

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : February 27, 2008
DATE OF DECISION : April 1, 2008

+ FAO(OS) 58/2002 and CM No.132/2002

S.N. MALHOTRA & SONS Appellant

Through: Mr. Kirti Uppal and Mr. Sanjeet
Singh, Advocates

versus

AIRPORT AUTHORITY OF INDIA & ORS. Respondents

Through: Mr. S.K. Chandwani and Mr. N.S.
Rahman, Advocates

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. Challenge raised in this appeal is to the judgment and order of the learned Single Judge dated December 12, 2001 passed in OMP No.1/2000 and 2/2000.
2. An agreement No.36/EE(C)/AMD-II/T-II/96-97 was entered into between the respondent herein (Airport Authority of India) and the appellant on 18.09.1996 pertaining to the work of special repairs to the terminal building at IGI Airport, Terminal-II. The amount settled was negotiated at Rs.9,01,797/- for certain renovations of a particular area in the aforesaid terminal building. The work was to commence on 31.08.1996 and it had to be completed on

28.02.1997. After the final bill had been prepared, the appellant set up certain claims vide letter dated 30th June, 1998. Disputes arose regarding the aforesaid claims and certain counter-claims were raised by the respondent. By his letter dated 06.11.1998, the appellant invoked the arbitration clause and requested for reference of the said disputes to arbitration. Respondent No.2, Chief Engineer (Retd.), CPWD was appointed as sole arbitrator to decide and make his award regarding the claims raised by the appellant Contractor and the counter-claims by the respondent Airport Authority of India subject, however, to their admissibility under Clause 25 of the aforesaid agreement. The learned arbitrator submitted his award on 30th September, 1999, which was assailed before the learned Single Judge by both the appellant and the respondent by filing petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Act").

3. The learned Single Judge after noticing that the primary issue involved is as to whether the respondent Airport Authority of India can raise the plea that the arbitrator acted without jurisdiction when such a plea was not taken before the arbitrator, took note of the contention of the appellant that in view of the clear language of Section 16 of the Act, the respondent was now debarred from raising such a plea. After referring to the relevant provisions of the Act, however, the learned Single Judge came to the conclusion that the appellant could be permitted to challenge the award and

raise the aforesaid plea after the conclusion of the arbitral proceedings and was not debarred from doing so. Having come to the aforesaid conclusion, the learned Single Judge went on to hold that under Clause 25 of the Agreement, which contained the arbitration clause, certain disputes were taken out of the jurisdiction of the arbitrator, as was clear from the use of the opening words of Clause 25: "Except where otherwise provided in the contract". In other words, certain disputes were to be treated as excepted matters. The dispute under Clause 2 of the Agreement [which stipulated that time was of the essence of the contract and laid down that the contractor shall pay as compensation an amount equal to 1% or such smaller amount as the Chief Engineer may decide on the amount of the estimated cost of the whole work as shown in the tender for everyday that the work remains uncommenced, or unfinished, after the proper dates], was one such dispute. On this premise, the learned Single Judge held that out of the total amount, the respondent would not be liable to pay a sum of Rs.34,664/- in OMP No.1/2000 and for similar reasons would not be liable to pay Rs.35,159/- in OMP No.2/2000.

4. We have heard the learned counsel for the parties and scrutinized the records. The principal contention of Mr. Kirti Uppal, the learned counsel for the appellant is that the judgment of the Single Judge is unsustainable as the award cannot be challenged for want of jurisdiction of the arbitral tribunal when no objection to the jurisdiction of the arbitral tribunal was taken under Section 16 of

the Act before the arbitrator. He further contends that in such circumstances, the respondent must be deemed to have waived its right to object and reference in this context is made by him to a recent judgment of the Supreme Court in ***Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr. AIR 2007 SC 817***. He also contends that it would be inequitable and indeed unjust to allow the respondent to raise objection to the jurisdiction of the arbitrator after the passing of the award, when no such objection or plea was sought to be raised at the relevant time.

5. Learned counsel for the respondent, on the contrary, sought to urge that the respondent was well within its rights to insist upon adherence to the agreement between the parties. He submits that it is trite law that the arbitrator is to arbitrate within the terms of the contract. He has no powers apart from those which the parties have given him under the contract. If he has travelled beyond the terms of the contract, he would be acting without jurisdiction whereas if he has remained within the parameters of the contract, his award cannot be questioned. Merely because the respondent did not challenge the action of the arbitrator in exceeding his jurisdiction does not mean that he cannot do so at a subsequent stage and, as a matter of fact, under Section 34(2)(iv) of the Act, it is always open to it to do so. The counsel further contends, relying upon the Constitution Bench judgment of the Supreme Court in ***Waverly Jute Mills Co. Ltd. vs. Raymon & Co. (India) (P) Ltd. AIR 1963 SC 90***, that it is well established that consent cannot confer

jurisdiction and this defect is not cured by the appearance of the parties in the proceedings, even if that is without protest.

6. Indubitably, the sole issue which arises for consideration in this appeal is as to whether any objection to the jurisdiction of the arbitrator as contained in Section 16, not raised before the arbitrator, could be permitted to be raised for the first time under Section 34.

7. For the purpose of addressing the aforesaid issue, it is deemed expedient to reproduce the provisions of Section 16 of the Act. The aforesaid Section is based on Article 16 of the United Nations Commission on International Trade Law (UNCITRAL) which adopted the Model Law on International Commercial Arbitration. Sub-Section (1) of Section 16 corresponds to Sub-Clause (1) of Article 16. Likewise, sub-Sections 2 and 3 of Section 16 of the Act correspond more or less to sub-clause 2 of Article 16 of the UNCITRAL Model Law. The preamble to the Act shows that this is so on account of the fact that it was considered “expedient to make law respecting arbitration and conciliation, taking into account the aforesaid model law and rules”. Section 16 reads as under:

“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."

8. A bare perusal of Section 16(1) of the Act makes it abundantly clear that the arbitral tribunal has now been rendered competent by the legislature to rule on its own jurisdiction, including ruling on any objections with regard to the existence or validity of the arbitration agreement.

9. Sub-Section (2) to Sub-Section (6) of Section 16 are apposite for the purposes of deciding the present controversy and hence are being analysed in depth hereinafter. While sub-section (2) relates to a plea that the arbitral tribunal does not have jurisdiction, sub-section (3) relates to a plea that the arbitral tribunal has exceeded its jurisdiction. Both sub-section (2) and sub-section (3) categorically

spell out the stage at which such a plea can be raised. Thus, sub-section (2) says that a plea that the arbitral tribunal does not have jurisdiction shall be raised at the earliest, i.e., **not later than the submission of the statement of defence**; and it further says that a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. Plea under sub-section (3) that the arbitral tribunal is exceeding the scope of its jurisdiction shall be raised during the arbitral proceedings and that too, **as soon as the matter alleged to be beyond the scope of its authority is raised before the arbitral tribunal**. Both the aforesaid sub-sections thereby expressly lay down the precise point of time **during the arbitral proceedings** at which the plea **shall** be raised before the arbitral tribunal.

10. The limitation of time imposed by sub-section (2) and sub-section (3), however, is relaxed somewhat by the provisions of sub-section (4) of Section 16, which is really in the nature of a proviso to sub-sections (2) and (3). Sub-Section (4) stipulates that 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**.

11. Sub-Section (5) and sub-section (6) lay down the course of action to be followed by the arbitral tribunal upon a plea being raised either under sub-section (2) or under sub-section (3). Under sub-section (5), the arbitral tribunal has the obligation and duty to **decide** on a plea referred to in sub-section (2) or sub-section (3) and, where it takes a decision rejecting the plea, the arbitral

tribunal shall continue with the arbitral proceedings and make an award. Sub-section (6) states that a party aggrieved by **such an arbitral award** may make an application for setting aside **such an arbitral award** in accordance with Section 34.

12. On an analysis of the provisions of Section 16(1) to (6), in our view, it is clear that the legislative intent was that a plea as to jurisdiction of the arbitral tribunal or as to exceeding of its authority must be raised at the threshold and cannot be entertained at a subsequent stage. In other words, a plea in terms of sub-section (2) or sub-section (3) of Section 16 of the Act not having been taken at the initial stage, must be deemed to be waived. Indications to show that the statutory mandate is that the plea should be raised at the earliest as culled out by us are set out hereunder:

- (i) The use of the words shall be raised **not later than the submission of the statement of defence** in sub-section (2) of Section 16.
- (ii) The use of the words “**as soon as the matter alleged to be beyond the scope of its authority is raised** during the arbitral proceedings” in sub-section (3) of Section 16.
- (iii) The discretion given to the arbitral tribunal under sub-section (4) of Section 16 to “**admit a later plea**” [in either of the cases referred to in sub-section (2) or Sub-Section (3)] “**if it considers the delay justified.**” In other words, the arbitral tribunal must, after examining the matter, rule that

the delay in raising objection in terms of sub-section (2) or sub-section (3) is justified. If the delay is not justified in the view of the arbitral tribunal, the arbitral tribunal will be at liberty not to admit the objection with regard to its jurisdiction and/or the scope of its authority, by passing an order refusing to admit the plea on the ground that there was unjustified delay.

- (iv) A ruling of the arbitral tribunal on the acceptance or rejection of the objection to its jurisdiction/competency is mandatory as is evident from a reading of sub-section (5), and particularly by the use of the words “shall decide on a plea referred to in sub-section (2) or sub-section (3)”.
- (v) Where the arbitral tribunal rejects the plea and proceeds to make an award, the aggrieved party under sub-section (6) “may make an application for setting aside **such an arbitral award**” in accordance with Section 34. The use of words “such an arbitral award” are of significance. The legislative intent quite clearly is that the arbitrator will rule on the objection raised or the plea raised before the Arbitral Tribunal in terms of sub-section (2) or sub-section (3) and it is only “**such an arbitral award**” which can be set aside in accordance with Section 34. The words “**such an arbitral award**” thus have direct reference to an award rejecting the plea of want

of jurisdiction of the arbitral tribunal or want of competency of the arbitral tribunal to deal with the matter. “**Such an award**” can only exist if the plea is raised before the arbitrator himself and not at any subsequent stage. The clear intent of the legislature thus appears to be that a plea subsequently raised as to the competence of the arbitral tribunal cannot be entertained.

13. In **SBP & Co. vs. Patel Engineering Ltd. and Anr.** reported in **(2005) 8 SCC 618**, a seven Judge Bench of the Supreme Court while noticing that a person aggrieved by the rejection of his objection by the Tribunal on its jurisdiction or the other matters referred to in that Section has to wait until the award is made to challenge that decision in an appeal against the Arbitral Tribunal in accordance with Section 34 of the Act, further noticed that an acceptance of the objection to jurisdiction or authority could be challenged then and there under Section 37 of the Act. In paragraph 12 of its judgment, the Supreme Court held as follows:

“12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting

to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that 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. **When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled.** Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act.....
”

14. Sections 34 and 37, which are relevant for the present purpose, are extracted below:

“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 furnished 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.

Explanation.— Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on

which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

37. Appealable orders.—(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

15. A conjoint reading of the aforesaid sections yields the following result. If the plea raised before the arbitral tribunal in terms of sub-section (2) or sub-section (3) of Section 16 is rejected by the arbitral tribunal and the arbitral tribunal proceeds to make an award, such an award can be challenged under Section 34 and an

appeal from the said order shall lie under Section 37(1)(b) of the Act. In other words, an appeal from an order setting aside or refusing to set aside an arbitral award under Section 34 passed by the Single Judge shall lie to the Court authorized by law to hear appeals. In case, however, the arbitral tribunal accepts the objection with regard to its jurisdiction, an appeal shall lie to a Court therefrom under Section 37(2)(a) of the Act. But as clarified by sub-section (3) of Section 37, no second appeal shall lie from an order passed under Section 37(2)(a) (see **Cref Finance Ltd. Vs. Puri Construction Ltd. AIR 2001 Delhi 414**).

16. In a case where objection to the jurisdiction of the arbitral tribunal is not raised at all, Section 37(2)(a) will not be attracted at all. Insofar as Section 37(1)(b) is concerned, as held by the Constitution Bench in the case of **Patel Engineering Ltd. (supra)**, an appeal against the final award will lie only when the objection to jurisdiction is overruled, meaning thereby that if no objection is raised at all before the arbitral tribunal and there is no decision of the arbitral tribunal as to its jurisdiction, there is no question of an appeal under Section 34 on that ground, i.e. on the ground of jurisdiction.

17. We are fortified in coming to the above conclusion by the provisions of Section 4 of the Act, which read as under:

“4. Waiver of right to object.– A party who knows that–

(a) any provision of this Part from which the

*parties may derogate, or
(b) any requirement under the arbitration
agreement,
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."*

18. Section 4 of the Act thus deals with waiver of the right to object, postulating four pre-conditions for waiver:

- (i) Non-compliance of a provision of the statute from which the parties may derogate or non-compliance with any requirement under the arbitration agreement.
- (ii) Knowledge of such non-compliance by the opposite party.
- (iii) Proceeding with the arbitration by the party who has knowledge without stating his objection.
- (iv) Stating of objection without undue delay or if a time limit is provided for stating that objection, such objection must be stated within that period of time and failure to do so shall be deemed to be waiver of the right to object.

19. A conjoint reading of Section 4 and Section 16 yields the following result:

- (i) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence [Section 16(2)].

- (ii) A plea that the arbitral tribunal is exceeding the scope of its jurisdiction shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings [sub-section (3)].
- (iii) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or in sub-section (3) [Section 16(5)].
- (iv) The arbitral tribunal if it takes a decision rejecting the plea shall continue with the arbitral proceedings and make an arbitral award, in which case the party aggrieved by such an arbitral award may apply for setting aside the same in accordance with Section 34 read with Section 16(6).
- (v) A party who knows that (a) any provision of the statute from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with by the opposite party, and yet proceeds with the arbitration without stating his objection to such non-compliance, without undue delay, shall be deemed to have waived his right to so object. (Section 4).

20. Thus, there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights **[Associated Hotels of India Ltd. vs. S.B. Sardar Ranjit Singh (1968) 2 SCR 548]**. The question, however, remains as to what constitutes waiver. In its legally accepted sense, a waiver is the

voluntary relinquishment or surrender of some known right or privilege. It is an agreement to release or not to assert a right and in that sense waiver is contractual (***Mademsetty Satyanarayana vs. G. Yelloji Rao (1965) 2 SCR 221***). In India, however, the waiver of a right has gained statutory acceptance in Section 115 of the Evidence Act of 1872. In the Arbitration Act, 1940, no statutory recognition was accorded to the plea of waiver, but in the Arbitration and Conciliation Act, 1996 a specific statutory provision dealing with waiver has been couched by the legislature. The rationale behind the enactment of the aforesaid section, which is based on Section 4 of the UNCITRAL Model Laws, appears to us to be the inequity of a party participating in the arbitral proceedings without raising any objection or demur, subsequently on finding that the award has been given in favour of the opposite party, raising the plea of lack of jurisdiction of the arbitral tribunal itself. To put it differently, can a party who with open eyes, chooses to take the chance of an award in its favour be allowed to resile from the stand adopted by it and render the entire arbitral proceeding futile.

21. A similar question came up before a Bench of the Supreme Court in the case of ***Dodsal (P) Ltd. vs. Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi (2001) 9 SCC 339***. In that case, the Court felt that whether a mandatory provision of the Arbitration Act can at all be waived required consideration by a larger Bench in view of the earlier judgment of the Supreme Court in ***Waverly Jute Mills Co. Ltd. vs. Raymon & Co. (India) (P) Ltd.*** reported

in **(1963) 3 SCR 209**. Speaking for the Bench, Justice B.L. Hansaria (as His Lordship then was) gave the following reasoning: (SCC pp.577-79, paras 1-8)

“1. An absolutely inequitable stand taken by the respondent (Delhi Electric Supply Undertaking) has led us to examine some fundamental questions of law. We have opened with this observation inasmuch as the respondent has challenged the award of the arbitrators made in favour of the appellant on the ground that the contract, which contained arbitration agreement, is void, because of which there is no agreement to refer the dispute to arbitration; and so, the arbitrators had no jurisdiction to pass the impugned award. Such a stand flies on the face of the respondent inasmuch as of the two arbitrators, one, namely Shri K.L. Vijh, had been appointed by the respondent itself. But as the award ultimately went in favour of the appellant, it raised the question of jurisdiction. We have no doubt in our mind that such a stand is inequitable, indeed highly inequitable. Question, however, is whether the law permits such a question to be raised.

2. The High Court accepted the contention that the contract was void inasmuch as Sections 201 and 203 of the Delhi Municipal Corporation Act read with Bye-law 3(1)(a) were violated. Dr Singhvi, appearing for the respondent has urged that the contract being void, along with it fell the arbitration agreement contained in the contract, because of which the arbitrators had no jurisdiction to pass the award in question.

3. It is further submitted that in such a case appearance of the respondents in the proceeding, i.e., its acquiescence, would not alter the situation in view of what has been held by a Constitution Bench of this Court in **Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd.** in para 21 of which it was stated that:

‘... an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their

duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction.'

4. The aforesaid stand brings to the fore the following fundamental questions of law:

(1) Whether the present was a case of contract being void or voidable?

(2) Whether a mandatory provision cannot at all be waived?

5. As we are proposing to refer the matter to a Constitution Bench, we may not dilate on the questions, except stating that a perusal of **Administrative Law by Wade and Forsyth (7th Edn., pp.339 to 344)** would show that in *Ridge v. Baldwin* some of the dissenting Judges of the House of Lords suggested that even ultra vires action might be merely voidable. Reference has also been made to what was held in **Anisminic Ltd. v. Foreign Compensation Commission** which has dealt with the question whether there are degrees of nullity. As to the question of waiver of a mandatory provision, we may refer to a recent decision of this Court in **Krishan Lal v. State of J&K** in which this aspect has been dealt with in paras 16 to 25. It has been pointed out that even a mandatory provision can be waived, if the provision be intended for the benefit of the person concerned, as distinguished from one which serves 'an important purpose' in which case there would be no waiver.

6. In this connection we may also refer to the provision contained in Section 4 of the Arbitration and Conciliation Ordinance, 1996, which is on the subject of 'waiver of right to object'. It has laid down that a party who knows (a) any provision of this part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

7. Another legal aspect is also involved in the present case. The same is whether an arbitration agreement can be read dehors what was contained in the contract. The respondent having itself appointed one of the arbitrators in writing, an examinable question arises whether this act cannot be said to constitute an implied agreement to refer the matter to arbitration. It may be pointed out that Section 7(2) of the aforesaid Ordinance recognises a separate agreement also.

8. Though the aforesaid questions were not examined in *Waverly Jute Mills* case and it would have been open to us to decide the same ourselves, we do not propose to do so, lest it be thought that we are overreaching the decision by a larger Bench. Instead, we desire that a five-Judge Bench — *Waverly* being a rendering by such a Bench — should decide whether in the context of the legal aspects mentioned by us above, it is open to a person like the respondent to raise the question of lack of jurisdiction of the arbitrator(s) and thereby deny the fruits (to the other side) of a long-fought-and-won battle, involving huge expenditure of time, money and energy, and thereby cause serious damage to equity also, which is an equally important facet to be borne in mind by the courts when seized with deciding a *lis* between parties."

22. In the said view of the matter, the referred matter came up before a five-Judge Bench for decision. In the said decision, reported in ***Dodsal (P) Ltd. vs. Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi (2001) 9 SCC 339***, the Constitution Bench, however, keeping in view the circumstances and long litigation of the case, held that it was not necessary to go into the referred question and decided the case on other grounds, leaving the question of law referred to it open to be decided in some other appropriate proceedings.

23. A similar question against cropped up in the case of ***Narayan***

Prasad Lohia vs. Nikunj Kumar Lohia and Ors. (2002) 3 SCC 572

before a two Judge Bench, wherein the following order was passed:

"Substitution applications are allowed.

A similar question, as is involved in this case, came up before a Bench of this Court in the case of Dodsai (P) Ltd. v. Delhi Electric Supply Undertaking of the Municipal Corpn. of Delhi. 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. v. Raymon and Co. (India) (P) Ltd. 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 19-7-1996 in Dodsai (P) Ltd. v. Delhi Electric Supply Undertaking of the Municipal Corpn. of Delhi but decided the issue on other grounds.

Since that question has not yet been decided and the 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 a larger Bench, of at least three Hon'ble Judges and hence, refer the petitions, namely, SLPs (C) Nos. 12384 and 13123 of 2000 to a Bench of three Hon'ble Judges.

Accordingly, the Registry is directed to place the papers before Hon'ble the Chief Justice for suitable orders."

24. Accordingly, the aforesaid matter was placed before a three-Judge Bench which proceeded to decide the question of law referred, i.e., whether a mandatory provision of the Arbitration and Conciliation Act can be waived by the parties. The said legal

question arose in the context of Section 10 of the Act. The appellant and the respondent therein were family members who had disputes and differences in respect of the family businesses and properties. The parties made their respective claims before two persons, presumed by the Court to be arbitrators. All the parties participated in the proceedings and eventually an award came to be passed by the aforesaid two persons. The first and second respondents filed applications for setting aside the said award. One of the grounds, in both the said applications, was that the arbitration was by two arbitrators whereas under the Arbitration and Conciliation Act, 1996, there cannot be an even number of arbitrators. It was contended that arbitration by two arbitrators was against the statutory provision of the said Act (Section 10) and, therefore, void and invalid. It was also submitted that the provisions of sub-clause (b) of Section 4 of the Act were not applicable to the case and even sub-clause (a) would not apply as waiver can only be in respect of a matter from which a party could derogate. The argument was that Section 10 of the Act was a mandatory provision which cannot be derogated and in respect of provisions which are non-derogable there can be no waiver. It was contended 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). As against this, matters from which a party can derogate are those provided under Sections 11(2), 19(1) and (2), 20(1) and (2), 22(1), 24, 25, 26

and 31(3).

25. Repelling the aforesaid contentions, the Supreme Court observed as follows: (SCC, pp.582-583, paras 14, 15 and 16)

“14. We have heard the parties at length. We have considered the submissions. Undoubtedly, Section 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 the 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.

15. 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.

16. It has been held by a Constitution Bench of this Court, in the case of Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. 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 Tribunal's 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 it so chooses, 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."**

26. The Court further held as follows: (SCC, p.585)

"19.....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.

20. 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."

27. Applying the test laid down in the aforesaid case and the statutory provisions referred to hereinabove, and also keeping in mind the fact that the respondent at no stage of the arbitral proceedings chose to raise a challenge to the assumption of jurisdiction by the arbitral tribunal on a matter falling in the category

of "excepted matters" under clause 25 of the agreement between the parties, we are of the considered view that the respondent is now debarred from raising such a plea for the first time under Section 34 of the Act. A conjoint reading of Section 16(2) and Section 4 shows that an objection to the arbitrator having exceeded his jurisdiction falls in the category of case covered by clause (b) of Section 4. The respondent knew that in respect of the non-compliance of any requirement under the arbitration agreement, it was free to raise challenge. It chose not to do so. As laid down in **Narayan Prasad Lohia (supra)**, if a party chooses not to so object there will be deemed waiver under Section 4. **Lohia's** case pertained to a statutory prohibition. In the present case, it is the requirement of a clause in an agreement which has not been adhered to. The respondent was all along aware of this non-compliance and participated in the proceedings without demur. The award in respect of the same is not to its liking. The challenge now sought to be raised by the respondent flies in the face of its tacit approval of the matter being dealt with by the arbitrator. Allowing the respondent to resile from his position at this stage without its laying any foundation for the challenge when it was free to raise the same, would be inequitable to say the least.

28. In **Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr. AIR 2007 SC 817** relied upon by the counsel for the appellant, the Supreme Court while determining the issue as to whether the appellant Jal Nigam could be allowed to raise the contention, on

the facts and circumstances of the case, that Clause 29 of the agreement is not an arbitration clause and due to want of jurisdiction of the Arbitral Tribunal to adjudicate upon the claims made by the contractor, the award dated 25th June, 2000 published on 14.11.2000 was a nullity, held that the Jal Nigam having submitted to the jurisdiction of the Arbitral Tribunal and having raised no objection to the competence of the Arbitral Tribunal cannot be allowed to contend that Clause 29 of the contract did not constitute an arbitration agreement by filing a petition under Section 37(1)(b) of the Act. Paragraph 9, which contains the ratio of the said decision, is as follows:

"9. We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jal Nigam before the Arbitrator. The said plea was not advanced before the civil court in Arbitration Case No.1 of 2001. On the contrary, both the courts below on facts have found that Jal Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jal Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the Arbitrator. It gave consent to the appointment of the Chief Engineer as an Arbitrator. It filed its written statements to the additional claims made by the contractor. The executive engineer who appeared on behalf of Jal Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the arbitral tribunal. He did not call upon the arbitral tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the arbitral tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10.9.99 passed in C.M.P. No.26/99. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jal Nigam cannot be now allowed to contend that Clause 29

of the Contract did not constitute an arbitration agreement."

29. In our considered opinion, the ratio of the above decision rendered in the case of ***Krishna Bhagya Jal Nigam Ltd. (supra)*** squarely applies to the facts of the present case. Learned counsel for the respondents was unable to rebut the contention of the counsel for the appellant that no plea or objection in terms of Sub-Section (2) or Sub-Section (3) of Section 16 of the Act was raised by the respondents before the Arbitral Tribunal and, on the contrary, he fairly conceded that the plea was raised for the first time before the Court.

30. We have also gone through the reference letter dated 30.12.1998 and on perusal of the same, we find that though it was mentioned that the claims/disputes by the appellant and the counter-claims of respondent shall be subject to their admissibility under clause 25 of the Agreement, but no specific objection was taken to their admissibility before the learned arbitral tribunal. In terms of Section 16 of the Act, the respondents were required to specifically object to the jurisdiction of the arbitral tribunal by filing written statement/reply to the claim petition of the appellants or otherwise during the arbitral proceedings. This, the respondents failed to raise. The respondents not having taken any objection to the jurisdiction of the arbitral tribunal before the arbitrator, thus the objection must be deemed to be waived.

31. To conclude, although ordinarily, we would have been inclined to hold that in so far as jurisdictional issues are concerned, the contours of Section 34 are wide enough to enable the Court to consider such issues though not raised before the arbitrator, apart from other issues. But in the teeth of the statutory provisions mandating time limits for the setting up of such pleas [Section 16(2), 16(3), 16(4)] and in the teeth of Section 4 of the Act and in view of the law laid by the Supreme Court, jurisdictional objections, in our view, cannot be permitted to be raised at a later point of time, even under Section 34. To hold otherwise, would be to render otiose the provisions of sub-sections (2) to (6) of Section 16 as well as Section 4 of the Act, and may even result in making a serious inroad into the provisions of Section 5 of the Act; which is aimed at cabining and confining judicial intervention in the arbitration process to the very minimum.

32. A cursory glance at the Act is sufficient to show that the salient feature of the Act of 1996 in juxtaposition to the Act of 1940 is the curb imposed on the extent of judicial intervention in the arbitration process. Section 5, which is poised next to Section 4 of the Act, reads as under:

“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.”

33. We, therefore, hold that the respondent must be deemed to

have waived any objection to the jurisdiction of the arbitral tribunal when it chose not to raise the plea now being raised by it, though it was fully aware of the terms of the agreement entered into between the parties. Section 34(iv) cannot come to the rescue of the respondent as the said section cannot be read in isolation and allowed to render otiose the provisions of Sections 4, 5 and 16 of the Act which, in a sense, are the high points of the Act. Any other interpretation of the aforesaid provisions of the statute would not only deprive the winning party of the fruit of its hard earned labour at the end of a long drawn out battle, but, in our considered opinion, would be opposed to public policy, as it would inevitably result in colossal waste of time, money and energy, all of which are necessarily expended in the arbitral process. This apart, it would frustrate the object of the Act itself viz., to provide for expeditious disposal of a dispute by recourse to arbitration.

34. In the result, we allow the appeals and set aside the judgment and order of the learned Single Judge dated December 12, 2001 passed in OMP No.1/2000 and 2/2000 and uphold the arbitration award dated 30.09.1999. FAO(OS) 58/2002 and CM No.132/2002 stand disposed of accordingly.

REVA KHETRAPAL, J

CHIEF JUSTICE

APRIL 1, 2008/km