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Union of India Vs Pam Development Pvt. Ltd.

A.P. No. 196 of 2003, A.C. No. 19 of 2003

Court: Calcutta High Court

Date of Decision: Sept. 11, 2007

Acts Referred:
Arbitration Act, 1940 â€" Section 11, 12, 20, 30, 33#Interest Act, 1978 â€" Section 3(3)(a)(ii)#Suits Valuation Act, 1887 â€" Section 11

Citation: 112 CWN 162

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: R.N. Das, Jayanta Banerjee, D.K. Singh and S. Chowdhury, for the Appellant;Pramit Kumar Ray, Tapan Kumar Sengupta and Yasser Md. Arafat, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.
The Railways challenge the award on the authority of the arbitrator to take up the reference. The Railways suggest that

since the reference was an altogether invalid reference, the award passed is void and notwithstanding the ground as to invalidity of the reference

having been taken at a belated stage in the arbitral proceedings, that which was not nonest to start with could not have been validated by

acquiescence or apparent acceptance by the Railways. The clause that the Railways rely on is one found in the General Conditions of Contract that

govern all railway contracts. The arbitration agreement in such General Conditions lays down the qualifications of an arbitrator depending on the

value of the claim. The specific part of the arbitration agreement that is relevant for the present purpose is clause 64(3)(a)(iii):

It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/Umpire and if for any reason, that is

not possible, the matter is not to be referred to Arbitration at all."

2. The contractor raised some murmur as to whether such term was incorporated into the General Conditions, and thus became part of the subject

agreement prior of the subject agreement being concluded, but the Railways show that not only did such stipulation apply to the subject reference,

but parties had also understood such stipulation would apply, though the contractor has disputed its effect. The Railways say that since the

reference was presided over by a retired Judge and not by a gazetted railway officer, what transpired at the arbitral proceedings should be

completely disregarded and the award be set aside as void.

3. There is a history as to how the disputes covered by the substantive agreement between the parties stood referred to the arbitrator. The

contractor instituted proceedings under Sections 5, 8, 11 and 12 of the Arbitration Act, 1940 before a Howrah court. Such proceedings were

transferred to this court. By an order of February 4, 2000, an umpire was appointed with a direction to ""enter upon the reference within a period

of fortnight from the date of forwarding the matter to him for such purpose"".

4. It transpires that the appointee under the order of February 4, 2000 declined the appointment following which a modification was made on

March 13, 2000 by replacing the name of the umpire in the order of February 4, 2000. Though the appointment was only as to the umpire, the

contractor applied for clarification of the order dated February 4, 2000 which was disposed of by Lala, J. on November 30, 2000 on the

following lines :

The Court: This is an application of the petitioner for modification and/or certification of the order dated 4th February, 2000 wherein a direction

was given by this court as follows :

The umpire will enter upon the reference within a period of fortnight from the date of forwarding the matter to him for such purpose.

In fact this court was pleased to appoint a retired Judge of this court as Umpire and subsequently he was replaced by another retired Judge of this

court who, in turn, proceeded on the basis of such direction as given by this court in the order dated 4th February, 2000. But in the fourth sitting of

the arbitration an advocate appearing on behalf of one of the parties raised a technical point that joint arbitrators are still in force and they are still

competent to proceed with the arbitration. Naturally it has created a technical problem because under normal circumstances when there is

difference between two Arbitrators, matter is to be referred to the Umpire. Umpire can hear out from that stage where it is completed before the

joint Arbitrators or can proceed de novo. In the instant case the joint Arbitrators have really become fucntus officio as stated by one of the parties

in the earlier occasion. Therefore intention of the court was there to proceed before the Umpire do novo but due to inadvertence it has not gone

down. Moreover, there cannot be any embargo when the court also directed the Umpire to proceed accordingly as above. Therefore the aforesaid

clarification made by this court in this respect that the Umpire will proceed de novo with the matter as he is continuing. This resolves the issue.

This application is treated on the day"s list as Motion (Adjourned) and disposed of without granting any opportunity for filing affidavits since the

same will cause unnecessary delay. However, no allegation has been made by the petitioner only receipt of application is admitted by the

respondent.

Parties are entitled to approach before the learned Umpire to proceed with the matter accordingly.

The application is accordingly disposed of.

...

5. Thus commenced the reference in right earnest and the parties settled it out therein on merits. The award records (at page 107 hereof) that an

application was made by the Railways at the 39th sitting of the reference on August 21, 2002 (the first sitting in the reference having been held or

April 11, 2000) for amendment of the counter-statement of facts to challenge the very authority of the arbitrator to take up the reference. It has to

be borne in mind that before such plea was taken by the Railways more than two years into the reference, they had served a counter-claim and

had not only sought an adjudication on the merits of the contractor"s claim, but had invited the arbitrator to sit in judgment over the Railways"

claim.

6. In the context of the Railways questioning the arbitrator"s authority, the award proceeds to record that such application was made at a time

when advocate for the contractor had almost concluded his argument. The award notices that the application was inspired by an order of July 5,

2002 passed by a Single Judge of this court.

7. The award thereafter informs that upon conclusion of arguments on such application, it transpired that the order of July 5, 2000 had been stayed

on appeal and ""learned Advocate for the Railways submitted at the 43rd sitting on 13-11-2002 that he was not in a position to pursue this

application for amendment as it was not known then as to how long the interim stay would continue. The said application was thereafter not

pressed.... and although... I heard the said application... I did not make any order or finding on the said application because of the continuance of

the interim stay by the Appeal Court."" (Emphasis supplied)

8. To continue in sequence, the order of July 5, 2002 in A. P. No. 397 of 1997 (Union of India vs. Krishna Kumar) was set aside by the appellate

court order of February 23, 2004 in APOT No. 557 of 2002. In course of the hearing of this petition, the Railways obtained a copy of an yet

unreported judgment of the Supreme Court rendered in the appeal arising out of the same matter passed on July 19, 2007 in Civil Appeal No.

[324 of 2004 (Union of India vs. Krishna Kumar). The Supreme Court restored the order of the Single Judge and it is such judgment that is put

forward as the sheet-anchor of the Railways'' assertion that the award under challenge in the present proceedings is void.

9. The judgment of July 5, 2002 was rendered in a petition u/s 34 of the Arbitration and Conciliation Act, 196, the provision or setting aside an

award under the later Act. It was the same term in the General Conditions that was in issue. The contractor in that case obtained the appointment

of an arbitrator following a request to court u/s 11 of the 1996 Act. The Railways challenged the authority of the arbitral tribunal u/s 12(3)(b) of the

1996 Act on the ground that the arbitrator did not possess the qualification agreed to between the parties. The arbitrator rejected the challenge at

the first meeting, recording that he ""did not find any merit in the submission of the respondent and, as such, (he was) not taking any cognizance of

the said application of the respondent.

10. In defence of the ground of invalidity of the reference, the contractor in that case argued that the Railways had taken a chance before the

arbitrator in their further participation in the proceedings, preferred a counter-claim, acquiesced in the proceedings and should be deemed to have

waived the objection as to the competence of the arbitrator. Upon such argument the court framed the following question:

... Whether the objection to competence of the Arbitral Tribunal goes to the root of the matter. If it does, the award cannot be allowed to prevail.

If it does not, the award should be allowed to stand.

11. His Lordship thereafter proceeded to assess the matter on the basis of the scope of authority u/s 11 of the 1996 Act as then understood in

view of the Constitution Bench judgment then prevailing reported at Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt.

Ltd., . Relevant passages from the Rani Construction judgment were quoted where the Supreme Court was of the opinion that the Chief Justice or

his designate under Section'' 11 of the 1996 Act was not required to perform any adjudicatory function and that there would be no impediment in

contending before a tribunal constituted by the Chief Justice or his designate that it had been wrongly constituted. Upon noticing the position in law

as it then stood u/s 11 of the 1996 Act, His Lordship concluded,

I am of the view that the attention of the learned Chief Justice was not drawn to the qualification of the arbitrator laid down on the agreement

between the parties and the arbitrator deliberately refused to take notice of the same when an application u/s 12(3)(b) of the Act was moved

before him.

12. Thereafter, His Lordship noticed the judgment reported at 1967 (3) All ER 301 (Rahcassi Shipping Co., S. A. vs. Blue Star Line Ltd.) where

an award passed by a lawyer was invalidated as the arbitration agreement between the parties required that the arbitrator or the umpire should be

a commercial man and not a lawyer. Relying on such principle, the award in the Krishna Kumar case was set aside upon the following conclusion :

This is a question of competence of the forum. If the forum is incompetent then it has no jurisdiction to decide the matter and this will go to the

root of the matter. It is well settled that ""even a right decision by a Wong" forum is no decision"". Reference may be made to the case of Pandhrang

vs. State of Maharashtra reported in (1936) 4 SCC 436.

13. In appeal, the order of July 5, 2002 was reversed on the reasoning that the clause was a mere guide and not a fetter. The appellate court was

of the view that since no challenge was thrown by the Railways when a request was made to the Chief Justice u/s 11 of the 1996 Act, the

appointment by the Chief Justice did not appear to be irregular although the arbitrator appointed was not a gazetted railway officer. The opinion

was that the Chief Justice was not bound to appoint an arbitrator who would have the same qualifications agreed to by the parties and the

appointment of another would not be invalid merely on such ground.

14. The matter was carried to the Supreme Court which noticed the change in the interpretation of Section 11 of the 1996 Act in the case reported

at S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . The Supreme Court relied on a passage from a judgment reported at (2004)10 SCC

504 (Union of India & Anr. vs. M.P. Gupta) to hold that since there was an express provision in the agreement- for appointment of a gazetted

railway officer, no other person could be appointed an arbitrator. The Supreme Court restored what was described as ""the well reasoned

judgment"" of the Single Judge passed on July 5, 2002.

15. The petitioner relies on a judgment reported at 2002(2) Arb.LR2 (SC) [A. Mohammed Yunus (Dead) by LRs. vs. Food Corporation of India

& Anr.] where there was a similar clause of exclusion and consequential extinction of the arbitration agreement. The award was made by an

arbitrator who was not appointed in accordance with the arbitration agreement. The award was made a rule of court and a decree in terms thereof

followed. In appeal, a Division Bench of the Kerala High Court held that the arbitrator had no authority to conduct the reference and the award

stood set aside. The Supreme Court upheld the order on the ground that the reference was coram non-judice.

16. The petitioner has also relied on the judgment reported at AIR 954 SC 340 (Kiran Singh & Ors. vs. Chaman Paswan & Ors.) and AIR 977

SC 1201 (Sunder Dass vs. Rara Prakash) to suggest that when the forum lacked authority in receiving the action, no amount of participation or

waiver could cure the initial defect, and any order passed by such a forum, inherently lacking in jurisdiction, could be disregarded and challenged

even in collateral proceedings.

17. In the Kiran Singh case the invalidity raised was on valuation. Paragraph 6 of the report summarises the position:

(6) The answer to those contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no

jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. 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 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. The question is what is the effect of Section 11 of the Suits Valuation Act on this position.

18. In the Sunder Dass case, retrospective operation of the proviso introduced in Section 3 of the Delhi'' Rent Control Act, 1958 fell for

consideration. A decree passed in a suit for recovery of possession was held to be without jurisdiction by reason of the retrospective effect of the

proviso which robbed the court of jurisdiction to entertain the matter. The Supreme Court enforsed the executing court''s view that since by

operation of law, the trial court had no authority to entertain the suit, the decree passed was a nullity.

19. The contractor refers to a judgment rendered by a Division Bench in another matter between the same parties relating to a separate contract

and reference. The judgment of the appellate court was made on April 17, 2006 in APOT No. 438 of 2005 (Pam Development Pvt. Ltd. vs.

Union of India). In such case, upon the Railways'' failure to appoint an arbitrator, a petition u/s 20 of the 1940 Act was made whereupon an

arbitrator was appointed by court. The Railways did not challenge the order of appointment, contested the contractor''s claim on merits and filed a

counter-claim in the reference. At the 57th sitting, the arbitrator''s jurisdiction was questioned on the basis of the order of July 5, 2002 which, by

the time the judgment in the unreported decision was rendered, had been set aside in appeal. The Division Bench noticed the Mohammed Yunus

and M. P. Gupta judgments and on the basis of a judgment reported at Ved Prakash Mittal Vs. Union of India and Others, (Full Bench) held that

the court u/s 20 was not altogether powerless when a party or an appointing authority disregarded the request for appointment in terms of the

arbitration agreement.

20. The Division Bench took cognizance of the Railways'' long and unqualified participation in the reference before the court appointed arbitrator

and on the basis of the judgment reported at Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, , a case of qualified

participation, relied on the Supreme Court dictum that when a party ""participated in the arbitration proceeding, invited the arbitrator to decide the

specific question and took a chance of a decision, it cannot therefore be now permitted to turn round and contend to the contrary.

21. In the Tarapore case when the arbitration clause was invoked by the contractor, the employer contended that the dispute raised was not

covered by the arbitration clause. The employer specified its demur and formulated points in dispute on which the arbitrator was invited to make an

award. In the reference, the first issue was raised as to the arbitrability of the substantive disputes. The Supreme Court held that then a specific

question is referred to an arbitrator, including a question of law, touching upon the jurisdiction of the arbitrator, the decision of the arbitrator would

be binding on both the parties and it would not be open to the parties to ""wriggle out of it by contending that the arbitrator cannot clutch at or

confer jurisdiction upon himself by misconstruing the arbitration agreement.

22. The Division Bench in the unreported case of Pam Development also referred to the judgments reported at Prasun Roy Vs. Calcutta

Metropolitan Development Authority and Another, Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., and Food

Corporation of India and Another Vs. A. Mohammed Yunus, . The Prasun Roy case and the Kerala case have relied upon by the respondent in

the present case and the Prabhat General Agencies case has been relied upon by the petitioner. In the Prabhat General Agencies case, the

Supreme Court construed the arbitration agreement to imply that if the judicial commissioner failed to act it did not appear to be the intention of the

parties to not supply the vacancy. In that case, the subordinate judge was moved to appoint an arbitrator. The application was opposed and

dismissed. The matter was carried to the High Court in revision which was also dismissed on contest. No appointment was made and there was no

reference. The Supreme Court reversed the orders passed by the subordinate judge and the revisional court and remanded the matter to the trial

court for appointing an arbitrator. The Division Bench in the unreported judgment rendered in the earlier matter between the same parties to the

present proceedings, found the Prabhat General Agencies case to be inapplicable in the context of the matter that was in issue. It is the same

matter which is in issue in the present proceedings.

23. In the Prasun Roy case, the Supreme Court held that if there was long participation, it made no difference whether the authority of the

arbitrator was questioned before or after making the award. The Division Bench in the unreported judgment relied on paragraph 8 of the Kerala

case and the fact that the jurisdiction of the court in appointing the arbitrator had been questioned. The following passage from the Kerala judgment

was referred to by the Division Bench to interpret the Supreme Court judgment in the appeal which arose therefrom :

As objection has been filed by the appellants questioning the very jurisdiction of the court in appointing the arbitrator it is not possible to hold that

the appellants took part in the proceedings before the arbitrator on the assumption that proceedings were before a competent authority. That

would not be the position if the appellants did not raise objection to the jurisdiction of the court in appointing the arbitrator. It is settled position that

if a party takes part in the proceedings before the arbitrator on the asumption that the proceedings were before a competent authority he cannot

later turn around and contend that the whole of the proceedings were coram nonjudice.

24. The contractor in the present case has relied on a judgment reported at Inder Sain Mittal Vs. Housing Board, Haryana and Others, . The

Housing Board filed two money suits against the appellants in the Supreme Court and by two separate orders, as agreed to by the parties, the

Superintending Engineer, ADB, Branch Circle, PWD was appointed arbitrator for settlement of some of the disputes. The reference began but

before it was concluded the person occupying the post was transferred and he carried the matter with him. The Housing Board challenged the

award on the ground that upon the transfer of the person who had entered upon reference, he lacked authority to continue with the reference. The

trial court rejected the objections u/s 30 of the 1940 Act, the High Court set aside the awards on revision. The Supreme Court restored the

awards on the following reasoning:

12. In view of the forgoing discussions, with reference to the provisions of the Act, we conclude thus:

(i) Grounds of objection u/s 30 of the Act to the reference made, with or without intervention of the court, arbitration proceedings and the award

can be classified into two categories viz. one emanating from agreement and the other from law.

(ii) In case the ground of attack flows from agreement between the parties which would undoubtedly be a lawful agreement, and the same is raised

at the initial stage, the court may set it right at the initial stage or even subsequently in case the party objecting has not participated in the

proceedings or participated under protest. But if a party acquiesced to the invalidity by his conduct by participating in the proceedings and taking a

chance therein cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of

reference, arbitration proceedings and/or award inasmuch as right of such a party to take objection is defeated.

(iii) Where ground is based upon breach of mandatory provision of law, a party cannot be estopped from raising the same in his objection to the

award even after he participated in the arbitration proceedings in view of the well-settled maxim that there is no estoppel against statute.

(iv) If, however, basis for ground of attack is violation of such a provision of law which is not mandatory but directory and raised at the initial stage,

the illegality, in appropriate case, may be set right, but in such an eventuality if a party participated in the proceedings without any protest, he would

be precluded from raising the point in the objection after making of the ward.

13. In the case on hand, it cannot be said that continuance of the proceedings and rendering of awards therein by the arbitrator after his transfer

was in disregard of any provision of law much less mandatory one but, at the highest, in breach of agreement. Therefore, by their conduct by

participating in the arbitration proceedings without any protest the parties would be deemed to have waived their right to challenge validity of the

proceedings and the awards, consequently, the objections taken to this effect did not merit any consideration and the High Court was not justified

in allowing the same and setting aside the award.

25. The respondent has next placed the judgement reported at Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (dead) through Lrs.

and Others, . There is a clear distinction made by the Supreme Court that all irregular or wrong decrees or orders are not necessarily null and void.

The Supreme Court quoted an earlier judgment with approval at paragraph 14 of the report:

14. Suffice it to say that recently a Bench of two judges of this court has considered the distinction between null and void decree and illegal decree

in Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others, . One of us (R.C. Lahoti, J., as His Lordship then was), quoting with

approval the law laid down in Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, stated: (SCC pp. 291-92, paras 6-8)

''6. What is Void-'' has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the

decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in

the court passing the decree must be patent on its face in order to enable the executing court to take cognisance of such a nullity based on want of

jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

7. Two things must be clearly borne in mind. Firstly, the court will invalidate an order only if the right remedy is sought by the right-person in the

right proceedings and circumstances. The order may be ""a nullity"" and ""void"" but these terms have no absolute sense : their meaning is relative,

depending upon the courts willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be

made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results.''

(Administrative Law, Wade and Forsyth, 8th Edn., 2000, p. 308). Secondly, there is a distinction between mere administrative orders and the

decrees of courts, especially a superior court. The order of a superior court such as the High Court, must always be obeyed no matter what flaws

it may be thought to contain. Thus a party who disobeys a High Court injunction is punishable for contempt of court even though it was granted in

proceedings deemed to have been irrevocably abandoned owing to the expiry of a time-limit.'' (fbzd.,p.312)

8. A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree

of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or

irregularity of procedure, cannot be termed in executable by the executing court; the remedy of a person aggrieved by such a decree is to have it

set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by

a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings."

25. The Division Bench judgment in the unreported Pam Development case would suffice for the contractor to resist the objection of jurisdiction

raised by the petitioner. But the petitioner asserts that the unreported Pam Development judgment is no longer good law upon the unreported

Supreme Court judgment in the Krishna Kumar case. The issue that arises is whether the principle of coram non-judice would apply to the facts of

this case as asserted by the petitioner or the definition of the expression found in Mitra"s Legal & Commercial Dictionary (6th ed.) page 196:

Coram non-judice. Outside the presence of a judge; before a judge or court that is not he proper one or that cannot take legal cognizance of the

matter. [Black"s Law Dictionary, 7th Ed.]

When a suit is brought and determined in a court which has no jurisdiction in the matter, then it is said to be coram non-judice, and the judgment is

void. [Black"s Law Dictionary, 5th Ed.]."

26. Just as the Division Bench in the Pam Development case read the principle laid down by the Supreme Court in the Mohammed Manus case on

the basis of the facts obtaining in the matter, it is necessary to appreciate the context of the Supreme Court judgment in the Krishna"" Kumar case.

To repeat, at the outset in that reference before the court appointed arbitrator, the Railways urged that the arbitrator lacked authority to address

the matter or adjudicate upon the disputes. The arbitrator did not deal with the formal application in such regard and took no cognizance thereof by

recording as such.

27. It is in such circumstances that the principle in the Tarapore case comes into play. The matter that the court will look into in setting aside

proceedings is, unlike in appeal, not the correctness of the arbitrator"s finding but as to whether he acted within the bounds of his authority in

making the finding. Every erroneous finding of an arbitrator is not set aside in appeal, the considerations under Sections 30 and 33 of the 1940 Act

are quite distinct from the powers of a court sitting in appeal over a judgment.

28. The arbitrator in the Krishna Kumar case failed to exercise a jurisdiction vested in him by law and completely ignored the challenge, formally

made, as to his authority to receive the matter. It is such conduct that was noticed by the Single Judge in the order of July 5, 2002 that was

restored by the Supreme Court on applying the law as recognised in the M. P. Gupta case, though the M.P. Gupta case was a challenge at the

stage of reference and not a post award challenge. At the time that the Krishna Kumar judgment was rendered by the Single Judge, an order

passed on an application u/s 11 of the 1996 Act was regarded as an administrative order and not a judicial order. The respondent in the Section

11 proceedings, thus, could not urge before court the grounds that it did before the court appointed arbitrator at the first sitting in the reference.

The further conduct of the reference in the Krishna Kumar case is tinged by the Railways'' objection as to jurisdiction at the outset and

participation despite such objection having been completely disregarded.

29. In the present case, the Railways had a chance to oppose the initial appointment in the proceedings under Sections 5, 8, 11 and 12 of the

1940 Act. The Railways have not shown that at that stage there was any objection of the nature now canvased. The court appointed an arbitrator

in such proceedings who declined the appointment and a further order was made thereafter. Again, the Railways cannot demonstrate that they had

urged the point now being made. The matter returned a third time to court on the clarification sought by the contractor. It does not appear, nor has

it been shown, that the Railways objected to the clarification on the ground now urged. The position, upon the clarification order, became quite

irregular in that the appointment was initially of an umpire but ultimately the umpire came to be the sole arbitrator.

30. The Railways did not prefer an appeal from any of the orders passed by this Court before the umpire was appointed and the umpire was

assigned the responsibility of a sole arbitrator. Even if the Railways may contend that Section 39 of the 1940 Act did not permit an appeal from

any of the orders, an appeal may have been maintained under clause 15 of the Letters Patent on the ground of the order being made in excess of

jurisdiction. Under Sections 5, 8, 11 and 12 of the 1940 Act, the court exercises judicial functions and, in the scheme of the 1940 Act, the

dichotomy of authority between the court and the arbitrator in such matter is more pronounced than in the later Act.

31. Despite it now being laid down in the Patel Engineering case that the power exercised by the Chief Justice or his designate u/s 11 of the 1996

Act is a judicial power, a reference by court does not preclude a challenge before the arbitral tribunal. Section 5 of the 1996 Act preserves the

provisions for challenge before an arbitrator, notwithstanding the reference being one through court. The position under the 1940 Act is

considerably different. There is an element of finality of an issue as to arbitrability or jurisdiction of the arbitral tribunal concluded upon a reference

made by the court under the 1940 Act, which is not there under the 1996 Act. The finality of an order has little to do with the quality of the order.

And it is such finality of the order of reference, unchallenged as it remained, that denudes the argument now made of much of its lustre.

32. Next there is the question of waiver and the appreciation of what amounts to waiver, on facts. Waiver has an element of intent to it. It is an

intentional relinquishment of a know right and the principle binds a party to his conduct.

33. In the Mohammed Yunis and Krishna Kumar cases, the objections as to the authority of the arbitrator were taken at the earliest stage and the

subsequent conduct of the parties challenging the award were viewed in such light. When a party is unwilling to proceed before a forum on such

party''s understanding of the lack of authority of the forum, the party records its protest and proceeds thereafter, a defence of waiver in such

party''s subsequent challenge of the authority of the forum may not be accepted. But where a party does not protest at the outset or within any

reasonable time thereafter, he may then be found guilty of ""taking a chance"" within the meaning of the Tarapore dictum. A party cannot give up its

all upon its initial ground being rejected. In the Krishna Kumar case, the Railways could not have walked out of the reference on the strength of

their conviction that the arbitrator lacked authority and, thereafter, challenge the award which they had not resisted on merits. Though the Krishna

Kumar judgment would show that the Railways would have been justified in walking out of the reference upon the arbitrator not ""taking

cognizance"" of their objection as to jurisdiction, their conduct cannot be flawed for their later contest on merits, or even an invitation to adjudicate

upon the counter-claim which, effectively, is a tool of defence. Whether or not the Railways participated in the reference without prejudice, it is the

contractor in the Krishna Kumar case who took a chance and proceeded despite being made aware of the Railways'' significant objection as to the

authority of the forum.

34. In the present case, there is unequivocal submission of the Railways in the authority of the arbitrator and the unreserved invitation to the

arbitrator to take up their counter-claim. One ought to infer from the Railways'' conduct that there was conscious, intentional relinquishment of the

Railways'' right under the relevant cause and there is implicit consent to the authority upon Railways'' unequivocal submission thereof.

35. Arbitration jurisdiction is consensual; the authority of a court to receive an action, is not. A court derives its authority from the statute and its

jurisdiction depends on the subject-matter and territorial and pecuniary considerations. Parties cannot confer jurisdiction on a court by consent.

But parties give jurisdiction to the arbitrator and that is recognised by statute. The Railways here consented to the reference being taken up by the

arbitrator. The clause that the Railways rely on was there at the beginning and was not introduced by the Krishna Kumar order of July 5, 2002 for

the Railways to suddenly wake up to is. By such time at the 39th sitting and two years into the reference, it was no longer the original clause that

gave the arbitrator the authority, it was the Railways consent to and acquiescence therein, that did.

36. Even thereafter, there was an abandonment of the challenge, however late and however misconceived the challenge was in the first place. The

arbitrator records that the application by which the challenge was made ""was thereafter not pressed"". It is possible that the Railways fairly thought

that upon the order of July 5, 2002 in the Krishna Kumar case being stayed in appeal, the challenge was unworthy of being carried further. But

there was no legal bar on the Railways to pursue the challenge notwithstanding the stay of the Krishna Kumar order of July 5, 2002. It would have

been a consideration in the argument and may have influenced the decision upon the challenge, but there was no legal embargo on the Railways to

pursue the challenge, the stay in the Krishna Kumar appeal notwithstanding.

37. The recording in the award that the challenge was not pressed is not questioned as to the correctness thereof, but the Railways merely rely on

the fact that they had made a challenge on the ground of jurisdiction before a decision on merits was rendered in the reference. Again, the merit of

the ground of lack of jurisdiction of the arbitrator urged by the Railways is tempered by the Railways having abandoned such challenge.

38. A challenge of the nature made by the Railways would go to the root of the matter if the pursuit of such challenge is undiluted by the

challenger''s conduct. Neither the Mohammed Yunus case nor the Krishna Kumar case can be read to be an authority for the proposition that an

arbitration award can be attacked on the ground of the reference having been made to a person not qualified to receive it, without such challenge

having earlier been made. If such authorities cannot be relied upon for the position at law that such a challenge has to be upheld even if first made

at the post award stage, the law that such authorities lay down has to be seen in the context and timing of the challenge made in either case.

39. The petitioner''s challenge as to the authority of the arbitrator fails. The other grounds taken need now be addressed.

40. The Railways engaged the contractor for constructing a gymnasium at Garden Reach at a price of Rs. 63,29,692/- for the building to be

completed within eight months from the issuance of the letter of acceptance on August 17, 1992. The contractor required the approved drawings

of the general layout, structural details and structural members. The arbitrator has found that there was considerable delay on the part of the

Railways and, for a building that was required to stand within eight months, the site was not handed over in its entirety even after the contemplated

date of completion.

41. The principal grievance of the Railways is that the award was made in respect of excepted matters and that the arbitrator erred in granting

interest as he-did. The Railways rely on clause 17(3) of the General Conditions of Contract that govern all railways contracts :

17(3) Extension of time on Railway Account. In the event of any failure or delay by the Railway to hand over to the Contractor possession of the

lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or

instructions or any other delay caused by the Railway due to other cause whatsoever, then such failure or delay shall in no way affect or vitiate the

contractor or alter the character thereof or entitle the Contractor to damages or compensation therefore but in any such case, the Railway may

grant such extension or extensions of the competition date as may be considered reasonable.

42. The Railways suggest that upon the time to complete the work having been extended by the Railways, the contractor could not found the claim

in the nature of damages or compensation for such extended period. The Railways repeat the argument noticed in detail in the award and submit

that the arbitrator acted- beyond his jurisdiction to receive a claim on an excepted matter as the adjudication of such excepted matter would not be

within the folds of the arbitration agreement. The Railways also seek to demonstrate that the arbitrator proceeded to make awards under various

heads with little or no evidence and on his subjective assessment of the matters.

43. In addition to clause 17(3) of the General Conditions, extension of time may be granted by the Railways under clause 17(2) thereof. Sub-

clause (2) does not have the same stifling words disentitling the contractor from claiming'' damages or compensation for the extended period, as

sub-clause (3) does. The argument made by the Railways has to be seen in the context of what was found on facts before the arbitrator. At page

94 of the award, the arbitrator has referred to a letter dated June 11, 1993 said to have been issued by the Railways granting extension of time.

But the arbitrator records that the ""letter was not proved to have been sent and/or received by the claimant as said by the Railway''s witness that

there was no entry in the Despatch Register showing that such letter was sent to the claimant."" The arbitrator has found as a matter of fact on the

appreciation of evidence that ""Railways never followed the provisions of General Conditions of Contract for granting extension of time beyond the

contract period by executing Supplementary Agreement under clause 17(3) of the General Conditions of Contract.

44. It is not for the court to reassess in such proceedings an assertion of fact, the denial thereof and the appreciation of the matter thereafter by the

arbitrator to arrive at a conclusion. Once it is evident that there has been appreciation of the matter in issue, consideration of the material before the

arbitrator and a decision thereupon, the court in setting aside proceedings can neither permit the matter to be reagitated or upset the conclusion and

the effect thereof unless they are palpably absurd and challenged on firmer grounds than what the Railways present in this case.

45. The Railways have challenged the sums awarded under the first, second, fifth and seventh heads of claim, in addition to the amount awarded

on account of interest. The first head of claim related to additional cost incurred towards change of location of the site. An award of Rs. 20,000/-

has been made against a claim of Rs. 1.5 lakh on such acceount. Under the second head, the contractor claimed for loss of earnings for Rs. 12.6

lakh on account of work that could not be executed within the stipulated period. The claimant sought such amount on account of profit,

representing 20 per cent of the approximate value of the contract of Rs. 63 crore. The arbitrator awarded Rs. 5,71,900/- under such head. The

fifth head of claim related to execution of non-scheduled and additional items of work, for which a sum of Rs. 30,000/- has been awarded against

a claim of Rs. 76,500/-. Under the seventh head, the arbitrator has awarded Rs. 10 lakh for idle charges against a claim of Rs. 10,50,500/-. The

Railways assert that there was no evidence before the arbitrator for him to award the amount that he did under such first, second, fifth and seventh

heads and that the arbitrator resorted to complete guesswork in arriving at the figures.

46. That there was no defence to sustain the first head of claim was urged before the arbitrator and has been dealt by him at page 98 of the award.

The arbitrator was of the view that upon the admitted position that there was alteration of the site, the claimant was entitled to reasonable costs for

such change of location. On the strength of a judgment of this Court noticed in the context, the arbitrator has concluded that damages may be

awarded on a reasonable basis, even by guesswork. The arbitrator thereafter has recorded that the claimant sought an award under such head for

additional costs incurred for transporting pilferages to the new location, for labour costs in shifting construction material and for carrying costs. He

has found the claimant to have justified the claim only to the extent of Rs. 20,000/- on account of transportation costs and has rejected the balance

claim under such head.

47. In respect of the second head on account of loss of expected profit, the arbitrator has awarded compensation at the rate of 15 per cent rather

than 20 per cent that the contractor claimed arid has arrived at a sum of Rs. 5,71,980/- by relying on a Supreme Court judgment and a judgment

of this Court after deducting the value of the work executed by the contractor.

48. The arbitrator has justified the award of Rs. 30,000/- on the fifth head as the arbitrator found the claimant had expended amounts for cutting

trees and removing rails four meters below the ground. The arbitrator held that the prohibition in the agreement for a claim for removal of

obstruction related to surface obstruction and the contractor had not claimed for dismantling old temples and godowns that were on the surface at

the site.

49. There is a considerable subjective element in the arbitrator''s assessment of the seventh head of claim for a sum of Rs. 10 lakh. But the reasons

at page 101 of the award in support of the amount granted under the seventh head cannot be read in isolation of the pages expended before that

on the nature of the disputes and on the assessment of the respective rights and obligations of the parties that preceded the short assessment of the

claim under such head. The arbitrator was of the opinion that the contractor mobilised men and machinery but could not use them profitably for

non-availability of work front. The arbitrator noticed letters issued by the contractor to which the Railways did not reply. Upon the arbitrator

finding that men and machine had been mobilised, which do not come free, he made a subjective assessment on the basis of the material before him

and when the process for arriving at the conclusion cannot be faulted, the conclusion itself may not be assailed unless it is demonstrably absurd.

50. There is no arbitrariness about the decision or the decision-making process relating to the first, second, fifth and seventh heads of claim to the

extent they have been accepted by the arbitrator. He has considered both the maintainability of the claims under such heads and assessed the

quantum due on the basis of the material before him.

51. The Railways have not challenged the rejection in entirety of the counter-claim made by them, but have next challenged the award of interest.

The arbitrator "granted interest at 10 per cent per annum from January 17, 1994 till the date of the award and at six per cent per annum thereafter

till realisation. He has also awarded costs of the arbitration assessed at Rs. 1,30,000/-. The arbitrator has justified the award of interest on the

decision reported at 2001(1) Arb LR 490 (SC) : (2001)2 SCC 758 (T. P. George vs. State of Kerala & Anr.).

52. In the T. P. George case the Supreme Court recognised that the arbitrator had authority to award interest at all four stages : from the time of

accrual of cause of action till filing of the arbitration proceedings; during pendency of the proceedings before the arbitrator; future interest arising

between the date of the award and date of the decree; and, interest from the date of the decree till realisation of the award. The decision was

rendered in a reference covered by the 1940 Act.

53. The Railways challenge the grant of interest, in principle, as they suggest that there is an express agreement upon which payment of interest is

barred and such an agreement is recognised by Section 3(3)(a)(ii) of the Interest Act, 1978. The express agreement that the Railways refer to is

found in clause 16(2) of the General Conditions :

16(2) Interest on amounts. No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor

under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.

Interest on the said Government Security will be drawn by the Railway Administration and credited to the Contractor and the Contractor shall not

be entitled to claim any other sum by way of interest or profit on the said Security Deposit than the amount actually drawn by the Railway

Administration from the Government.

54. The respondent urges that as the contract stood determined, the clause contained therein barring payment of interest would not operate. The

respondent shows that the arbitrator arrived at such conclusion. The respondent says that the agreement stood determined on April 16, 1993 as

has been found by the arbitrator at pages 94 and 95 of the award. The respondent refers to the judgments reported at 1996 (29) Arb LR 566

(N.G. Gunani vs. Union of India) and Union of India (UOI) Vs. Pam Development Pvt. Ltd., to suggest that the challenge on interest cannot be

urged in view of the N.G. Gunani principle having been followed by a Division bench of this Court in another reference between the same parties.

As in the earlier reference between the parties which was the subject matter of the judgment reported at Union of India (UOI) Vs. Pam

Development Pvt. Ltd., , in addition to clause 16(2) of the General Conditions, the Railways also challenge the award of interest on the

unliquidated amount. In the Gunani case there was a bar as to payment of interest but the clause was construed by the High Court of Andhra

Pradesh to be a bar on departmental officers which would not fetter the powers of the arbitrator to award interest. The Division Bench of this

Court in the earlier reference between the parties held that the arbitrator"s power to award interest for the post reference period must be

incorporated in the arbitration agreement or else, his authority in such area would remain untrammelled. It would be best to set out the conclusion

of the Division Bench as, in view of such conclusion, the grounds urged to challenge the award of interest cannot be entertained at all:

48. We are in agreement with the ratio of the judgments of this Court in the case of Board of Trustees for the Port of Calcutta vs. Mahalakshmi

Constructions (supra) and that of the Hon"ble High Court of Andhra Pradesh in the case of N.G. Gunani [1996 (4) Andh LT 1046] (supra). In the

present case, the interest prohibition clause admittedly was incorporated in the GCC, but not in the Arbitration Cause forming the Arbitration

Contract. In our opinion, a plain reading of the contract does not reflect intention of the parties to denude the power of the Arbitrator to award

interest. Clause 16(2) of the GCC has not been included in the list of excepted matters in Clause 63 thereof. It has also not been argued before us

the issue of award of interest came within excepted matters. Accordingly, we are of the view that the interest exclusion clause should be held in the

present case to be an embargo on the power of the appellant or its officers to award interest, but the Arbitrator"s power to award interest has not

been curbed in the agreement.

48. We accordingly hold that no illegality was committed by the Arbitrator in" awarding interest in the present case. We agree with the Hon"ble

Single Judge on this issue also.

55. The challenge to the award, thus, fails on all counts. The petition is dismissed with costs assessed at 500 GMs.

56. In view of the petitioner"s challenge falling, there will be a judgment and decree in terms of the award and the decree will carry interest at the

rate of six per cent per annum till payment.

57. The petitioner seeks stay of operation of the order. The order will remain suspended for three weeks from date. Urgent photostat certified

copies of this judgment, if applied for, be, issued to the parties upon compliance with requisite formalities.