

Neutral Citation No. - 2024:AHC-LKO:53362

Reserved/AFR

Court No. - 6

Case :- FIRST APPEAL No. - 184 of 2013

Appellant :- U.P.Rajya Bhandaran Nigam Ltd.Lko.Thro.M.D And Ors.

Respondent :- U.P.Purva Sainik Kalyan Nigam Ltd.
Lko.Throu.Its Chief Proje

Counsel for Appellant :- Rakesh K.Chaudhary

Counsel for Respondent :- Amrendra Nath Tripathi,Nirmit
Srivastava,Pankaj Patel,Pratap Shanker,Suyash Manjul,Vibhanshu
Srivastava

Hon'ble Rajnish Kumar,J.

1. Heard, Shri Rakesh K.Chaudhary, learned counsel for the appellants alongwith Shri Aditya Pandey, Advocate and Shri Vibhanshu Srivastava, learned counsel for the respondents.

2. This First Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (here-in-after referred as Act of 1996) has been preferred against the judgment and decree dated 16.09.2013 passed in Regular Suit No.17 of 2011; U.P.Rajya Bhandaran Nigam Ltd. and others Versus U.P. Purva Sainik Kalyan Nigam Ltd. by the District Judge, Lucknow and to set aside the award dated 16.01.2011 passed by the sole Arbitrator in Arbitration Case No.28 of 2008; U.P. Purva Sainik Kalyan Nigam Ltd. Versus the Managing Director, U.P. Rajya Bhandaran Nigam Limited and others by allowing the application under Section 34 of the Arbitration and Conciliation Act, 1996 (here-in-after referred as the Act of 1996).

3. Learned counsel for the appellants submitted that there was no Arbitration Agreement between the parties and it could not have been even by consent of parties, therefore the arbitration could not have been held and the judgment and award passed by

the sole Arbitrator is without jurisdiction. He further submitted that even the claims raised by the respondent-claimant were beyond limitation in view of Section 43 of the Act of 1996, according to which the provision of Limitation Act 1963 (36 of 1963) are applicable which provides the limitation of three years for such claims, therefore the same could not have been considered and the claim was liable to be dismissed on this ground alone. He further submitted that the impugned judgment and award made by the sole Arbitrator is against the public policy in view of Section 31(7) (a) and 31(8) of the Act of 1996. Learned counsel for the appellants further submitted that the award is also not sustainable as the parties have not been treated equally as different costs have been awarded to both the parties, therefore there is violation of Section 18 of the Act of 1996. Learned counsel for the appellants further submitted that on account of theft, the appellants had suffered loss for which the First Information Report was also lodged. The correspondences show that the action was taken by the respondent against the Guards, therefore the bills were rightly withheld, which could not have been directed to be paid.

4. On the basis of above learned counsel for the appellant submitted that since the arbitration proceedings are without jurisdiction, therefor the impugned judgment and award passed by the sole Arbitrator and the judgment and order passed by the District Judge on Application under Section 34 of the Act of 1996 are not sustainable and the same are liable to be set aside. Learned counsel for the appellants relied on **Yeswant Deorao Deshmukh Versus Walchand Ramchand Lothari; 1950 Supreme Court Reports 852, The United Commercial Bank Ltd. Versus Their Workmen; 1951 Supreme Court Reports 380, Kiran Singh and others Versus Chaman Paswan and others; 1954 AIR 340,**

Judgment and order dated 13th of January 2020 passed by Hon'ble Supreme Court in K.Lubna and others Versus Beevi & others; Civil Appeal Nos.2442-2443 of 2011 and M/s. B and T AG versus Ministry of Defence; 2023 LiveLaw (SC) 466.

5. Per contra, learned counsel for the respondents submitted that the Sole Arbitrator was appointed with the consent of the appellants and no objection in this regard was taken before the Arbitrator. The appellants not only consented for appointment of Arbitrator but made a counter claim also before the Arbitrator, therefore the appellant cannot raise this objection after disposal of arbitration proceedings and it cannot be said that the proceedings are without jurisdiction in view of Section 7(4)(c) of the Act of 1996. He further submitted that no denial of notice for appointment of Arbitrator was ever made, rather the claims were raised and the Arbitrator was appointed by this court with the consent of the appellants. He further submitted that the claim of the respondent was also admitted by the appellants, therefore, the issues were made only on counter claim. He further submitted that the plea of limitation is also not available to the appellants as it was not taken at the threshold, when the Arbitrator was appointed by this court with the consent of the appellants for appointment of the Arbitrator. Even otherwise the claim was admitted and the counter claim was also made and contested, which has also been allowed. He further submitted that since the claim of the respondent was accepted by the appellants and the Sole Arbitrator while awarding the claim and the counter claim provided for set off in the award, therefore the appellants had done the summer salt and taken the aforesaid pleas. He further submitted that the cost has been awarded according to the claims, therefore the Hon'ble Arbitrator had rightly provided for the set off and no deduction has been made in the costs claimed by the

appellants. The claim and counter claim have been awarded after affording sufficient opportunity, in accordance with law, therefore the plea of unequal treatment is also misconceived and not tenable including the other contentions.

6. On the basis of above, learned counsel for the respondent submitted that there is no illegality or infirmity in the arbitration proceedings and the judgment and award passed by the Sole Arbitrator as well as the judgment and order passed on the application under Section 34 of the Act of 1996 filed by the appellants. The appeal has been filed on misconceived and baseless grounds. It is liable to be dismissed. Learned counsel for the respondent relied on **Mahanagar Telephone Nigam Limited Versus Canara Bank and others; (2020) 12 SCC 767, Union of India Versus Pam Development Private Limited; (2014) 11 SCC 366 and M/s. Raj Kishan & Company Versus National Thermal Power Corporation; 2012 SCC OnLine Del 4799.**

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The parties had entered into an agreement on 10.08.2001 for providing Security Personnel at Air Strip, Prithviganj, Pratapgarh by the Kalyan Nigam i.e. the respondent for protection of food grains belonging to Rajya Bhandaran Nigam i.e. the appellants. The said agreement was renewed from time to time. According to clauses 13, 14 and 16 of the said agreement the Kalyan Nigam was liable to indemnify the Bhandara Nigam for any loss and damages caused to it on account of negligence of the Security Guards deputed by Kalyan Nigam. On 04.02.2002 the fact of theft of 204 cover tops worth Rs.4,85,724/- belonging to Bhandaran Nigam came into the knowledge of Bhandaran Nigam and it was informed to Kalyan Nigam on 06.02.2002. The First Information Report of the said occurrence was lodged in the

concerned Police Station, who submitted the final report on 18.04.2002, which was not accepted by the learned Magistrate concerned and the police was directed to re-investigate the matter. After re-investigation, the final report was again submitted by the Police which was accepted on 16.05.2005 by the Magistrate concerned. Accordingly Bhandaran Nigam suffered a loss of Rs.4,85,724/- due to negligence of Kalyan Nigam employees. The claim of the appellants is also that Bhandaran Nigam had decided to shift their stock from Hawai Patti, Prithviganj, Pratapgarh, but the employees of Kalyan Nigam caused obstruction in shifting of stock. Therefore the Bhandaran Nigam had to employ the guards from Industrial Security and Training Force, who after great difficulties, could shift the stock, therefore it had to suffer the extra expenditure of Rs.3,62,825/- due to illegal and wrongful activities of Kalyan Nigam for shifting their stock. As the Kalyan Nigam did not indemnify the loss suffered by the Bhandaran Nigam, the wage bills submitted by the Kalyan Nigam to the Bhandaran Nigam on 01.05.2003, 02.06.2003, 01.07.2003, 01.08.2003, 01.09.2003 and 10.09.2003 for the total sum of Rs.6,67,193.20 remained unpaid.

9. The respondent preferred Arbitration Application No.28 of 2008; U.P. Purva Sainik Kalyan Nigam Limited through the Managing Director Versus the Managing Director, U.P. Warehouse Corporation Limited, Lucknow and another before this court for appointment of an Arbitrator. This court, by means of the order dated 05.12.2008, with the consent of learned counsel for the appellant appointed Sri K.L.Sharma, J. (Former Judge of this Court) as Arbitrator in the matter subject to his convenience and consent.

10. In pursuance of the aforesaid order passed by this court and the consent of the sole Arbitrator, he commenced the proceedings

after notice to the parties. The respondent-claimant filed his claim for Rs.6,67,193.23 as the unpaid wages of security service rendered to the opposite party no.2 since April 2003 till September 2003 claiming that the respondents provided the security personnel to the opposite party no.2 in terms of the agreement entered into between the parties on 10.08.2001, but the wages of the Security Personnel was paid upto March 2003 only, whereas Security Personnel remained on duty till September 2003 and wage bills dated 1st May, 2003, 2nd June, 2003, 1st July, 2003, 1st August 2003, 1st September 2003 and 10th September 2003 were not paid by the opposite party no.2 despite repeated reminders and notices. It was further alleged that the appellant-opposite parties admitted the claim of the respondent for a sum of Rs.6,67,193.23 and alleging theft of 204 cover tops in their legal notice made a counter claim of Rs.8,08,959.95. Since the appellant-opposite party no.2 neither paid the admitted amount of wage bills nor nominated an Arbitrator to decide the dispute the respondent-claimant moved an Arbitration Application before the Lucknow Bench of Allahabad High Court under Section 11 of the Act of 1996 and consequently the Arbitrator was appointed with the consent of appellant-opposite parties.

11. The appellants-opposite parties filed a joint statement of defence admitting the claim of the respondent-claimant for payment of the wages on account of the security services rendered from April 2003 till the date of terms of the agreement i.e. 09.09.2010. However appellants-opposite parties made a counter claim of Rs.8,48,969.95 also as against the claim of Rs.6,67,193.23 made by the respondent-claimant and imposed the liability on the respondent-claimant to return Rs.1,81,776.72 to the appellants. The appellants-opposite parties alleged in support of the counter claim, firstly that 204 cover Tops worth

Rs.4,85,724/- were stolen from the Hawai Patti, Prithvi Ganj, Pratapgarh due to negligence of the security personnel of the Kalyan Nigam and secondly, the appellants have suffered a loss of Rs.3,63,245.95 on account of the hindrance and obstacles caused by the security personnel by preventing the shifting of food stocks from the site to another site and for employing police force and taking the security services from Industrial Security force.

12. The respondent-claimant filed a replication to the joint statement of defence denying its liability for the alleged theft claim and also the alleged losses denying any negligence or hindrance etc., caused by security personal employed by Kalyan Nigam during the period from April 2003 till their actual dis-engagement.

13. On the basis of the pleadings of the parties, documents placed on record and after hearing the 9 points for determination were made by the Tribunal, which are extracted here-in-below:-

“(I) Whether the Annexure C-1 of the statement of defence filed by the O.Ps. is false, fake and fabricated document ? If so, its effect ?

(II) Whether the O.P. received 150 cover tops on 2.5.2002, 100 cover tops on 22.5.2002 and 149 cover tops on 30.5.2002, at their Air Strip Prithviganj in District Pratapgarh ?

(III) Whether there was alleged theft of 204 cover tops from the site of Air Strip, Prithviganj on or before 4.2.2002 ? If so, its value?

(IV) Whether the alleged theft of cover Tops was due to the negligence of the Security Staff ? If so, its effect and liability ?

(V) Whether the security staff of the claimant created any obstacle or hindrance in the shifting of the stores by the staff of the O.P.? If so, whether the O.P. suffered expenditure/loss of Rs.3,63,245.95 due to the delayed shifting?

(VI) Whether the claimant is liable to pay the value of the allegedly stolen cover Tops according to para 16 of the contract of security services dated 10.8.2001 executed between the parties? If so, its effect?

(VII) Whether the claimant is entitled to get interest on unpaid wages of security staff with effect from April 2003? If so, at what rate and at what amount and for what period?

(VIII) Whether the claimant is entitled to costs of the arbitral proceedings?

(IX) To what relief is the claimant entitled?”

14. After affording opportunity of evidence and hearing, the learned Arbitrator allowed the claim as well as the counter claim. Being aggrieved, the same was challenged under Section 34 of Act of 1996 before the District Judge, Lucknow by the appellant-opposite parties. The District Judge, after considering the grounds raised by the appellant-opposite parties, pleadings and evidence on record and affording opportunity dismissed the application/objection. Hence this appeal has been filed.

15. The first ground taken by learned counsel for the appellants-opposite parties is that since there was no arbitral agreement between the parties, therefore the whole arbitration proceedings are without jurisdiction and not sustainable in the eyes of law. It is not in dispute that the agreement dated 10.08.2001 entered into between the parties does not contain the arbitration clause, whereas the contention of learned counsel for the respondent is that since there was no objection in the various correspondence made in this regard and counter claim was also raised and the learned Arbitrator was appointed by this court by means of the order dated 05.12.2008 passed in Arbitration Application No.28 of 2008 with the consent of the appellants and thereafter not only the claim was admitted, but a counter claim was also filed and decided and no such plea was ever raised, therefore it cannot be taken at this stage.

16. Section 2(b) of the Act of 1996 defines the arbitration agreement, according to which, Arbitration agreement means an agreement referred to in section 7. Section 7 of the Act of 1996 provides the Arbitration Agreement, which is extracted here-in-below:-

“ 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 [including communication through electronic means] 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) The 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.”

17. According to the aforesaid Section 7, the Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement shall be in writing and arbitration agreement is in writing if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement or 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. Therefore merely because an arbitration clause is not in the arbitration, it cannot be said that the dispute can not be settled through arbitration and it is without jurisdiction, if it can be inferred in terms of Section 7 and the intention of parties to settle their disputes through arbitration are discernable from the same..

18. The Hon’ble Supreme Court, in the case of **Mahanagar Telephone Nigam Limited Versus Canara Bank and others (Supra)**, considering the provisions of Section 7 of the Act of 1996 has held that the arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The intention of the parties must be inferred from the terms of the

contract, conduct of the parties and correspondence exchanged to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad-idem and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach and must not be allowed to be thwarted by a pedantic and legalistic interpretation. The relevant portions of paragraph 9 are extracted here-in-below:-

“The existence of a valid arbitration agreement

9. A valid arbitration agreement constitutes the heart of an arbitration. An arbitration agreement is the written agreement between the parties, to submit their existing, or future disputes or differences, to arbitration. A valid arbitration agreement is the foundation stone on which the entire edifice of the arbitral process is structured. A binding agreement for disputes to be resolved through arbitration is a sine qua non for referring the parties to arbitration.

9.1. Section 7 defines “arbitration agreement” and reads as follows:

.....

9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.

9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words “including communication through electronic means” in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement [*Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.*, (2015) 13 SCC 477 : (2016) 1 SCC (Civ) 733] .

9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation. [*Union of India v. D.N. Revri & Co.*, (1976) 4 SCC 147]

9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An “arbitration agreement” is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.

9.6. In *Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.* [*Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.*, (1963) 3 SCR 183 : AIR 1962 SC 1810] , this

Court while ascertaining the terms of an arbitration agreement between the parties, held that : (AIR p. 1820, para 30)

“30. ... *If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term.* The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract.”

(emphasis supplied)

9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in *Enercon (India) Ltd. v. Enercon GmbH* [*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59], held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute.

9.8. In this case, MTNL raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings. We will first deal with this issue. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the following documents exchanged between the parties, and the proceedings:

9.8.1. The minutes of the meeting dated 27-3-2001 was convened by the Cabinet Secretariat, wherein all three parties were present and participated in the proceedings. The Committee on Disputes, in the meeting dated 16-12-2008 expressed the view that all the three parties should take recourse to arbitration in view of the different interlinked transactions between them. Canara Bank suggested that to expedite the arbitration, it should be conducted under the Arbitration and Conciliation Act, 1996. This was accepted by MTNL, and no objection was raised.

9.8.2......

9.8.3......

9.8.4......

9.9. The agreement between the parties as recorded in a judicial order, is final and conclusive of the agreement entered into between the parties. [*State of Maharashtra v. Ramdas Shrinivas Nayak*, (1982) 2 SCC 463 : 1982 SCC (Cri) 478. See also *Chitra Kumari v. Union of India*, (2001) 3 SCC 208] The appellant MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court, is now estopped from contending that there was no written agreement to refer the parties to arbitration.

9.10. An additional ground, for rejecting the preliminary objection raised by MTNL is based on Section 7(4)(c) of the Arbitration and Conciliation Act, 1996. Section 7(4)(c) provides that there can be an arbitration agreement in the form of exchange of statement of claims and defence, in which the existence of the agreement is asserted by one party, and not denied by the other. [*Savitri Goenka v. Kanti Bhai Damani*, 2009 SCC OnLine Del 177 : (2009) 1 Arb LR 320] In the present case, Canara Bank had filed its statement of claim before the arbitrator, and MTNL filed its reply to the statement of claim, and also made a counterclaim against Canara Bank. The statement of claim and defence filed before the arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party, under Section 7(4)(c) of the 1996 Act. In view of the aforesaid discussion, the objection raised by MTNL is devoid of any merit, and is hereby rejected.”

19. Section 4 of the Act of 1996 provides the waiver of right to object, which is extracted here-in-below:-

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

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

20. Section 16 of the Act of 1996 provides the competence of arbitral tribunal to rule on its jurisdiction. Sub Section (2) of Section 16 provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, which is extracted here-in-below:-

“**16. Competence of arbitral tribunal to rule on its jurisdiction.**—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, —

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

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

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

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

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

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

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

21. The Hon’ble Supreme Court, in the case of **Union of India Versus Pam Development Private Limited (Supra)**, has held that Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence and the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the court and he is deemed to have waived the right to objection with regard to the

lack of jurisdiction of the Arbitral Tribunal. The relevant paragraph 18 is extracted here-in-below:-

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *BSNL v. Motorola India (P) Ltd.* [(2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524] Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows: (SCC p. 349, para 39)

“39. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.”

22. Adverting to the facts of the present case admittedly the appellant-opposite parties had admitted the claim of the respondent-claimant in the correspondences and the Arbitrator was appointed with the consent of the appellants-opposite parties by this court and no objection in this regard was taken by the appellants, therefore the agreement recorded in judicial order is final and conclusive. Even after appointment of Arbitrator, when the claim was filed before the Arbitrator it was specifically pleaded in the claim that despite the observations made by this court in Writ Petition No.2197 of 2007(MB); U.P. Purva Sainik Kalyan Nigam Limited Versus State of U.P. and others passed on 6th of April, 2007 no Arbitrator was appointed and despite legal notice no payment was made and the counter claim was also made and the Arbitrator has been nominated by this court in Arbitration Application No.28 of 2007, but no objection to the same was raised in statement of defence, rather the counter claim was made by the appellants-opposite parties and thereafter the matter was contested before the learned Arbitrator. Therefore not

only no objection was given for the appointment of Arbitrator but the claim was contested and counter-claim was also raised without any demur, therefore the exchange of correspondence and statement of claims and defence and conduct of parties indicates that there was agreement between the parties to settle their disputes through arbitration therefore the appellant-opposite parties are estopped from raising any objection in this regard.

23. It was only after the arbitration proceedings were decided and the claim as well as the counter claim were allowed, when Application under Section 34 of the Act of 1996 was preferred before the District Judge, this issue was raised. Learned District Judge after considering the pleadings of the parties and the law held that the jurisdiction and existence of Arbitration Clause is the preliminary issue, which may have been raised before the High Court, who has been pleased to appoint the Arbitrator and moreover the judgment passed by the High Court appointing the Arbitrator has not been challenged before the Hon'ble Supreme Court and when no appeal has been filed, this issue cannot be allowed to be raised now for the first time in this court, which has been entertaining objection in petition under Section 34 of the Act of 1996. This court is of the view that it has rightly been held by the learned District Judge because once the right of this plea was waived and sole Arbitrator was got appointed by the consent of the appellants and thereafter also despite pleaded in the statement of claim no objection was raised in the statement of defence, rather the counter claim was preferred and contested, this plea could not have been raised and rightly rejected.

24. Learned counsel for the appellant-opposite parties relied on the view of one of Hon'ble Mr. Justice Fazl Ali expressed in the case of the **United Commercial Bank Ltd. Versus Their Workmen (Supra)** in which he has observed that it was said that

Rule 12 was ultra vires for two reasons; firstly, it shows that a 'vacancy' for the purposes of the proceedings before the Tribunal can be caused and need not always be a permanent one, as suggested on behalf of the appellants and secondly, what is more important, that a 'vacancy' does not affect the jurisdiction of the remaining members to continue the proceedings, for it is settled law that consent cannot given jurisdiction in respect of a subject matter though it might cure a mere irregularity. The Hon'ble Judge observed that it appears to me to be unnecessary to inquire into this side issue. Therefore this issue has not been examined by the Hon'ble Supreme Court in the said case in the facts and circumstances of the case, therefore it is not of any assistance in the facts and circumstances of this case for the reason that the appellant-opposite parties have not only consented for adjudication of the dispute through Arbitrator and appointment of Arbitrator, but admitted the claim of the respondent-claimants and raised a counter claim also and contested without any objection at the appropriate stage, which were considered by the learned Arbitrator and decided, therefore the appellants-opposite parties have waived their right, therefore it cannot be raised at this stage.

25. The Second argument of learned counsel for the appellants-opposite parties is that the claims raised by the respondent-claimant were beyond limitation in view of Section 43 of the Act of 1996, according to which the provisions of limitation Act 1963 are applicable, which provides the limitation of 3 years for such claim, is misconceived and not tenable for the reason that this objection was not taken by the appellants-opposite parties either before the High Court or before the Arbitrator, rather the counter claim was filed and contested before the learned Arbitrator. Any such objection should have been taken at the very first instance. Even otherwise this objection is not available to the appellants-

opposite parties because they themselves raised a counter claim, pursued the same and the counter claim has also been allowed. The Delhi High Court, in the case of **M/s. Raj Kishan & Company versus National Thermal Power Corporation; 2012 SCC OnLine Del 4799** has held that the plea of limitation is not open to the petitioner to raise at this stage as the same was never raised before the Arbitral Tribunal.

26. Learned counsel for the appellants-opposite parties in this regard has relied on **M/s. B and T AG Versus Ministry of Defence (Supra)** in which the Hon'ble Supreme Court has held that statutory time period for enforcement of a claim which was three years cannot be defeated on the ground that the parties were negotiating, but it is not of any assistance to learned counsel for the appellant-opposite parties in the facts and circumstances of the case for the reason that in the present case the parties were not only negotiating but they had proceeded further and the appellants-opposite parties had admitted the claim of the respondent-claimant and also raised the counter claim neither only in the negotiations but before the learned Arbitrator also. Therefore once the Arbitration proceedings were decided and even claim of the appellants-opposite parties was allowed they cannot raise this objection.

27. Learned District Judge after considering the plea of limitation raised by the appellants-opposite parties and the law laid down by the Hon'ble Supreme Court has rightly held that the point of limitation was not raised by the petitioner before the Hon'ble Arbitrator nor before the High Court at the time of appointment of Arbitrator, hence for the first time it cannot be allowed to be raised before the court.

28. The Hon'ble Supreme Court, in the case of **National Insurance Company Limited Versus Boghara Polyfab (P) Ltd;**

(2009) 1 SCC 267, has held that the Chief Justice or the designated Judge will have the right to decide the preliminary aspects which includes the existence or otherwise of a live claim, therefore once this plea was not taken before the High Court at the time of appointment of Arbitrator and thereafter before the Arbitral Tribunal, it is not open to the appellants-opposite parties to take before the court.

29. The Hon'ble Supreme Court, in the case of **Yeswant Deorao Deshmukh Versus Walchand Ramchand Kothari (Supra)**, relied by learned counsel for the appellants-opposite parties has held that if the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. The Hon'ble Supreme Court has relied on the observations of Lord Watson in **Connecticut Fire Insurance Co. Versus Kavanagh; (1892) A.C. 473**, in which it has been said that when a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. Thus if the basic pleadings have been made then this plea could have been raised. Similar view has been taken by the Hon'ble Supreme Court in the case of **K.Lubna and others Versus Beevi and others (Supra)**. But in the present case there are no such pleadings were made or raised either before this court at the time of appointment of the Arbitrator, rather the consent was given or it was raised before the Arbitrator at the relevant stage in terms of statutory provisions, therefore it is of no assistance to the appellants-opposite parties.

30. Similarly the case of **Kiran Singh and others Versus Chaman Paswan and others (Supra)** relied by learned counsel for the appellants-opposite parties is not applicable on the facts and circumstances of the present case in view of discussions made here-in-above.

31. The third argument of learned counsel for the appellants-opposite parties is that the impugned judgment and award made by the sole Arbitrator was against the public policy in view of Section 31(7)(a) and 31(8) of the Act of 1996. Section 31(7)(a) of the Act 1996 provides that unless otherwise agreed by the parties, an arbitral award for payment of money may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Section 31(8) provides that the costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31A. Section 31A provides regime for costs, which is in the discretion of the Arbitral Tribunal. The Arbitral Tribunal after considering the pleadings of the parties and evidence on record and claim of the parties has allowed the interest and the costs as claimed by the parties.

32. The learned District Judge after considering the pleadings of the parties and the award has recorded a finding that the Hon'ble Arbitrator has committed no wrong in awarding interest at the rate of 18% per annum from the date of acceptance of final report. Moreover, costs, as granted by the Hon'ble Arbitrator to both the parties, and expenses of the witnesses also cannot be said to be excessive because the Hon'ble Arbitrator has very meticulously gone through the record while awarding expenses of the witnesses of both the parties. This Court after going through the records and the findings recorded by the Hon'ble Arbitrator

and the learned District Judge does not find any illegality or error in the findings recorded by the learned Arbitrator and the District Judge. Learned counsel for the appellants-opposite parties also could not point out any error or illegality in the said findings or as to how it is against public policy.

33. The arguments of learned counsel for the appellants-opposite parties that the award is not sustainable as the parties have not been treated equally as different costs have been awarded to both the parties, therefore there is violation of Section 18 of the Act of 1996. Section 18 of the Act 1996 provides that the parties shall be treated with equality and each party shall be given a full opportunity to present his case. Therefore in view of Section 18 the equal opportunity is required to be provided to both the parties to present their case. Though this plea does not appear to have been taken before the learned District Judge while filing the application under Section 34 of the Act of 1996, however perusal of the award indicates that equal opportunity has been provided to both the parties before passing the award, which has not been denied. Defence of the appellants-opposite parties and the counter claim raised by him has properly been considered and dealt with in the award on the basis of pleadings, evidence and material on record, therefore merely on the basis of different costs awarded to both the parties it cannot be said that the parties have not been treated equally. The costs and interest including the claim and counter claim have been awarded according to the claims made by the parties, therefore the other contentions of learned counsel for the appellant-opposite parties are not tenable and repelled accordingly.

34. In view of above and considering the over all facts and circumstances of the case this court is of the view that the impugned judgment and order dated 16.09.2013 has rightly been

passed in accordance with law by the District Judge, Lucknow dismissing the objection of the appellants-opposite parties against the award dated 16.01.2011 passed by the sole Arbitrator in Arbitration Case No.28 of 2008, which does not call for any interference by this court. This First Appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

35. The appeal is, accordingly, **dismissed**. No order as to costs.

(Rajnish Kumar,J.)

Order Date :-05.08.2024

Banswar