CASE NO.:
Appeal (civil) 5244-5246 of 2003

PETITIONER:
Food Corporation of India

RESPONDENT:
M/s A.M. Ahmed & Co. and Anr.

DATE OF JUDGMENT: 31/10/2006

BENCH:
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

The appellant - Food Corporation of India (hereinafter called the 'FCI') preferred the above appeals against the judgment and final order dated 13.08.2002 passed by the Division Bench of the High Court of Judicature at Madras in OSA Nos. 157-159 of 1997 whereby the High Court dismissed the appeals filed by the FCI and passed a decree in terms of the Award together with interest @ 12% p.a. from the date of the decree till the date of the payment.

The present dispute and differences arise out of the contract relating to the work of clearing, stevedoring, forwarding, exporting, handling and transport contract and delivery of foodgrains, sugar, flour, for the users, gift, hospital/suppliers and other commodities and gunny/twine bales imported at the Port of Tuticorin at the FCI Storage Godowns in and around Tuticorin for a period of two years from the date of contract i.e. 08.04.1981 in pursuance of Work Order No. SPC.1(1)/80 dated 20.04.1981 issued by the Senior Regional Manager, FCI, Madras. The respondent-contractor/claimant submitted his offer on 20.02.1981along with covering letter. On 07.04.1981, a communication was issued by the FCI to the claimant accepting their offer which had been reduced through negotiation to 397% ASOR.

According to the FCI, a perusal of the said tender document shows that in addition to cargo handling work at the Port, the respondent-contractor had to perform various other duties including unloading of food grains from railway wagons, machine-stitching of food grain bags, loading into trucks and other vehicles, etc. etc. According to the FCI, the tender agreement did not provide for any escalation clause and also stated that other than the rates agreed between the parties, the contractor would not be entitled to any other payments.

On 01.09.1981, the Tamil Nadu Government issued a notification in the Gazette notifying the settlement arrived at between the Port Users and Cargo Handling labour of Tuticorin Port regarding implementing of the settlement dated 04.01.1981. The respondent, by his letter dated 07.09.1981 to the FCI, pointed out the revision of wages and asked the FCI to review its case for revision of rates and pass necessary orders for revising the rates. The claim for escalation made by the respondent was rejected by the FCI by its letter dated 14.03.1984. The respondent filed O.P. No. 49 of 1986 in the Subordinate Court, Tuticorin for appointment of an Arbitrator in the dispute regarding escalation. The said Court passed an order appointing an Arbitrator in the matter. The High Court

of Madras modified the order passed by the Subordinate Court and directed the Managing Director of the FCI to appoint an Arbitrator in terms of contract between the parties. The special leave petition filed against the aforesaid order was dismissed by this Court on 05.05.1989. The special leave petition was filed by the FCI being aggrieved by the finding that the dispute between the parties was an arbitrable dispute, since the only question to be determined was payment of escalation which was not provided for in the contract, therefore, could not have been referred to arbitration. Following the dismissal of the special leave petition, the FCI appointed respondent No.2 \026 Mr. B.S.Hegde Joint Secretary and Legal Advisor Government of India as Sole Arbitrator. Respondent No.1 filed Statement of Claim raising several claims. The FCI filed a counter claim. The Arbitrator, on 10.04.1992, passed the Award awarding a sum of Rs.57,10,517/- and Rs. 22,84,207/- under claims (i) and (ii) respectively with interest @ 9% p.a. from 08.08.1989 till date of the award and future interest @ 12% p.a. till date of decree or realization.

The FCI filed O.P.No. 350 of 1992 under Section 14(2) of the Arbitration Act praying for a direction to the Arbitrator to file the Award before the High Court so as to enable it to challenge the same. Respondent No.2 filed the Award before the Sub-Court Tuticorin on 30.06.1992. The claimant filed a petition before the Subordinate Court for making the Award rule of Court and a decree in terms of the Award. The Division Bench of the Madras High Court in appeal preferred by the FCI against the dismissal of O.P. No. 350 of 1992 directed withdrawal of the O.P. filed before the Tuticorin Court to the High Court. The FCI, upon being informed by the Registry of the High Court regarding transfer of OPs and their re-numbering as O.P.Nos. 441 and 441A of 1993, filed objections to the Award under Sections 30 and 33 of the Arbitration Act which was numbered as O.P. No. 697 of 1993. A learned Single Judge of the High Court dismissed the objections filed by the FCI by holding the same to be time-barred and made the Award as rule of Court and passed decree in terms of the Award. The FCI preferred an appeal to the Madras High Court which was dismissed by the Division Bench of the said Court on 14.07.1997. The High Court, vide judgment and order in special leave petition Nos. 21377-21379 of 1997, set aside the dismissal and remanded the matter back to the Division Bench of the High Court for disposal on merits. The Division Bench, after dismissing the objections filed by the FCI, passes a decree in terms of the Award together with interest @ 12% p.a. from the date of the decree till the date of the payment. Aggrieved by the dismissal of the appeal by the High Court, the FCI preferred the above appeals.

We heard Mr. K. Mohan, learned senior counsel and ASG appearing for the appellant and Mr. R. Anand Padmanabha, learned counsel for respondent No.1.

Mr. K. Mohan, learned senior counsel appearing for the appellant, made the following submissions:

1. In the absence of an escalation clause in the contract, the Arbitrator could not have awarded any amount towards escalation and, therefore, the Arbitrator has erred in awarding and the courts below in upholding the escalation awarded by the Arbitrator;

2. The High Court completely erred in not noticing that Clause 7 of the contract deals with payment of minimum wages and this is different from the wage increase in the present case which is not minimum wages but are wages prescribed through settlement and, therefore, erred in holding that there was an

implied provision in the contract to pay the wages;
3. The High Court ought not to have taken into account the ex-gratia payment made by the Corporation to bypass the absence of the escalation clause and in holding that despite absence of escalation clause, the contractor would be entitled to escalation.
4. Relying on the judgment of this Court reported in (2000) 3 SCC 27 State of Orissa vs. Sudhakar Das (dead) by LRs submitted that in the absence of any escalation clause, an arbitrator cannot assume any jurisdiction to award any amount towards escalation and, therefore, that part of the award which grants escalation charges is clearly not sustainable and suffers from patent error;
5. Relying on the judgment of this Court reported in (1990) 4 SCC 647 S.Harcharan Singh vs. Union of India for the proposition that only when there is provision for variation the arbitrator can award escalation and since there was no such clause the arbitrator has exceeded his jurisdiction;
6. Associated Engineering Company vs. Govt. of A.P. reported in 1999 (4) SCC 93 was relied on for the purpose that the award in question was rendered beyond the limits of contract and that the arbitrator cannot depart from the contract and award;
7. He placed strong reliance on Rajasthan State Mines and Minerals Limited vs. World Engineering Enterprises and Others, 1999 (9) SCC 283 for the very same proposition that the award cannot be against the stipulation in the contract;
8. 2001 (4) SCC 241 Ramachandra Reddy vs. State of Andhra Pradesh was cited for the proposition that the escalation in rates of labour and materials can only be granted on the basis of agreement;
9. He also relied on 2002 (1) SCC 659 State of Rajasthan vs. New Bharat Construction Company for the proposition that award of 9% interest for the period 08.08.1989 to 10.04.1992 and 12% interest for the future is excessive. He placed strong reliance on para 8 of the said judgment wherein this Court reduced the rate of interest from 18% and 15% to 6% through out;
10. He also drew our attention to the award passed by the arbitrator, orders passed by the different courts and also the relevant clauses in the agreement with reference to the appointment of wages etc.;
11. Concluding his argument, Mr. Mohan submitted that the High Court has completely erred in not noticing that the award suffers from the gross errors apparent on the face of the record and that the arbitrator has not gone into the evidence as to the amount of enhanced wages actually paid by the respondent to the workers and has merely awarded an assumed amount without giving any reason as to how the amount was arrived at.

Mr. Anand Padmanabha, learned counsel, made the following submissions by way of reply to the arguments advanced by the appellant's counsel:

1. there is no specific bar to the claim for escalation being made and that the conduct of the FCI when it requested the claimant to continue their work would amount to promissory or equitable estoppel;
2. the claim for escalation is justifiable on the ground that the claimant could never have anticipated the sudden wage increase and other statutory obligations imposed by

the Government under any stretch of imagination while tendering for the work as early as February, 1981. It is further submitted that the claimant had quoted for the work based on the then prevailing wages at the time of tender who by providing them with a marginal increase for feasibility of execution.

3. The statutory obligation to pay higher wages arose under the notification published in the Tamil Nadu Gazette extraordinary published in Part-6 Section 3a dated 01.09.1981 marked as Exhibit-C5.

4. The above claim of unawareness of increase in wages consequent to Tuticorin being declared as a major Port entailing higher wages on par with wages being paid to dock labour in other major ports.

5. Owing to the enormous losses that mounted up, the claimants had represented the matter to the FCI reiterating the grave and disastrous monetary losses, sustained by them and requesting for relief by neutralizing the increased operational cost and its payment. Thereafter, the FCI had appointed a series of committees who had gone into the requests made and although the committees have recognized the need to neutralize the increase of extra costs incurred by the claimants on labour, as it has occasioned by an order of Government, but to the dismay of the claimant, no adequate relief was granted by the FCI. Various representations were made by the claimants to the official hierarchy of the FCI as early from 07.09.1981, 06.11.1981, 23.12.1981 during the currency of the contract and thereafter effective persuasion continued since then. Notwithstanding the fact that the FCI hierarchy was fully convinced to be just and proper in neutralizing these losses, it was only marginally met with by the Zonal Manager (South) who had reimbursed a paltry sum as an interim relief and recommended for sanction of appropriate escalation to be granted. Although the claimants were given the sanguine hope for their entitlement as genuine and reasonable, no final decision was taken during the tenure of contract including extended period of three months which the claimant was called upon to continue for the storage operations.

6. Large amounts were expended by the claimants to meet this extra cost incurred to pay the new wage structure and additional benefits given to labour as per the directives of the Government. The unexpected expenditure incurred by the wage hike, necessitated immediate requirement of enormous outlay which crippled the claimants resources. Consequently, the claimants had to raise additional funds from private sources at exorbitant interest to meet these contingencies. Instead of resorting to a cease work out of frustration in contract by a supervening event which was not within the contemplation of the parties at the time of entering into the contract, the claimants had carried on with the work effectively making enhanced wage payments in sizable amounts on the strength and faith of the assurance given by the FCI hierarchy. The huge expenditure incurred in mobilizing resources at exorbitant interest to meet the emergent situation had created additional burden on the claimants by way of accumulation of interest alone, owing to the indecisions of the FCI in settling this matter. Therefore, the claimants have claimed to 10% contractor’s profit or interest as damages as the case may be on the amounts

claimed for reimbursement. Ever since 07.09.1991, various representations submitted by the claimants seeking redressal of their grievances, the matter remained pending for want of final decision. Although the claims of the claimants were justified and had every reason for granting the same as recommended by the FCI officials at, different levels, of late, it has been turned down and denied to the claimants. Therefore, disputes and differences had arisen between the parties to the subject contract.

7. The claimants acted upon and carried on the work on the strength and faith of the assurance given by the FCI to meet the claimants demand and in the interest of smooth working of the contract and in order to avoid the stoppage of work a decision was taken to grant enhanced rates w.e.f. 01.09.1981.

We have carefully considered the rival submissions with reference to the records, pleadings, judgments and with reference to the rulings cited by both the sides.

This Court, while issuing notice dated 13.12.2002 in the special leave petition passed the following order

"ORDER

Learned Attorney General argues that there is no clause providing for escalation to reimburse the expenses incurred by the contractor in the contract agreement. In spite of the same the Arbitrator has awarded escalation in expenses.

Issue notice on SLPs as also on the prayer for interim relief."

In our opinion, the argument of the learned senior counsel for the FCI that there is no clause in the contract providing for escalation to reimburse the expenses and, therefore, the arbitrator had exceeded his jurisdiction has no substance. The issue of jurisdiction of the arbitrator to go into the claim of the claimant towards compensation and neutralization of the extra expenditure incurred on account of statutory wage revisions had already concluded in the earlier proceedings arising out of the application filed by the claimant firm under Section 20 of the Arbitration Act for appointment of the arbitrator. The FCI in the said proceedings specifically contended that there was no escalation clause in the contract, the claim of the claimants for compensation on account of wage revision should not be referred to arbitration and that the said claim was non-arbitrable. However, the learned Subordinate Judge, Tuticorin by order dated 16.02.1987 in O.P. No. 49 of 1986 rejected the said contention holding that the said claim was arbitrable. On appeal filed by the FCI before the High Court the High Court also confirmed the same by order dated 01.03.1989 in CMA No. 291 of 1987. This Court also dismissed the special leave petition No. 5213 of 1989 filed by the FCI by order dated 05.05.1989. Thus, the FCI is barred by res judicata from raising the same issue again in the present proceedings.

Even on merits, the claimants firm is entitled to be paid the said compensation, in view of clause 7 of the contract dealing with payment of wages.

PAYMENT OF WAGES TO WORKERS:

The contractors shall pay not less than minimum wages to the workers engaged by them on either time-rate basis or piece rate basis on the work. Minimum wages both for the time rate and for the piece rate work shall mean the rate(s) notified by the appropriate authority at the time of inviting tenders for the work. Where such wages have not been so notified by the appropriate authority, the wages prescribed by

the Senior Regional manager as minimum wage shall be made applicable. The contractors shall maintain necessary records and registers like wage book and wage slip etc., register of unpaid wages and Register of fines and deductions giving the particulars as indicated in appendix VI. The minimum wages prescribed for the time being for piece-rate and time-rate workers are as indicated below:-

(1) Time Rate

Worker (Male) : Rs.5.50 (Rupees Five and paise fifty only per day)

Time Rate

Worker (Female) : Rs.5.50 (Rupees Five and paise fifty only per day)

(2) Piece rate

Workers: Rs.5.50 (Rupees Five and paise fifty only per day)"

It is also submitted that in the subsequent correspondence with the claimant firm also the FCI agreed to pay the expenditure incurred on account of wage revision. In this regard, the learned Arbitrator after elaborately considering the correspondence between the parties has found in the impugned award as follows:-

"Whatever may be the arguments now put forth by the respondents, from the admitted facts, it is borne out and evident that the respondents had accepted their responsibility to compensate the extra expenditure sustained by the claimants. Having not made any reservations about its responsibility to neutralize the extra expenditure of the claimants by enhancing the contract rates, the respondents had accepted its liability after an exhaustive study of the matter, including the aspects of the arguments now put forth by the respondents and finally accorded sanction for enhancement in the contract rates. Since the relief was meager and inadequate, the claimants again appealed for the balance due to them which too was not protested or denied but on the contrary was acted upon. The respondents sincerely wanted to know the actual expenditure incurred by the claimants and its bonafides, for which purpose the District Officers at Tuticorin were deputed in Oct.81 for verification of payments vouchers and other relevant records connected with the discharge of one Vessel prior to 01.09.1981 and one after 01.09.1981. This aspect is very relevant and has a direct bearing on the issues relating to claims I & II.

It is borne out from the records and argued by the claimants that soon after the completion of the claimant's contract, the next contract was awarded by the Food Corporation to a Stevedoring Agency for 1297% ASOR for port operations alone (vide Ex.C24) as against the claimants' rate of 397% ASOR for port as well as godown and railhead operations combined, which was offered prior to the introduction of the new working pattern and increased wages in labour rates. According to the claimants, the tenders for godown operations were separately called for and was awarded by the Food Corporation at a rate of 777% ASOR which was the lowest tender received. The percentage and the figures of this statement submitted by the claimants are accepted to be correct by the respondents FCI. The claimants reiterated that this will be ample justification and testimony to prove and establish the rates that prevailed for the port operations and godown operations in Tuticorin at the time of execution of the work by the claimants and thereafter. The rates are reflected in terms and ASOR by virtue of the acceptance of these percentage by the Food

Corporation for the subsequent years' work obtained as the lowest offer on the competitive tenders invited by the Food Corporation. It was also stated that the other users of Tuticorin Port viz. M/s SPIC and Railways had also accepted the revised notification as mandatory and binding on all Port Users being statutory in character and accordingly had reimbursed the difference by way of escalated rates fully neutralizing the excess expenditure incurred by its contractors. The claimants had also produced documents by way of Exhibits to this effect as certificates issued by the respective organizations for having reimbursed the difference of escalated rates. Respondents do not dispute these aspects, but state that the payment by other Port Users cannot fasten them with any similar liabilities nor is it binding on them."

We have carefully perused the award. The award, in our view, is not vitiated by any error of fact or law on the face of the record and that the arbitrator has not committed any misconduct within the meaning of the Act. The High Court has also in para 19 of the impugned judgment correctly dismissed the objection raised by the FCI on the issue of absence of any escalation clause in the contract while rendering the following finding, Raviraja Pandian,J. speaking for the Bench, held;
"From the payment of wages clause (Clause 1) of the letters referred to above and also of the fact that, a committee of the High Officials of the appellant has been constituted to go in depth of the factual position as to the payment of wage hike as per the notification dated 01.09.1981 and the further fact that, the committee has gone into and submitted a report as to the actual payment and also the interim payment made by the appellant would clearly prove that, the appellant had by the above said actions alive to the circumstance of payment of enhanced wages considered the just demand of increase of rates and not stick to his stand that there was no escalation clause in the agreement and as such the claim of the respondents not maintainable. Hence, we are of the view that, the learned counsel for the appellant is not well placed in the contention that, the arbitrator has mis-conducted himself and passed an award for escalation of price without their being any clause for escalation in the contract and the same has to be rejected and is rejected."

The respondent claimant was awarded the contract for carrying out the work of clearing, forwarding, stevedoring etc. from the Ports at Tuticorin for the period and from 08.04.1981 to 07.04.1983. During the currency of the contract w.e.f. 30.08.1981, the wages of the workmen employed in the cargo handling was sharply increased to almost three-fold consequent upon the settlement arrived under Section 12(3) of the Industrial Disputes Act. The State Government notified the same in the Gazette on 01.09.1981. In view of the statutory increase in the wages payable to the port labourers, the claimant made a representation dated 07.09.1981 to the FCI to revise the rates in respect of the contract besides pointing out that the Claimant would be constrained to discontinue the work as the work at the contracted rates would result in large loss. The claimant again wrote a letter on 23.12.1981 to the FCI detailing the handling cost in view of the revised wage pattern and for early order on the representation. In the said letter, the claimant has also mentioned that it had offered its explanations on 22.12.1981 to the Committee appointed by the FCI and visited the FCI in this behalf. The Committee constituted by the FCI made a

report dated 15.01.1982 to the FCI after inspecting the place of contract and after examining the issue. The said Committee recommended for allowing the escalated rates specified therein, supplementing with details. The first respondent wrote another letter on 19.01.1982 expressing anguish over the non-grant of relief claimed and inability to carry on the works from 25.01.1982 as notified in the letter dated 25.12.1982. The FCI in its reply dated 21.01.1982 stated as follows:
"The Committee's report is under examination. You are requested not to bring about any stoppage in the work as contemplated by you as this will complicate matters."

The claimant was also served a phonogram dated 23.01.1982 which reads thus:
"Your request for escalation of rates is under consideration of the Zonal Manager. Pending decision, request continue work without stoppage."

The claimant was acting and carrying on the contract work without bringing any stoppage of work from 25.01.1982 incurring heavy loss, as it was thus made to believe that it would be adequately compensated.
While the matter stood so, the FCI appointed Mr. P.N.Chinnaswamy, Joint Manager, New Delhi to look into the matters relating to the demand of the contractor for increase in rates consequent upon the implementation of the settlement arrived at between the representatives of Port Users and cargo handling labour in Tuticorin which is effective from 01.09.1981. Mr. Chinnaswamy in his report dated 17.02.1982 under the head "Final Recommendations" stated as follows:
"There is definitely a necessity for escalating the rates of the present contractors. Contractors were not aware of the definite shape of matters to take place when they submitted their tender initially in February 1981. Enhanced rates of payment have become statutory as the scheme has also been published in the Gazette consequent upon settlement of 31.08.1981.." He recommended for 962% over SOR for the operations at New Port and 1108% over SOR for the Operations at Old Port at Tuticorin instead of 397% ASOR originally agreed for both the ports."

The claimant did not get any response from the FCI even after the report of Mr. P.N.Chinnaswamy, a letter dated 24.02.1982 was sent to the FCI that it would become impossible for the contractor to continue the work if the issue was not settled as the FCI did not keep the promise that the issue would be settled by 04.03.1982.
The FCI by its letter dated 28.03.1982 communicated the contractor as follows:
"With reference to your telephonic information given, that you will be stopping the work from Monday the 29th March, 1982 at the port and at Godowns in the absence of a decision on your demand for escalation of rates, please be informed that, our Regional office at Madras have already taken up the matter with Head Office, New Delhi and a decision is awaited. In the meantime please arrange to continue the work at the port as well as at the godowns without any interruption."

However, the FCI by its letter dated 13.04.1982 accorded sanction of 488% of ASOR instead of 397% ASOR in relation to old port operations and which would workout to an increase of 91% only and 430% of ASOR instead of 397% of ASOR for the operations at new port and which would come to an increase

of 31% only .
The claimant accepted the same under protest and without prejudice by its letter dated 17.04.1982 and requested the FCI, New Delhi for review of the decisions of the above grant of marginal relief.
It is seen from the records that the contract period was from 08.04.1981 to 07.04.1983 for a period of two years. Wage revision came into effect from 01.09.1981. From 07.09.1981 to 28.02.1984, the contractor made various representations during the currency of the contract. The FCI did not allow the contractor to discontinue the contract work during the currency of the contract promising that the revision of wages is under their consideration. It is stated by the contractor that they had handled about 1.68 lacs metric tones of foodgrains at both the ports incurring huge loss and after the contractor had completed the performance of the contract the FCI by its letter dated 14.03.1984 informed the contractor that the request for escalation of rates had not been agreed to by their Head Quarters, New Delhi which compelled the contractor to approach the court for redressal of its grievances.
The Corporation had raised a specific question before the arbitrator that escalation in rates claimed by the contractor could not be granted for the simple reason that the agreement did not provide for any grant of the escalated rates during the tenure of contract and hence no enhanced rates other than the rates agreed upon can be granted. The learned arbitrator specifically rejected the above contention on the basis of the subsequent acceptance of responsibility by the FCI.
In our view, the arbitrator has not mis-conducted himself and that the award has been passed in consonance with the principles of natural justice. The High Court of Madras has also upheld the award of arbitrator rightly holding that there is no error apparent on the face of the record.
As already noticed, the subject matter relates to the performance of the contract between the periods from 08.04.1981 to 07.04.1983. Now that 23 years and odd had already elapsed since the contract period and that the contractor is being prevented by the FCI to receive the monies spent by him as awarded by the arbitrator. It is also seen from the records that the quantum claimed by the respondents was never disputed by the FCI and it is an admitted fact that the wage revision came into force w.e.f. 01.09.1981 and the contractor firm had paid the workers revised wages from 01.09.1981.
It was argued by Mr. Mohan that the award of interest @9% for the period 08.08.1989 to 10.04.1982 and 12% for the future is excessive and in support of the said contention 2002 (1) SCC 659 was relied on. During the pendency of the appeal, this Court while granting special leave directed the FCI to deposit 50% of the awarded amount which cannot be withdrawn by the respondent-contractor. It is stated in the I.A. Nos. 4-6 of 2003 that the FCI had deposited only a sum of Rs.39,97,362/- on 22.08.2003 which is 50% of the principal amount in the award and that the FCI had not deposited 50% of the total amount awarded which includes the principal amount of Rs.79,94,724/- and interest @ 9% p.a. from 08.08.1989 till date of publication of the award i.e. 10.04.1992 and future award @ 12% p.a. till the date of realization. Therefore, an application was moved to pass appropriate orders directing the FCI to deposit the balance of the amount as per the directions of this Court dated 25.07.2003. In clarification of the order dated 25.07.2003, this Court directed the FCI to deposit half of the amount awarded by the arbitrator with interest and permitted the contractor to

withdraw the said amount on furnishing bank guarantee of a nationalized bank to the satisfaction of the Registrar of this Court. 3 months time was granted for depositing the amount. Pursuant to the Court's order, an amount of Rs.1,04,10,664/- has been deposited and kept in FD and the same is renewed from time to time. Accordingly, the amount has been released to the contractor on their submitting the bank guarantee to cover the entire amount. However, it was alleged that the bank guarantee submitted on 12.08.2005 has since expired on 15.08.2006 and that the contractor has not taken steps to submit fresh bank guarantee to cover the amount. The contractors are liable for the consequences thereof. In the circumstances, the FCI prayed for a direction to produce fresh bank guarantee or to renew the existing bank guarantee so that the amount is secured as per the directions of this Court. On 31.08.2006, the Contractor filed extended bank guarantee and the validity of the same is up to 15.02.2007.

Two judgments of this Court on escalation and legal misconduct of the arbitrator can be beneficially referred to, followed and applied to the case on hand.

The first judgment is in Hyderabad Municipal Corporation vs. M. Krishnaswami Mudaliar & Mudaliar & Anr., (1985) 2 SCC 9. The only question argued by the counsel for the Hyderabad Muncipal Corporation was that the respondent contractor was not entitled to claim 20% extra over and above the rates originally agreed upon between the parties under the contract. Under the contract, drainage work in question was entrusted to the respondent and under the terms of the contract the work was to be completed by the contractor within a period of one year. Admittedly, at the instance of the Executive Engineer, PWD due to financial difficulties \026 less budget having been provided for in the year in question, therefore the respondent-contractor was requested to spread over the work for two years more that is to say to complete the same in three years but the contractor was agreeable to spread over the work for two years as suggested on condition that extra payment will have to be made to him in view of increased rates of either material or wages. The Government did not intimate to the contractor that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates. In fact, no reply was sent by the Government and a studied silence was maintained by the Government in regard to the contractor's demand for extra payment, in spite of several reminders in that behalf, till the contractor actually completed the work during the spread over period. After completion of work, the contractor submitted his final bill claiming 20% extra over and above the rates originally agreed upon between the parties. The Government stated that he was not entitled to increased rates. The High Court, after considering the correspondence exchanged between the parties has taken the view that the government was liable to make extra payment for the work done as there was no dispute that the rates of material, etc. had increased during the extended period of two years and the contractor was entitled to such extra payment. This Court, after considering the relevant material on record, was also of the view that both in equity and in law the contractor is entitled to receive extra payment and the High Court was right in deciding the question in contractor's favour. This Court held that the liability to make this extra payment has been properly saddled on the Municipal Corporation.

The second judgment is in P.M. Paul vs. Union of India, AIR 1989 SC 1034. In this case, the dispute that was referred to the arbitrator was as to who is responsible for the delay,

what are the repercussions of the delay in completion of the building and how to apportion the consequences of the responsibility. The arbitrator found that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under the claim. He accordingly allowed the same. Counsel appearing for the Union of India submitted before this Court that the arbitrator had granted a sum of Rs. 2 lakhs as escalation charges and cost in the absence of escalation clause was not a matter referred to the arbitrator. In other words, it was urged that the arbitrator had traveled beyond his jurisdiction in awarding the escalation cost and charges. This Court in paragraphs 11 & 12 of the judgment held thus:

11. It is well-settled that an award can only be set aside under Section 30 of the Act, which enjoins that an award of an arbitrator/umpire can be set aside, inter alia, if he has misconducted himself or the proceeding. Adjudicating upon a matter which is not the subject-matter of adjudication, is a legal misconduct for the arbitrator. The dispute that was referred to the arbitrator was, as to who is responsible for the delay, what are the repercussions of the delay in completion of the building and now to apportion the consequences of the responsibility. In the objections filled on behalf of the respondent, it has been stated that if the work was not completed within the stipulated time the party has got a right for extention of time. On failure to grant extention of time, it has been asserted, the contractor can claim difference in prices.

12. In the instant case, it is asserted that the extension of time was granted and the arbitrator has granted 20% of the escalation cost. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. The arbitrator has noted that Claim I related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended, period of contract from 9.5.1980 for the work under phase I, and from 9.1 1.80 for the work under phase II. The total amount shown was Rs. 5,47,618.50. After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he was accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and hence, the arbitrator had not misconducted himself in awarding the amount as he has done.

The above two cases, in our opinion, squarely apply to the facts and circumstances of the case on hand. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The Arbitrator by awarding wage revision has not mis-conducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion.

In our opinion, having considered the totality of the circumstances, we feel that it would be just and proper to award interest @9% p.a. throughout instead of 12% as awarded by the arbitrator for the period in question. The amount already received by the claimant will be adjusted towards the entire claim and the balance amount together with interest at 9% p.a. shall be paid by the FCI within 2 months from the date of this order failing which the said balance amount shall carry interest @12% from the date of its due till realization. In view of this order in this judgment, the bank guarantee furnished by the respondent-contractor shall stand discharged. The Supreme Court Registry is directed to do the needful immediately.

The impugned judgment of the High Court is modified accordingly. The appeals are thus partly allowed as above leaving the parties to bear their own costs.