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Through: Mr. Sanjay Parikh, Mr Abinash K Mishra, Mr Titin Sahni and Ms Mamta Saxena, Advocates

... Respondents

***CORAM :-***

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|----|-----------------------------------------------------------------------|----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not?                                | No |
| 3. | Whether the judgment should be reported in the Digest?                | No |

1. Petition under Section 34 of the Arbitration Act 1996 is preferred with respect to the arbitral award dated 2<sup>nd</sup> August, 2000 of the respondent No.1 arbitrator. Disputes and differences had arisen between the respondents No. 2 and 3 (Union of India & Controller of Stores of the respondent No.2, Northern Railway) and the petitioner out of the order dated 1<sup>st</sup> February, 1994 placed by the respondent Railways on the petitioner for delivery of goods of the total value of Rs 54,96,504/- with delivery period upto 1<sup>st</sup> March, 1994. Upon the failure of the petitioner to supply the entire quantity of goods inspite of extension of delivery period till 25<sup>th</sup> November, 1994, the respondent cancelled the said order on 12<sup>th</sup> December, 1994 at the risk and costs of the petitioner for the balance quantity.

The bid of the petitioner was the lowest in the tender issued by the respondent for the said purpose but the petitioner, inspite of acceptance of its bid, failed to deposit the security leading to the cancellation of the said bid also on 2<sup>nd</sup> May, 1995. In these circumstances, the respondent Union of India claimed damages of Rs 23,90,806.60p from the petitioner. The petitioner also made a claim for refund of security deposit of Rs 1,01,000/-

2. The arbitrator has in the award found that the respondent had given enough opportunities to the petitioner to supply the balance quantities but the petitioner had failed to supply the same. The award also records that the general damages claimed by the respondent were worked out on the market price on or around the date of the breach of the contract since the advertisement for the tender was opened on 17<sup>th</sup> August, 1995 and lowest rates were taken into consideration for determining the prevailing market price. It is also recorded that the rates taken into consideration in this regard were for the goods of the same specification as the goods subject matter of the agreement which had been breached. The award has thus allowed the said claim of the respondent for general damages and deducts therefrom the security deposit of Rs 1,01,000/-. Interest at 18% per annum w.e.f. 15<sup>th</sup> December, 1995 being the date the respondent had asked the petitioner to pay the said general damages has also been awarded to the respondent.

3. The award also records that the petitioner had in its additional written statement brought out certain other issues. The arbitrator has held that he was appointed on 13<sup>th</sup> November, 1997 and any challenge to his appointment ought to have been made within 15 days of appointment and which the petitioner had not done and the

issue of appointment raised in the additional written statement was barred under the Act. The arbitrator held nine hearings till 5<sup>th</sup> May, 2000. The award records that most of the hearings were of the duration of two hours each.

4. It is the case of the petitioner that in the hearing on 5<sup>th</sup> May, 2000 the representative of the petitioner alongwith the lawyer had gone to attend the hearing before the arbitrator but the arbitrator was not present in his Chamber till 3.25 p.m.; that even after arrival of the arbitrator, the representative and advocate of the petitioner were made to wait and only thereafter called upon to argue; that the lawyer of the petitioner took a preliminary objection that the arbitration proceedings could continue only under the 1996 Act and the proceedings being conducted by the arbitrator were without jurisdiction; that the arbitrator on hearing so lost his temper and started shouting at the representative and advocate of the petitioner as to why they had been wasting the time of the arbitrator if they had objection to his appointment; that though the counsel for the petitioner pointed out that the objections in this regard had been taken as early as in October, 1998 but the arbitrator continued shouting and abusing the representative and advocate of the petitioner and threatened that he will write such an order against the petitioner which the petitioner will not be able to challenge upto the Supreme Court. The petitioner claims to have written a letter dated 12<sup>th</sup> May, 2000 recording the aforesaid to the General Manger, Northern Railway with copy to the arbitrator and other persons.

5. The next date before the arbitrator was 15<sup>th</sup> May, 2000. However, none on behalf of the petitioner appeared before the arbitrator on that date. The arbitrator as such adjourned the hearing

and vide letter dated 12<sup>th</sup> June, 2000, admittedly delivered to the petitioner, fixed the next date as 3<sup>rd</sup> July, 2000. It is further the case of the petitioner that the advocate representing the petitioner before the arbitrator and who is the same advocate as representing the petitioner herein, vide letter dated 20<sup>th</sup> June, 2000 to the petitioner expressed inability to appear on 3<sup>rd</sup> July, 2000 owing to the humiliation meted out on 5<sup>th</sup> May, 2000 and asked the petitioner to make alternative arrangement. It is the admitted position that none on behalf of the petitioner appeared before the arbitrator on 3<sup>rd</sup> July, 2000 also and on which date the arbitrator concluded the proceedings and thereafter published the award dated 2<sup>nd</sup> August, 2000 (supra). The petitioner thereafter wrote a letter dated 4<sup>th</sup> September, 2000 to the arbitrator and sought copies of the proceedings.

6. Thus it will be seen that though the petitioner had contested the claim of the respondent before the arbitrator by filing a reply thereto but the petitioner did not chose to make submissions before the arbitrator.

7. The counsel for the petitioner has before this court also at the outset taken the same plea as before the arbitrator on 5<sup>th</sup> May, 2000 and which is alleged to have led to the arbitrator losing his temper.

8. It is not in dispute that the arbitrator was appointed vide letter dated 13<sup>th</sup> November, 1997 of the appointing authority and entered into reference on 20<sup>th</sup> November, 1997. As per the terms and conditions of the agreement between the parties, the disputes were to be referred to the sole arbitration of a Gazetted Railway Officer to be appointed by the General Manager, Railways.

9. The petitioner has as annexures to its petition filed its letter dated 18<sup>th</sup> December, 1997 in response to the letter dated 20<sup>th</sup> November, 1997 of the arbitrator informing of having entered into reference and inviting remarks and claims and counter claims from the petitioner. The petitioner in the said letter dated 18<sup>th</sup> December, 1997 did not take any objection to the appointment of the arbitrator or found fault therewith and only contended that it had not been furnished the copy of the claim of the respondent Union of India and sought direction for being supplied copy thereof. The same was supplied to the petitioner under cover of letter dated 2<sup>nd</sup> January, 1998 of the arbitrator. The petitioner filed a written statement dated 10<sup>th</sup> March, 1998 to the said claim petition and in which also no challenge was made to the appointment of the arbitrator. On the contrary, the petitioner made a counter claim for refund of its security deposit of Rs 1,01,000/- with interest before the arbitrator. Had the petitioner had any objection to the appointment of the arbitrator, the question of the petitioner making the counter claim would not have arisen. The respondent thereafter filed a rejoinder and reply to the counter claim on 15<sup>th</sup> September, 1998.

10. An additional written statement appears to have been filed by the petitioner before the arbitrator alongwith an application seeking directions, in or about October, 1998. In the said additional written statement the petitioner for the first time took a plea that the arbitration proceedings being under the 1996 Act, had to be before an arbitral tribunal of three arbitrators, one each to be appointed by each party and the third to be appointed by the two arbitrators. In the application it was also submitted that the arbitrator should lay down the procedure to be followed after assessing from the parties

the points of disputes and whether they would like to examine any witness.

11. The arbitrator vide his letter dated 19<sup>th</sup> April, 1999 called upon the respondent Union of India to file the response to the said additional written statement.

12. The pleadings were thereafter completed on the same also. In the meanwhile, the petitioner also wrote letters proposing the name of its arbitrator and calling upon the respondent to nominate its arbitrator under the procedure which, according to the petitioner, was applicable under the 1996 Act.

13. The first question urged before this court also is that under the 1996 Act, the arbitration could not be of a Gazetted Officer of the Railways appointed by the General Manager concerned of the railways as agreed between the parties and had to be by an arbitral tribunal of three arbitrators. Prima facie, finding the said proposition of the counsel for the petitioner to be preposterous, it was indicated to the counsel that if he pressed the same, it would be subject to costs, if unsuccessful. The counsel for the petitioner has vehemently pressed the said objection before this court and relied upon on **MMTC Ltd Vs Sterlite Industries (India) Ltd** (1996) 6 SCC 716; **Thyssen Stahlunion GMBH Vs Steel Authority of India Ltd** (1999) 9 SCC 334; **Shetty's Constructions Co. Pvt Ltd Vs Konkan Railway Construction** (1998) 5 SCC 599. I am however unable to find any of the said judgments laying down any such proposition, that upon coming into force of the 1996 Act, the agreement between the parties providing for sole arbitration of the

Gazetted Officer of the railways appointed by the General Manager concerned of the railways to have become void.

14. The counsel for the petitioner also referred to the provisions of Sections 10 and 11 of the Act but again this court was unable to comprehend as to how on the basis thereof submissions as aforesaid could be made. In spite of making it so clear to the counsel, no explanation was forthcoming.

15. It was sought to be suggested that under the 1996 Act there cannot be an arbitration of a sole arbitrator and also that once Section 10(1) and Section 11(2) give freedom to the parties to determine the number of arbitrators, the agreement of a date prior to the coming into force of the Act providing for a sole arbitrator to be appointed by one of the parties is no longer good and enforceable. However, the argument again is found to be preposterous. The Act in Section 10(1) and Section 11(2) does not purport to interfere with the existing agreement of the parties. If as per the existing agreement the arbitration is to be of a sole arbitrator or if the said sole arbitrator is to be appointed by one of the parties, that agreement's sanctity has not been disturbed by the Act. No provision of the Act makes the existing agreements of arbitration otiose. In fact, Section 85(2) of the Act provides for arbitration under Agreements of a date prior to coming into force of the new Act, under the provisions thereof and nowhere suggests that the parties shall have to arrive at a fresh agreement as to the constitution of the arbitral tribunal. Even otherwise the purport of the new Act was not to remodel the existing contracts between the parties qua arbitration. In fact, the Supreme Court in **Narayan Prasad Lohia Vs Nikunj Kumar Lohia** (2002) 3 SCC 572 has gone

to the extent of dismissing the challenge to an arbitral award in an arbitral proceedings commenced after coming into force of the new Act on the ground of the arbitration being of an even number of arbitrators in contravention of Section 10(1) of the Act. Further, Section 10(2) of the Act expressly recognizes the arbitration of a sole arbitrator.

16. Attention of the counsel for the petitioner was invited to **Northern Railway Administration, Ministry of Railway, New Delhi Vs Patel Engineering Company Ltd** (2008) 10 SCC 240 and **Union of India Vs M/s Singh Builders Syndicate** 2009(4) SCALE 491. The Supreme Court in **Singh Builders Syndicate** (supra) also has not held such government contracts providing for appointment of an arbitrator by an appointing authority of the concerned department of the Government to be bad under the 1996 Act. All that has been done is to suggest that the government department should consider restructuring their contracts to provide for arbitration by a neutral person rather than by their own officers.

17. The next contention of the counsel for the petitioner is that the arbitrator ought to have dealt first with the objection taken under Section 16 of the Act. It is urged that the award is bad for the reason of the arbitrator having not first rendered a decision on the said aforesaid objection and in straightway pronouncing the award.

18. In my view the aforesaid contention of the petitioner does not arise in the facts of the present case inasmuch as the petitioner after raising the said objection stopped appearing before the arbitrator. The arbitrator even in the absence of the petitioner was not required to first render the finding on the same. Even otherwise I find that

the Bombay High Court in **Scan Organics Ltd Vs Mukesh Babu Financial Services Ltd** 1998(3) RAJ 240 (Bom) has held that the arbitrator is not required to, before proceeding further with the matter, dispose of the plea taken under Section 16. The same view was taken under the old Act in **Premier Fabricators Vs Heavy Engineering Corporation Ltd.** (1997) 4 SCC 319. I am also of the view that the arbitral tribunal is not bound to first adjudicate pleas taken under Section 16 of the Act and in their wisdom/discretion are entitled to defer the decision on the said plea till alongwith the award. Though I must hurry to add that for the sake of economizing time and costs, unless the arbitral tribunal for reasons to be recorded holds that the said plea cannot be adjudicated, it is preferable to adjudicate the same immediately. In the present case the arbitrator has, in the award, dealt with the plea of the petitioner and held that the plea was taken by the petitioner after the prescribed time of 15 days and is not tenable. In view of my having independently reached the conclusion that the plea aforesaid has no merit, no ground for interference under Section 34 is made out.

19. The next contention of the counsel for the petitioner is that the bias in favour of the respondent is evident from the conduct of the arbitrator in the hearing on 5<sup>th</sup> May, 2000 as described hereinabove. It is contended that the plea with respect to the said bias was taken immediately after hearing on 5<sup>th</sup> May, 2000 and the arbitrator has failed to deal with the same also. Reliance on the parameters of bias is placed on **Ranjit Thakur Vs Union of India** (1987) 4 SCC 611, **Dr G. Sarana Vs University of Lucknow** (1976) 3 SCC 585, **Bihar State Mineral Development Corpn. Vs Encon Builders (I) Pvt Ltd** (2003) 7 SCC 418.

20. In the present case, the petitioner after 5<sup>th</sup> May, 2000 when the bias of the arbitrator in favour of the respondent is stated to have spilled out, the petitioner did not appear before the arbitrator. On the contrary, the petitioner merely wrote to the appointing authority of the arbitrator in this regard. Of course the petitioner sent a copy of the said letter to the arbitrator also but the same cannot be equated with sending a written statement to the arbitrator in this regard within the meaning of Section 13(2) of the Act. Moreover, under Section 13(3) of the Act, unless the arbitrator so challenged withdraws from his office, he is entitled to continue the arbitral proceedings. The only remedy of a party in that case is to challenge the award at the time of petition under Section 34 of the Act. That being the position of law, no prejudice has been suffered by the petitioner inasmuch as the plea of the petitioner is now for consideration before the court.

21. Without the petitioner appearing before the arbitrator and arguing bias and thereby inviting the arbitrator to return a finding thereon, the petitioner cannot be permitted to take up the plea under Section 34 of the Act. The petitioner in the present case by choosing to deliberately absent itself from two consecutive hearings before the arbitrator and of which hearings it had notice failed to press the plea, if any, available to it of bias and is now precluded from raising the same before this court. Even otherwise on the basis of the averments aforesaid I am unable to make out any case of bias. The officers of Union of India who in the matter of such contracts are acting merely in the exercise of their official duties/functions have no personal interest in the matters and merely by virtue of being an officer of the Union of India cannot be said to be biased. If that were

to be so, most of the contracts where Union of India or its various branches are parties and all of which provide for such arbitrations would have come to a naught. Challenges such as this have been made in the past and have not succeeded. For a case of bias to be made out, the party alleging the same has to show something more. In the present case there is nothing. It appears that the petitioner after participating in the proceedings and after being unable to prove its case decided to absent from the proceedings and set up the ground of the incident of 5<sup>th</sup> May, 2000. Had any such incident occurred the best fora to raise the same before, was the arbitrator himself. However, the petitioner chose not to do the same. Perhaps the petitioner feared that if it appeared before the arbitrator, the cat would come out of the bag and the truth would have been recorded. The petitioner thereafter filed the present proceedings before this court and has already delayed the enforcement of the award by nine years.

22. The reliance on **NTPC Ltd Vs Siemens Atkeingesellschaft** (2001) 4 SCC 451, **Konkan Railway Corporation Ltd Vs Rani Construction Pvt Ltd** (2002) 2 SCC 388 and **SBP & Company Vs Patel Engineering Ltd** (2005) 8 SCC 618 is misconceived. I am even otherwise reluctant to believe the incident of 5<sup>th</sup> May, 2000 alleged by the petitioner. No affidavit of the advocate for the petitioner who is alleged to have been humiliated has been filed before this court. Besides the lawyer, Shri Balwant Singh and P.S. Bindra, representatives of the petitioner are also stated to have been present in the said hearing. Their affidavits have also not been filed. The petition is accompanied with the affidavit of only one Mr Ranbir Singh, partner of the petitioner. In fact the petitioner has filed as

annexure Z to the petition an authorization letter dated 25<sup>th</sup> April, 2000 whereby the petitioner had authorized Mr K.S. Walia to appear on its behalf before the arbitrator on 5<sup>th</sup> May, 2000. Ordinarily such authorization letter would be made only when the said Mr K.S. Walia alone was to appear before the arbitrator on that date inasmuch as if the advocate was also to be appearing, there would have been no necessity to prepare such a letter. There is no explanation as to why the said Mr K.S. Walia did not appear on 5<sup>th</sup> May, 2000 and why the other representatives who are alleged to have appeared alongwith the lawyer appeared on that date. I also find on the arbitral record received in this court, a letter dated 5<sup>th</sup> May, 2000 of the arbitrator recording the proceedings of that date. It is recoded therein that due to pre-engagement of the lawyer of the petitioner he had to leave early. It is further recorded therein that though the representatives of the petitioner had earlier represented that they had nothing to argue regarding the appointment of sole arbitrator but the same had been raised again. It is also significant that though the incident is stated to have been of 5<sup>th</sup> May, 2000, the first letter thereafter is claimed to have been sent only on 12<sup>th</sup> May, 2000. Had any such incident as alleged occurred, representation would have been immediately made of the same. It appears that the letter dated 12<sup>th</sup> May, 2000 is an afterthought, after the petitioner decided to absent from the arbitration proceedings.

23. Even if the challenge of the petitioner based on the incident of 5<sup>th</sup> May, 2000 is to be believed, the same still does not constitute any case of bias. The arguments of the petitioner have been found to be preposterous by this court also. As aforesaid, at the time of hearing only it was informed to the counsel for the petitioner that in the

event of his being unsuccessful, he would be burdened with costs. Even if the arbitrator is understood to have reacted sharply to the argument challenging his appointment after arbitral proceedings had been underway for some time and after arguments on merit having commenced the same still does not make out a case of bias for the award to be set aside on the said ground.

24. The counsel for the petitioner has next contended that the claims were barred by time. The only basis of the said argument is that while the first cause of action accrued to the respondent on 12<sup>th</sup> December, 1994 i.e., on termination of the contract, the claim petition is dated 22<sup>nd</sup> December, 1997 i.e. after three years of the said date. However, upon attention of the counsel for the petitioner being invited to the letter dated 13<sup>th</sup> November, 1997 of appointment of arbitrator, and which must be in pursuance to invocation of arbitration prior thereto and to Section 21 of the Act, whereunder the arbitration is deemed to have commenced on the date of invocation, the counsel did not press the said argument further. The premise of limitation being three years is also erroneous. I may however notice that the counsel for the petitioner had attempted to bring the plea of limitation also under Section 16 of the Act. That in my opinion was a wrong approach. Limitation is a mixed question of law and facts and cannot be said to be with respect to the arbitrator's own jurisdiction or with respect to existence or validity of the arbitration agreement.

25. The counsel for the petitioner lastly urged that the award does not deal with any of the pleas of the petitioner in its written statement. In my view the petitioner having stopped appearing before the arbitrator, the arbitrator was not required to deal with

the various pleas in the written statement. The arbitrator has else found the petitioner to be in breach and has awarded damages to the respondent/railways therefor. The award to this extent is not found to be in contravention of any substantial law of this country and nothing has been pointed out that the award is contrary to any terms of the agreement of the parties. No merit is found in any of the pleas challenging the award. No case under Section 34 of the Act is made out. The petition is dismissed. For the reasons aforesaid, the petitioner is also burdened with costs of Rs 50,000/- of these proceedings.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

18<sup>th</sup> August, 2009  
M