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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.05.2012

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FAO(OS) 318/2008

M/s. MEDIA ASIA PRIVATE LIMITED

..... APPELLANT

Vs

PRASAR BHARTI & ANR.

..... RESPONDENTS

Advocates who appeared in this case:

For the Appellants: Mr. Rahul Gupta, Mr. Pinnaky Addy, Mr. Shekhar Gupta and Mr. Pulkit Sachdeva, Advocates

For the Respondents: Mr. Rajeev Sharma and Mr. Sahil Bhalaik, Advocate

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J. (ORAL)

1. The respondent filed an application under section 11(6)(c) of the Arbitration and Conciliation Act, 1996 on the original side of this court which was registered as AA No.203/2000. The said application makes a reference to an agreement dated 13.01.1995 entered *inter se* the parties giving the appellant a status of accredited advertising agent w.e.f. 01.02.1995. It is also the say in the application that from January, 1995 to October, 1997, the appellants' programme "Ek Se Bad Kar Ek" was

telecast on the National network of DD-1. The appellant failed to pay the bills raised by the respondent from time to time. As against the total billing amount of Rs.12,37,15,132/-, the appellant paid only a sum of Rs.11,14,73,075/- leaving an outstanding balance of amount of Rs.1,22,42,057/-, which has not been paid despite repeated request, including a legal notice. There was no response to the legal notice.

2. Disputes having arisen between the parties, by virtue of the agreement dated 13.01.1995 containing an arbitration clause, the matter was required to be referred to arbitration. The arbitration clause reads as under :-

“In the event of any question, dispute or difference arising under these presents or in connection therewith (except as to any matters the decision of which is specially provided for by these presents), the same shall be referred to the sole arbitration of an officer appointed to be the arbitrator by the Director, General, Doordarshan. It will be no objection that the arbitrator is a Government servant, that he has to deal with the matters to which these presents relate or that in the course of his duties as a Government servant, he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to these presents.

In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, it shall be lawful for the Director General, Doordarshan to appoint another arbitrator in place of the outgoing, arbitrator in the manner aforesaid.

The arbitrator may, from time to time, with the consent of the parties to these presents enlarge time for making and publishing the award.

Upon every and any such reference, the assessment of the costs of and incidental to the references and the award respectively shall be in the discretion of the arbitrator. Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder

and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.”

2.1 In terms of the arbitration clause, the Director General, Doordarshan was the designated authority to appoint the arbitrator but that post was lying vacant since 1998, it compelled the respondent to file the application. The appellant was given numerous opportunities to file reply to the application on 28.09.2000, 17.11.2000, 29.11.2000, and the last opportunity on 30.01.2001 but, to no avail. Thus, on 23.04.2001, the learned Single Judge passed an order appointing Justice J.B. Goel (Retired) as the Sole Arbitrator to look into the disputes between the parties.

2.2 The Arbitrator thereafter commenced proceedings and a statement of claim was filed on behalf of the respondent. The appellant filed its defence statement-cum-counter claim and, the case was listed for admission / denial of documents on 30.04.2003. The appellant, however, did not complete the admission / denial of documents and the proceedings were adjourned to 30.05.2003. In the interregnum period, the appellant filed an application dated 06.05.2003 seeking to raise certain jurisdictional issues; which are enumerated in the application as under :-

- “(1) Whether reference made in the case is barred by limitation?
- (2) Whether Art. 299 of the Constitution of India is attracted to the case and if so, its effect?
- (3) Whether there is any valid arbitration agreement between the parties and if so, its scope.”

2.3 In view of the aforesaid application, the pleadings were directed to be completed qua the application on 30.05.2003. However, on 23.08.2003, the learned Arbitrator opined that the application would be considered after the parties have led their evidence in the case.

2.4 The arbitration proceedings thereafter concluded and resulted in an award dated 03.05.2008. The awarded amount including pendente lite interest awarded is Rs.3,33,13,290/- alongwith cost totaling to Rs.3,37,10,000/- alongwith future interest at 18% p.a. on the principal amount.

2.5 The question raised as to lack of jurisdiction of the Tribunal has been dealt with in paragraph 31 of the award, which reads as under :-

“31. This plea raises a dispute about the lack of jurisdiction of this Tribunal but was not taken in reply to Section 11 (6) (c) of the Arbitration Act. The order passed on that application is final under section 11 (7) thereof. Hence, this plea does not lie before this Tribunal. In any case, this plea ought to have been taken before or at the time of submission of the statement of defence and could not be taken later on. It is barred under section 16 (2) of the Arbitration Act, 1996. This plea is disallowed.”

2.6 It is relevant to note that the aforesaid paragraph is prefaced by para 29, which reads as under :-

“29. In the written submissions dated 2.9.2004, various other new pleas have been taken on behalf of Respondent. These pleas are belated, afterthought, beyond pleading and are not tenable and liable to be disallowed at the outset.”

2.7 The appellant thereafter filed objections under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act), which came to be dismissed by the impugned order dated

30.05.2008.

2.8 The appeal was admitted on 29.07.2008, and on the interim application for stay, orders were passed on the same day directing the appellant to deposit the principal amount and 25% of the interest as awarded under the award within eight weeks. The respondent was permitted to withdraw the amount on furnishing an undertaking to this court to refund the amount with interest at 9% p.a. and / or on such terms as may be ordered by the court at the time of disposal of the appeal. It was observed that in case the amount is not deposited within the prescribed time, the stay will stand vacated. This order was assailed in SLP (C) 26007-08/2008 by the appellant but was dismissed on 10.11.2008. The admitted position is that this amount was not deposited. The respondent, however, did not take out execution proceedings, the reason for which are noted in the latter part of judgment.

3. We have heard learned counsels for parties and perused the record including the compilation of the record sought to be handed over to us for the first time today in court. As to what was urged before the learned Single Judge is set out in paragraph 3 of the impugned order, which reads as under :-

“3. The award has been challenged by the petitioner on the ground that the agreement dated 13th January, 2005 entered into between Doordarshan Commercial Services, the predecessor of claimant and the petitioner was a standardized adhesion contract and this agreement was subject to unilateral changes by the claimant. Clauses 3 and 6 of the agreement gave authority to Doordarshan Commercial Services to suspend or cancel agencies' accreditation (respondent's accreditation) without assigning any reason and also gave to the claimant a right to amend and alter the rules governing grant of accreditation and therefore, these clauses were unconscionable. It is further submitted that clause 5 of the agreement was also inconsistent with the provisions of Sub-Section 3 of Section 12 of the

Arbitration and Conciliation Act as it gave an authority to the claimant to appoint any of its officials as an Arbitrator (even if he was interested in the matter). It is submitted that Clause 5 was not a valid clause resulting into a no arbitration agreement between the parties and the award was therefore vitiated. It is also submitted that the Arbitrator should have held that it has no jurisdiction on the basis of Clause 5 of the agreement and hence the award was not tenable in the eyes of law.”

3.1 The learned Single Judge thereafter proceeded to deal with these objections. We have consciously extracted the pleas urged before the learned Single Judge as recorded in paragraph 3, as the learned counsel for the appellant before us, seeks to urge aspects different from what was urged before the learned Single Judge, on the ground that, the objections filed under section 34 of the said Act incorporate the said pleas. We may note that the objections run from A to Z and AA to YY numbering more than 50. We thus put to learned counsel for the appellant that the learned Single Judge is hardly expected to go through more than 50 objections filed unless it is specifically urged in court. The aspects urged before the learned Single Judge have been recorded and have been dealt with. If the appellant was of the view that other aspects had been urged and had not been dealt with by the learned Single Judge then the remedy was to file a review application before the learned Single Judge inviting findings on those aspects so that the appellate court would have the benefit of the view of the learned Single Judge. Our aforesaid conclusion is fortified by the judgment of the Supreme Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr.*, (1982) 2 SCC 463 which has been relied upon by us in a recent judgment in *FAO (OS) 185/2011, Municipal Corporation of Delhi VS. Natraj Construction Company* decided on 01.05.2012. We extract relevant part of paragraph 10 of the said

judgment as under :-

10. We may usefully refer to the observation of the Supreme Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr.*, (1982) 2 SCC 463 in this behalf while dealing with the issue of express concessions made in the High Court. It was sought to be portrayed in that case that the concession was wrongly recorded, being contrary to written submissions filed in the High Court. Despite this, the Supreme Court refused to accept such a plea. The Supreme court observed that it would not launch an enquiry into what transpired in the High Court. It was observed in paras 4 to 9 of the said judgment as under :-

“4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. “Judgments cannot be treated as mere counters in the game of litigation.” (Per Lord Atkinson in *Somasundaram Chetty V. Subramanian Chetty*, AIR 1926 PC 136 : 99 IC 742). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of

fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (*Per Lord Buckmaster in Madhu Sudan Chowdhri V. Chandrabati Chowdhrair, AIR 1917 PC 30 : 42 IC 527*). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In *R v. Mellor* [(1858) 7 Cox 454: 6 WR 322: 169 ER 1084] Martin, B. was reported to have said:

“We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.”

6. In *King-Emperor v. Barendra Kumar Ghose* (28 Cal WN 170: AIR 1924 Cal 257: 38Cal LJ 411: 25 Crl. LJ 817). Page, J. said:

“... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented; much less is it to be exposed to animadversion.”

7. In *Sarat Chandra Maiti v. Bibhabati Debi* (34 Cal LJ 302 : AIR 1921 Cal 584: 66 IC 433). Sir Asutosh Mookerjee explained what had to be done:

“... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment...”

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else.

(emphasis supplied)

4. We may notice that the plea of the learned counsel for the appellant before us is that there were two agreements *inter se* the parties – the first one dated 01.05.1994 and the second one dated 13.01.1995. The first agreement is stated to contain no arbitration clause while, the second one contains an arbitration clause. The first agreement is stated to be related to a particular serial “Ek Se Bad Kar Ek”. It has thus been contended that these were two separate agreements and the cause of action qua the amount due under the two agreements could not have been clubbed together. It has also been urged that a substantive part of the claims of the respondent related to the first agreement dated 01.11.1994 and that a specific plea qua this issue has been raised in ground W of the application under section 34 of the said Act.

4.1 We put a specific query to learned counsel for the appellant that since the appellant had itself filed the counter claim, whether the counter claim will relate to both the agreements or to only the subsequent agreement dated 13.01.1995 containing the arbitration clause. Learned

counsel for the appellant fairly concedes that even the counter claims relate to both the agreements.

4.2 We are thus faced with the situation where the application filed by the respondent under section 11(6) of the said Act containing the averments remained un rebutted by the appellant despite various opportunities granted. Resultantly, as prayed by the respondent in the said application an arbitrator was appointed. Even before the arbitrator, on the claim being filed by the respondent, the appellant neither in the response to the claim nor in the counter claim adverted to the objection pertaining to the absence of an arbitration agreement in respect of part of the claims (as noticed above even counter claims pertains to that agreement, i.e., agreement dated 01.11.1994). The application seeking to raise the jurisdictional issue was filed subsequently in the arbitration proceedings where also the question raised was about the “valid arbitration agreement” between the parties and its scope. There is, to our mind, a subtle but clear distinction between the challenge to the validity of an arbitration agreement and the absence of the arbitration agreement. There is no averment made in the application whatsoever qua the issue of absence of an arbitration agreement in respect of part of the claims which purportedly arose from agreement dated 01.11.1994. This aspect was sought to be raised for the first time in the objections filed by the appellant under section 34 of the said Act. It appears that may have been precisely for the reason that the aspect of absence of arbitration agreement was never pressed before the learned Single Judge. Since it does not form a part of the pleas advanced on behalf of the appellant, before the learned Single Judge, it cannot be considered at this stage. If we may elaborate this aspect, what was sought to be advanced before the learned Single Judge was that clause 5 of the agreement dated

13.01.1995, was not a valid clause as it permitted the Director General of Doordarshan to appoint government servant as an arbitrator irrespective of his status or the fact that he may have dealt with matter before him in the past or expressed an opinion on the issue which required his view as an arbitrator. This clause was challenged as being contrary to section 12 of the Act. Therefore, according to the appellant award was vitiated as the arbitrator had failed to decide this issue. This, according to us, is a plea completely different from what is sought to be urged before us.

4.3 It is ground 'D' of the application under section 34 of the said Act, where this plea has been urged before the learned Single Judge i.e., the provisions of clause 5 of the agreement dated 13.01.1995 cannot be categorized as an arbitration clause as, under the said clause, the Director General, Doordarshan was given the power to appoint an officer including a government servant who has dealt with the matters relating to the disputes and / or in the course of duties as the government servant has expressed views on all or any of the matters in dispute or difference.

4.4 It is in this context that the learned Single Judge observed that, it was not a government servant who had been appointed as the Arbitrator in the present case but a retired Judge of this court who has been so appointed. The Arbitrator, as well as, the learned Single Judge had taken note of the provisions of the said Act to come to the conclusion that such a objection could not have been raised by the appellant and that to, at the stage at which it was sought to be raised. In this behalf, reliance has been placed on section 11(7) of the said Act. Section 11 deals with the appointment of the Arbitrators and sub section (7) provides that the decision of the Chief Justice or his nominee qua the appointment of an Arbitrator would be "**final**".

4.5 Learned counsel for the appellant did seek to contend that as per

the legal position prevalent at the relevant stage of time, the order of the Chief Justice had been held to be administrative in character and not judicial. This aspect, however, stands clarified by the judgment of the Supreme Court in *Gas Authority of India Ltd. and Anr. Vs. Ket Construction (I) Ltd. and Ors.*, (2007) 5 SCC 38 in paragraph 19, which reads as under :-

19. Respondent 1 did not at all appear before the arbitrator appointed by Appellant 1. Respondent 1 neither filed any statement of claim nor raised any plea of jurisdiction before the arbitrator. Section 16 of the Act says that 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. In *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* in para 21 a Constitution Bench of 5 learned Judges has ruled that if the Arbitral Tribunal has been improperly constituted, it would be open to the aggrieved party to require the Arbitral Tribunal to rule on its own jurisdiction in view of Section 16 of the Act. It was also observed that the expression used in sub-section (1) that the “Arbitral Tribunal may rule on any objections with respect to the existence or validity of the arbitration agreement” shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction and there is no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted. This decision has been partly overruled on another point by a larger Bench of 7 learned Judges in *SBP & Co. v. Patel Engg. Ltd.* but the aforesaid view has not been dissented from or reversed. This will be evident from the conclusions arrived at by the larger Bench which have been summarised in para 47 of the Report and sub-para (ix) thereof reads as under: (SCC p. 664)

“(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the

Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.”

(emphasis supplied)

5. The other aspect emanating from the provisions of the said Act is the effect of sub sections (2) and (4) of section 16 of the said Act. The said sections read 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.

XXXX

(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.....”

5.1 Sub-section (1) of section 16 makes a distinction between the existence and validity of an arbitration agreement and provides for the Arbitral Tribunal to rule on its own jurisdiction. Sub-section (2) provides that a plea qua the lack of jurisdiction of the arbitral tribunal has to be raised not later than the submission of statement of defence. Sub-section(4), however, provides that such a plea may be admitted at a later

stage if, the arbitral tribunal considers the delay justified.

5.2 It is not disputed that the appellant failed to take this plea in the statement of defence but on the other hand filed simultaneously a counter claim. Thus, the plea was not taken as per sub-section (2) of section 16 of the said Act. Learned counsel for the appellant, however, seeks to utilize the gateway provided by sub-section (4) of section 16 of the said Act and further contends that the Arbitrator has not given a finding on this aspect.

5.3 It appears that other than the manner in which the jurisdiction issue was sought to be raised in the application filed subsequently (which aspect we have dealt hereinabove), there was no such specific plea raised which is also apparent from paragraph 29 of the award stating that some aspects were sought to be raised only by filing written submission post oral submissions, which would not be permissible, but in any case had been dealt with. Even if we analyse this plea now, we find there can hardly be any excuse for the delay in taking such a plea. In fact in the application, there is no averment to show as to why the said plea was not taken earlier and, what is the reason for which it was being taken subsequently. The preliminary objections as taken by the appellant before the Arbitral Tribunal have been set out in paragraph 26 of the award.

5.4 Learned counsel for the appellant faced with the aforesaid position seeks to contend that such a plea can always be raised even for the first time under section 34 of the said Act and relies on the judgment of the Supreme court in *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan And Ors., (1999) 5 SCC 651*. We, however, find that the paras relied upon by learned counsel for the appellant itself show that this question has been left open and a finding has been arrived at assuming

there is no such prohibition. The discussion on this aspect is contained in paragraphs 20 to 24 of the said judgment. It is noticed in paragraph 23 that the matter was being dealt with on the assumptions that the appellant was not precluded from raising any question at the stage of section 34 though these issues have not been raised before the Arbitrator as per sub-sections (2) and (3) of section 16. In paragraph 24 it has been clearly stated that the Supreme Court was not deciding the question whether the appellant is precluded at the stage of section 34 from raising the question relating to the scope of reference.

5.5 On the other hand, the matter in issue has been squarely dealt in *Gas Authority of India Ltd. and Anr.(supra)* even on this aspect. The discussion and the conclusions are contained in paragraphs 21 to 25 which read as under :-

21. The Preamble to the Act makes it amply clear that Parliament has enacted the Arbitration and Conciliation Act, 1996 almost on the same lines as the Model Law, which was drafted by the United Nations Commission on International Trade Law. In *Sundaram Finance Ltd. v. NEPC India Ltd.* it has been observed that the provisions of the Arbitration and Conciliation Act, 1996 should be interpreted keeping in mind the Model Law as the concept under the present Act has undergone a complete change. It will, therefore, be useful to take note of the corresponding provisions of the UNCITRAL Model Law. Article 16 of the Model Law, which corresponds to Section 16 of the Act, is being reproduced below:

UNCITRAL Model Law

“16. *Competence to rule on own jurisdiction.*—(1) The Arbitral Tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For the purpose, an arbitration clause which forms part of a contract shall be treated as an agreement

independent of the other terms of the contract. 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 in the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The Arbitral Tribunal may rule on a plea referred to in clause (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the Arbitral Tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.”

22. The commentary on the three clauses of the Model Law has been given under Headings A, B, C and D. Note 1 under Heading A and Note 11 under Heading D, which are relevant for the controversy in hand, are being reproduced below:

“A. ‘Kompetenz-kompetenz’ and separability doctrine, clause (1).

Note 1. Article 16 adopts the important principle that it is initially and primarily for the Arbitral Tribunal itself to determine whether it has jurisdiction, subject to ultimate court control (see below paras 12-14). Clause (1) grants the Arbitral Tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as ‘kompetenz-kompetenz’, is an essential and widely accepted feature of modern international arbitration but, at present is not yet recognised in all national laws.

* * *

D. Ruling by the Arbitral Tribunal and judicial control, clause (3) [Corr. to Sections 16(5), (6)].

Note 11. Objections to the Arbitral Tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision, in order to avoid possible waste of time and costs. However, in some cases, in particular, where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with partial or complete decision on the merits of the case. Article 16(3), therefore, grants the Arbitral Tribunal discretion to rule on a plea referred to in clause (2) either as a preliminary question or in an award on the merits.

23. So, the commentary on the Model Law which was drafted by UNCITRAL and has been adopted by many countries including India, shows that where a party asserts that the Arbitral Tribunal has not been properly constituted or it has no jurisdiction, then such a plea must be raised before the Arbitral Tribunal right at the beginning and normally not later than in the statement of defence.

24. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the Arbitral Tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the Arbitral Tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

25. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(a)(v) of the Act on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.”

(emphasis supplied)

5.6 The conclusion is thus clear that if the plea of jurisdiction is not taken before the Arbitrator as provided in section 16 of the said Act, such a plea cannot be permitted to be raised in proceedings under section 34 of the said Act for setting aside the award, unless good reasons are shown.

5.7 A similar view has also been taken by the Supreme Court in ***Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Anr., (2007) 2 SCC 720*** in paragraph 9 reads as under :-

“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 Jala 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 724 facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala 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 Jala 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 10-9-1999 passed in CMP No. 26 of 1999. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now be allowed to contend that clause 29 of the contract did not constitute an arbitration agreement.”

5.8 A distinction has been carved out between a plea of validity of an arbitration agreement and the lack of jurisdiction of an Arbitrator in the absence of an arbitration clause, which is the relevant question even in the present appeal as it was never the plea of the appellant before the arbitrator of there being lack of jurisdiction on the ground of absence of an arbitration agreement nor, was such a plea urged before the learned single Judge, though it was contained in one of the grounds. The conduct of the appellant in filing counter claims qua subject matter of both the agreements itself shows that the parties understood that they would get their disputes qua both the agreements resolved through the mode of arbitration. There was, thus, consent of the parties to the adoption of arbitral process to adjudicate the disputes *inter se* the parties arising from the two agreements.

5.9 We may note the submission of learned counsel for the respondent, which is relevant qua the issue of jurisdiction, that while the first agreement dated 1.11.1994 gave rights of telecast, it is through the second agreement that the credit facility was made available to the appellant qua advertising facility. In other words the second agreement provide credit facility even in respect of that which was subject matter of the first agreement dated 1.11.1994. It was submitted discounts in the second

agreement were made available qua the first agreement. The agreements, thus, are intertwined and that is how, both the parties appear to have understood the agreements. Therefore, it is evident that they had no hesitation in subjecting themselves to the jurisdiction of the Arbitrator by filing the claims and counter claims qua both the agreements.

6. The only other aspect urged by learned counsel for the appellant is qua the purported failure on the part of the arbitrator to decide its counter claims. The learned arbitrator in paragraph 55 of the award has referred to the fact that the appellant had not sought the appointment of an arbitrator qua counter claims raised before him. In other words the disputes qua counter claims were not referred to him. The arbitrator, however, went on to say that in any case all the claims encapsulated in the counter claims were time barred and were thus disallowed. Learned counsel for the appellant contends that the counter claims could not have been dealt with in this manner and ought to have been specifically adjudicated. He further submits that though specific grounds were raised qua the non consideration of the counter claims before the learned single Judge, the same do not form a part of the adjudication before the learned single Judge.

6.1 To our minds, the position is, once again, the same, i.e., the aspect of counter claim was never urged as one of the pleas before the learned single Judge as is apparent from para 3 of the impugned order which records all the pleas which were urged by the appellant.

6.2 The aforesaid being the only pleas we find no merit in the appeal.

7. In the end we may note that as per the respondent execution proceedings were not taken out because the appellant is apparently a shell company having no assets. The appellant on the other hand has spent money to contest the respondent's claim before the arbitrator and proceeded to

suffer an award, the objections having been dismissed and yet failed to pay up the amount or deposit the amount in this Court as per interim orders passed by the Division Bench. The appellant's endeavour to get the interim orders of the Division Bench set aside though having failed before the Supreme Court, yet no amount has been deposited towards the satisfaction of the award. As to how the respondent would recover the amount is a moot point as it may at the end be only a paper decree.

8. The appeal is completely devoid of merits and is, accordingly, dismissed with costs of Rs.1 lakh.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

MAY 10, 2012

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