(2014) 08 DEL CK 0233

Delhi High Court

Case No: FAO (OS) No. 285/2014 and CM Nos. 10351, 10352 and 10354/2014

Delhi Development Authority		APPELLANT
	Vs	
Bhardwaj Brothers		RESPONDENT

Date of Decision: Aug. 1, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 34(2), 34(2)(a), 34(2)(b), 34(2)(b)(ii)
- Constitution of India, 1950 - Article 226
- Contract Act, 1872 - Section 23, 28

Citation: AIR 2014 Delhi 147 : (2014) 3 ARBLR 333 : (2015) 213 DLT 675 : (2014) 144 DRJ 471

Hon'ble Judges: G. Rohini, C.J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Beenashaw N. Soni, Advocate for the Appellant

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

This appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) impugns the order dated 10th February, 2014 of the learned Single Judge of this Court of dismissal in limine of OMP No. 175/2014 preferred by the appellant u/s 34 of the Arbitration Act for setting aside of the Arbitral Award dated 1st November, 2013.

2. In the light of our recent judgments, (i) State Trading Corporation of India Ltd. Vs. Toepfer International Asia PTE Ltd., and, (ii) Delhi State Industrial and Infrastructure Development Corporation Ltd. Vs. Rama Construction Company, , dealing with the scope of interference with an arbitral award u/s 34 and in an appeal u/s 37, we heard the counsel for the appellant in extenso at the stage of admission and reserved judgment.

3. The challenge to the arbitral award, before the learned Single Judge as well as before us is on two grounds. Firstly it is contended that the Arbitral Tribunal had no jurisdiction to entertain the claims of the respondent as the same were preferred beyond the time of 120 days prescribed in the contract and the Arbitral Tribunal erred in rejecting the said objection of the appellant. Secondly it is contended that the Arbitral Tribunal erred in assessing the claim of the respondent for price of the items substituted for the items provided for in the contracts at prevailing market rates, applying Sub-Clause (v) of Clause 12 of the Contract, when the same should have been assessed at the rates entered in the current CPWD Schedule of Rates, as provided in Sub-Clause (iii) of the said Clause 12 of the Contract.

4. The arbitral award rejects the objection of the, appellant of the claims being not arbitrable for the reason of having been preferred beyond the prescribed period of 120 days, by observing/holding (i) that the claims were within the prescribed period of limitation under the Limitation Act, 1963; (ii) as per Section 43 of the Arbitration Act, the provisions of the Limitation Act apply to arbitral proceedings also; and, (iii) that the Clause in the Contract providing the period of 120 days, from receiving intimation from the Engineer-in-Charge that the final bill was ready for payment, for preferring the claim is hit by Section 28 of the Contract Act, 1872 and is also void u/s 23 of the Contract Act.

5. As far as the second ground of challenge to the arbitral award is concerned, the arbitral award reasons (i) that the rates could not be determined as per the CPWD Manual since the same was not part of the Contract and hence had to be necessarily determined under Sub-Clause (v) of the Clause 12 which prescribes the measure of prevailing market rates; (ii) that the market rates as claimed by the respondent were less than as verified by the appellant itself; and, (iii) that the rates at which the appellant was offering payment for the substituted items to the respondent were never communicated by the appellant to the respondent during the course of execution of the works and the said rates were adopted by the appellant only at the time of finalization of the bill, much after the date of completion of the works. Accordingly, the respondent was awarded a total sum of Rs. 19,85,974/- besides interest at 9% per annum from the date of the award to the date of payment.

6. The learned Single Judge dismissed the petition u/s 34 of the Arbitration Act holding that there was no reason to interfere with the award since the rates for the substituted item which the respondent had claimed and which had been awarded were lesser than the market rate assessed by the appellant itself and that since the appellant had not intimated/informed the respondent at the time of execution of the works that it will be paying the CPWD rates for the substituted items, the appellant at the time of preparation of the bills could not be permitted to make payment at the CPWD rates.

7. The counsel for the appellant contended that the Arbitral Tribunal erred in reasoning that the CPWD Manual was not part of the contract and thus the price of

the substituted items could not be assessed at the CPWD rates and had to be assessed at the market rate. It is contended that Clause 12 supra of the Contract clearly provides the manner in which the rates for such substituted items had to be worked out and assessed i.e. in the first instance at the contracted rate for the substituted items if specified in the contract; if such rates are not specified in the contract then from the rate for a similar class of work as specified in the Contract; if no rate for similar class of work also is specified in the Contract then at the rates entered in the current CPWD Schedule of Rates; if the same is also not possible then on the basis of Delhi Schedule of Rates (DSR)-2007 and only if there is no rate of substituted item in the DSR-2007 also then as per the prevalent market rates. It is argued that the CPWD Manual prescribes the rates for the substituted items in the present case and as per which rates the appellant had offered the final payment and the Arbitral Tribunal erred in awarding the rates as per the prevailing market rates.

8. We have enquired from the counsel for the appellant whether not the said challenge is a challenge on the merits of the arbitral award. We have yet further put to the counsel for the appellant that as to how, misinterpretation of a contractual provision or misinterpretation of a contract by the Arbitral Tribunal constitutes a ground of challenge u/s 34 of the Arbitration Act.

9. We have in State Trading Corporation of India Ltd. supra held:-

5. The challenge in this appeal is on the ground that the learned Single Judge ignored that the interpretation of the contract between the parties given by the Arbitral Tribunal is contrary to the express terms and conditions thereof and the Arbitral Tribunal has given a meaning to the terms and conditions which is not contemplated in the contract. The senior counsel for the appellant thus wants us to read the contract between the parties, particularly the clauses relating to demurrage, and then to judge whether the interpretation thereof by the Arbitral Tribunal is correct or not.

6. In our view, the interpretation in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., of the ground in Section 34 of the Act for setting aside of the arbitral award, for the reason of the same being in conflict with the public policy of India, would not permit setting aside, in the aforesaid facts. A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable u/s 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one''s motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no

sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties'' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. Joseph Raz in his paper "The Politics of the Rule of Law" has opined that the function of the rule of law is to facilitate the integration of a particular piece of legislation with the underlying doctrines of the legal system; the authority of the courts to harness legislation to legal doctrine arises neither from their superior wisdom nor from any superior law of which they are the custodians; it arises out of the need to bring legislation in line with doctrine. The courts ensure coherence of purpose of law, ensuring that its different parts do not fight each other. The learned author has further observed that a law which is incoherent in purpose serves none of its inconsistent purposes very well. Purposes conflict if due to contingencies of life serving one will in some cases retard the other. The second basis for the authority of the courts to integrate legislation with doctrine is the need to mix the fruits of long

established traditions with the urgencies of short term exigencies. In ensuring the coherence of law, the courts are expected to ensure the effectiveness of the democratic rule. In giving weight to the preservation of long established doctrines i.e., the traditions, they protect the long term interest of the people from being swamped by the short term. We have taken the liberty to quote from the aforesaid paper since the courts are being repeatedly called upon to adjudicate on the various provisions of the re-enacted arbitration law. From the various pronouncements in the last about 18 years since re-enactment, it appears that the danger of interpreting the new Act in a manner doing away with the whole object/purpose of re-enactment is imminent. The courts continue to be inundated till date, in spite of repeal of the old Act 18 years ago, with cases thereunder also, particularly of challenge to the arbitral award. Provisions of the old and the new Act relating to inference with the arbitral award are vastly different. However, when the courts, in the same day are wrestling with a matter concerning arbitral award under the old Act and with that under the new Act, the chances of culling out the huge difference between the two are minimal. It is not to be forgotten that the courts deal with and rule on disputes where monies and properties of real persons are at stake. The courts do not decide in abstract. Thus, when in one case the courts interfere with the arbitral award for the reason of the same not rendering to the litigant what the courts would have granted to him, the courts find it difficult in the very next case, though under the new Act, to apply different parameters.

11. Arbitration under the 1940 Act could not achieve the savings in time and money for which it was enacted and had merely become a first step in lengthy litigation. Reference in this regard can be made to para 35 of Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc., . It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground, of the award being in conflict with Public Policy of India, was also incorporated. However the juxtaposition of Section 34(2)(b)(ii) shows that the reference to Public Policy" is also in relation to fraud or corruption in the making of the award. The new Act was being understood so [see

Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., and which has not been set aside in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, till the Supreme Court in Saw Pipes Ltd. (supra) held that the phrase Public Policy of India'' is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consonance with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international commercial arbitration of the United Nations Commission on International Trade Law (UNICTRAL). It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

15. Applying the aforesaid test, we are afraid, the arguments of the senior counsel for the appellant are beyond the scope of Section 34.

16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal u/s 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe GMBH Vs. Steel Authority of

India Ltd., and Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India, . It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed u/s 34 of the Act and was raised for the first time in the arguments.

17. The Supreme Court in Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran, refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission of India, and on Kwality Manufacturing Corporation Vs. Central Warehousing Corporation, . Similarly, in P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in National Highways Authority of India Vs. M/s. Lanco Infratech Ltd., held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court u/s 34 of the Act. The Supreme Court in Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion.

18. If we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible.

Before proceeding further, mention may also be made of New Delhi Apartment Group Housing Society Vs. Jyoti Swaroop Mittal, which remained to be noticed and where a Division Bench of this Court held that Saw Pipes Ltd. supra cannot be read as permitting a Court exercising powers u/s 34 to sit in appeal over the findings of fact recorded by the Arbitrator or interpretation placed upon the provisions of the agreement.

10. We have in Delhi State Industrial & Infrastructure Development Corporation Ltd. supra further held that:-

...the parties, by agreeing to be bound by the arbitral award and by declaring it to be final, agree to be bound also by a wrong interpretation or an erroneous application of law by the Arbitral Tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Even under the 1940 Act where the scope of interference with the award was much more, the Apex Court in Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, and U.P. Hotels and Others Vs. U.P. State Electricity Board, held that the arbitrator''s decision on a question of law is also binding even if erroneous. Similarly, in N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, it was held that even if the umpire committed an error of law in granting amount, it cannot be said to be a ground for challenging the validity of the award; the mistake may be a mistake of fact or of law.

11. We are further of the view that the scope of judicial review of an arbitral award is akin to review under Article 226 of the Constitution of India of the decisions of bodies, where it is a settled principle of law (See State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, and State of U.P. and Another Vs. Johri Mal, that the judicial review is of the decision making process and not of the decision on merits and cannot be converted into an appeal. This is quite evident from the various Clauses of Section 34(2)(a) which prescribe the grounds of challenge on the lines of violation of the principles of natural justice in making of the award or invalidity of the arbitral agreement and non-arbitrability of the disputes arbitrated and of the composition of the Arbitral Tribunal or arbitral procedure being not in accordance with the agreement between the parties. Section 34(2)(b) adds the ground of the arbitral award being in conflict with the public policy of India. None of the said grounds are the grounds of challenge on the merits of the award. The ground of challenge of the award being in conflict with the public policy of India is explained as the award being induced or affected by fraud or corruption or being in violation of Section 75 or Section 81. Thus the grounds of challenge are akin to the grounds of judicial review under Article 226 and not to grounds of appeal or revision. We are reminded of the merits legality distinction in judicial review as culled out by Lord Hailsham in The North Wales Vs. Evans (1982) 1 WLR 1155 by observing "the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment,

reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the Court". Lord Brightman in the same judgment held that judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made and it would be an error to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself. It was clarified that only when the issue raised in judicial review is whether a decision is vitiated the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors. In our opinion the same is an apt test also for judicial review of the arbitral awards and just like a mere wrong decision without anything more is not enough to attract the power of judicial review, the supervisory jurisdiction conferred on the Court under the Arbitration Act is limited to see that the Arbitral Tribunal functions within the limits of its authority and that the arbitral award does not occasion miscarriage of justice. The Supreme Court in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, commenting on the radical changes brought about by the re-enactment of the arbitration law observed that the role of the Courts under the new law is only supervisory, permitting intervention in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice etc. and the Court cannot correct the errors of arbitrators and can only quash the award leaving the parties free to begin arbitration again.

12. Of the finality of arbitral awards, there is no doubt under our arbitration law. The Supreme Court as far back as in Union of India (UOI) Vs. A.L. Rallia Ram, held that:-

An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Courts are also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred.....The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided in the arbitration agreement.

of course the said judgment being under the Arbitration Act, 1940 proceeds to hold that an award is bad on the ground of error of law on the face of it. However the legislature while re-enacting the arbitration law has removed the ground of challenge of error of law on the face of the award. In Mc. Dermott International Inc. supra also it was held that the parties to the Arbitration Agreement make a conscious decision to exclude the Courts jurisdiction as they prefer the expediency and finality offered by arbitration. We are bound to respect the said change brought about by the legislature and cannot dogmatically review the awards on the grounds of challenge which have been intentionally taken away by the legislature.

13. It cannot also be lost sight of that non-conferring of finality on the arbitral awards not only affects the speed and expense of arbitration but also has a more subtle consequences of, extensive judicial review changing the nature of the arbitral process to an even greater extent. If arbitration becomes simply another level of decision making, subject to judicial review on merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards against judicial reversal producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an Appellate Court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, in our opinion would substantially undercut the ability of arbitrators to successfully resolve disputes. The Courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the Court will deem meritorious. The Courts if start undertaking to determine the merits of the grievance, would be usurping the function which under that Arbitration Act, 1996 is entrusted to the Arbitration Tribunal. This plenary review by the Courts of the merits would make meaningless the provisions that the arbitral award is final, for in reality it would almost never be final. We though may admit that sieving out the genuine challenges from those which are effectively appeals on merits is not easy.

14. Arbitration will not survive, much less flourish, if this core precept is not followed through by the Courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the Courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it. The power to intervene must and should only be exercised charily, within the framework of the Arbitration Act. Minimal curial intervention is underpinned by need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. The parties having opted for arbitration, must be taken to have acknowledged and accepted the attendant risks of having only a

very limited right of recourse to the Courts. It would be neither appropriate nor consonant for the Court to lend assistance to a dissatisfied party by exercising appellate function over arbitral awards, save to the extent statutorily permitted.

15. As it would be obvious from the above, the contention aforesaid of the counsel for the appellant does not constitute a challenge to the arbitral award on the grounds permitted and as discussed hereinabove. It is not the case of the appellant that the arbitral award is vitiated, for us to go into the merits of the challenge.

16. As far as the other argument of the counsel for the appellant of the claims of the respondent which have been allowed in the award being not arbitrable for the reason of having been preferred beyond the time stipulated, the same if tenable would indeed constitute a ground of challenge to the award within the parameters laid down in Section 34 of the Arbitration Act.

17. The counsel for the appellant in this regard referred to paras 49 to 51 of Manohar Singh and Sons Vs. Raksha Karamchari Coop. Gr. H. Soc. and Another, which in turn referred to the judgment of the Supreme Court in National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, laying down that though an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period of limitation that prescribed by law would be void as offending Section 28 of the Contract Act but there could be agreement which does not seek to curtail the time for enforcement of the right but which provides for forfeiture or waiver of the right itself, if no action is commenced within the period stipulated by the agreement and such an agreement would not fall within the mischief of Section 28 of the Contract Act. On the basis thereof, it was contended that the Arbitral Tribunal wrongly held the clause in the subject contract requiring the respondent to prefer a claim within 120 days to be void as offending Section 28 of the Contract Act, as the said clause instead of curtailing the time for making the claim provides for forfeiture or waiver of the claim itself, if not made within 120 days.

18. I am afraid, the reliance on National Insurance Co. Ltd. supra is without regard to the subsequent judgments considering the same. It has been held by this Court in Punj Lioyd Ltd. Vs. National Highways Authority of India, that National Insurance Co. Ltd. though pronounced on 21st March, 1997 i.e. soon after the amendment of Section 28 of the Contract Act with effect from 8th January, 1997, does not deal with the amended Section 28 and for which reason it held that party could agree/provide for forfeiture of rights, when the amendment was brought to get over such interpretations of Section 28 as existing earlier. SLP(C) No. 14885-14886/2009 preferred thereagainst was dismissed on 18th April, 2012, though leaving the question of law with regard to Section 28 open. However, as far as this Court is concerned, the same view was also taken in Smt. Biba Sethi and Mr. Nitin Sethi Vs. Dyna Securities Limited, and in Shri Satender Kumar Vs. Municipal Corporation of Delhi and Another and earlier thereto in Pandit Construction Company Vs. Delhi Development Authority and Another, . In the said state of law, the said contention

has also no merit.

19. We accordingly do not find any merit in this appeal and dismiss the same.

No costs.