

THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.320 of 2007

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JUDGMENT: (per Hon'ble Sri Justice M. Seetharama Murti)

This civil miscellaneous appeal under Section 37 of the Arbitration & Conciliation Act, 1996 ('the Act' for short) by the claimant is directed against the order dated 06.11.2006 passed in AOP.No.662 of 2002 by the learned Principal District Judge, Visakhapatnam.

2. We have heard the submissions of the learned counsel for the claimant/appellant and the learned counsel for the 1st respondent. The other respondents herein are the learned Arbitrators.

3. The parties in this appeal shall hereinafter be referred to as the claimant and the respondent as arrayed in the Arbitral proceedings for convenience and clarity.

4. The facts leading to the filing of the present appeal and the facts necessary for consideration, in brief, are as follows: -

The claimant-company/ship owner, had entered into a Contract of Affreightment ('the COA' for short) dated 14.09.1999 with the respondent-company. Under the said contract, the claimant had agreed to transport total quantity of 4,60,000 metric tonnes (5% more or less in Charterer's option) of limestone in bulk from ½ safe berths Mina Saqr/Ras Al Khaima to Visakhapatnam. As per the agreement, shipment was to be effected in parcel size of 25/35,000 metric tonnes with about five or six shipments per quarter. The parties to the contract had intended that each shipment and transportation was to be governed by the terms of the COA. While so, as differences and disputes had arisen between the parties, the parties invoked the arbitration clause which is clause 55 of the said COA, which reads as under: '**All disputes arising under this Charter Party shall be settled in India in accordance with the provision of the Arbitration & Conciliation Act, 1996 (No.26 of 1996) or any further amendments thereof, and under the Maritime Arbitration Rules of the**

Indian Council of Arbitration. The Arbitrators to be appointed from out of the maritime panel of Arbitrators of ICA. The Arbitrators shall be commercial men.'

As per the said clause of the COA, the claimant had nominated one learned Arbitrator and the respondent had nominated another learned Arbitrator. Both the Arbitrators had appointed the third learned Arbitrator as the Presiding Arbitrator. Before the Arbitral Tribunal the claimant had filed its claim for Rs.46,36,995.93ps. The respondent had filed a counter resisting the claim. In their reply, the claimant had revised its claim and made a revised claim of Rs.43,86,275.72ps. During the course of hearing, the respondent had submitted an affidavit to the Tribunal stating that there is no dispute arising under the contract for adjudication by the Tribunal and asked the Tribunal to decide the issue of jurisdiction as a preliminary issue as per Section 16 and the other provisions of the Act. Both the parties had made oral submissions and had also filed written summaries of submissions on the issue of jurisdiction. Subsequent hearings were also held. The Arbitral Tribunal had recorded the minutes of the meeting held on 18.01.2002. In the said minutes, it was *inter alia* recorded/held as follows: '**After hearing arguments on behalf of Claimants and Respondents, the Tribunal has unanimously decided to continue with the Arbitral proceedings in accordance with Section 16(5) of the Arbitration and Conciliation Act, 1996.**' Having so held, the Tribunal had framed the following agreed issues:

1. Whether plea of lack of jurisdiction in the Tribunal is sustainable?
- 2 . Whether respondents are to pay Rs.38,62,377.14ps admitted payable by them to claimants?
3. If yes, interest if any, at what rate, at what amount and for what period?
4. Whether claimants caused losses to respondents being in breach of Contract of Affreightment dated 19.04.1999?
5. If yes, whether respondents are entitled to damages for an amount of Rs.38,62,377.14ps?
6. Other relief, if any.

On the issue No.1 concerning lack of jurisdiction, the Arbitral Tribunal held as follows: - 'The Tribunal considers that there is a dispute between the parties under the COA which provides for arbitration under clause 55, and that therefore, the Tribunal has jurisdiction.' On issue No.2, the Tribunal held as follows: - 'Freight having been earned, charterers are indebted to owners to the extent of Rs.38,62,432.81ps as admitted by them. Therefore, they must pay this sum to the

Claimants together with interest as per clause 88 of the COA'. On issue No.3 regarding interest, the Tribunal held as follows: - 'Interest will be payable @ 18% from date of this award till the date of payment of the awarded amount.' On issue No.4 concerning the question as to whether the claimants caused losses to the respondent company being in breach of the COA and issue no.5, whether the respondents are entitled to damages of an amount 38,62,432.81ps, the Arbitral Tribunal held that there was no breach of contract by the claimants and therefore, the respondent company is not entitled to damages for breach of contract. Therefore, the aggrieved respondent filed a petition under Section 34 of the Act in the Court of the learned District Judge, Visakhapatnam. On merits, the learned District Judge had allowed the said petition and had set aside the award dated 28.03.2002 passed by the Arbitral Tribunal. Therefore, the claimant is before this Court.

5. The learned counsel for the claimant would contend as follows: - 'The Court below had erred in holding that the Arbitral Tribunal had not followed the procedure laid down in Section 16 of the Act. The Court below had erred in setting aside the award inspite of coming to the conclusion that the Tribunal had jurisdiction. The Court below ought to have noted that the respondent had waived and/or was deemed to have waived its objection regarding jurisdiction of the Arbitral Tribunal as the same was not raised in the counter statement filed by it and as the respondent had participated, without protest, in the proceedings by filing a counter claim. The Court below had failed to consider that the respondent filed an application purportedly under Section 16(2) of the Act on the date fixed for hearing. The Court below had erred in coming to the conclusion that making of separate application by the respondent at a later point of time indicated that the respondent has been pressing for the decision of the Arbitral Tribunal on its own jurisdiction. This finding was recorded in the absence of any evidence to this effect. The Court below had erred in coming to the conclusion that the making of separate application by the respondent at a later point of time indicated that the respondent had been pressing for the decision of the Arbitral Tribunal on its own jurisdiction in spite of clear evidence to the contrary in the form of the minutes of the arbitration proceedings held on 18th and 19th of January, 2002 which established that the respondent had not pressed for any decision on the Arbitral Tribunal's jurisdiction and had participated without protest in the proceedings. The Court below ought to have seen that the Tribunal considered the objection of the respondent regarding its jurisdiction on the

preliminary issue and that the panel of Arbitrators had unanimously decided to continue with the Arbitral proceedings in accordance with Section 16(5) of the said Act having rejected the plea of the respondent on the issue of jurisdiction. The Court below ought to have seen that Section 16 did not enjoin the Arbitral Tribunal with a duty to record a separate decision rejecting the plea relating to lack of jurisdiction. Section 16 of the Act specifically provided that Arbitral Tribunal shall continue with the proceedings and pass its Award if it decides to reject the plea regarding lack of jurisdiction. In this case, the Tribunal had rejected the plea regarding the lack of jurisdiction raised by the respondent and had recorded its minutes on 18th and 19th of January 2002. The Court below had failed to appreciate that the Tribunal had proceeded to deal with the other issues on the above said dates only after the parties had concluded their arguments on the issue of jurisdiction and on rejecting the plea of lack of jurisdiction in accordance with the provisions of the Act and after deciding unanimously to continue with the arbitration proceedings. The Court below had failed to consider that Section 16 of the Act provides that a party aggrieved by an award passed after rejecting its objection regarding the jurisdiction of the Arbitral Tribunal may make an application for setting aside such award, in accordance with Section 34 of the Act, only after the award on merits of the case has been made. The Court below had failed to appreciate that a separate decision, if any, was passed by the Arbitral Tribunal rejecting the objection of the respondent as to its jurisdiction was not an appealable order in terms of Section 37 of the Act. The Court below had failed to appreciate that the respondent had not suffered any prejudice by reason of the Arbitral Tribunal not recording a separate detailed decision, if any, required under law rejecting the objection as to jurisdiction at the time when it had decided to proceed with the arbitration proceedings. The Court below had failed to appreciate that the failure of the Arbitral Tribunal to record a separate decision rejecting the objection of the respondent as to jurisdiction did not render the award patently illegal. The non recording of a separate decision rejecting the objection of the respondent as to jurisdiction of the Tribunal was a mere procedural irregularity, in any view of the matter, and it is not an illegality and such an irregularity of a trivial nature could be ignored. The Hon'ble Supreme Court in **Oil and Natural Gas Corporation Ltd. V. Saw Pipes Ltd., reported in (2003) 5 SCC 705** has held that an Arbitral award should not be set aside if a party has not suffered any prejudice by reason of any irregularity. The Court below had erred in coming to a conclusion that the provisions of Section 16 of the Act are mandatory. The Court below had erred in

holding that the Tribunal had not decided the issue of jurisdiction as a preliminary issue as directed by the Supreme Court in the case of **Olympus Superstructures Pvt. Ltd., v. Meena Vijay Khetan & Others reported in (1999) 5 SCC 651**. The court below had erred in coming to the conclusion that the departure made by the Arbitral Tribunal invalidated the award passed. The order passed by the Court below is unsustainable. The Court below had erred in holding that the Award of the Arbitral Tribunal is unsustainable for not following the procedure under Section 16 of the Act though the necessary procedure was duly followed. The Court below had erred in holding that the Tribunal had not dealt with the issues in a proper way. The respondent had unequivocally admitted its liability towards the claimant's for the amounts claimed by the claimant; but, the respondent has wrongfully withheld such amount towards another claim relating to an independent contract. The Court below ought to have seen that the Tribunal had rightly held that the respondent could not be allowed to withhold the amount towards another claim relating to an independent contract, when admittedly the amount was payable by the respondent under the subject contract to the claimant. The Court below had erred in holding that the Arbitral Tribunal had not given reasons for the award passed by it and ought to have appreciated that the Arbitral Tribunal had given reasons for the award. The Court below, while setting aside the award of the Arbitral Tribunal, without examining the merits of the matter ought not to have made a sweeping observation that the Award was not supported by reasons. The Court below had failed to appreciate that the Arbitral Tribunal had duly dealt with each and every issue in its award. The order of the court below, which is contrary to the facts and the law, is liable to be set aside and the award of the Arbitral Tribunal is to be restored.'

6. The learned counsel for the respondent while supporting the order of the Court below and while contending that the award of the Tribunal is unsustainable and while praying for the dismissal of this appeal and confirmation of the order of the Court below had *inter alia* contended as follows: - 'This respondent contended before the Tribunal that there is no Arbitral dispute and that the Tribunal has no jurisdiction to enter into the reference and continue with the Arbitral proceedings and make an award. This objection was raised before making the first statement of defence. An affidavit was filed raising an objection that the Tribunal has no jurisdiction and also a plea was taken in the counter statement. After oral hearings,

as directed by the Tribunal, written arguments were also submitted. The Tribunal has not recorded a finding and has not decided the issue of jurisdiction as a preliminary issue and has not ruled on its jurisdiction before deciding to continue with the Arbitral proceedings. The Tribunal had violated the provisions of Section 16 of the Act. No separate decision was recorded on the issue of jurisdiction and this issue was also decided while deciding the merits of the main dispute i.e., the issues involved in the main matter. Prejudice was caused to the respondent. The said course adopted by the Tribunal is contrary to the decision of the Supreme Court in **Olympus Superstructures Pvt. Ltd., v. Meena Vijay Khetan & Others (supra)** Further the award is not supported by reasons. Hence, the court below had rightly interfered with the award and had set it aside. There is no merit in the appeal.'

7. Now the points for consideration in this appeal are:

1. **Whether the Arbitral Tribunal, before continuing with the Arbitral proceedings and making an Arbitral Award, had, in-fact, not decided or ruled on its own jurisdiction either expressly or impliedly and had failed to take a decision rejecting the plea of the respondent that the Tribunal does not have jurisdiction?**
2. **In case this Court comes to the conclusion that the Arbitral Tribunal had decided the issue of jurisdiction while dealing with the merits of the Arbitral dispute, then the next question is – Whether such a course adopted by the Arbitral Tribunal had caused any prejudice to the respondent? And, if not so, whether the award of the Tribunal can be held to be valid and sustainable?**
3. **Whether the claimant/appellant herein had made out valid and sufficient grounds for setting aside the order of the Court below and restoring the Award of the Arbitral Tribunal?**

8. POINTS:

8.1 The introductory facts and the facts leading to the present stage of the matter are already stated supra, in detail. We have given earnest consideration to the facts, the evidence and the submissions. We have carefully gone through the material record and the decisions cited. The Arbitral Tribunal passed an award in favour of the claimant/appellant herein. The said Award was assailed by the respondent herein

before the Court below. The Court below on point No.1 had held that there is no force in the contention of the learned counsel for the respondent herein that there exists no dispute between the parties and that the Arbitral Tribunal has no jurisdiction. Thus, the Court below had held that there is an arbitrable dispute between the parties and that the Arbitral Tribunal has jurisdiction. No appeal or cross appeal is filed by the respondent assailing the concurrent findings of the Tribunal and the Court below on this issue. Therefore, there is no dispute now with regard to the fact that there is a dispute between the parties, which is arbitrable, and that the Tribunal has got jurisdiction.

8.2 However, on point No.2, the Court below had held to the effect that the Arbitral Tribunal has committed serious error in not deciding on its own jurisdiction as a preliminary issue and that the same is contrary to Section 16 (2 & 3) of the Act. The finding of the Court below on point No.2 alone is now under challenge before this Court. In view of the rival contentions, it is necessary to refer to Section 16 of the Act, which reads as follows:

16. Competence of Arbitral Tribunal to rule on its jurisdiction.

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(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.

Section 16 of the Act deals with the competency of Arbitral Tribunal to rule on its jurisdiction. The Section also says that the Arbitral Tribunal shall decide on the plea that it does not have jurisdiction, if raised not later than the submission of statement of defence, and shall continue with the Arbitral proceedings and make an Arbitral award in a case where the said plea that the Arbitral Tribunal does not have jurisdiction is rejected. The learned counsel for the claimant contends that the Tribunal has decided the question that it has got jurisdiction and then had unanimously decided to continue with the Arbitral proceedings in accordance with Section 16(5) of the Act and that therefore, the order of the Court below with findings to the contrary is erroneous and is liable to be set aside. He had also submitted that there is no need to record a separate decision and that it is enough if the Tribunal decides or rules on its jurisdiction before deciding to continue with the Arbitral proceedings. He had also submitted that either an express or an implied decision would suffice and meet the requirement of law. In support of the contention that the Arbitral Tribunal had ruled on its jurisdiction before continuing with the arbitration proceedings, he had placed reliance on the undisputed minutes of the meetings held on 18th January 2002, which were recorded and signed by the panel of Arbitrators. On the other hand, the learned counsel for the respondent would contend that the Arbitral Tribunal had not decided the issue of jurisdiction as a preliminary issue and that the Tribunal had not passed a separate order on that preliminary issue before continuing with the Arbitral proceedings and making an Arbitral award, and that, therefore, the Tribunal has committed a serious error in not deciding on its jurisdiction as a preliminary issue and that, therefore, the Tribunal had acted in contravention of sub-section (2) of Section 16 of the Act. He had further submitted that an express ruling and a separate decision on the preliminary issue of jurisdiction are necessary and any implied ruling does not meet the requirement of law.

8.3 In this backdrop, the first point/question is as to whether or not the Arbitral Tribunal had decided or ruled on its jurisdiction, either expressly or impliedly, before continuing with the Arbitral proceedings and making an Arbitral Award. We have carefully gone through the proceedings of the learned Arbitrators, as borne out by the record, particularly, the Award. A reading of the Award would show the following

facts: "Hearings were conducted on 7th and 8th of September 2001 at Visakhapatnam and that during the course of the said hearings, the respondent had submitted an affidavit to the Tribunal stating that there is no dispute for adjudication by the Tribunal and asked the Tribunal to decide on its jurisdiction as a preliminary issue, as per Section 16 of the Act. On the said objection, both the parties were heard by the Tribunal orally; and, both the parties had also filed their written submissions in connection with the issue of jurisdiction. A further hearing was conducted on 18th of January 2002 at Mumbai.' It is necessary to reiterate that before this Court there is no dispute now that there is an arbitrable dispute between the parties as held by the Tribunal and the court below. Therefore, the only aspect to be considered is in regard to the ruling of the Tribunal on the issue of jurisdiction. The learned panel of Arbitrators had recorded the minutes of the meeting held on 18th of January 2002. The said minutes read as under: -

'The Tribunal advised both parties that it has taken note of the plea of jurisdiction made by respondents in their Counter Statement dated 20.3.2001 as also in an Affidavit submitted to the Tribunal at its first hearing on September 7, 2001.

After hearing arguments on behalf of Claimants and Respondents, the Tribunal has unanimously decided to continue with the Arbitral proceedings in accordance with Section 16(5) of the Arbitration and Conciliation Act, 1996.'

The said minutes also would show that after recording the above finding, the Tribunal has then framed the issues which were agreed upon by the parties. Therefore, from the aforementioned minutes recorded by the panel of Arbitrators, which are undisputed, it is clear that the Tribunal after due consideration of the oral and written submissions on the preliminary issue of jurisdiction has unanimously decided to continue with the Arbitral proceedings in accordance with Section 16(5) of the Act. However, as rightly pointed by the learned counsel for the respondent, there is no specific recording in the minutes that 'the contention of the respondent that the Tribunal does not have jurisdiction is rejected'. It is further rightly pointed out that the Tribunal having decided to continue with the Arbitral proceedings had framed the first issue viz., **'whether the plea of lack of jurisdiction in the Tribunal is sustainable'** and had answered this issue also along with the other issues holding *inter alia* that the Tribunal considers that there is a dispute between the parties under the COA, which provides for arbitration under clause 55 and that

therefore, the Tribunal has jurisdiction. Basing on the said aspects pointed out, the learned counsel for the respondent would further contend that the Tribunal had not decided the issue of jurisdiction as a preliminary issue and that therefore, the Tribunal had framed the first issue and had also answered the same while answering the other issues concerning the merits of the main dispute. He would further submit that had the Tribunal already decided the issue of jurisdiction earlier as a preliminary issue, then the Tribunal would not have again framed and decided the issue no.1 on the aspect of its jurisdiction. But, the fact of the matter is that the Tribunal had heard both the sides on the issue of jurisdiction and had also received written submissions and had held a further hearing on 18th of January 2002 and had then recorded that it is unanimously deciding to continue with the Arbitral proceedings in accordance with Section 16(5) of the Act. The contents of the minutes extracted supra, if examined in the context of the matter, are enough to come to a safe conclusion that the Tribunal had decided/ruled on its jurisdiction and had, therefore, unanimously decided to continue with the Arbitral proceedings. Therefore, from the material record, it cannot be said that the Arbitral Tribunal had not decided the issue of jurisdiction and had failed to rule on its jurisdiction before continuing with the Arbitral proceedings. We, accordingly, hold that the Arbitral Tribunal had taken a decision on its jurisdiction, before unanimously deciding to continue with the Arbitral proceedings, though it has not expressly rejected the contention that it lacked jurisdiction. Point No.1 is accordingly answered. However, for reasons best known to it, the Arbitral Tribunal had again formulated issue no.1 referred to supra and had recorded its finding on the said issue of jurisdiction also while deciding the other issues.

8.4 Before taking up the next point, it is necessary to examine the contentions of the respondent on the aspect that the Arbitral Tribunal has not passed a separate order specifically rejecting the respondent's contention that it has no jurisdiction. The said contentions are as under: 'The Arbitral Tribunal has committed a serious error in deciding the issue of its jurisdiction along with the other issues and in not deciding the issue of jurisdiction as a preliminary issue by passing a separate order. Therefore, on these grounds the award was rightly set aside by the Court below.' Let it be assumed for a moment that the Tribunal had not decided the issue of its jurisdiction as a preliminary issue as it has not passed an order excepting recording

minutes. In the light of this assumption, it is necessary to consider the issue as to whether the award is liable to be set aside on the sole ground that the issue of jurisdiction was not decided as a preliminary issue and that the said issue was decided along with the other issues by the Arbitral Tribunal. A reading of the provision of Section 16 of the Act would show that a plea that the Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. However, under sub-section (4) of Section 16 the Arbitral Tribunal may admit such a plea at a later point of time if it considers that the delay in raising the plea is justified. The only requirement of sub-section (5) is that the Arbitral Tribunal has to take a decision rejecting the plea that it does not have jurisdiction before continuing with the Arbitral proceedings and making an award. In the case on hand, the fact that the Tribunal had recorded the minutes of its meeting held on 18th January 2002 is not in dispute. A perusal of the said minutes would show that the Tribunal has unanimously decided to continue with the Arbitral proceedings, as already noted. Further, a perusal of the award of the Tribunal would show that before deciding any other issues, the first issue on lack of jurisdiction was decided by the Arbitral Tribunal and it was held that the Tribunal has got jurisdiction. After deciding that first issue only, the other issues were answered and the dispute was adjudicated. Therefore, in the instant case before deciding any other issues concerning the merits of the matter, the issue of jurisdiction was decided by the Tribunal. In the well considered view of this Court, there is no requirement of law that the issue of jurisdiction has to be separately decided as a preliminary issue by passing a separate order before continuing to proceed with the Arbitral proceedings. This view of this Court finds support from the ratio in the decision in **Maharshi Dayanad University and another v. Anand Coop L/C Society Ltd., and another**. The facts of the cited case are as follows: - 'The first respondent invoked jurisdiction of the District Court under Section 11 of the Act seeking appointment of an Arbitrator. The District Judge, controlled as he then was, by the decision in *Konkan rly.Corpn.Ltd., v. Rani Construction* [(2002) 2 SCC 388] appointed the Superintending Engineer as arbitrator by relying on clause 25-A of the tender conditions, leaving it to the parties to raise all objections, including the objection to his jurisdiction, before the arbitrator in terms of Section 16 of the Act. Feeling dissatisfied, the appellant filed a writ petition before the High Court relying on the decision of the Supreme Court that since the order based on the application under Section 11 was an administrative order, a writ petition was maintainable, by referring

to *State of Orissa v. Gokulananda Jena* [(2003) 6 SCC 465]. The High Court held that the objections sought to be raised could be raised by the appellant before the arbitrator and there was no reason for the High Court to interfere with the order appointing an arbitrator in the circumstances of the case. Feeling aggrieved thereby, the appellant had preferred the appeal by special leave before the Supreme Court.' In this factual background, while dismissing the appeal, the Supreme Court had held as follows: -

'We are, therefore, satisfied that it would be appropriate to leave this question, as also the other questions to be decided by the arbitrator rather than our trying to answer them at this stage in view of the fact that this case is not governed by the principles recognized by SBP & Co.[(2000)4 SCC 272]. But, we make it clear that the arbitrator, in the first instance, has to decide whether the existence of an arbitration agreement in terms of Section 7 of the Act is established and also to decide whether the claim now made is a claim that comes within the purview of clause 25-A of the tender conditions in case it is found to be an agreement within the meaning of Section 7 of the Act. Only on deciding these two aspects can the arbitrator go into the merits of the claim made by the respondent. It is clarified however that this does not mean, that he should treat these two aspects as preliminary issues and decide them first; but only that he must decide them without fail while proceeding to finally pronounce his award.'

8.5 The ratio in the decision would support the view that the issue of jurisdiction need not necessarily be decided as a preliminary issue and the said issue of lack of jurisdiction has to be decided before the learned Arbitrators going into the merits of the claim made by the claimant. Therefore, the Hon'ble Supreme Court has clarified in the cited decision that 'it does not mean that the arbitrator should treat the two issues as preliminary issues and decide them first; but only that he must decide them without fail while proceeding to finally pronounce his award'. In the case on hand, the panel of Arbitrators having heard the submissions of both the sides and having received written submissions on the issue of lack of its jurisdiction had held a hearing on 18th of January, 2002 and had unanimously decided to continue with the Arbitral proceedings. Further, the learned arbitrators as is evident from the award had decided the issue of lack of jurisdiction as the first issue and had then proceeded to decide the other issues concerning merits of the dispute and had finally pronounced the award. Therefore, the said award which finds approval from

the procedure suggested by the Hon'ble Supreme Court in the above ruling cannot be said to be bad in law and therefore, need not be set aside. Therefore, the contention of the respondent that the Court below was right in setting aside the award of the Tribunal is devoid of merit and cannot be countenanced.

8.6 Coming now to the next point as to whether any prejudice has been caused to the respondent for the mere reason that the issue of lack of jurisdiction was decided by the panel of Arbitrators as issue no.1, it is appropriate to refer to the legal position dealing with the rights of the parties who are aggrieved of a decision made by the Arbitrators on the issue of lack of jurisdiction. In this regard, it is necessary to first refer to Sections 34 and 37 of the Act, which read as under:

34 Application for setting aside Arbitral award. —

(1) Recourse to a Court against an Arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An Arbitral award may be set aside by the Court only if—

(a) the party making the application 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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the Arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the Arbitral Tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

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

37. Appealable orders.—

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

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

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

(2) Appeal shall also lie to a Court from an order granting of the Arbitral Tribunal,—

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

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

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

8.7 A reading of the provisions of the sections would show that when only an order accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16 is made, a right of appeal is provided to the aggrieved party under Section 37 of the

Act. But, in a case where an order rejecting the plea referred to in sub-sections (2) and (3) of Section 16 is made, no right of independent appeal is provided under Section 37 of the Act. It is pertinent to note that under sub-section (2) of Section 37 it is provided that an appeal shall also lie to a Court from an order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16. However, no appeal lies to a Court from an order of the Arbitral Tribunal rejecting the plea referred to in sub-section (2) or (3) of Section 16 of the Act. Therefore, it is clear that under Section 37 of the Act, an appeal is provided only against an order of the Arbitral Tribunal accepting the plea of lack of jurisdiction or excess of jurisdiction. No appeal has been provided against an order rejecting the plea of lack or excess of jurisdiction. Thus, the scheme of the Act appears to be that where an objection as to lack or excess of jurisdiction is raised by a party in accordance with sub-sections (2) and (3) of Section 16 and the Arbitral Tribunal decides to accept such plea, the decision would be appealable under Section 37(2) of the Act. However, in case the Arbitral Tribunal rejects the plea and passes the award on merits, the remedy of the aggrieved party is to make an application for setting aside the award in accordance with Section 34 of the Act. In the light of these provisions, this court is not inclined to accept the argument that the issue of lack of jurisdiction or excess of jurisdiction has to be invariably decided as a preliminary issue and that the Arbitral Tribunal is obliged under law to record a separate decision rejecting the plea relating to lack or excess of jurisdiction and thereafter it has to make a separate Arbitral award. For that reason, in the well considered view of this Court, the Tribunal is not required under law to treat the said issue of lack or excess of jurisdiction as preliminary issue; however, the Tribunal is obliged to make a decision on the said issue without fail and then must decide the other issues while proceeding to finally pronounce the award as held by the Supreme Court. In a case where the Arbitral Tribunal rejects the plea of lack of its jurisdiction and passes the award on merits, the remedy of the aggrieved party is to make an application for setting aside the award in accordance with Section 34 of the Act. Therefore, it cannot be said that prejudice has been caused to the respondent herein for the Tribunal not deciding the issue of lack of jurisdiction as a preliminary issue as in the case on hand the Tribunal had rejected the plea of the respondent that the Tribunal has no jurisdiction. Point No.2 is accordingly answered.

8.8 Coming to the claimant's case that the order of the Court below is not sustainable being not in accordance with the facts and law, it is to be noted that the

Court below has also recorded a finding that there is an arbitrable dispute; however, the Court below has simply referred to the ratios in the decisions in **Scan Organics Limited v. Mukesh Babu Financial Services Limited [1998(3) RAJ 240(BOM) and Union of India and another v. M/s.East Coast Boat Builders & Engineers Ltd., [AIR 1999 Delhi 44]** without discussing the facts of the present case and applicability of the ratios in the precedents to the case on hand. As already noted, in the case on hand, there is no scope to hold that the Arbitral Tribunal has not ruled on its jurisdiction before proceeding to continue with the proceedings in view of the minutes of the meeting, which are extracted supra. Further, the Tribunal had decided the first issue of the lack of jurisdiction and had ruled on its jurisdiction before answering the other issues and pronouncing the award. In **Union of India and another v. Major Bahadur Singh** the Supreme Court held as under:

‘Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.”

Therefore, the finding of the Court below that Arbitral Tribunal has committed a serious error in not deciding on its own jurisdiction as a preliminary issue cannot be sustained.

8.9 Now that this Court has held that the above said finding of the Court below is

unsustainable, the appeal has to be allowed. However, it is necessary to also note that in the concluding paragraph of the order impugned, the learned District Judge had held as follows: - **‘Further having gone through the Award passed by the learned Arbitral Tribunal, I arrived at a definite conclusion that the Award is not supported by reasons, and it has not dealt with the issues involved in the matter in a proper way.’** This is also one of the grounds for setting aside the award by the Court below. However, on this aspect, no issue or point for consideration was framed by the Court below and a sweeping observation was made. Further, that observation or finding is not supported by any reasons much less valid reasons. On an all-encompassing observation that the Award is not supported by reasons, the Award was set aside. Therefore, the setting aside of the award by the court below on that ground is unsustainable. Coming to the merits of the matter, we are of the considered view that the Court below had erred in holding that the Tribunal had not dealt with the issues in a proper way and had not assigned reasons. The respondent had unequivocally admitted its liability towards the claimant's for the amounts claimed by the claimant; but, the respondent had wrongfully withheld such amount towards another claim relating to an independent contract. The Tribunal had rightly held that the respondent could not be allowed to withhold the amounts towards another claim relating to an independent contract, when admittedly the amount was payable by the respondent under the subject contract to the claimant. Therefore, on the reading of the entire award, it is clear that the Tribunal had dealt with the issues properly and had recorded reasons in support of its conclusions and findings. The law is well settled that an Arbitrator is not expected to write a judgment like a Court of law but has only to state as to how he has come to the finding arrived at by him. No particular form is required for giving reasons. The arbitrator is neither expected to record at great length the communications exchanged and the submissions made by the parties nor is he expected to analyze the law and the authorities. It is sufficient for him to explain what his findings are and how he has reached at the conclusions. Sufficiency of reasons is not to be gone into by the Court. On an application of the above tests to the award in the instant case, we are satisfied that the panel of Arbitrators had given their decision after recording adequate reasons. In this case on hand, one of the learned Arbitrators was chosen by the respondent. The decision was made unanimously by the panel of arbitrators. Therefore, we do not find ourselves in agreement with the one sentence finding of the Court below that the Award is not supported by reasons and the panel of Arbitrators has not dealt with the

matter in a proper manner. The following decisions are relevant on the aspect of extent of judicial intervention or the scope of interference of the Court. (1) **Delhi Development Authority v. R.S.Sharma and Company, New Delhi**; (2) **Associate Builders v. Delhi Development Authority**; (3) **M/s.Navodaya Mass Entertainment Ltd., v. M/s.J.M.Combines**; and (4) **Oil And Natural Gas Corporation Limited v. Western Geco International Limited**. The settled principles for interference with an Arbitral Award under Section 34(2) of the 1996 Act as per the decision of the Supreme Court in **Delhi Development Authority** (3 supra) are as follows:

a. **An award, which is**

(i) **contrary to substantive provisions of law; or**

(ii) **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;**

is open to interference by the court under Section 34(2) of the Act.

(b) **The award could 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.**

(c) **The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.**

(d) **It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.**

In the decision in **Associate Builders** (4 supra), the Hon'ble Supreme Court referred to the ratios in various earlier decisions including the decision **Delhi Development Authority v. R.S.Sharma and Company, New Delhi** (3 supra) and had further elucidated the law on the point and had further held that when a Court is applying the public policy test to an arbitration award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected and that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he

delivers his Arbitral award and thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score and that once it was found that the Arbitrator's approach is not arbitrary or capricious then, his word is the last word on facts. In the decision in **M/s. Navodaya Mass Entertainment Ltd** (5 supra) the scope of interference of the Court was considered and it was held that even if two views are possible the view taken by the Arbitrator would prevail. In the decision in **Oil and Natural Gas Corporation Limited** (6 supra) it was held that the expression "fundamental policy of Indian law" includes all such fundamental principles that provide basis for administration of justice and enforcement of law in India. In this case on hand, it is not the finding of the Court below that the award is against the fundamental policy of India or that the decision is perverse or irrational or not in compliance of the Principles of Natural Justice. In view of this legal position, which is settled, the learned District Judge ought not to have interfered with the Award by merely recording that the Award is not supported by reasons when the facts and the law are otherwise. The points are answered accordingly in favour of the appellant and against the respondent.

9. In the result, the appeal is allowed, however, without costs. The order passed by the Court below is set aside and the Award passed by the Arbitral Tribunal is restored.

Miscellaneous petitions pending, if any, in this appeal, shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

16th April, 2015

Vjl