SUPREME COURT OF INDIA

Narayan Prasad Lohia

Vs.

Nikunj Kumar Lohia

C.A.No.1382 of 2002

(G.B. Pattanaik, S.N. Phukan and S.N. Variava JJ.)

20.02.2002

JUDGMENT

S. N. Variava, J.

1. Leave granted.

2. This Appeal is against a Judgment dated 18th May, 2000. Briefly stated the facts are as follows:

> "The Appellant and the Respondents are family members who had disputes and differences in respect of the family businesses and properties. All the parties agreed to resolve their disputes and differences through one Mr. Pramod Kumar Khaitan. Subsequently, on 29th September 1996 they agreed that the said Mr. Pramod Kumar Khaitan and one Mr. Sardul Singh Jain resolve their disputes. For the purposes of this Order we are not deciding whether these two persons acted as Arbitrators or Mediators. That is a matter of contention between the parties which we are, at present, not called upon to decide. For the purposes of this order we are presuming that the parties had agreed to the Arbitration of these two persons. The parties made their respective claims before these two persons. All parties participated in the proceedings. On 6th October, 1996 an Award came to be passed by the said Mr. Pramod Kumar Khaitan and Mr. Sardul Singh Jain."

3. On 22nd December, 1997 the 1st Respondent filed an Application in the Calcutta High Court for setting aside the Award dated 6th October, 1996. On 17th January, 1998 the 2nd Respondent filed an Application for setting aside this Award. One of the grounds, in both these applications, was that the Arbitration was by two Arbitrators whereas under the *Arbitration and Conciliation Act, 1996* (hereinafter called the said Act) there cannot be an even number of arbitrators. It was contended that an arbitration by two arbitrators was against the statutory provision of the said Act and therefore void and invalid. It was contended that consequently the Award was unenforceable and not binding on the parties. These contentions found favour with a single Judge of the Calcutta High Court who set aside

the Award on 17th November, 1998. On 18th May, 2000 the Appeal was also dismissed. Hence this Appeal to this Court.

4. When this matter reached hearing on 16th January, 2000, the following Order has been passed by this Court:

> " Substitution applications are allowed.
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> A similar question, as is involved in this case, came up before a Bench of this Court in the case of *Dodsal Private Ltd. vs. Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi*[1]. In that case this Court felt that the question whether a mandatory provision of the Arbitration Act can at all be waived requires consideration by a larger Bench in view of an earlier judgment of this Court in *Waverly Jute Mills Co. Ltd. vs. Raymon and Co. (India) P. Ltd.*[2]. In the said view of the matter the Bench referred the question to a larger Bench of this Court. It is now noticed that the said Constitution Bench, which was seized of the referred case, did not decide that issue as could be seen from its decision dated 19th July, 1996 in *Dodsal Private Ltd. vs. Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi Civil Appeal Nos. 2372-2374 of 1987*[3] , but decided the issue on other grounds.
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> Since that question has not yet been decided and question involved is an important question of law likely to arise in future cases, we feel it appropriate that this issue should be decided by larger Bench, of at least three Hon'ble Judges and hence, refer the petitions, namely, SLP (C) 12384 and 13123 of 2000 to a Bench of three Hon'ble Judges.
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> Accordingly, the Registry is directed to place the papers before Hon'ble the Chief Justice for suitable orders."

5. Accordingly, this matter is before this Bench. At this stage we are only deciding the question of law referred i.e. whether a mandatory provision of the said Act can be waived by the parties.

6. It would be appropriate to set out, at this stage, the relevant provisions of the said Act. Sections 4, 5, 10, 11, 16 and 34 read as follows:

> "4. Waiver of right to object.- A party who knows that –
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> (a) any provision of this Part from which the parties may derogate, or
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> (b) any requirement under the arbitration agreement,
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> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided

for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

10. Number of arbitrators.- (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

11. Appointment of arbitrators. –

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and –

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to –

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub- section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12)(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice " in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

16. Competence of arbitral tribunal to rule on its jurisdiction.-

"(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

34. Application for setting aside arbitral award.-

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub- section (3).

(2) An arbitral award may be set aside by the court only if –

(a) the party making the application furnishes proof that –

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

or

(b) the court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India."

17. The said Act was enacted to consolidate and amend the law relating to domestic and international commercial arbitration and for matters connected therewith and incidental thereto. One of the objects of the said Act is to minimise the role of Courts in the arbitration process. It is with this object in mind that Section 5 has been provided. Judicial authorities should not interfere except where so provided in the Act. Further Section 34 categorically provides that the award can be set aside by the Court only on the grounds mentioned therein. Therefore one of the aspects which would have to be considered is whether the 1st and 2nd Respondents case fell within any of the categories provided under Section 34.

18. Mr. Venugopal submits that Section 10 of the said Act is a mandatory provision which cannot be derogated. He points out that even though the parties are free to determine the number of arbitrators such number cannot be an even number. He submits that any agreement which permits the parties to appoint an even number of arbitrators would be contrary to this mandatory provision of the said Act. He submits that such an agreement would be invalid and void as the Arbitral Tribunal would not have been validly constituted. He submits that composition of the arbitral tribunal itself being invalid the proceedings and the Award, even if one be passed, would be invalid and unenforceable.

19. Mr. Venugopal submits that Section 4 of the said Act would only apply provided:

"(a) a party knew that he could derogate from any provision of this Part or

(b) a party knew that any requirement under the arbitration agreement had not been complied with and the party still proceeded with the arbitration. He submits that, this case does not fall under category (b) above. He submits that even category (a) would not apply because waiver can only be in respect of a matter from which a party could derogate. He submits that in respect of provisions which are non-derogable there can be no waiver. He submits that Section 10 is a provision from which a party cannot derogate. He submits that matters from which a party cannot derogate are those provided in Sections 4, 8, 9, 10, 11(4) and (6), 12, 13(4), 16(2), (3) and (5), 22(4), 27, 31, 32, 33, 34(2) and (4), 35, 36, 37, 38(1) and 43(3). He submits that as against this matters from which a party can derogate are those provided under Section 11(2), 19(1) and (2), 20(1) and (2), 22(1), 24, 25, 26 and 31(3). Mr. Venugopal submits that Section 10 compulsorily precludes appointment of an even number of Arbitrators in public interest and as a matter of public policy. He submits that if there are an even number of Arbitrators there is a high possibility that, at the end of the arbitration, they may differ. He submits that in such a case parties would then be left remediless and would have to start litigation or a fresh arbitration all over again. He submits that this would result in a collosal waste of time, money and energy. He submits that to avoid such waste of time, money and energy the Legislature has, in public policy, provided in a non-derogatory manner, that the number of arbitrators shall not be even."

20. He submits Section 16 does not provide for any challenge to the composition of the arbitral tribunal. He submits that a reading of Section 34(2)(a)(v) shows that the Legislature contemplated a challenge to the composition of the arbitral tribunal. He submits that significantly Section 16 does not provide for a challenge to the composition of the arbitral tribunal. He submits that an invalid composition of the arbitral tribunal goes to the root of the jurisdiction. He submits that an arbitral tribunal which has been illegal constituted would have no jurisdiction or power to decide on the question of its inherent lack of jurisdiction. He submits that Section 16 does not cover and would not govern such a challenge. Mr. Venugopal submits that the High Court was right in setting aside the Award on this ground. He submits that this Court should not interfere.

21. On the other hand, Mr. Dwivedi submits that Section 4, 10 and 16 are part of the integrated scheme provided in the said Act. He submits that the provisions have to be read in a manner whereby there is no conflict between any of them or by which any provision is not rendered nugetory. He submits that undoubtedly Section 10 provides that there should not be an even number of arbitrators. He points out that Section 10 starts with the words " "The parties are free to determine the number of arbitrators". He submits that arbitration is a matter of agreement between the parties. He submits that generally, in an arbitration, the parties are free to determine the number of arbitrators and the procedure. Parties could agree upon an even number of arbitrators. He submits that even after a party has agreed to an even number of arbitrators he can still object to the composition of the arbitral tribunal. He submits that such objection must be taken before the arbitral tribunal not later than the date

of submission of the statement of defence. He points out that under Section 16(2) such an objection can be taken even though the parties had appointed or participated in the appointment of the arbitrator. He submits that the wording of Section 16 are wide enough to cover even an objection to the composition of the arbitral tribunal. He submits that a conjoint reading of Sections 4, 10 and 16 indicates that if an objection is not taken before the arbitral tribunal, within the time laid down under Section 16(2), then the party would be deemed to have waived its right to object by virtue of Section 4. He submits that an award could be challenged on ground of composition of the arbitral tribunal only provided that an objection is first taken before the arbitral tribunal under Section 16 and the arbitral tribunal has rejected such an objection.

22. Mr. Dwivedi submits that Section 34 (2)(a)(v) does not permit the setting aside of an award on the ground of composition of the arbitral tribunal if the composition was in accordance with the agreement of the parties. He submits that Section 34(2)(a)(v) would come into play only if the composition was not in accordance with the agreement of the parties. He points out that in this case the composition is in accordance with the agreement of the parties and, therefore, the award cannot be set aside on this ground. Mr. Dwivedi submits that even presuming that Section 34(2)(a)(v) permitted a challenge on the ground of composition of the arbitral tribunal, still the Court may refuse to set aside the award. He points out that the words used, in Section 34, are "an arbitral award may be set aside by the court". He submits that in this case the Respondents had entered into such an agreement. He submits that they had participated in the arbitral proceedings without any objection. He submits that there could be no law which permits a party who has so appointed and participated to then resile and seek to have the award set aside. He submits that it would be against public policy to permit waste of time, money and energy spent in the arbitration by having the award set aside. He submits that it would also be inequitable to permit such a party to challenge the award on this ground. He submits that the impugned Orders of the High Court cannot be sustained and require to be set aside.

23. We have heard the parties at length. We have considered the submissions. Undoubtedly, Sections 10 provides that the number of arbitrators shall not be an even number. The question still remains whether Section 10 is a non-derogable provision. In our view the answer to this question would depend on question as to whether, under the said Act, a party has a right to object to the composition of the arbitral tribunal, if such composition is not in accordance with the said Act and if so at what stage. It must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties.

24. In the said Act, provisions have been made in Sections 12, 13, and 16 for challenging the competence, impartiality and jurisdiction. Such challenge must however be before the arbitral tribunal itself. It has been held by a Constitution Bench of this Court, in the case of Konkan Railway Corporation Ltd. vs. Rani Construction Pvt. Ltd. (Judgment dated 30th January, 2002 in Civil Appeal Nos. 5880- 5889 of 1997) that Section 16 enables the arbitral tribunal to rule on its own jurisdiction. It has been held that under Section 16 the arbitral tribunal can rule on any objection with respect to existence or validity of the arbitration

agreement. It is held that the arbitral tribunals authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, under Section 16, a party cannot challenge the composition of the arbitral tribunal before the arbitral tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if he so choose, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the arbitral tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

25. We are also unable to accept Mr. Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non- derogable. Even though the said Act is now an integrated law on the subject of Arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the Legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the Agreement of the parties is invalid. The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed. Thus we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to Arbitration of two persons and then participates in the proceedings. On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the Award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

Even otherwise, under the said Act the grounds of challenge to an arbitral award are very limited. Now an award can be set aside only on a ground of challenge under Sections 12, 13 and 16 provided such a challenge is first raised before the arbitral tribunal and has been rejected by the arbitral tribunal. The only other provision is Section 34 of the said Act. The only ground, which could be pressed in service by Mr. Venugopal, is that provided under Section 34(2)(a)(v). Section 34(2)(a)(v) has been extracted hereinabove. According to Mr. Venugopal if the composition of the arbitral tribunal or the arbitral procedure, even though it may be in accordance with the agreement of the parties, is in conflict with a provision of the Act from which the parties cannot derogate, then the party is entitled to have the award set aside. He submits that the words "unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate" as well as the words "failing such agreement" show that an award can be set aside if the agreement is in conflict with a provision of Part I of the said Act or if there is no agreement which is in consonance with the provisions of Part I of the said Act. In other words, according to Mr. Venugopal, even if the composition or procedure is in accordance with the agreement of the parties an award can be set aside if the composition or procedure is in conflict with the provisions of Part I of the said Act. According to Mr. Venugopal the words "failing such agreement" do not mean that there should be no agreement in respect of the composition of the tribunal or the arbitral procedure. According to Mr. Venugopal, an agreement in respect of the composition of the arbitral tribunal or arbitral proceudre which is not in consonance with a provision of Part I of the said Act would be invalid in law and therefore would be covered by the phrase "failing such agreement". He submits that the words "failing such agreement" mean failing an agreement which is in consonance with a provision of Part I of the said Act. He submits that Section 34(2)(a)(v) entitles the Respondents to challenge the award and have it set aside.

26. In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with the provisions of this Act" would only arise if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I which the parties cannot derogate. In other words, even if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the arbitral tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure. If there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure and the

composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision.

27. Respondents 1 and 2 not having raised any objection to the composition of the arbitral tribunal, as provided in Section 16, they must be deemed to have waived their right to object. For the reasons aforesaid, the Judgments of the learned single Judge and the Division Bench on the question of law discussed cannot be sustained. They are accordingly set aside.

28. The Appeal be now placed before a Bench of two Judges for consideration of other aspects which are stated to have been raised.

[1]*(1996) 2 SCC 576*
[2]*(1963) 3 SCR 209*
[3]*1996 (7) SCALE (SP) 1*