



2024:DHC:6099



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

Reserved on: 8 August 2024
Pronounced on: 14 August 2024

+ O.M.P. (COMM) 252/2016

HALA KAMEL ZABALPetitioner

Through: Ms. Mamta Tiwari and
Ms. Veronica Mohan, Advocates

versus

ARYA TRADING LTD. & ORS.Respondents

Through: Ms. Ritika Sinha, Adv. for R1
Mr. Jay Savla, Sr. Advocate with Mr. Rajpal
Singh and Mr. Anirudh Jamwal, Advocates
for R-2 & 3

+ O.M.P. (COMM) 254/2016 and IA 20012/2015

ARYA TRADING LIMITEDPetitioner

Through: Ms. Ritika Sinha, Adv.

versus

HALA KAMEL ZABAL & ORSRespondents

Through: Ms. Mamta Tiwari and
Ms. Veronica Mohan, Advocates
Mr. Jay Savla, Sr. Advocate with Mr. Rajpal
Singh and Mr. Anirudh Jamwal, Advocates
for R-2 & 3

+ O.M.P. (COMM) 262/2016 and CCP (O) 41/2015, Crl. M.A.
15682/2015, I.A.13662/2012, 13664/2012, 15013/2015,
20013/2015, 8934/2016

MS HALA KAMEL ZABAL & ORS.Petitioners

Through: Ms. Mamta Tiwari and



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Ms. Veronica Mohan, Advocates for P1
Mr. Jay Savla, Sr. Advocate with Mr. Rajpal
Singh and Mr. Anirudh Jamwal, Advocates
for P2 & 3

versus

ARYA TRADING LTD.Respondent
Through: Ms. Ritika Sinha, Adv. for
Respondent

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT
14.08.2024

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1. Does the appointment of an Arbitrator, in an International Commercial Arbitration¹, by the High Court, vitiate the resultant arbitral award, if the appointment is in consonance with the arbitration agreement between the parties? This somewhat contentious issue engages the Court in this case, though, in my view, it stands covered by the judgment of the Supreme Court in *Narayan Prasad Lohia v Nikunj Kumar Lohia*².

2. These are cross petitions under Section 34 of the Arbitration and Conciliation Act, 1996³ assailing an arbitral award dated 14 February 2012 rendered by a learned Sole Arbitrator. The dispute is essentially between the petitioners in OMP (Comm) 262/2016 on the one hand and the respondent in the said OMP on the other. Before

¹ "ICA" hereinafter

² (2002) 3 SCC 572

³ "the 1996 Act" hereinafter



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me, too, adversarial stances were adopted by the petitioners in OMP (Comm) 262/2016 represented by Ms. Mamta Tiwari, learned Counsel (for Petitioner 1), Mr. Jay Savla, learned Senior Counsel (for Petitioners 2 and 3) and by Ms. Ritika Sinha, learned Counsel (for the respondent). OMP (Comm) 252/2016 has separately been filed by Petitioner 1 in OMP (Comm) 262/2016 and OMP (Comm) 254/2016 has separately been filed by the respondent in OMP (Comm) 262/2016. As all OMPs assail the same award, for ease of reference and keeping in mind the manner in which the parties were represented in Court, Hala Kamel Zabal, V.K. Jhunjhunwala, and Zabatex Textiles India Pvt. Ltd. as Petitioners 1, 2 and 3 in OMP (Comm) 262/2016, shall collectively be referred to as the petitioners and Arya Trading Ltd., the respondent in the said OMP, shall be referred to as the respondent.

3. By the impugned Award the petitioners have been directed to pay, to the respondent, a sum of US \$ 1,04,190/- along with interest, consequent on which the respondent is required to transfer 6,43,865 equity shares of Petitioner 3, held by it, to Petitioners 1 and 2.

4. Among the contentions advanced by the petitioners, to assail the impugned award, is a challenge to the validity of the appointment of the learned Arbitrator. The petitioners contend that the learned Arbitrator was appointed by this Court, which did not have the authority or power to do so. The dispute being in the nature of an ICA, the petitioners' contention is that the Supreme Court, and the Supreme Court alone, had the jurisdiction to appoint an arbitrator to



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arbitrate on the dispute. As, in the submission of the petitioners, the appointment of the learned Arbitrator stands vitiated *ab initio*, the impugned award is also liable to be set aside even on this sole ground.

5. This Court, by order dated 11 August 2023, observed that, in view of the contention taken by the petitioners, it was “necessary to examine whether appointment of an arbitrator by this Court in the above context invalidates the resultant arbitral proceedings”, and further opined that it was appropriate to decide this aspect as a preliminary issue.

6. Resultantly, I have heard Ms. Mamta Tiwari, learned Counsel and Mr. Jay Savla, learned Senior Counsel for the petitioners and Ms. Ritika Sinha, learned Counsel for the respondent, at length. I proceed, by this order, to decide the aforesaid preliminary issue.

Rival Submissions

No dispute that arbitration was an ICA

7. At the very outset, it may be noted that there is no dispute, among learned Counsel, that the arbitration, which stands concluded by the impugned award, was an ICA, within the meaning of Section 2(1)(f)⁴ of the 1996 Act, as the dispute is unquestionably commercial,

⁴ (f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is –

(i) an individual who is a national of, or habitually resident in, any country other than India;
or
(ii) a body corporate which is incorporated in any country other than India; or



and the respondent (as the claimant) and Petitioner 1 (Respondent 1 before the learned Arbitrator) are both situated outside India.

Submissions of Ms. Mamta Tiwari

8. Ms. Mamta Tiwari initially drew my attention to the arbitration clause contained in Article 28 of the Shareholders Agreement⁵ dated 23 November 2006, constituting the contract between the parties, which read thus:

“ARTICLE 28 – DISPUTE RESOLUTION

28.1 The Parties shall make endeavours to settle any claim, dispute or controversy arising out or in relation to this Agreement, including any dispute with respect to the existence or validity hereof, the activities performed hereunder, or the breach of this Agreement that is a part of such conciliation process, by mutual conciliation. Before arbitration is pursued, the parties shall arrange for one representative of each party to meet in order to assist in reaching a solution to the dispute.

28.2 In the event a dispute cannot be resolved through conciliation pursuant to Article 27.1 hereof within (15) days of such extended period as parties may agree, a party may refer the dispute or difference to binding arbitration *as hereunder provided in accordance with the Arbitration and Conciliation Act, 1996. The arbitration shall be held in New Delhi. A sole Arbitrator shall be appointed by the Chief Justice of the Delhi High Court upon a reference made to him as per the provision of the Arbitration and Conciliation Act, 1996.* The applicable law shall be Indian Law. The costs and expenses of such arbitration shall be borne by the concerned parties to the dispute.”

(Emphasis supplied)

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

⁵ "the SHA" hereinafter



Thus, submits Ms. Tiwari, the arbitration agreement envisaged appointment of the Arbitrator “as per the provision of the Arbitration and Conciliation Act, 1996”. The stipulation, immediately prior thereto, of the arbitrator being appointed by the Chief Justice of this Court, she submits, cannot be read in isolation. A holistic reading of the arbitration clause, according to her, reveals that predominance is to be accorded to the covenants of the 1996 Act. The Chief Justice of this Court could appoint the Arbitrator only if such appointment was permissible under the 1996 Act. Inasmuch as Section 11(6) of the 1996 Act specifically requires the Arbitral Tribunal to be constituted by the Supreme Court, in the case of an ICA, she submits that the appointment of the learned Arbitrator, by order dated 13 August 2009, passed by this Court in Arb. App. 75/2009, was *ex facie* and *ab initio* illegal, thereby vitiating the arbitral proceedings which followed the appointment in their entirety. According to Ms. Tiwari, the requirement of the arbitrator, in the case of an ICA, being appointed by the Supreme Court, as provided in Section 11(6), is non-derogable. Such a plea, she submits, can be taken any time, for which she relies on the following passage from the judgment of the Supreme Court in ***Hindustan Zinc Ltd v Ajmer Vidyut Vitran Nigam Ltd***⁶:

“17. We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. This was held by this Court in ***Kiran Singh v. Chaman Paswan***⁷, as follows:

“6. ... It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A

⁶ (2019) 17 SCC 82

⁷ (1955) 1 SCR 117 : AIR 1954 SC 340



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defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judice*, and that its judgment and decree would be nullities.”

9. Ms. Tiwari submits that the entire arbitral proceedings have taken place behind the back of her client, who did not even receive the initial notice stated to have been issued by the respondent under Section 21⁸ of the 1996 Act, which signals the statutory commencement of the arbitration. Nor, she submits, was her client ever served the notice in Arb. App. 75/2009, in which, by order dated 13 August 2009, this Court appointed the learned Arbitrator. It was only because the respondent has also chosen to challenge the impugned Award by way of OMP 636/2012, in which this Court issued notice, directing the petitioners to file its affidavit of assets, that her client came to know of the arbitral proceedings.

10. Ms. Tiwari places further reliance on the judgments of the High Court of Madras in *Shashank Malik v. Dailmlar Financial Services India Ltd*⁹ (paras 17, 18, 21 and 22), *P Sivaramakrishnan v. Kotak Mahindra Prime Ltd*¹⁰ (para 16) and *D Rajaseeli v. Manju Foundation Pvt Ltd*¹¹.

⁸ 21. **Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

⁹ 2023 SCC OnLine Mad 2050

¹⁰ 2023 SCC OnLine Mad 2608

¹¹ 2023 SCC OnLine Mad 2933



Submissions of Mr. Jay Savla for Petitioners 2 and 3

11. Mr. Savla, adding to the submissions of Ms. Tiwari, first seeks to point out that there was no concession, by his clients, to the appointment, by this Court, of the learned Arbitrator to arbitrate on the disputes between the parties, on 13 August 2009. He points out that his clients had opposed the request, albeit on the ground that the agreement, in which the arbitration clause was contained, was only a draft. To appreciate the submission, it is necessary to reproduce the order dated 13 August 2009, passed by the learned Chief Justice, thus:

“This is an application under Section 11(5) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) praying for appointment of an arbitrator in terms of Article 28 of the Shareholders Agreement dated 23.11.2006 to arbitrate upon the disputes between the parties under the Agreement. The facts giving rise to this application are as follows:

2. Respondent No. 1 Ms Hala Kamel Zabal and Respondent No. 2 Smt. Vrinda Krishna Jhunjunwala are the promoters of Respondent No. 3 company M/s Zabatex Textiles India Pvt Ltd. The applicant company and respondents entered into a Shareholders Agreement whereby the applicant company acquired 33.33% of the equity share capital of the company. Under the agreement, the applicant company was granted certain rights with respect to the operation, management and day to day functioning of the company. The grievance of the applicant company is that notwithstanding the substantial equity and debt contributions made by it, the shareholders and directors of the company deliberately sought to exclude the applicant company from the operation and management of the Respondent No.3 company. The applicant therefore issued notice to the respondents for appointment of arbitrator in terms of Article 28 of the Agreement. In the meantime, a petition was also move under Section 9 of the Act in which certain interim reliefs were granted in favour of the applicant.

3. The application is opposed by the respondents mainly on the ground that there is no valid arbitration agreement between the parties. According to the respondents, the following points clearly



indicate that the terms of the purported shareholders agreement were yet to be crystallised and finalised:

- (a) Purported SHA was not signed by Respondent No. 2;
- (b) The date of Agreement is 23.11.2006, whereas the date of purchase of Stamp Paper is 06.01.2007;
- (c) As the 'Draft' SHA, each party was required to appoint 2 Directors, however, only 1 Director was nominated by each party;
- (d) Article 3 of the purported SHA does not reflect the correct understanding of the parties as to the capitalisation and is infact in contradiction with clause 3.5 of the purported SHA itself, as the total number of shares mentioned in para 3.1 to 3.4 of the purported SHA, does not match with figure mentioned in para 3.5. This clearly indicates that the SHA was a 'Draft' only;
- (e) The investment made by the Petitioner was returned to it, as per its instructions;
- (f) The terms of SHA were not incorporated in Articles of Association of the Respondent No.3.

4. It is further contended by the respondents that an understanding was arrived at between the applicant and respondent Nos. 1 and 2 returning the money and pursuant to this understanding, the respondent had transferred the imported plant and machinery worth Rs.2,22,88,510/- to M/s Terra Manufacturing and Sales and sold goods worth Rs.38,53,410/- to M/s Main Knitting Limited.

5. I have heard counsel appearing for both sides. Learned counsel appearing for the respondents strenuously contended that there is no valid arbitration agreement as the Shareholders Agreement was not signed by Respondent No. 2 and this fact by itself, according to the learned counsel, is sufficient to establish the fact that the terms of the agreement were not finalised. The submission is devoid of any substance. It is seen from the records that the Shareholders Agreement was signed by Respondent No. 1 as well as Mr. Sunil Jhunjhunwala, a close relative of Respondent No. 2 just above the place assigned for her to sign. Mr. Sunil Jhunjhunwala is also a director of the company and has filed an affidavit on behalf of the respondents. It is also pertinent to note



that in their reply, the respondents annexed two e-mails dated 9th June, 2007 and 19 June, 2007 whereby they themselves insisted that the applicant should provide to the Company the “Original Shareholders Agreement” for filing it to the Reserve Bank of India to seek its approval for the return of the unsecured loan of the applicant. There is no dispute that the applicant had made substantial contributions both in debt and equity as per the terms of the Agreement. The case of the respondents that there was a subsequent understanding for refund of the money and pursuant thereto, certain machinery and goods were transferred to certain companies is vehemently disputed by the applicant.

6. I am satisfied that there is a valid and binding arbitration agreement between the parties. All other disputes will have to be decided on merits by the arbitrator. I appoint Justice Anil Dev Singh (Retd.), as the sole arbitrator to adjudicate upon the disputes between the parties. The arbitration application stands disposed of.”

12. Mr. Savla points out that Section 4¹² of the 1996 Act, which envisages waiver, in certain circumstances, of the right to object, applies only to provisions from which a party may derogate. In such a case, if the party, in the awareness that there is no compliance with the provision, does not record his objection in that regard, and proceeds with the arbitration, Section 4 deems the party to have waived his right to object. The stipulation, in Section 11(6), that an arbitrator, in the case of an ICA, shall be appointed by the Supreme Court, he submits, is not derogable. As such, the petitioners are entitled, at any stage, to raise an objection to the validity of the appointment of the learned Arbitrator. Mr. Savla also invokes, in this context, the principle that jurisdiction cannot be conferred by consent.

¹² 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.



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13. In support of his submissions Mr. Savla cites para 16 of **Amway India Enterprises Pvt Ltd v. Ravindranath Rao Sindhia**¹³ and paras 21, 22, 42, 43 and 51 of **Roptonal Ltd v. Aneez Bazmee**¹⁴. Additionally, he cites **Perkins Eastman Architects v. HSCC India**¹⁵.

Submissions of Ms. Ritika Sinha for the respondent

14. Ms. Sinha submits that an arbitral award can be set aside only on one or more of the grounds envisaged by Section 34 of the 1996 Act, and the submissions of the petitioners do not make out a case covered by any of the said grounds.

15. She further submits that the stipulation, in Section 11(6), that the arbitrator would be appointed, in the case of an ICA, by the Supreme Court, is derogable and relies, for the said submission, on Section 11(2)¹⁶, which grants the parties to an arbitration agreement the freedom to agree on the procedure to appoint the arbitrator or arbitrators. She also places reliance, in this context, on paras 10, 18 and 19 of **Narayan Prasad Lohia** and Paras 19 and 20 of **Hindustan Zinc**. She further submits that judgments of the Supreme Court which rule against unilateral appointment of an arbitrator, such as **Perkins Eastman Architects**, have no application, as they are premised on the principle that adjudication by an impartial arbitrator is an essential element of public policy.

¹³ (2021) 8 SCC 465

¹⁴ Judgment dated 8 June 2016 of the High Court of Bombay in Review Petition (L) 7 of 2016

¹⁵ (2020) 20 SCC 760

¹⁶ (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.



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16. Ms. Sinha further points out that the petitioners have not been able to demonstrate any prejudice that has been caused to them as a result of the arbitral proceedings having been conducted by the learned Arbitrator. She emphasises that the petitioners have never chosen to challenge the appointment of the learned Arbitrator, even before this Court on 13 August 2009 and had, rather, preferred counter-claims before the learned Arbitrator. In such circumstances, she submits that the petitioners are completely estopped from, at this juncture, seeking to assail the arbitral award on the ground that the arbitrator could not have been appointed by this Court. She places reliance, for this purpose, on para 9 of the judgment of the Division Bench of the High Court of Bombay in *Zee Sports Ltd v. Nimbus Media Ltd*¹⁷ and para 33 of the judgment, also of the Division Bench of the High Court of Bombay, in *Antikeros Shipping Corporation v. Adani Enterprises Ltd*¹⁸.

17. The decision in *Roptonal*, Ms. Sinha points out, was carried to the Supreme Court by way of Civil Appeal 10395/2018¹⁹ which, *vide* order dated 10 October 2018, disposed of the matter on a concession, by both parties, that they had no objection to the arbitral proceedings being continued by the Arbitrator who was earlier *in seisin* thereof.

¹⁷ (2018) 1 Mah LJ 349 (DB)

¹⁸ (2020) 3 Mah LJ 855 (DB)

¹⁹ *Anees Bazmee v Roptonal Ltd*



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18. Ms. Sinha submits, further, relying on para 7 of the judgment of the Supreme Court in **Rafique Bibi v. Sayed Waliuddin**²⁰, that an order passed without jurisdiction is not necessarily a nullity in every case.

Submissions of Ms. Mamta Tiwari and Mr. Savla in rejoinder

19. In rejoinder, Ms. Tiwari seeks to distinguish **Narayan Prasad Lohia** on the ground that, unlike that case, the appointment of the learned Arbitrator in the present case *is not* in terms of the arbitration agreement between the parties, which required the appointment to be *in accordance with the 1996 Act*. Appointment of an arbitrator in an ICA by the High Court is, she submits, clearly not in accordance with the 1996 Act and is also, therefore, not in accordance with the arbitration agreement between the parties.

20. She further submits that, in so far as her client is concerned, she never received the notice issued by respondent under Section 21 of the 1996 Act and was, in fact, entirely in the dark regarding the arbitral proceedings till she was asked to file her affidavit of assets in the Section 34 proceedings instituted by respondent against the impugned Award. Ergo, the judgment of the High Court of Bombay in **Zee Sports** would not apply.

Submissions of Mr. Jay Savla in rejoinder

²⁰ (2004) 1 SCC 287



21. Mr. Jay Savla submits, in rejoinder, that the judgment in *Zee Sports* does not lay down the law correctly, in view of the decisions in *Perkins Eastman* and other such cases which clearly establish that participation in the arbitral proceedings does not estop either party from challenging the appointment of the arbitrator even after the award is rendered. *Narayan Prasad Lohia*, he submits, dealt with Section 10(1)²¹ of the 1996 Act, which envisages the *number of arbitrators* in the Arbitral Tribunal and cannot, therefore, be likened to Section 11(6), which deals with the very mechanism for appointment of the arbitrator.

22. Besides, submits Mr. Savla, *Narayan Prasad Lohia* was rendered before Explanation 1 to Section 34(2) was inserted by Section 18(1) of the Arbitration and Conciliation (Amendment) Act, 2016²², and could not, therefore, apply now, as the “fundamental policy of Indian law” also now stands encompassed [by Explanation 1(ii)] within the meaning of the expression “public policy of India” for the purposes of Section 34(2)(b)(ii) of the 1996 Act.

Analysis

23. Three issues arise for consideration, viz.

- (i) whether the appointment of the learned Arbitrator was in accordance with the 1996 Act,

²¹ 10. Number of arbitrators. –

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

²² “the 2016 Amendment Act” hereinafter



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- (ii) whether the appointment of the learned Arbitrator, by this Court, vitiates the impugned award, and
- (iii) whether the petitioners can be permitted to raise this ground at this stage.

The occasion to examine issue (iii) would arise only if the impugned award otherwise stands vitiated on account of the illegality in the appointment of the learned Arbitrator.

Re. Issue (i) – Whether the appointment of the learned Arbitrator was in accordance with the 1996 Act

24. Issue (i) has necessarily to be answered in the negative, as Section 11(6) categorically requires the arbitrator to be appointed, in the case of an ICA, by the Supreme Court, whereas, in the present case, the arbitrator was appointed by the Chief Justice of this Court.

Re: Issue (ii) – Whether the appointment of the learned Arbitrator, by this Court, vitiates the impugned award

25. This is the pivotal issue for consideration. What is the impact, on the impugned award, of the appointment of the learned Arbitrator being violative of Section 11(6)?

26. The judgment in *Narayan Prasad Lohia*

26.1 This issue stands answered by the judgment of the Supreme Court in *Narayan Prasad Lohia*.



26.2 The dispute between the parties in *Narayan Prasad Lohia* came to be arbitrated by two arbitrators, who rendered an award on 6 October 1996. The respondents (before the Supreme Court) challenged the award, *inter alia*, on the ground that the composition of the Arbitral Tribunal was violative of Section 10(1) of the 1996 Act, which forbade the constitution of an Arbitral Tribunal consisting of an even number of arbitrators. This contention was accepted by a single Judge of the High Court of Calcutta, who set aside the award on that sole ground. The judgment of the single Judge was affirmed by the Division Bench. *Narayan Prasad Lohia*²³, the successful litigant in the arbitration, appealed to the Supreme Court.

26.3 The Supreme Court addressed the issue from two angles. It considered, firstly, whether Section 10(1) was a derogable provision and, secondly, whether the contention of the respondents (before the Supreme Court) constituted a valid ground on which the arbitral award could be challenged under Section 34.

26.4 The first aspect – “Derogability” of Section 10(1)

26.4.1 “Derogable”, though a word not *stricto sensu* known to the English language, has nonetheless become part of legal lore. Classically, “derogable” would mean “from which it is possible to derogate”. In order, however, to determine whether a particular provision of the 1996 Act is, or is not, derogable, the Supreme Court

²³ “NPL” hereinafter



evolved, and applied a distinctive test in paras 14 to 16 of the report in

Narayan Prasad Lohia:

“14. We have heard the parties at length. We have considered the submissions. Undoubtedly, Section 10 provides that the number of arbitrators shall not be an even number. The question still remains whether Section 10 is a non-derogable provision. *In our view the answer to this question would depend on the question as to whether, under the said Act, a party has a right to object to the composition of the Arbitral Tribunal, if such composition is not in accordance with the said Act, and if so, at what stage.* It must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties.

15. In the said Act, provisions have been made in Sections 12, 13 and 16 for challenging the competence, impartiality and jurisdiction. Such challenge must however be before the Arbitral Tribunal itself.

16. It has been held by a Constitution Bench of this Court, in the case of **Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd**²⁴ that Section 16 enables the Arbitral Tribunal to rule on its own jurisdiction. It has been held that under Section 16 the Arbitral Tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the Arbitral Tribunal's authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus *it is no longer open to contend that, under Section 16, a party cannot challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself.* Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. *Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if it so chooses, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-*

²⁴ (2002) 2 SCC 388



derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.”

(Emphasis supplied)

26.4.2 Thus, the Supreme Court held that Section 10(1) was derogable, and that, therefore, the respondents (before it) having allowed the arbitration to proceed without objecting, were, by virtue of Section 4, deemed to have waived their right to object. The reasoning, proceeded thus:

(i) The issue of whether a particular provision was, or was not, derogable, was required to be determined on the basis of whether a party could complain of breach of the provision and, if so, at what stage. Specifically in the context of Section 10, the Supreme Court observed that the answer to the question as to whether Section 10 was derogable would depend on whether a party had the right to object to the composition of the Arbitral Tribunal if it was violative of Section 10, and, if so, the stage at which such objection could be raised.

(ii) As held by the Constitution Bench of the Supreme Court in ***Konkan Railway Corporation***, Section 16²⁵ required a challenge to the competence, impartiality and jurisdiction of the

²⁵ 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.



Arbitral Tribunal, to be taken before the Arbitral Tribunal itself. This would include a challenge to the composition of the Arbitral Tribunal as being violative of Section 10(1).

(iii) Such a challenge had, by virtue of Section 16(2), to be taken not later than submission of statement of defence, irrespective of whether the challenger had, or had not, participated in the proceedings or even himself appointed the arbitrator.

(iv) This implied that a party was also free, if it so chose, *not to raise* such a challenge by *not objecting* within time stipulated in Section 16(2), i.e. before submission of the statement of defence. Failure, on the part of a party, to object to the composition of the Arbitral Tribunal before submission of the statement of defence would result in waiver of the party's right to so object, by virtue of Section 4 of the 1996 Act.

(v) Thus, if a party did not want to challenge the composition of the Arbitral Tribunal, it could do so by not raising such a challenge within the time stipulated in Section 16(2).

(vi) This indicated that Section 10(1) was a derogable provision.

(vii) In conclusion, the Supreme Court observed that the issue of whether Section 10 was a derogable or a non-derogable



provision could not be decided merely by referring to Section 10 but had to be decided by reading Section 10 and Section 16 in juxtaposition.

26.4.3 Thus, where a party was challenging the arbitral award on a ground which could have been taken at an earlier stage, but was not, the issue is required to be examined by addressing, upfront, the question of whether the ground of challenge is one which could be raised under Section 16(2) or 16(3)²⁶, as all such challenges are derogable, by failing to raise it within the statutorily stipulated period. If it is, then, if the party has allowed the arbitration to proceed without raising the challenge by way of objection within the stipulated period, he shall be deemed to have waived the right to object.

26.4.4 Applying this principle, the Supreme Court found, in *Narayan Prasad Lohia*, that

26.4.5 Applying this principle to the case at hand, the position that emerges is as under:

- (i) The plea that the appointment of the learned Arbitrator was illegal was clearly one which could have been raised before the learned Arbitrator under Section 16(1). The objection in *Narayan Prasad Lohia*, too, questioned the legality of the constitution of the Arbitral Tribunal. If such a challenge was covered by Section 16(2), there is no reason why a challenge to

²⁶ (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.



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the jurisdiction of the learned Arbitrator to arbitrate on the dispute, on the ground that his appointment was invalid, could not be raised before the learned Arbitrator himself.

(ii) Even otherwise, Section 16(1) empowers the Arbitral Tribunal to rule on its jurisdiction. “Jurisdiction” is a word of wide and expansive import. In ***Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field Ltd***²⁷, it was held that the validity and existence of the arbitration agreement was an issue which impacted the jurisdiction of the Arbitral Tribunal. Wharton defines “jurisdiction” as “*legal authority; extent of power; declaration of the law.*” The Supreme Court, in ***Delhi Special Police Establishment v. S K Loraiya***²⁸, held that “the word “jurisdiction” *signifies the initial jurisdiction to take cognizance of a case*”. “Jurisdiction” was defined, in ***Ujjam Bai v. State of U.P.***²⁹, as the “authority to decide” and, in ***Harpal Singh v. State of Punjab***³⁰ as the “authority or power to entertain, hear and decide a case and to do justice in a case and determine the controversy”. An important clarification is to be found in ***Anwar Hussain v. Ajoy Kumar Mukherjee***³¹, which holds that “the expression ‘jurisdiction’ does not mean the power to do or order the act impugned³², but *generally the power and authority of the judicial officer to act in the matter*”.

²⁷ (2020) 2 SCC 455

²⁸ (1972) 2 SCC 692

²⁹ AIR 1962 SC 1621

³⁰ (2007) 13 SCC 387

³¹ AIR 1965 SC 1651

³² This principle may stand diluted by later decisions, already cited *supra*, as “jurisdiction”, as the law stands today, would also encompass the power to do an act.



CIT v. Pearl Mech Engg & Foundry Works (P) Ltd³³

delineated the contours of the expression “jurisdiction” thus:

“The word “jurisdiction” implies the court or tribunal with judicial power to hear and determine a cause, and such tribunal cannot exist except by authority of law. Jurisdiction always emanates directly and immediately from the law; it is a power which nobody on whom the law has not conferred it can exercise. In other words, “jurisdiction” has reference to the power of the court or tribunal over the subject-matter, over the res or property in contest, and to the authority of the court to render the judgment or decree it assumes to make.”

With respect to the power of the Arbitrator to rule on his own jurisdiction, as conferred by Section 16(1) of the 1996 Act, the 7-judge Constitution Bench of the Supreme Court, in ***In re. Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899***³⁴, ruled thus:

“131. Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreement. Importantly, the parties have a right under Sections 16(2) and 16(3) to challenge the jurisdiction of the Arbitral Tribunal on grounds such as the non-existence or invalidity of the arbitration agreement. The Arbitral Tribunal is obligated to decide on the challenge to its jurisdiction, and where it rejects the challenge, it can proceed with the arbitral proceedings and make an arbitral award. It is the principle of procedural competence-competence which recognises the power of an Arbitral Tribunal to hear and decide challenges to its jurisdiction.”

The expression “jurisdiction” is, thus, wide and compendious in its import. It encompasses all considerations which affect the authority of the tribunal – in this case, the learned Arbitrator – to adjudicate on the dispute. An Arbitral Tribunal is essentially

³³ (2004) 4 SCC 597

³⁴ (2024) 6 SCC 1



a transient entity, which materializes on its constitution and evaporates on the rendition of the award. If, therefore, the constitution of the Arbitral Tribunal is flawed, it acquires no jurisdiction to enter on reference. It is for this reason that the Supreme Court held, in ***Narayan Prasad Lohia***, that a challenge to the constitution of the Arbitral Tribunal, premised on the numerical strength of its members, is a challenge which could be raised before the Arbitral Tribunal itself under Section 16(1). Equally, therefore, a challenge to the validity of the appointment of the Arbitral Tribunal, predicated not on its numerical strength but on the competence of the authority which appointed the Arbitral Tribunal, is also a challenge which can be raised before the Arbitral Tribunal itself under Section 16(1).

(iii) *Except Hala Kamel Zabal*, none of the other parties to these proceedings plead ignorance of the arbitral proceedings. They are all, therefore, squarely covered by the decision in ***Narayan Prasad Lohia***. Having failed to raise the objection regarding legality of the appointment of the learned Arbitrator at any earlier stage, and having allowed the arbitration to continue to award, they are deemed to have waived the right to object to the award, now, on that ground.

26.5 The second aspect – Section 34(2)(a)(v)



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26.5.1 The Supreme Court has also found the respondent's challenge to the arbitral award to be unsustainable in view of Section 34(2)(a)(v), which envisages evisceration of an arbitral award if "the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties".

26.5.2 The Supreme Court held that the words "unless such an agreement was in conflict with the provision of this part", which follow the above words in Section 34(2)(a)(v), apply only where the first part of the clause was fulfilled, i.e., the composition of the Arbitral Tribunal, or the arbitral procedure, was not in accordance with the agreement between the parties.

26.5.3 If the composition of the Arbitral Tribunal and the arbitral procedure are in accordance with the agreement between the parties, no occasion would, in other words, arise to examine whether the agreement itself was in conflict with any provision of Part I of the 1996 Act. If the composition of the Arbitral Tribunal was found not to be in accordance with the agreement between the parties, the parties would still not be able to challenge the award on that basis, unless the agreement itself was in conflict with a non-derogable provision in Part I of the 1996 Act.

26.5.4 So long as, however, the composition of the Arbitral Tribunal was in accordance with the agreement of the parties, the arbitral award could not be challenged under Section 34 on the ground that the



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composition of the Arbitral Tribunal was in conflict with Part-I of the Act.

26.5.5 This second ground on which the Supreme Court allowed the NPL's appeal also applies, with equal vigour, to the case at hand, *and also applies to Hala Kamel Zabal*. The Supreme Court held that, so long as the composition of the Arbitral Tribunal was in accordance with the arbitration agreement, it was not open to either party, after the award had been passed, to contend that the arbitration clause was itself violative of the 1996 Act, in view of Section 34(2)(a)(v).

26.5.6 Learned Counsels for the petitioners sought to contend that, unlike the situation which obtained in *Narayan Prasad Lohia*, in the present case, the arbitration clause did not merely state that the arbitrator was to be appointed by the Chief Justice of High Court, but went on to state that the appointment was to be in accordance with the 1996 Act. Premised on this contention, it is sought to be contended that, as the 1996 Act clearly requires the arbitrator, in an ICA, to be appointed by the Supreme Court, the appointment of the learned Arbitrator in the present case was violative of the 1996 Act, and, consequently, also violative of the arbitration agreement between the parties.

26.5.7 This argument would be acceptable if one were to vivisect the arbitration clause in the agreement between the parties in the present case and treat the requirement of appointment of the arbitrator by the Chief Justice of this Court and appointment in accordance with the



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1996 Act as two unconnected requirements, independently to be satisfied. The arbitration clause is, however, peculiarly and, it must be contended, most unhappily, worded. It envisages the party referring the dispute to arbitration “as hereunder provided in accordance with” the 1996 Act. It further goes on to state, quite unequivocally, that the arbitrator “shall be appointed by the Chief Justice of the Delhi High Court”, but also states that the appointment would be “upon a reference made to him as per the provision of the Arbitration and Conciliation Act 1996”. There can be no wishing away the fact that Clause 28.2 of the Shareholding Agreement specifically requires the arbitrator to be appointed by the Chief Justice of this Court. That express stipulation cannot be diluted, much less undone, by the caveat, which follows, that the appointment would be made on a reference made to the Chief Justice as per the provisions of the 1996 Act.

26.5.8 It is correct that Section 11(6) of the 1996 Act, seen in isolation and without reference to the arbitration clause in the SHA, would require the reference for appointment of arbitrator in the present case to be made to the Supreme Court rather than to this Court, as the arbitration was in the nature of an ICA. At the same time, such a reference, if made, would be contrary to the arbitration clause. The appointment of the learned Arbitrator by the Chief Justice of this Court, in the present case, was clearly in accordance with Clause 28.2 of the SHA.



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26.5.9 Para 19 of *Narayan Prasad Lohia* indicates that, between the requirement of the appointment of the arbitrator being in consonance with the arbitration agreement between the parties and the arbitration agreement itself being in consonance with the 1996 Act, precedence was to be accorded to the former consideration rather than the latter. This is because Section 34(2)(a)(v) envisages, as a ground of challenge, to the arbitral award, the contention that the appointment of the arbitrator is contrary to the agreement between the parties. It does not envisage the contention that the agreement between the parties is contrary to the 1996 Act as constituting a valid ground to challenge the arbitral award.

26.6 When one applies, to the facts of the present case, the two considerations which weighed with the Supreme Court in *Narayan Prasad Lohia*, the position that emerges is that, as in that case, the challenge to the impugned award, in the present case, has also to fail.

26.7 The reasoning adopted by the Supreme Court in para 16 of *Narayan Prasad Lohia*, to hold that Section 10 of the 1996 Act is a derogable provision, would apply, equally, to the requirement of an arbitrator, in an ICA, being appointed by the Supreme Court, as contained in Section 11(6).

26.8 As in the case of Section 10(1), a party, if it desires to challenge the competence or jurisdiction of the arbitrator to arbitrate on the dispute, on the ground that the appointment of the arbitrator was not in accordance with the Act, has to do so before filing of first statement



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of defence. By not doing so, the party effectively waives his right to raise the said challenge by virtue of Section 4 read with Section 16(2). Thus, this results in Section 11(6) also becoming a derogable provision, just as in the case of Section 10(1).

26.9 The second ground on which the Supreme Court upheld the appeal of *Narayan Prasad Lohiya* would also apply, equally, to the present case. Section 34(2)(a)(v) permits challenging the arbitral award only if the composition of the Arbitral Tribunal is not in accordance with the agreement between the parties. Inasmuch as the agreement between the parties, in the present case, required the arbitrator to be appointed by the Chief Justice of this Court, and the arbitrator was, in the present case, indeed appointed by the Chief Justice of this Court, the impugned award cannot be challenged under Section 34(2)(a)(v) either.

27. In view of the enunciation of the law in *Narayan Prasad Lohia*, therefore, the challenge to the impugned Award on the ground that the appointment of the learned Arbitrator was illegal, must fail.

28. Ms. Mamta Tiwari sought to contend that, even if Section 11(6) were to be regarded as a derogable provision, the only consequence is that failure to raise an objection on the ground of non-compliance with the said provision without undue delay, and permitting the arbitration to continue, could result in deemed waiver of the right to so object. If Section 16(2) were to be applied, failure to raise the objection regarding jurisdiction of the Arbitral Tribunal would have to



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be raised before submission of the first statement of defence. Neither of these provisions, she submits, would apply, as her clients were never served either with the Section 21 notice, or any notice in Arb App 75/2009.

29. Even if this submission were to be accepted, the second ground on which *Narayan Prasad Lohia* dismissed the challenge by the respondents (in that case) to the arbitral award, viz., that, as the appointment of the Arbitrator was in accordance with the arbitration agreement between the parties, would nonetheless apply. I do not deem it necessary, therefore, to examine the correctness of Ms. Tiwari's contention that her clients have remained innocent of the proceedings till they were served with a notice to declare their assets in OMP (Comm) 636/2012, which, as already noted, Ms. Sinha emphatically refutes.

30. Re. amendment of Section 34 by the 2016 Amendment Act

30.1 An arbitral award which is in conflict with the public policy of India is liable to be set aside under Section 34(2)(b)(ii). Prior to the 2016 Amendment Act, the Explanation to Section 34(2) read thus:

“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.”

30.2 This Explanation was replaced, by the 2016 Amendment Act, by two Explanations, Explanation 1 and Explanation 2. Of these,



Explanation 1, in stark contradistinction from the expansive scope of the erstwhile Explanation to Section 34(2), restricted the scope of the expression “public policy of India” to *only* three situations. Of these, clause (ii) to Explanation 1 envisages a situation in which the award “is in contravention of the fundamental policy of Indian law”, and clauses (i) and (iii) are, *ex facie*, not applicable to the present case.

30.3 None of these clauses, plainly, apply, as they relate to a situation in which the *award* is contrary to the public policy of India. While this may be available to the petitioners as an independent ground of challenge, the infirmity, in such a case, attaches to the award. The legality, or otherwise, of the appointment of the arbitrator, or the composition of the Arbitral Tribunal, cannot render the award contrary to the fundamental policy of Indian law.

30.4 Whether it is so vitiated for any other reason would, however, have to be examined when the petitioners are heard on other grounds of challenge to the impugned award.

31. The preliminary issue framed by this Court on 11 August 2023 is, therefore, answered by holding that the appointment of the learned Arbitrator by the Chief Justice of this Court, in the present case, *does not* vitiate the impugned award.

32. Before parting, this Court feels it incumbent to record its appreciation for the manner in which Ms. Ritika Sinha, a young and enthusiastic Counsel, argued the matter, with equanimity and poise,



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and a thorough grasp of the intricacies of the controversy, despite, I am constrained to admit, an often unsympathetic Court, and seasoned Counsel opposite her. The manner in which she dealt with the matter presages well for the times to come.

33. To hear learned Counsel on other grounds of challenge to the impugned Award, renotify on 23 August 2024.

C.HARI SHANKAR, J

AUGUST 14, 2024/dsn