

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

+ O.M.P. 383/2008 & IA 10315/2008

JAPAN TRAVEL SERVICES Petitioner
Through Mr. Anil K. Kher, Sr. Adv.
with Mr. Rishi Manchanda, Adv.
versus

ALL NIPPON AIRWAYS CO. LTD.
& ORS. Respondent
Through Mr. Alok Mahajan with
Mr. Rajesh Arya and Ms. Anjani
Mahajan, Adv.

AND

+ O.M.P. 384/2008

STIC TRAVELS PVT.LTD.
AC+ Petitioner
Through Mr. Anil K. Kher, Sr. Adv.
with Mr. Rishi Manchanda, Adv.
versus

ALL NIPPON AIRWAYS
COMPANY LTD & ORS. Respondents
Through Mr. Alok Mahajan with
Mr. Rajesh Arya and Ms. Anjani
Mahajan, Adv.

% Date of Decision : 10th November, 2009

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J. (ORAL)

1. The above two petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act,

1996”) challenging two similar arbitral Awards dated 5th February, 2008. While one of the arbitral Awards pertains to disputes arising out of Cargo and Mail Bookings, the other pertains to sale and reservation of seats for passengers.

2. Mr. Anil K. Kher, learned senior counsel for petitioners-objectors submitted that the impugned arbitral Awards are liable to be set aside on two grounds. He firstly submitted that the impugned arbitral Awards are vitiated by fraud as the draft awards had been prepared by the foreign solicitor of the respondents-claimants and were only sent for signatures of the Arbitrator, who signed the same without application of mind.

3. In this connection, Mr. Kher drew my attention to the draft arbitral Awards which had been forwarded by the respondents-claimants’ solicitor to the Arbitrator with a copy to the petitioners-objectors’ lawyer vide letter dated 29th November, 2007. He contrasted the said draft awards with the impugned final Awards passed by the learned Arbitrator to contend that between these two documents there are no significant/material differences.

4. Secondly, Mr. Kher submitted that the composition of the arbitral tribunal was not in accordance with the agreements executed between the parties. Mr. Kher referred to the arbitration clauses in the

Agreements executed between the parties. Clause 13 of one of the Agreements executed between the parties reads as under :-

“13. ARBITRATION

- (A) *The Principal and the Agent hereby agree that any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Tokyo, Japan in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of Justice (Japan) for the time being in force, which Rules are deemed to be incorporated by reference into this Clause. There shall be a sole arbitrator to be appointed by the Director of the Arbitration Office. The language of the arbitration shall be the English Language.....”*

(emphasis supplied)

5. Mr. Kher stated that in accordance with the aforesaid Clause, the disputes, if any, were to be referred to arbitration in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of Justice (Japan) and that too to a sole arbitrator to be appointed by the Director of Arbitration Office of the Ministry of Justice (Japan). He however, pointed out that the impugned Awards had been passed by an arbitral tribunal constituted at the instance of Japan Commercial Arbitration Association (hereafter referred to as “JCAA”). He submitted that the agreements executed between the parties never contemplated submission/reference of disputes between the parties to JCAA and appointment of arbitrator by JCAA. Consequently, Mr. Kher submitted that the impugned Awards were in violation of Sections 34(2)(v) and 48(1) of Act, 1996.

6. On the other hand Mr. Alok Mahajan, learned counsel for the respondents-claimants submitted that the Arbitrator had not simply appended his signatures on the draft awards handed over to him by the respondents-claimants' counsel. Mr. Mahajan drew my attention to the Arbitrator's order dated 1st October, 2007 wherein the Arbitrator had asked counsel for the respondents-claimants to prepare a draft finding of facts and award and submit the same along with adequate supporting evidence. The relevant portion of the Arbitrator's order dated 1st October, 2007 is reproduced hereinbelow :-

“3. Counsel for the Claimant is requested to prepare a draft Finding of Facts and Award and submit the same, along with adequate supporting evidence not already in the record, to the JCAA on or before the close of business on Friday, November 30, 2007.....”

(emphasis supplied)

7. Mr. Mahajan also drew my attention to the order passed by the Arbitrator on 17th December, 2007 wherein the Arbitrator recorded as under :-

“.....The Arbitrator and Counsel for the Claimant reviewed the draft Arbitral Award prepared by Counsel for Claimant and submitted to the Arbitrator and the JCAA on November 30, 2007, with a confirmed copy having been transmitted to the Counsel for the Respondents. The Arbitrator reviewed the evidence submitted by counsel for Claimant in support of the draft Arbitral Award are amply supported by the evidentiary record duly submitted for and on behalf of the Claimant in these two arbitration cases.....

xxxx xxxx xxxx xxxx

I. Determinations

xxxx xxxx xxxx xxxx

2. The Arbitrator has prepared the attached draft Arbitral Awards in Arbitration Case Nos.07-07 and 07-08, Tokyo.

3. Counsel for both parties shall provide the Arbitrator with written comments, if any, on the form or substance of the draft Arbitral Awards (Counsel for both Parties are particularly requested to confirm the accuracy of all figures and dates), on or before the close of business in Japan on Monday, February 4, 2008.

xxxx

xxxx

xxxx

xxxx

5. Failure by Counsel for the Respondents or the Respondents to appear in these Arbitral proceedings will result in the draft Arbitral Award being finalized and signed at the next arbitral hearing.”

(emphasis supplied)

8. Mr. Mahajan further stated that a comparison of the draft arbitral awards prepared by counsel for the respondents-claimants and the final arbitral awards as pronounced by the Arbitrator would clearly show that the same were neither identical nor vitiated on account of non-application of mind.

9. As far as reference of disputes to JCAA was concerned, Mr. Mahajan referred to Section 7 of the Act, 1996 which reads as under :-

“7. Arbitration agreement. –

(1) *In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*

(2) *An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

(3) *An arbitration agreement shall be in writing.*

(4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

10. Mr. Mahajan also drew my attention to the following correspondence exchanged between the parties. The relevant correspondence referred to by Mr. Mahajan is reproduced herein below:-

“A. Legal Notice dated 24.2.2007 by Mahajan & Associates, on behalf of Petitioner:-

“....Please note that such Arbitration proceedings will be in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association, which Rules are, for the time being, in force in Japan, as stipulated in the aforesaid Agreements dated 1.1.2003, entirely at your own cost and risk.”

B. Reply dated 16.3.2007 from Manu Nayar & Co. on behalf of Respondent, to the above Legal Notice:-

“....If despite this reply, your client chooses to invoke arbitration or take any legal proceedings, the same shall be defended by our client and our client shall be constrained to file a counter claim or a separate Suit for recovery.....”

C. Response by Mahajan & Associates dated 2.4.2007 to Reply to Legal Notice:-

“....it is evident from your reply that unresolved disputes, differences, claims, and alleged counter-claims, between our respective clients have arisen which are mandatorily required to be referred to the Arbitration of Japan Commercial Arbitration Association (JCAA) as provided for in the two GSA Agreements dated 1st January, 2003, for Passenger and Cargo Sales, and as indicated by us in our Legal Notice dated 24.02.2007. Consequently, our client has initiated the prescribed procedure for Arbitration before JCAA in Tokyo.”

D. Letter dated 07.07.2007 from Shri Kapil Kher to JCAA on behalf of Respondent:-

“....At the outset we would like to clarify that our client never disputed the existence of an arbitration agreement between All Nippon Airways Co. Limited and Japan Travel Services.....”

11. Mr. Mahajan also referred to the Arbitrator's finding in the impugned Awards on this aspect. The observations referred to by Mr. Mahajan in the impugned Awards are as under :-

“...In the Determination by Arbitrator dated August 30, 2007, the Arbitrator held as follows:

It is the opinion of the Arbitrator, giving due consideration to the clear intention of the parties and the arguments of their Counsel, that to deny the arbitral jurisdiction of the JCAA, in these two cases because of imprecise drafting would be unfair, unreasonable and unjust. The parties bargained for arbitration in Japan as the method of resolving disputes. The JCAA is the only permanent arbitral institute in Japan. Therefore, the Arbitrator has concluded for the reasons set forth above that the parties intended to nominate the JCAA by referring to the Arbitration Institute in the agreements. Both arbitrations shall proceed under the auspices of the JCAA.

Counsel for the Respondents has made no arguments, inspite of being given an opportunity to do so, in opposition to this Determination. The Arbitrator continues to maintain that the above Determination and its Reasoning are correct, and in accordance with

the virtually universal rule and practice in the field of international commercial arbitration.

B. Additional Grounds.

Furthermore, there are additional grounds for the arbitral jurisdiction of the JCAA as follows :

(1) As mentioned above, in the Legal Notice dated February 24, 2007, Mahajan & Associates informed the Respondents that the claimant will initiate arbitration proceedings in Tokyo, Japan if the Respondents do not pay the claimed amount and that such arbitration proceedings will be in accordance with the Commercial Arbitration Rules of the JCAA (See Exhibit Ko No.28). By sending the Legal Notice, the Claimant clearly specified the JCAA as the arbitral institute in the instant case.

(2) In reply to the Legal Notice, Manu Nayar & Co., the attorneys for the Respondents, sent a letter dated March 16, 2007, to Mahajan & Associates. On the last page of the letter, Manu Nayar & Co. state as follows : “If despite this reply, your client chooses to invoke arbitration or take any legal proceedings, the same shall be defended by our client.” (See Exhibit Ko No.29). Clearly, the Respondents did not deny the jurisdiction of the JCAA and the Respondents stated that they would defend the arbitration.

(3) By and under letter dated April 2, 2007, addressed to the Counsel for the Respondents, Mahajan & Associates, for and on behalf of the Claimant, reiterated the initiation or arbitration at the JCAA, by the Claimant, in view of the evident unresolved disputes, differences, claims, alleged counter-claims, between the Claimant and the Respondent (See Exhibit Ko. No.30).

In light of the above, the claims made in the Request for Arbitration shall be finally settled by arbitration in Tokyo, Japan, in accordance with the Commercial Arbitration Rules of the JCAA.”

12. In this context, Mr. Mahajan also referred to the earlier determination dated 30th August, 2007 by the Arbitrator which reads as under :-

“....Turning to the cases at hand, it is patently clear from the language of Clause 13(A) that the parties have contractually agreed “that any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration in Tokyo, Japan...” Thus, the Arbitrator can see no basis for an argument that the parties have not agreed to arbitration. The intent of the parties to submit to arbitral jurisdiction is clear and incontrovertible.

The letter from Kapil Kher, dated 07th July 2007, acknowledges the correctness of the above conclusion by stating as follows :”At the outset we would like to clarify that our client never disputed the existence of an arbitration agreement between All Nippon Airways Co. Limited and Japan Travel Services..” The gist of the argument by Counsel appears to be limited to a challenge to the jurisdiction of the JCAA to hear this dispute. This challenge, in turn, appears to be based on the reference in the arbitration clause to the “Arbitration Institute, Ministry of Justice (Japan).”

It is true that the parties did not specifically refer to the JCAA. This fact, however, is not fatal as it reflects only a lack of precision in drafting, not uncommon among business people without legal training, as to the proper name of the forum for arbitration. To the best knowledge and belief of the Arbitrator, no such “Arbitration Institute” exists within the Ministry of Justice of Japan. In fact, the JCAA is the only permanent arbitral institute, in Japan and it deals mainly with international commercial disputes of the nature and type contemplated by these cases. It is not unreasonable or unfair to Respondents to interpret the reference to the Arbitration Institute to mean the JCAA, thus, giving meaning and effect to the clear intention of the parties to arbitrate in Japan.

It is the opinion of the Arbitrator, giving due consideration to the clear intention of the parties and the arguments of their Counsel, that to deny the arbitral jurisdiction of the JCAA in these two cases because of imprecise drafting would be unfair, unreasonable and unjust. The parties bargained for arbitration in Japan as the method of resolving disputes. The JCAA is the only permanent arbitral institute in Japan. Therefore, the Arbitrator has concluded for the reasons set forth above that the parties intended to nominate the JCAA by referring to the Arbitration Institute in the agreements. Both arbitrations shall proceed under the auspices of the JCAA.

The JCAA being the proper forum for these arbitration cases, it follows that the appointment of the Arbitrator by the JCAA under Rule 16, and this determination by the Arbitrator under Rule 33, Paragraph 1, are both valid and with full effect.”

13. Mr. Mahajan further submitted that since law of Japan was the governing law and the situs for arbitration was Tokyo, it was for the petitioners-objectors who were challenging the arbitral awards to show that appointment of the Arbitrator or the arbitration procedure was not in accordance with the law of Japan. Mr. Mahajan submitted that in the present case, petitioners-objectors had failed to show that either the appointment of the Arbitrator or the arbitration procedure was not in accordance with the law of Japan. In this connection, Mr. Mahajan relied upon a judgment of the Supreme Court rendered in the case of ***Transocean Shipping Agency (P) Ltd. Vs. Black Sea Shipping & Ors.*** reported in ***(1998) 2 SCC 281*** wherein it has been held as under :-

“15. The appellants have raised various disputes in relation to arbitration. The appellants have contended that the arbitration has not been conducted in accordance with the law of Ukraine. They also contend that the government order appointing the second respondent as the sole arbitrator is not a valid appointment of the arbitrator. They have also contended that the arbitrator being an official of the first respondent, is an interested arbitrator. The appellants, however, did not produce before the High Court any material including the law of Ukraine to establish that the award was invalid as per Ukrainian law or the procedure was incorrect.

xxxx

xxxx

xxxx

xxxx

18. The appellants have now sought permission to produce before us the arbitration law of Ukraine which according to them, is the prevailing law. This is rightly objected to by the respondents. The respondents also

contend that what is sought to be produced is not the entire law on the subject. We do not propose to permit the appellants now to produce/prove the relevant law of Ukraine when they have failed to do so before the High Court, and their contention has been consequently rejected by the High Court. The practice of filing fresh documents or evidence for the first time before this Court when the High Court had rejected the claim in the absence of such material, must be deprecated. The appellants were in a position to produce the relevant material before the High Court. They failed and neglected to do so. They must take the consequence. The respondents have, in this connection, also pointed out that any objections to the competence of the arbitrator, or any defect in arbitration procedure could have been agitated by the appellants in Ukraine before the prescribed authorities. They have, however, not taken any steps in accordance with the law of Ukraine to challenge the arbitration or the award. Hence the award has now become final and binding. The respondents have filed an affidavit stating that the award has become final and binding as per Ukrainian law. The appellants have not controverted this by showing the relevant law. A mere assertion by the appellants that the award is defective or not in accordance with the law of Ukraine cannot be treated as establishing this contention. On the contrary, the presumption would be in favour of the validity of the award.”

14. Mr. Mahajan lastly submitted that the petitioners-objectors’ objections had not been filed within limitation as prescribed under Section 34 (3) of the Act, 1996 inasmuch as copies of the awards had been received by the respondents-claimants on 9th February, 2008 while the affidavit accompanying the present objection petitions had been sworn on 21st July, 2008.

15. In rejoinder, Mr. Kher submitted that the objection petitions were within limitation as they had been filed on 2nd May, 2008. He reiterated that the draft arbitral awards prepared by the respondents-

claimants' solicitor had been 'blindly copied' by the learned Arbitrator. He stated that only where the respondents-claimants' solicitor had left a blank, the Arbitrator had filled up the same by quoting previous orders. In this connection, Mr. Kher referred to the draft arbitral awards annexed with letter dated 29th November, 2007 wherein respondents-claimants' solicitors had virtually directed the Arbitrator to '*please insert the details of proceedings of 7th December, 2007*'. He submitted that other than that the Arbitral Tribunal had made no changes in the draft arbitral awards that had been prepared by respondents-claimants' solicitors including all figures, dates and amounts.

16. Before I deal with the rival submissions, I may mention that a foreign award can only be enforced if it fulfills the conditions prescribed in Section 48 of Act, 1996 for enforcement of foreign awards and the said foreign award does not fall foul of Section 34(2) of Act, 1996. Sections 34(2) and 48(1) and (2) of Act, 1996 are reproduced hereinbelow :-

“34. Application for setting aside arbitral award. –

(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.*

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.

xxxx xxxx xxxx

48. Conditions for enforcement of foreign awards. –

(1) *Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-*

(a) *The parties to the agreement referred to in section 44 were, under the law applicable to them,*

under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference 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, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that-

(a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) The enforcement of the award would be contrary to the public policy of India.

(emphasis supplied)

17. In fact, the Supreme Court in case of ***Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr.*** reported in ***(2008)4 SCC 190*** has held as under :-

“33. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes — (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement.”

18. The Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in (2008) 13 SCC 80 after referring to a catena of judgments has held that an arbitration award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:-

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

19. It is further held by Supreme Court in the aforesaid judgment that an award can be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

20. From the aforesaid Sections 34(2)(v) and 48(1)(d) of Act, 1996 it is apparent that a foreign award would not only be unenforceable but would also liable to be set aside if the composition of arbitral authority/tribunal was not in accordance with the agreement executed between the parties. In my opinion, by virtue of the said two Sections, it is for this Court to examine as to whether the arbitral tribunal was constituted in accordance with agreements executed between of the parties. Consequently, Arbitrator's finding in the impugned Awards that only the arbitral tribunal was competent to determine whether the parties had agreed to arbitrate under the aegis of JCAA, is not in consonance with law.

21. In fact, upon a perusal of the dispute resolution mechanism as provided in Clause 13 of the agreements executed between the parties, it is apparent that disputes between the parties had to be resolved through a sole arbitrator to be appointed by the Arbitration Institute, Ministry of Justice (Japan) in terms of Arbitration Rules. Accordingly, respondents-claimants had no right or cause to make a reference to JCAA for appointment of an arbitrator as the parties never agreed to JCAA being the appointing authority. Consequently, in my view, the reference/submission of disputes by respondents-claimants to JCAA as well as the appointment of Mr. Gerald Paul by JCAA as sole arbitrator and rendering of the Awards in accordance with JCAA Rules was not in consonance with the terms of the agreements.

22. I further find that the Arbitrator in Determination Letter dated 30th August, 2007 as well as in the final Awards dated 5th February, 2008 has repeatedly emphasised that the initial disputes resolution mechanism provided in Clause 13 was a consequence of ‘imprecise drafting’ and further that the parties actually intended to nominate JCAA as it was the only permanent arbitral institute in Japan. The Arbitrator in the impugned Awards has further held that *“to deny the arbitral jurisdiction of the JCAA in these two cases because of imprecise drafting would be unfair, unreasonable and unjust.”*

23. However, in my opinion, the arbitrator being a creature of an agreement cannot stike down any clause of the said agreement as unfair, unreasonable and unjust and that too on account of alleged imprecise drafting. I also find it strange that the Arbitrator in the impugned Awards has reached the conclusion to the best of his knowledge and belief that there existed no Arbitration Institute, Ministry of Justice (Japan) – without any proof. I must mention that the respondents-claimants have not filed any evidence on record either before the Arbitrator or before this Court to show as to what was the mistake in drafting and how the same was committed. Further, in my opinion, if there was a mistake in dispute resolution mechanism, then the onus to prove that mistake was on the respondents-claimants in the present proceedings, which they have failed to discharge.

24. This Court can also take judicial notice of the fact that international commercial agreements executed between the parties are normally vetted by law officers of the corporations and senior solicitors. In fact, in any international commercial agreement, governing law, jurisdiction clause and the disputes resolution mechanism are subject matter of intense negotiations and it is the party which has a higher bargaining position that is able to negotiate the clauses in its favour.

25. I may mention that in India, if the institute to whom the arbitration clause provides a reference to is non-existent, then the aggrieved party has to apply to Court for appointment of an arbitrator under Section 11 of Act, 1996 or Section 20(4) of old Act, 1940. In this context, I may refer to a Division Bench's judgment of this Court rendered in case of ***A.M. Rasool Construction & Engineering Services Pvt. Ltd. Vs. National Buildings Construction Corporation Ltd.*** reported in (1998) 1 AD (Delhi) 1008 wherein it has been held as under:-

“8. Clause 14 of the contract between the parties in clear terms establishes that both the parties to the agreement agree to the sole arbitration of the Project Director who is to undertake the arbitration either himself, or to appoint some other person of the Corporation other than the officers connected directly with the supervision of the works at work site to act as arbitrator. The said provision is certain and clear.

9. However, no person in the respondent Corporation is designated as Project Director now. therefore, it is not possible for the "Project Director" to act as arbitrator, or appoint another person as arbitrator as the Project Director does not exist.

10. In the circumstances, the only course of action which is open is to make an appointment by the Court itself under Section 20(4) of the Act, which has not been done in the instant case.”

26. I also find that respondents-claimants have not led any evidence to show as to what is the law prevalent in Japan on this aspect. In my opinion, the onus would be on the respondents-claimants to show that the law in Japan was contrary to the agreements executed between the parties. The onus cannot be on the petitioners-objectors to prove the impossible, especially when they have discharged their burden by showing that composition of the arbitral tribunal was not in accordance with the agreements executed between the parties. Accordingly, the ***Transocean Shipping Agency***'s judgment (supra) relied upon by Mr. Mahajan has no application to the facts of the present case.

27. Respondent-claimants reliance upon Section 7 of Act, 1996 and the correspondence exchanged between the parties seems to indicate that their submission is that a new arbitration agreement was executed between the parties superseding the dispute resolution mechanism provided in Section 13 of the agreements executed between the parties. However, I find that petitioners-objectors had unequivocally stated in the contemporaneous correspondence that the parties had agreed to resolve their disputes only through a sole arbitrator to be appointed by the Arbitration Institute, Ministry of Justice (Japan) in terms of its Arbitration Rules. In this regard, petitioners-objectors' two letters dated 25th June, 2007 and 7th July, 2007 are reproduced hereinbelow :-

Letter dated 25th June, 2007

“In your said letter aged 8th June 2007 you have stated as follows:

Pursuant to the arbitration agreement provided for in Article 13(A) of the Agreement for the Appointment of a General Sales Agent in India between All Nippon Airways Co. Ltd. and Japan Travel Services dated 1st January, 2003, the JCAA will appoint a sole arbitrator....”

Article 13(A) of the said Agreement dated 1st January, 2003 reads as under :.....

From the above it is very clear that under the alleged Agreement dated 01st January, 2003, between All Nippon Airways Co. Limited and Japan Travel Services, it was agreed inter alia, that :

- The disputes, if any, shall be referred to arbitration in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of Justice (Japan) for the time being in force; and*
- a sole arbitrator would be appointed by the Director of the Arbitration Office of the Ministry of Justice, Japan.*

In view of the above it is not understood as to how:

- i) The Japan Commercial Arbitration Association entertained a request for arbitration from All Nippon Airways Co. Limited, as the Parties to the said Agreement NEVER agreed to submit their alleged disputes to arbitration under the Rules of JCAA; and*
- ii) How JCAA appropriated to itself a jurisdiction to issue a notice to my client, Mr. Subhash Goyal, who was never a party to the said Agreement.*

In the light of above, please take note that you have nothing to do with the disputes that have allegedly arisen between the Parties named as Claimant and Respondent in your notice under reply and your interfering in the matter is highly unsolicited.

Since my client has been put to lot of inconvenience by the actions of All Nippon Airways Co. Limited and JCAA, my client, while reserving the right to claim damages for dragging him into unnecessary litigation, my client demands payment of US\$ 5000 towards the cost of reply, from both of you.”

Letter dated 7th July, 2007

“The objection of our client, Mr. Subhash Goyal, to the proceedings initiated before the JCAA is in view of following :

- a) Mr. Subhash Goyal is not a party to the said Agreement;*
- b) The Parties to the Agreement, i.e., All Nippon Airways Co. and Japan Travel Services, have agreed to have the disputes resolved through a sole arbitrator to be appointed by the Arbitration Institute, Ministry of Justice, Japan, in terms of its Arbitration Rules;*
- c) Therefore, JCAA has no right and jurisdiction to interfere in the alleged disputes between the Parties to the said Agreement, as these Parties never agreed to submit themselves to arbitration as per JCAA’s Commercial Arbitration Rules.*

Therefore, your contention that JCAA may proceed with the arbitration proceedings under the Rule 16 of its Commercial Arbitration Rules is unfounded and all actions taken by you are void ab initio, since you have no power to take cognizance of the request for arbitration forwarded by All Nippon Airways Co.

We reiterate that you have no locus standi to interfere in the matter, as it was never agreed by the Parties to the Agreement to submit themselves to the JCAA Commercial Arbitration Rules, at any point of time.

28. Moreover, the agreements which had been specifically executed between the parties clearly state that it could be amended only if both the parties agreed to specific amendment/modification in writing. The

relevant clause 11(f) of the Agreement executed between the parties reads as under :-

“11. MISCELLANEOUS

xxxx xxxx xxxx xxxx

(F) Amendment: Any provision of this Agreement may be amended or modified only if both parties agree to the specific amendment or modification in writing. The parties hereto agree that they will make all necessary amendments to this Agreement (including but not limited to any deletion, modification or substitution) to ensure that all the laws, rules, and regulation as may from time to time be in force in India relating to the appointment of the Agent or any matters related hereto will be complied with.”

29. Consequently, in my opinion, the letters referred by Mr. Mahajan and reproduced in para 10 hereinabove do not constitute a modification in writing of the draft resolution mechanism as provided in the agreements executed between the parties.

30. As far as the issue of the impugned Awards being vitiated by fraud is concerned, I am of the view that the impugned Awards are in material respects identical to the draft awards prepared by the foreign solicitors of the respondents-claimants. I find that only where the respondents-claimants' solicitor had left a blank, the Arbitrator has filled up the same by quoting previous orders. I also find that the respondents-claimants have failed to place on record a practice, if any, in Japan of preparation of draft awards by parties to the litigation. I may mention that this Court vide order dated 13th March, 2009 passed in OMP 383/2008 had specifically adjourned the matters for the lawyer

of respondents-claimants to obtain instructions on this aspect. The order dated 13th March, 2009 reads as under :

“Part arguments heard.

During arguments Mr. Anil K. Kher, learned Senior Counsel appearing on behalf of the petitioner has contended that the appointment of the Arbitrator in this case was not by the authority mentioned in the Arbitration Agreement. He has further argued that the impugned award is vitiated by non-application of mind by the Arbitrator since the Arbitrator has simply appended his signatures on the draft award handed over to him by the counsel appearing on behalf of All Nippon Airways Co. Ltd. who is award holder in the case. Mr. Mahajan, learned counsel appearing on behalf of the respondent requests for a date to verify whether the impugned award is verbatim the same as the draft award handed over by the counsel for the award holder and in case it is found to be the same then to take instructions from his client. He, therefore, requests for a date to address arguments in the matter....”

(emphasis supplied)

31. Even vide order dated 10th August, 2009 in OMP No. 300/2008, this Court had given another opportunity to respondents-claimants to prepare its arguments on this aspect. The said order reads as under :-

“OMPs No.383/08 and 384/08 are connected OMPs wherein objections have been filed by the respondent against the award. One of the plea of the respondent is that the award was obtained by playing fraud as a draft award was sent to the Arbitrator by counsel for the claimant to be signed by the Arbitrator and the Arbitrator passed the same award.

List OMPs No.383/08 and 384/08 along with this petition on 5th November, 2009.

OMP No.301/2008 be also listed on the same date.”

(emphasis supplied)

32. Despite aforesaid orders, no affidavit or evidence has been filed by respondents-claimants stating that in Japan circulation of draft

awards by the parties is a prevalent practice. Consequently, in my view, the impugned Awards are opposed to public policy and are liable to be set aside on this ground also.

33. As far as respondents-claimants preliminary objection that these petitions have not been filed within limitation are concerned, I find that the present petitions have been filed on 2nd May, 2008, i.e., within the stipulated limitation period of three months from the date of receipt of the Awards, that means, 9th February, 2008.

34. I am also of the opinion that Section 34(3) of Act, 1996 only stipulates that an application for setting aside an arbitral award should be filed within three months of the applicant having received the arbitral award. It does not stipulate that the objection petition should be free of defects and should be numbered within the stipulated period of three months. The objections raised by the registry in numbering of an application can be as trivial as adequate margin space not having been provided to adequate stamps not having been filed. I am also of the opinion that placing such a strict interpretation of Section 34(3) would not be warranted as an aggrieved party would then lose a valuable right to challenge an award. Even today, we entertain petitions filed under Section 34 of Act, 1996 even though the same were initially filed with defects, provided the said defects are removed within a reasonable time. Consequently, in my opinion, the objection petitions having been filed

within three months from the date of receipt of the arbitral Awards cannot be said to be barred by limitation.

35. I am also of the view that the issue of limitation raised by learned counsel for respondents-claimants is not of crucial importance in the present cases because, as stated hereinabove, the impugned foreign Awards can only be enforced under Section 49 of Act, 1996 if the Court first find that the foreign awards are enforceable under Section 48 of Act, 1996. The concept of limitation under Section 34(3) of Act, 1996 would not apply to proceedings under Section 48 of Act, 1996. Accordingly, even if the petitioners-objectors' objections are held to be barred by limitation under Section 34(3) of Act, 1996, respondents-claimants would not be able to enforce the Award, if it fell foul of Sections 48 of Act, 1996. Incidentally, both the grounds on which the Awards have been impugned are also grounds to deny enforcement and execution of foreign awards under Section 48 and 49 of Act, 1996.

36. Accordingly, the impugned Awards dated 5th February, 2008 are set aside. However, respondents-claimants are given liberty to seek redressal of their grievances by invoking the disputes resolution mechanism in accordance with the agreements executed between the parties as well as in accordance with law.

MANMOHAN, J.

NOVEMBER 10, 2009
'AA'/rn