SUPREME COURT OF INDIA

M/S ETHIOPIAN AIRLINES

Vs.

M/S STIC TRAVELS (P) LTD.

11/07/2001

(A.P.Misra, Doraswamy Raju)

Appeal (civil) 4051 of 2001

JUDGMENT

MISRA, J.

Leave granted. Heard learned counsel for the parties. Since long, both the legislature through its enactment and the courts through its interpretation have been battling to cut short the traditional procedures in Courts to dispense quick justice by taking recourse through the arbitration proceedings. The laudable objectives and great expectations in spite of best efforts have never reached the desired results. To reach it, time and again comprehensive review of the Arbitration Act through amendments and re-enactment has been made. Every words of any statutes having stretchable meaning gives fertility to the Bar to interpret it such, as to suit the exigency of his client by finding loopholes in a statute in spite of the best attempt by the legislature to conclude the disputes at the earliest, by raising various objections thus frustrating its very objectives. It is here courts have to play an important role of taking recourse to such interpretation which subserve the objective and defeat any attempt to flout it.

Arbitration proceedings sprouts out of an agreement, understanding or consent of the contesting parties. It also lays down as to who shall arbiter over their dispute. It is their desire, explicitly or implicitly expressed in the agreement, which the courts have to guard and interpret so. The statute steps in, in aid of this agreement not in derogation of it. It is only when agreement is silent, against the public policy, or any person does not perform its obligation under such agreement, the statute steps in to fill up such gaps and issues directions where necessary, for doing an act which is also in aid of such agreement. Thus while interpreting any arbitrator statute, if there be two possible interpretation, the one which leans to satisfy the desired agreement should be accepted.

The present case is one of such illustration, where the suit is filed in the year 1994 under Section 20 of the Arbitration Act, 1940, for the appointment of arbitrators, yet till this date, the challenge to the constitution of the Arbitral Tribunal has yet to be resolved. Placed in such situations, the courts have to rise, to give such interpretation, which fulfills its objectives, cut shorts the procedure and lend supports to the true intention of the parties as infused in the arbitration clause of their agreement.

The question raised is of the interpretation of Section 10 of the Arbitration Act 1940 (hereinafter referred to as 'the aforesaid Act') and the interpretation of Article XVI, the arbitration clause of the agreement between the parties. The present appeal is directed against the judgment and order dated

8th November, 2000 passed in O.M.P. No. 133 of 1999 by the Delhi High Court through which the said O.M.P. has been allowed, holding Justice Avadh Behari Rohatgi to be the Chairman of the Arbitral Tribunal along with Justice H.L. Anand (Retd.) and Mr. C.S. Aggarwal, Advocate. The High Court while interpreting the aforesaid arbitration clause held it to fall under sub-section (2) of Section 10 of the aforesaid Act. The submission is the High Court erred in interpreting the arbitration clause to make it fall under sub-section (2) of Section 10, in fact, it falls under sub-section (1) of Section 10. In order to appreciate the controversies and the issues involved, it is necessary to dwell on to the necessary facts. So hereunder we are giving short matrix of facts.

The respondent was appointed as the General Sales Agent of the appellant Airlines for various territories. In pursuance to the same, two agreements dated 1.7.1987 and 5.1.1980 were executed between the appellant and the respondent. However, the engagement of the respondent was terminated by the appellant w.e.f. 20th December, 1994. This led into the dispute and for resolving it, the respondent filed a suit under Section 20 of the aforesaid Act. During pendency of this proceeding, late Justice G.C. Jain was appointed as the nominee arbitrator of the appellant airlines and Mr. C.S. Aggarwal, Advocate was appointed as the nominee arbitrator for the respondent and in turn these two nominee arbitrators appointed Justice Avadh Behari Rohatgi to be the Chairman of the Arbitral Tribunal. Thereafter, the proceedings before this Tribunal commenced from 16th September, 1995.

After the unfortunate demise of Justice G.C. Jain, the appellant nominated Mr. O.P. Vaish, Senior Advocate as its nominee arbitrator on 18th May, 1998 but who later resigned and shortly thereafter Mr. Justice H.L. Anand (Retd.) was appointed as the nominee arbitrator by the appellant. The case of the appellant is that no formal proceedings took place during the tenure of Mr. O.P. Vaish. After stepping in of Justice H.L. Anand, he suggested to Mr. C.S. Aggarwal that further steps in the proceedings should be taken only after considering the request contained in the letter dated 28th December, 1998 written by the counsel for the appellant which desired the two arbitrators to nominate afresh a Chairman. This according to the respondent triggered a fresh dispute thus thwarting the smooth flow of the arbitration proceedings before the said three arbitrators.

The dispute further has arisen in this case, as aforesaid, on account of different interpretation given by Mr. Justice H.L. Anand and Mr. Justice Avadh Behari Rohatgi regarding the status of Justice Rohatgi. In case Section 10 (1) is applicable he could only be an umpire, therefore, cannot participate in the arbitration proceedings and if Section 10 (2) applies he can continue as a Chairman of the Arbitral Tribunal and participate in the same. The view of Justice H.L. Anand is contained in a letter dated 12th March, 1999 to Justice Rohatgi that the matter could only be heard by the nominee arbitrators and not by the three member Tribunal as it happened in the past. Another ancillary issue which arises as a result of the aforesaid view of Mr. Justice H.L. Anand is, whether Justice Anand and Mr. C.S. Aggarwal would have to go through the exercise of appointing a third arbitrator/Umpire. The appellant in fact filed an application (I.A. No. 5676 of 1999) for clarification, however, the same could not be listed for hearing as the court file could not be traced. The respondent in the meanwhile filed the aforesaid O.M.P. No. 133 of 1999 taking a stand that Section 10(1) had no application on the facts of the present case. The Delhi High Court through its impugned judgment has held that Justice Rohatgi would continue to be the chairman of the Arbitral Tribunal and the decision of the majority shall prevail. This is so as both the nominee arbitrators of the appellant and the respondent appointed the aforesaid Justice Avadh Behari Rohatgi to act as the Chairman of the Arbitral Tribunal.

On 16th September, 1995 the Arbitral Tribunal consisting of the aforesaid three persons passed an

order that both the counsels should seek instructions from their respective clients and state on the next date of hearing, whether they were prepared to refer their disputes arising under the agreements to this Arbitral Tribunal. On 1st June, 1996 counsels statement were recorded that their clients were agreeable to refer the disputes to this Arbitral Tribunal. After the appointment of Justice H.L. Anand on 30th December, 1998, he sent a fax to Mr. C.S. Aggarwal for a meeting on 6th February, 1999 to consider the question of appointing an Umpire or appointing the third arbitrator. During this period on the 8th March, 1999 Justice Rohatgi through letter desired to convene a meeting of the Arbitrators for 20th March, 1999. Before that date, Justice Anand wrote a letter dated 12th March, 1999 to Justice Rohatgi that according to his opinion the matter could only be heard by the nominee arbitrators and not by the three member Tribunal as had happened in the past. Justice Anand made request through this letter to Justice Rohatgi to cancel the proceedings fixed for 20th March, 1999 and it to remain stayed until the question of law raised is determined by the Court. On 13th March, 1999 Justice Rohatgi rejected the said request of Justice Anand as he was of the opinion that there was no conflict between Section 10 (1) and Section 10(2). He opined, in view of his appointment as Chairman there is no question of third arbitrator being an Umpire. This dispute as aforesaid, was decided by the Delhi High Court by holding Section 10 (2) to be applicable and not Section 10 (1) in view of the language of the aforesaid arbitration clause.

Mr. F.S. Nairman, learned senior counsel for the appellant submits with vehemence, with reference to the arbitration clause that Section 10 (1) would be applicable in view of the deemed clause incorporated in it and the High Court erred in placing it under Section 10 (2). The submission is that language of Section 10 (1) is very clear which stipulates, when a reference is to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, then such appointed third arbitrator would be deemed to be an umpire and not a third arbitrator. In the present case, admittedly both the appellant and the respondent nominated their respective arbitrators and such nominated arbitrators appointed Mr. Justice Rohatgi as the third arbitrator. Thus submission is in view of the deeming clause, Mr. Justice Rohatgi's appointment cannot be construed as a third arbitrator but only as an umpire. On the other hand, learned senior counsel for respondent Mr. K.K. Venugopal submits that the language used in the arbitration clause makes it abundantly clear that the parties intended to have their dispute resolved through reference to the Arbitral Tribunal consisting of three arbitrators. In view of this the reference of dispute would fall under sub- section (2) of Section of Section 10 and not under Section 10 (1). The submission is in order to find in which of the two fields, viz., of sub-sections (1) and (2) this case falls, the clear intent of the parties as incorporated in the arbitration clause has to be read and if the intention of the parties, as in the present case, is clear that the dispute is to be resolved by the three arbitrators then the case would not fall under sub-section (1) but would fall under sub- section (2) and thus High Court committed no error in concluding the same.

In order to further appreciate and adjudicate the issue involved we are herewith reproducing below both Section 10 of the aforesaid Act and Article XVI of the arbitration clause of the aforesaid two agreements.

Section 10: "Provisions as to appointment of three or more arbitrators.- (1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitraors, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be

appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail."

Artcile XVI

"1. In the event of any dispute concerning the interpretation or application of this Agreement, or concerning any rights or obligations based on or relating to the Agreement, such disputes shall be referred to and finally settled by an arbitral tribunal.

2. If the parties agree to the appointment of a single arbitrator the arbitral tribunal shall consist of him alone.

3. If they do not so agree the arbitral tribunal shall consist of three arbitrators. Each party shall within a reasonable time appoint one of the three arbitrators, and the two arbitrators so appointed shall appoint the third, who shall act as Chairman. Both parties shall do all in their powers to expedite the arbitral process.

4. When the arbitral tribunal consists of more than one arbitrator its decision shall be given by a majority vote.

5. The arbitral tribunal shall settle its own procedure and if necessary shall decide the law to be applied. The award shall include directions concerning allocation of costs and expenses of and or incidental to arbitration, including arbitrators' fees.

6. The award shall be final and conclusively binding upon the parties."

We find that the field of operation of both sub-sections (1) and (2) of Section 10 are separate and exclusive. Sub-section (1) is applicable in a case: (a) where an arbitration agreement provides that a reference is to the three arbitrators; (b) one to be appointed by each party and the third by the two appointed arbitrators. If the case falls in this field, it further engraves a deeming clause that such appointment third arbitrator to be an umpire.

While the field of sub-section (2) is in a case, (a) where an arbitration agreement provides for a reference to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), then the award of the majority shall prevail unless the arbitration agreement otherwise provide. Both these two sub-sections speak about reference to three arbitrators. In order to find, whether case falls under sub-section (1) or sub-section (2) it has to be found, whether the appointment of the three arbitrators could be said to be otherwise than as mentioned in sub-section (1). The submission on behalf of the appellant by Mr. Nariman is, the words, "otherwise than as mentioned in sub-section (1)" refers to the method of appointment while submission for respondent by Mr. Venugopal is, such an appointment in the present case is otherwise than as provided in sub-section (1), as appointment of the third umpire, namely, Mr. Rohatgi was as an chairman, indicating the parties intended that the third arbitrator could not be an umpire.

Strong reliance is placed for the appellant in Ghasilal Todi Vs. Biswanath Kerwal & Ors., AIR 1964 Cal. 466. The submission is, the arbitration clause in this case is similar to the one in the present

case. For ready reference relevant portion is reproduced below:

"That in case of any dispute arising out of this agreement or during the continuance of this partnership business between the parties the same will be decided by arbitration, each party will nominate one persona and the persons so nominated will elect a third person as Chairman and the decision of the majority will be binding on the parties. The venue of the arbitration would be at the business office or at any convenient place as may be agreement upon."

While interpreting sub-section (1) of Section 10 the Court held:

"In the instant case the third arbitrator i.e., the Chairman is in law deemed to be the umpire. He will have the same power and function as that of an umpire. Law does not empower the parties to direct the third arbitrator appointed in the manner indicated in Section 10 (1) to act as other than an umpire. He will have powers and functions as that of an umpire. In that view of the matter, if the arbitration clause provides for the appointment of a third arbitrator by the two arbitrators appointed by the parties, he, in law, is incompetent to sit along with the two others as a member of the board or arbitrators and decide the disputes by a majority. He is the umpire, in law, and comes in the picture only when the two arbitrators do not agree. The provision in the contract that the majority will decide and that their decision is to be final is contrary to the provisions of Section 10 (1) which is a mandatory provision and not merely directory...".

In that case the Court was mainly called upon to decide, whether the award by single arbitrator, in view of the aforesaid arbitration clause was valid or not. Under the said arbitration clause, one party appointed an arbitrator while the other party could not appoint within the stipulated period and thus question of appointment of third arbitrator never arose. The Court held award by the single arbitrator would be valid. For this the Court relied in the case of Merinos and Frangos Ltd. v. Dulien Steel Products Inc. of Washington reported in 1961 (2) Lloyd's Rep 192. The aforesaid decision of Ghasilal (supra) was not a case where two appointed arbitrators appointed the third arbitrator as in the present case and there no question was raised, whether third appointed arbitrator could sit as a member of the Arbitral Tribunal along with the other two arbitrators as that situation has not arisen. There it was a case where only one arbitrator was appointed by one of the parties and the limited question raised was, whether on the failure to appoint the arbitrator by the other party, in view of the said arbitration clause, could the award by single arbitrator would be valid. In our considered opinion this decision could in no way be said to be the decision deciding the periphery of the two fields of sub-sections (1) and (2) in which the aforesaid two sub- sections operates. This decision merely considered, whether award by one of the appointed arbitrator would be valid. The question, whether the third appointed arbitrator would be an umpire or not was not in issue thus adjudication if any could not be by the ratio decision of this case.

Reliance by the Calcutta High Court in the aforesaid case on the Marinos & Frangos Ltd. (supra) is also of no avail as there also issue was limited to the question, whether the award by the single arbitrator could be valid in view of similar arbitration clause. Within this limitation the court did interprets Section 9 of the English Arbitration Act, 1950 (hereinafter referred to as "the 1950 Act") which is pari materia to Section 10 of the aforesaid 1940 Act. Hence we proceed to examine this case also in extenso. This case interpreted clause 35 of the arbitration clause incorporated in the agreement between the parties with reference to Sections 7 and 9 of the 1950 Act. Clause 35 is quoted hereunder: "35. Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force, before a board of three persons consisting of one arbitrator, to be appointed by the

owners, one by the charterers and one by the two so chosen. The decision of any two of the three on any appoint or points shall be final."

Sections 7 and 9 of the 1950 Act are also quoted hereunder:

"7. Where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein -

(a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent...

9. (1) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties."

We may first record here, this arbitration clause 35 is different than the arbitration clause XVI in the present case. Clause 35 does neither contain that the appointed third arbitrator to be the chairman nor it contains the condition that the decision of such Arbitral Tribunal shall be by majority vote. The Queen's Bench held:

"Sect. 9 (1) was mandatory and provided that where there was an apparent reference to three arbitrators, the third was to be treated as an umpire; that the last sentence of Clause 35 was accordingly overridden; that Clause 9 (1) had the effect of bringing the agreement back into Sect. 7 (as an arbitration agreement that the reference should be to two arbitrators); and that, when charterers failed to appoint a substitute arbitrator, S. had jurisdiction to act as sole arbitrator -Order of Master reversed, shipowners being at liberty to enter judgment in terms of award in their favour."

It is significant to refer to Section 8 also of the aforesaid 1950 Act which gives clear statutory intent of keeping in mind the arbitration agreement while interpreting such provisions. Section 8 is quoted hereunder:

"8.(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to include a provision that if the arbitrators have delivered to any party to the arbitration agreement, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators."

Section 8 starts with the words "Unless a contrary intention is expressed therein (in the arbitration agreement)", so in the absence of any contrary intention in the agreement, where the reference is to the two arbitrators and the two arbitrators appoint a third arbitrator by virtue of the deeming clause

the third such appointed arbitration is to be the umpire.

Firstly this statute takes care and gives precedence to the agreement of the parties by incorporating the words, "unless a contrary intention is expressed therein" but the Court interpreted the provisions without examining whether any contrary intention exists in the agreement, as it was neither raised nor was a case there. This was also a case, where the two appointed arbitrators of the parties did not appoint the third arbitrator and further after one of the arbitrator died the party concerned did not renominate the arbitrator, hence the question was, whether the award by the sole arbitrator is valid? This case thus have no relevance nor has adjudicated the issue involved in the present case. The Calcutta High Court has merely relied on this decision to uphold the award by the sole arbitrator to be valid.

One of the submissions on behalf of the respondent is that not only arbitration clause clearly reveals that parties intended that the dispute be referred to the three arbitrators but the conduct of parties also reveals to the same effect. The proceedings went on before three arbitrators without objection been raised. Reliance is placed on the order dated 16th September, 1995 when the aforesaid three member Tribunal directed both the parties to obtain instructions from their respective clients and to state on the next date of hearing, whether they were prepared to refer the dispute to this Tribunal (three member Tribunal). And on the next date, i.e. 1st June, 1996 the said Tribunal recorded the statements of the counsels for the parties which consented for referring all the disputes to the said three member Tribunal. Not only this consent is recorded, the parties continued to appear before the said three member Tribunal right from 1995 till April 1998. In fact, the first objection for the first time was raised after the appointment of Mr. Justice Anand in the year 1998. However, the submission for the appellant is that though the proceedings continue but there was no effective proceeding except one effective hearing on 17th January, 1998 when affidavit dated 23.6.1997 of respondent was treated as examination in-chief and he was cross examined. The submission is that the plea of acquiescence is not sustainable because estoppel and acquiescence do not confer jurisdiction. Reliance is placed on Karnal Improvement Trust Vs. Parkashwanti, 1995 (5) SCC 1559 at p. 172 para 22.

The submission of Mr. Nairman, in his usual eloquence as he does at the first flash is impressive and attractive but on deeper examination it leads to a different result. There could be no dispute, as submitted by him, in a case where two arbitrators are appointed by the two parties separately and the third being appointed by the said two appointed arbitrators the third arbitrator in view of sub-section (1) of Section 10 is to be construed as an umpire. But the question still is, whether the arbitration clause in the present case, stipulates appointment of third arbitrator as in sub-section (1) or his appointment could be said to be otherwise than as mentioned under sub-section (1) in terms of sub-section (2). In order to decipher and carve out separate field of the said two sub-sections, the interpretation of arbitration clause is very significant. If the appointment arbitrators under Section 10 (1) is an appointment simpliciter as contained in sub-section (1) then the appointment of third arbitrator is to be read as an umpire but in a case where arbitration clause is clear and intends explicitly or implicitly, for reference of the dispute to the three arbitrators of whom the third is to be the Chairman and award to be by majority, then this clear intention is it to be placed to fall under sub-section (2) and not under sub-section (1). A deeming clause is introduced in sub-section (1) where intention of the parties to the contrary are not clear then a third arbitrator is deemed to be an umpire. It is because of this sub-section (2) refers to "..the award of the majority shall" and further the words, "unless the arbitration agreement otherwise provides" gives significant focus on intent of the contracting parties which is the foundation of arbitration proceedings. This is to satisfy the desired understanding of the agreement of the parties, who desired to refer their dispute for

adjudication to the desired arbitration tribunal. Thus a conjoint reading of both the said two sub-sections, makes it clear, where an arbitration agreement provides simpliciter for a reference to an arbitral tribunal consisting of three arbitrators one each appointed by parties and the third by such appointed arbitrators then the appointment of such third arbitrator is to be treated as an umpire but where parties intentions are clear, to be spelt out from the agreement that the parties intends their dispute to be decided by three arbitrators by majority, by such words such as that the arbitrator is to be the chairman of such Tribunal, then the appointment of such third members is to be construed to be an appointment otherwise than as mentioned under sub-section (1). We find in the present case the clause 3 of the Article XVI of the agreement provides that the arbitral tribunal shall consist of three arbitrators. Each party to appoint one of the three arbitrators and two arbitrators so appointed shall appoint the third who shall act as Chairman.

When parties referred to third arbitrator to act as Chairman the intention are very clear the chairman means who chairs a Tribunal or who heads the Tribunal and not as an umpire. The function of umpire only comes into play when there is difference between two arbitrators. When there is no difference umpire does not play any role. On the other hand, Chairman has to chair every meeting of the Tribunal over which he has to chair. In the present case, he has to chair the arbitral tribunal. In such a case could it be said that the appointment of the third arbitrator was simpliciter appointment of the third arbitrator as contemplated under sub-section (1) of Section 10? In the present case the words "who shall act as a Chairman" gives clear intention of the parties. The submission of Mr. Nariman mere change of nomenclature would make no difference cannot be accepted. It has to be examined by picking up the intention of the parties out of totality of the words in the arbitration clause. Once parties clearly intends which could be culled out from the arbitration clause that the appointment of the third arbitrator is to function and chair the Tribunal then such chairman, the third appointed arbitrator is to be interpreted to fall under sub-section (2). This intention in the said arbitration clause is further reinforced by clause 4 of the aforesaid Article XVI, where it gives clear intention of the parties where it provides, in a case arbitral tribunal consists of more than one arbitrator its decision shall be given by a majority vote. This word 'majority' is to be found in sub-section (2) and not in sub-section (1). Thus after considering the submission on behalf of both the parties, we have no hesitation to come to the conclusion that the appointment of the third arbitrator in the present case is an appointment, otherwise than as mentioned in sub-section (1). Thus the present case would falls under sub-section (2) of Section 10.

Mr. Nariman further submits, so long the arbitration clause in an agreement is not superseded by a fresh agreement, the statutory consequences provided in Section 10 (1) would continue to flow notwithstanding the consent of the parties, as recorded on the 1st June, 1996. He submits it is not even the respondent case of any supersession of the arbitration clause in view of what is recorded by the arbitrators on the 1st June, 1996. To reinforce this he referred to the various extensions sought by the parties for making an award within time even after 1st June, 1996 based on the extension of time for the Tribunal constituted in the year 1995. The submission to this extend cannot be discredited that parties accepted the continuance of originally constituted Tribunal and no fresh Tribunal came into existence on the 1st June, 1996. This submission need not take us long to decide as learned counsel for the respondent very clearly accepted that he is not relying on what is recorded on the 1st June, 1996 to be a fresh agreement. Submission for the respondent is, what is recorded on the 1st June, 1996 by the respective counsels is in consonance with the stand taken by the respondent, viz., both the parties understood Clause XVI of the agreement to be that that the reference to the arbitral Tribunal is to be one which consists of three arbitrators and not that the third arbitrator to be an umpire. This submission has merit and would make no difference even if the submission of Mr. Nariman is accepted. None of the parties understood the constitution of fresh

Tribunal from 1st June, 1996. It is not in doubt that since the constitution of the three-member tribunal in the year 1995 till about April, 1998 including the proceeding on 17th January, 1998, when the appellant cross-examined the deponent who sworn the affidavit dated 23rd June, 1997 for the respondent, the proceedings continued before the three- member tribunal. Every date all the three members sat. This is without entering into the dispute, whether any effective date, except the aforesaid one date, was there or not. It can be said, even for the miscellaneous purposes the parties were appearing on the various dates before the three- member tribunal without raising any objections.

One of the submissions for respondent is that the appellant acquiesced by presenting itself before the three-member tribunal on large number of date for a period of three years hence is stopped from raising any such dispute that constitution of Tribunal was not valid. Reliance is placed in Neelakantan & Bros. Const. Vs. Suptd. Engineers, 1998 (4) SCC 462; M/s Construction India Vs. Secretary, Works Dept., 1998 92) SCC 89; M.K. Shah Engineers & Contractors Vs. State of M.P., 1999 (2) SCC 594 and Prasun Roy Vs. Calcuta MDA, 1987 (4) SCC 217. The first three cases are where objection is raised after making of the award. The last case is where objection is prior to the making of an award, based on allegation of bias of the arbitrator. On the other hand Mr. Nariman submits that the plea of acquiescence is not sustainable because estoppel and acquiescence do not confer jurisdiction reliance is on Karnal Improvement Trust Vs. Parkashwanti, 1995 (5) SCC 159 at 172 para 22. He further submits acquiescence cannot bring in a change of legal status relying on Sha Mulchand Co. Vs. Jawahar Mills Ltd., 1953 SCR 351. Having considered this submissions on this point, we feel, it is not necessary for us to adjudicate it as we have already concluded by interpreting the arbitration clause that the parties intended that their dispute be referred to the arbitral tribunal consisting of three arbitrators. We have also held that the conduct of the parties also indicates to the same effect which is also indicated by their conduct when they proceeded to appear before the three-member tribunal for a long period without raising any objection.

In view of the aforesaid finding, the ancillary question raised through letter dated 28th December, 1998 by the counsel for the appellant, regarding appointment of a fresh chairman after the appointment of Mr. Justice H.L. Anand has no merit for acceptance. If the Tribunal consisted of three member, as we have interpreted it so as to fall under sub-section (2) of Section 10, then even if one of the arbitrators nominated by the party is incapacitated or dies and is later substituted, would not give fresh right to such two arbitrators appointed by the parties, to appoint a fresh chairman. Appointed chairman by the said two arbitrators does not fall because of the substitution of one of the nominated arbitrator on account of death or incapacitation of one of the such nominated arbitrator. We may record here, Justice H.L. Anand opinion about the validity of the Arbitral Tribunal consisting of three members, in view of Section 10 (1), did require consideration. However, in view of the findings recorded by us this controversy stands settled.

For the aforesaid reasons, we have no hesitation to uphold the impugned judgment and order of the High Court which holds arbitral tribunal consists of three members Justice Avadh Behari Rohatgi to be the chairman along with Mr. Justice H.L. Anand (Retd.) and Mr. C.S. Aggarwal, Advocate as other two members. The High Court further rightly held while interpreting arbitration clause XVI contained in the aforesaid two agreements that it falls under sub-section (2) of Section 10. For the aforesaid reasons we dismiss the present appeal with costs on the parties.