerable expenditure did not bring to them the expected returns, on account of the premature termination of the Agency agreement and the encashment and appropriation of the bank guarantees. The appellants could not have reaped the full benefit of those business ventures. There seem to be no proper rendition of accounts at the proper time and the finalisation came only at a much later stage. Keeping in view all these practicalities and realities of the situation, we are convinced, on the peculiar facts and circumstances of this case, that equities have to be properly worked out between parties to ensure that no one is allowed to have their pound of flesh unjustly against the other. Since this Court has chosen to take up for consideration the merits of the claims of the respective parties in these appeals filed by the appellants, in order to do substantial justice between parties in exercise of its powers under Article 142 of the Constitution of India, we consider it not only appropriate but just and necessary as well, on an overall consideration of the matter, to reject the counter-claim made by the State.

The challenge to the orders of the High Court dated 11.8.96 fails and shall stand rejected. Consequently, we set aside the Award of the Arbitrator, as affirmed by the learned District Judge. The judgment of the High Court rendered on 29.9.1995 shall stand modified, accordingly. The appeals shall stand finally disposed of on the above terms. The parties will bear their respective costs.

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