

(1999) 08 AHC CK 0135
In the Allahabad High Court
Case No : C.M.W.P. No. 44071 of 1998

Indian Institute of Technology, Kanpur	APPELLANT
Vs	
Anushree Constructors and Consultants Associates (P.) Ltd., New Delhi and others	RESPONDENT

Date of Decision : 11-08-1999

Acts Referred:

Arbitration Act, 1940 — Section 30
Arbitration and Conciliation Act, 1996 — Section 1(3), 21, 34, 34(2), 34(3)
Constitution of India, 1950 — Article 136, 226

Citation : (1999) 4 AWC 3493 : (1999) AWC 3493

Hon'ble Judges : A.K. Jog, J

Bench : Single Bench

Advocate : Dinesh Kackker and S.N. Verma, for the Appellant; B.N. Singhvi and S. Chopra, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Jog, J.

Facts of the case-

1. Indian Institute of Technology, Kalyanpur, Kanpur (called the Institute), a body corporate was established by and under Institutes of Technology Act. 1961, to provide for education and research in various branches of Engineering. Technology. Sciences and Acts.
2. The works department of the Institute floated tenders on 8th October. 1987 for eight different works. Tenders of M/s. Anushree Contractors and Consultant Associate Private Limited. New Delhi, called the Contractors (respondent No. 1) were accepted and works were awarded as per details given in Paragraph 8 of the writ petition. For each contract, articles of agreements were executed by the Institute and the Contractor. Details of articles of agreements, except clause 55, are not necessary for the purpose of the present petition, which provided for

arbitration, in case of dispute and/or difference arising between the parties. Clause 55 as quoted in Paragraph 14 of the writ petition reads :

"(a) All disputes and differences arising, between the parties to this agreement in the matter of meaning and interpretation of these articles of agreements and conditions whether giving rise to any claim settlement or not concerning the works, during or after the construction of building, shall be referred to a sole arbitrator by mutual agreement of parties to this contract, falling which to the President, for the time being of the Indian Institute of Engineers who may be appointed as a sole arbitrator and the award of such arbitration shall be final and conclusive and binding on the parties hereto. The submission shall be deemed to be submission to arbitration under the meaning of the Arbitration Act, 1940 or any statutory modification re-enactment thereof for the time being in force."

3. The agreement containing aforequoted arbitration clause is admitted to the parties.

4. It is alleged, on behalf of the institute, that inordinate delay was committed by the Contractor in executing works and the works were completed after various extension of times as per details given in Paragraph 16 of the writ. In Paragraph 17 of the writ petition it is also alleged that there were several defects in the constructions and consequently last payment was withheld. The Contractor had written various letters to the Institute regarding non-payment of contract money under several heads. The validity and justification of the stand taken by the either party is not subject-matter of the writ petition and hence details are not required to be mentioned to appreciate the controversy and the issue arising in the present case.

5. Chronological dates and factual matrix required for decision of the present petition are being given below :

Sl. No.

Date

Description

1.

16.4.94

Respondent No. 1 wrote a letter to the Director of the Institute making certain demands for payment and stating that in case the amount claimed is not paid for any reason the matter may be referred to a n Arbitrator (mutually acceptable to the Institute and him) in terms of clause 55 of the Agreement. (Writ Annexure-3 page 70).

2.

1.1.96

Contractor's letter-cum-receipt of Rs. 3,56,939.00 and requesting Institute to refer dispute on several other heads to a mutually acceptable Arbitrator (Writ Annexure-4 page 75).

3.

14.1.96

Above letter for referring the dispute received by the Director of the Institute.

4.

25.1.96

Letter of the Director of the Institute to Shri Dharam Veer (respondent No. 2) to give consent for appointment as Arbitrator to resolve "dispute" between the parties? (Writ Annexure-5 page 76) and (Annexure-A to C.A.).

5.

30.1.96

Arbitrator/respondent No. 2 (Shri Dharam Veer) gave written consent to act as sole Arbitrator.

6.

16.8.96

Act No. 26 of 1996 published in Section 1(3) of the - Act providing for enforcement with effect from 25.1.1996. in view of Ordinance No.

VIII of 1996 and Ordinance No. II of 1996.

7.

Contractor filed claim before the Arbitrator Institute filed objections/ counter claim.

8.

3.6.97

Award given by Sole Arbitrator. Awarded Institute to pay Rs.35,70,455.00 inclusive of past Interest, re-reference charge. pendents lite and future interest at the rate of 18% from the date of the Award counter-claim of the Institute not considered by the Arbitrator on the "ground that it was not referred to him by the Director of the Institute vide letter dated 25.1.96 (Writ paragraph 6, Page 81).

9.

10.6.97

Application- 4Ga filed by Institute to set aside Award filed In Court (Case No,

12/70 of 1997)? (Photostat copy duly attested by counsel for "Contractor" and not disputed by Institute as record of this writ petition).

10.

16.6.97

Application (Paper No. 4Ga) u/s 34, Arbitration and Conciliation Act,

1996-4Ga-copy supplied by counsel for petitioner No. 1-not disputed by counsel for petitioner.

11.

Objection by respondent/ company.

12.

23.9.98

Application 38/C-2 (To decide question of applicability of New Act or Old Act as preliminary question Writ Annexure-2 P. 63.

13.

Contractor's reply-Annexure-B to C.A.

14.

Written submissions filed before respondent No. 3 (D. J. Kanpur) Writ Annexure-7.

15.

Written submission filed by Contractor" before D. J., Kanpur Annexure C to C.A.

16.

16.11.98

Judgment and order passed by D. J. Kanpur, rejecting application 38-C/2 (Annexure-1 to the writ petition) PP. 44.

6. Evidently parties have participated in proceedings before the Arbitrator who rendered his Award dated 3rd June. 1997.

7. Relevant extract of the said Award (Annexure-6 to the Writ Petition Paper Book PP 84 to 86) is reproduced for each reference :

"3.01. Contract clause regarding arbitration.-- Condition 55 of the Contract Agreement pertains to Arbitration. This clause provides for a reference to a sole arbitrator by mutual agreement of parties to this contract, failing which The submission shall be deemed to be submission to arbitration under the meaning of the Arbitration Act, 1940 or any statutory modification, re-enactment thereof for the time being in force."

"3.01. The letter from the Director I.I.T. Kanpur seeking my help for adjudicating these claims is dated 25.1.96 (which was received by me a few days later). In my letter dated 30.1.96, I intimated my fees and also pointed out "Government of India has recently issued an ordinance regarding arbitration. A copy of the ordinance may also be obtained."

3.02. The Hon"ble Supreme Court has held in Secretary to the Government of Orissa and Another Vs. Sarbeswar Rout, As soon as the arbitrator indicates his willingness to act as such, the proceedings must be held to have commenced." In the present case, the proceedings are to be treated as commencement on 30.1.96.

3.03. In the first hearing itself, the claimants pointed out that Government of India had issued an ordinance regarding arbitration, which was effective from 25.1.1996, and the same should apply to this Arbitration. They were directed to supply a copy of the same. The claimants submitted a copy of "The Arbitration and Conciliation Ordinance. 1996". This is effected from 25th January, 1996 with copy to respondents. The respondents raised no objection [This ordinance has since been changed into "The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)".

8. The Institute in the Court of Respondent No. 3 (District Judge, Kanpur) filed an application (Paper No. 4Ga) dated 10th June, 1997, registered as Miscellaneous Application No. 12/70 of 1998, Indian Institute of Technology v. Anushree Contractors and Consultants and another u/s 34, Arbitration and Conciliation Act. 1996 (called "New Act") for setting aside the arbitral "Award". Copy of the said application was not brought on record by either of the parties but a photocopy of it, certified to be correct by counsel for respondent No. 1 has been, however, supplied and kept on record of the case after perusal. Learned counsel for the petitioner Sri Yashwant has no objection to it. It may be noted, this application was filed under New Act.

9. Title of the said application reads :

"Application for setting aside the Arbitral Award u/s 34 of the Arbitration and Conciliation Act, 1996".

10. The contractor filed objections against the said application (4/Ga).

11. While aforesaid application (4/Ga) was pending. Institute filed another application (38/Ga) dated 23rd September. 1998 before the Court of respondent No. 3 and prayed that question of applicability of the New Act and Arbitration Act, 1940 (called Old Act) may be first adjudicated before deciding application (4/Ga) u/s 34. New Act.

12. Stand of the Institute, as is evident from perusal of paragraph Nos. 2, 6, 7 and 9 of the application (38/Ga), is that "Arbitrator" was not justified in proceeding on the assumption that New Act (which came in force w.e.f. 25.1.1996) governs the arbitral proceedings since he had conveyed his

willingness to act as arbitrator on 3rd January. 1996 : and secondly, the factum of "No objection" on the point and allowing the arbitrator to proceed on the basis of provisions of New Act did not tantamount to the consent or agreement to adjudicate the dispute under New Act. The contention of the Institute is that so called "No Objection" on their part before arbitrator was with reference to the date of commencement of the New Act and it was not an "agreement" as such for applying the provisions of the New Act. The Institute in paragraph 11 of the application (38/Ga2) asserted that in case the proceedings are entertained under the New Act. the objector was likely to suffer great loss and prejudice because ground for setting aside award under old Act are much wider than those provided under the New Act.

13. Learned District Judge (respondent No. 3) rejected Application (38Ga) treating it as preliminary objection vide judgment and order dated 16th November. 1998 (Annexure-1 to the writ petition) which is being impugned in the present petition and it is prayed that a writ, order or direction in the nature of certiorari be issued by this Court to quash the impugned judgment and order dated 16th November. 1998), a writ, order or direction in the nature of mandamus directing respondent No. 3 to set aside the award made by the arbitrator (respondent No. 2) be issued apart from other general reliefs.

14. Before proceeding to consider the case on merits, it may be noted that a learned single judge, while hearing matter at admission stage. passed following order on 22nd December, 1998, which is reproduced :

"22.12.1998

Present : Hon"ble Mr. Justice Binod Kumar Roy

1. Sri S. N. Verma, learned senior counsel appearing in support of this writ petition, with reference to the ratio laid down by the Supreme Court interpreting Section 85(2)(a) read with Section 21 of the Arbitration and Conciliation Act, 1996 in Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, contended that in view of the fact that the petitioner had already made a request for Arbitration vide his letter dated 10.1.1996 the provisions of the New Act will be applicable.

2. Sri B. N. Singhvi, learned senior counsel appearing on behalf of respondent No. 1, on the other hand, with reference to the decision of the Supreme Court in Secretary to the Government of Orissa and Another Vs. Sarbeswar Rout, , contended that the submission of Mr. Verma are devoid of any force and that the decision in Secretary to the Government of Orissa supra, which was rendered by 3 judges of the Supreme Court holds the field and governs the instant case.

3. The decision in Shetty's Construction Company Pvt. Ltd., relied upon by Mr. Verma, prima facie appears to be directly on the issue. Accordingly I am of the view that this case requires adjudication by this Court.

4. This writ petition is admitted. However, in order to expedite the controversy I

fix Tuesday dated 2nd February. 1999 as its date of hearing and on that date it will be listed for hearing amongst top five cases on the board.

5. Issue notice by registered post as well as ordinary mode to respondent No. 2 for which necessary requisite etc. must be filed by tomorrow. The office will despatch the notices on the reopening day. If they are filed by tomorrow.

6. Till further orders of the Court the proceedings before the respondent No. 3 shall remain stayed.

Sd/- Binod Kumar Roy, J."

15. Said order shows that writ petition was admitted because the learned single Judge felt necessity of adjudication by this Court in view of the above two decisions of Hon"ble Supreme Court namely, Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, , relied upon by the petitioner and Secretary to the Government of Orissa and Another Vs. Sarbeswar Rout, , relied upon by respondent No. 11.

16. Office report dated 29th January. 1999 on the order-sheet shows that notice meant for respondent No. 2 were issued fixing 2nd February, 1999 by registered post as well as ordinary process, but neither acknowledgment nor undelivered cover was received back after delivery. The service on respondent No. 2 shall be deemed sufficient under Chapter VIII (Explanation II), Allahabad High Court Rules (Rules of Court. 1952).

17. On 21st July. 1999 this Bench was nominated and that is how this case has come up before this Bench.

18. Respondent No. 1 (Contractor) is represented by counsel and filed counter-affidavit.

19. Respondent No. 2 Sri Dharam Veer, arbitrator is neither represented by counsel nor counter-affidavit on his behalf is on record. No vested rights of the arbitrator are to be prejudiced either way and his presence or absence in Court is not material : particularly when the "Award" is being defended by the Contractor (respondent No. 1), the beneficiary under the said Award. There are no allegations of mala fide/bias. His absence, in spite of service, as noted above, is not relevant.

20. District Judge, Kanpur Nagar, impleaded as respondent No. 3, is Judicial Officer who has passed the impugned order. He is represented by Sri Sunil Ambwanl, Advocate, who appeared before this Court and submitted that he has nothing to add to what is already mentioned in the order dated 16th November, 1998.

21. In this context, one may refer to Savitri Devi v. District Judge, Gorakhpur and others, 1999 2 ARC 7 "Paragraph 14, wherein Hon"ble Supreme Court has observed thus :

"14. Before parting with this case, it is necessary for us to point out one aspect of the matter which is rather disturbing, in the writ petition filed in the High Court as well as the SLP filed in this Court, the District Judge, Gorakhpur and the 4th Additional Civil Judge (Junior Division), Gorakhpur, are shown as respondents and in the Special Leave Petition, they are shown as contesting respondents. There was no necessity for impleading the judicial officers who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court, nor is there any justification for impleading them as parties in the SLP and describing them as contesting respondents. We do not approve of the course adopted by the petitioner which would cause unnecessary disturbance to the functions of the concerned judicial officers. They cannot be in any way equated to the officials of the Government. It is high time that the practice of impleading judicial officers disposing of civil proceedings as parties to writ petition under Article 226 of the Constitution of India or Special Leave Petitions under Article 136 of the Constitution of India was stopped. We are strongly deprecating such a practice."

22. In view of the above. District Judge, Kanpur Nagar, is not at all necessary party to be impleaded and/or to be heard in the present writ proceedings.

23. Preliminary objection raised by respondents.--Sri B. N. Singhvi, Senior Advocate, before the commencement of the arguments on merits, raised preliminary objection and submitted that writ petition is not maintainable. Said objection is contained in paragraph 2 of the, counter-affidavit of respondent No. 1, which is quoted below :

"At the outset, I submit that this Hon"ble Court has no jurisdiction under Article 226 of the Constitution of India to entertain and try this petition which is exclusively under the provisions of the Arbitration and Conciliation Act, 1996. I submit that an order in the nature of interlocutory order under the provisions of Section 34 of the Arbitration and Conciliation Act. 1996, cannot be gone into by this Hon"ble Court under Article 226 of the Constitution of India in a writ petition. It is submitted that if the writ jurisdiction is allowed to be invoked in the matters of Arbitration Act or the Arbitration and Conciliation Act, when the entire arbitration proceedings of alternative mechanism of justice would be frustrated, and. the attempt to decide the disputes by Arbitration by consuming minimum time, would be severely affected. The petitioners cannot be allowed to seek relief under writ jurisdiction if at all they are aggrieved by the impugned order of the District Judge, Kanpur Nagar, in the proceedings u/s 34 of the Arbitration and Conciliation Act, 1996, because adequate provisions relating to the filing of an appeal is made available under the said Act, in any case, the petitioners have not come to this Hon"ble Court with clean hands and, therefore, they should not be given any equitable relief under the writ jurisdiction."

24. Contention of the learned counsel for the respondent is that writ petition is premature inasmuch as the application u/s 34. New Act filed by the petitioner has not been decided on merits and the same is still pending before District

Judge u/s 34 of the New Act. In paragraph 3 of the counter-affidavit contesting respondent has alleged that entire attempt of the petitioner is to without any delay in payments of arbitral award. Even though, there is no stay granted by any Court against the award of the arbitrator, the petitioners have failed and neglected to pay the amount awarded by the arbitrator and, that no application for stay of the award has ever been made by the petitioners since June, 1997. Their entire objective is to delay the main hearing of their own application u/s 34 for setting aside the award. The application (38/C2) on which the impugned order has been passed, itself is not maintainable because the application (4Ga) itself is a special application which can be made under the provisions of Section 34 on the grounds mentioned in subsection 2, clause (a) of Section 34. It is after more than one year that the petitioners thought fit to make an application like the one (38/C2) on which impugned order is passed deciding "preliminary issue" relating to the question of applicability of the Old Act or the New Act.

25. The learned counsel for the petitioner, however, submitted that "preliminary objection", pertains to the "jurisdiction" and forum and these questions have been adjudicated against the institute and hence writ petition is maintainable.

26. Since parties have already exchanged pleadings and question to be adjudicated is purely of legal nature and coupled with the circumstances that the parties have addressed on merit as well. I propose to decide the petition on merits. "Merits" and "demerits" of preliminary objection are not adjudicated in the facts of present case. It shall be a colossal loss of time and energy of the parties as well as of Court and It is better if "Preliminary objection" is ignored and this preliminary objections set at rest.

27. Relevant provisions of Old/ New Arbitration Act.--it will be useful to refer to the following provisions of the Old Act and the New Act:

Old Act :

"Section 30. Grounds for setting aside award.--An award shall not be set aside except on one or more of the following grounds, namely :

- (a) that an arbitrator or umpire has misconducted himself or the proceedings ;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35 ;
- (c) that an award has been improperly procured or is otherwise invalid.

Section 34. Power to stay legal proceedings where there is an arbitration agreement. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any, other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time before filing a written statement or taking any other steps in the proceedings, apply to the

judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority may make an order staying the proceedings."

New Act ;

Section 1(3).--It shall be deemed to have come into force on the 25th day of January, 1996.

Section 9.--Interim measures etc. by Court--A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court :

(i)

(ii) for an interim measure of protection in respect of any of the following matters, namely :

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement ;

(b) securing the amount in dispute in the arbitration ;

(c) the detention, preservation or inspection of any property or thing which to the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observations to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence ;

(d) interim injunction or the appointment of a receiver :

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

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

Section 34.---Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if :

(a) the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subject it or, failing any indication thereon, under the law for the time being in force ; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration :

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted. only that part of the arbitral award which contains decision on matters not submitted to arbitration may be set aside ; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties, cannot derogate, or, failing such agreement^ was not in accordance with this Part ; or

(b) The Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India,

Explanation--Without prejudice to the generality of sub-clause (ii) of clause (b), 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 ink violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral tribunal.

28. Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application without a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a

period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

Section 43. Limitations.--(1) The Limitation Act, 1963 (XXXVI of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purpose of this section and the Limitation Act, 1963 (XXXVI of 1963), arbitration shall be deemed to have commenced on the date referred in Section 21 :

Section 85. Repeal and saving,--(1). The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937), the Arbitration Act. 1940 (X of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (XLC of 1961) are hereby repealed.

(2) Notwithstanding such repeal :

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force ;

(b) all rules made and notifications published, under the said enactments, shall, to the extent to which they are not repugnant to this Act. be deemed respectively to have been made or issued under this Act.

29. Petitioner's contention .--The case of the petitioner is that arbitral proceedings commenced on 14th January, 1996 (when the letter from contractor for referring the dispute was admittedly received by the Director) in view of the decision in the case of Shetty's Construction (supra). Second limb of the argument is that there was no agreement for deciding the matter under New Act. In other words, Institute never gave "No Objection" before the arbitrator to proceed under New Act. Hence said "No Objection" cannot be treated as equated and within the meaning of expression "any agreement to the contrary" used in Section 21 and Section 85(2)(a) of the New Act. The petitioner further contended that the decision in the case of Shetty's Construction (supra), though rendered by a Bench of two Judges of the Supreme Court is-directly applicable on all the four-corners. The earlier decision, according to the petitioner, in the case of Secretary to the Government of Orissa (supra), decided by Bench of three Judges is distinguishable both on law and fact since the question arising in the present case has not been at all considered in the said case.

30. The question for adjudication in the present writ petition is whether Arbitration Act, 1940 {Old Act) or Arbitration and Conciliation Act, 1996 (New Act) is applicable to "arbitration proceedings" in view of admitted facts of the present case. Answer depends upon ascertainment of "Date of Commencement" of arbitral proceedings u/s 21 (New Act).

31. The other vital aspect, which requires adjudication in the instant case, is-- whether there was any agreement--express or implied--between the parties to get the dispute adjudicated by "Arbitrator" under provisions of the New Act.

32. Ordinance No. VIII of 1996 was published in the Central Gazette dated 16th March, 1996 (1996 Part III) LLT 1987), Clause 1 (3) of the said Ordinance was to come into force on the date as the Central Government may appoint. The said Ordinance was made operative with effect from January 25, 1996, vide Central Government Notification in the Official Gazette appointed 25th January, 1996, as the date to put into force. The said Ordinance was subsequently replaced by the Arbitration and Conciliation Second Ordinance, 1996, (Ordinance No. 11 of 1996). Clause 1 (3) of the said Second Ordinance provided "it shall be deemed to have come into force on the 25th day of January. 1996."

Learned counsel for the contesting respondent, however, sought to counter above contention of the petitioner by drawing notice of the Court to clauses 3.01 to 3.04 of the Award quoted in earlier part of the judgment.

33. The Arbitration and Conciliation Act. 1996, Act No. 26 of 1996, received assent of the President on August 16, 1996 and published in the Gazette of India Part II dated 19th August, 1996. Section 1(3) of the New Act contemplated "it shall be deemed to have come into force on 25th January. 1996".

34. Reading of Section 85(1), New Act shows that the provisions of Old -Act (Arbitration Act, 1940) were saved to the extent that the said Act continued to apply to the arbitral proceedings, which had commenced before the New Act came into force subject, however, to the condition that the parties to the proceedings do not agree otherwise. Section 85(2)(a) of the New Act unequivocally provides that provisions of Old Act shall not apply in case the parties agree that matter be decided under New Act. Provisions of New Act shall apply to arbitral proceedings, irrespective of the fact that arbitral proceedings had commenced before the commencement of the New Act provided the parties to the said proceedings agree so, can be decided as per new subject to both parties agree to.

35. Reasons.--Section 85(2)(a) of New Act contemplates that provisions of Old Act shall not be applicable even if said proceedings had come into existence prior to commencement of New Act. Section 85(2)(b) provides that all rules made under Old Act shall, to the extent to which they are not repugnant to the New Act, be deemed respectively to have been made or issued under New Act. It further provides that "Rules" "Notifications" under Old Act shall not be applicable to the extent they are repugnant to New Act. It shows that even those arbitral proceedings, which had commenced before New Act, shall be governed by Rules and Notifications under Old Act but only to the extent that they are not repugnant to New Act.

36. Clause 3.04 of the award clearly mentioned that when fact of commencement of New Act was brought on record "Institute" raised no objection

to the applicability of the provisions of New Act.

37. Institute allowed the arbitrator to proceed on the basis that it had no objection to the applicability of New Act. By not raising objection to the applicability of New Act before the Arbitrator, Institute explicitly agreed for proceedings to be carried in accordance with the provisions of the New Act.

38. Perusal of objection of the petitioner u/s 34, New Act (paper 4Ga) shows that petition filed in u/s 34 of New Act.

39. At this belated stage (i.e., in writ proceedings) objection on this ground, after award is rendered, is not permissible. Petitioner is estopped from raising the said objection now. It will give institute a leverage to abuse "process of law". By delay Institute is to gain at the cost of the contractor. This Court cannot permit itself to be used as a tool for exploiting a party.

40. Petitioner is now estopped under law from raising this issue.

41. I also find Institute has not come forward to make offer to deposit "arbitral amount" with this Court or District Judge to prove its bona fide. Unfortunately, bona fide of the Institute are lacking.

42. The petitioner Institute having agreed by not raising objection and there being "agreement to the contrary" as contemplated u/s 85(2)(a) of the New Act. the petitioner can have no valid grievance when award is delivered on the basis of its own representation. Arbitrator committed no wrong by proceeding on the basis that New Act is applicable to the case between the parties.

43. The above conclusion is fully supported in view of the following decisions :

See- 1. 1998 (8) SCO 651 (Paragraph 2), Secretary Irrigation and Power Department Government of Orissa v. Niranjan Swain.

2. Krishi Utpadan Mandi Samiti Vs. Moti Lal and Others,

3. 1999 (1) SC 272 (Paragraphs 17 to 19). M. K. Shah Engineers and Contractors v. State of M.P.

4. 1998 1 ARC 109 (Paragraphs 12, 12A and 13)

44. Harris and Martin Ltd. v. Vith A.D.J. and others. Hon'ble Supreme Court has observed in the case of Harris and Martin (supra) that plea once "waived", in the facts of case like the one in hand, cannot be allowed to be pressed later so as to take other side by surprise.

45. Again clause 55 of the agreement, aforequoted clearly contemplates "submission shall be deemed to be submission to the arbitration under the meaning of the Arbitration Act. 1980, or any statutory modification re-enactment thereof for the time being in force."

46. Expression used in the agreement clause 55 along with the conduct of the

petitioner in not raising the objection before the arbitrator shows that petitioner Institute is raising an issue which it had already waived before the arbitrator.

47. No injury or substantial prejudice.--There is another aspect of the matter. The Petitioner has failed to show that prejudice shall be suffered by him if proceedings are governed by New Act.

48. In paragraph 10 of the objection (Application 38C-Annexure-2 to the writ petition) it is asserted that under Old Act the objection to an award is entertained by Civil Judge, Kanpur Nagar whereas under New Act objection will be before District Judge. Without going into the correctness of the allegation, I find no substantial prejudice will be caused if matter is adjudicated by the District Judge instead of Civil Judge inasmuch as Court of District Judge is higher than the Court of Civil Judge.

49. Writ Jurisdiction. Discretionary remedy and not as of course--Conduct of parties--Relevant consideration : If substantial justice done--High Court shall refuse to set aside even an illegal order in that case.--The learned counsel for the petitioner then submitted that scope of challenging an award under New Act is limited to the ground contained in Section 34. On the other hand, scope for Interference u/s 30. Old Act is much wider than scope under New Act."

50. Be that as it may, in instant case, the parties agreed to have the matter adjudicated by the arbitrator as per provisions of the New Act as permitted u/s 85(2)(a) New Act, Petitioner's grievance, now after "award" is given cannot be entertained. It will cause enormous inconvenience and injury to the other side. And on this ground this Court can refuse to entertain the writ petition under Article 226 of Constitution of India, which is a discretionary jurisdiction and not as of course.

51. On behalf of the petitioner reliance has been placed, as indicated above, on the decision in Shetty's Constructions (supra). It may be stated that in Shetty's Constructions (supra) all relevant dates in that case were prior to the date of commencement of the New Act. i.e., to 25th January, 1996. In the instant case the date 30th January, 1996 (when the Arbitrator conveyed his written consent) is, admittedly, after 26th January, 1996. Case of Shetty's Construction (supra) is thus distinguishable on facts.

52. In the case of Secretary to the Government of Orissa (supra) the Apex Court had no occasion to consider the question of applicability of the provisions of the Old Act and New Act as such. Supreme Court in that case considered the question as to when proceedings before the arbitrator is deemed to commence. The said question was considered by the Supreme Court when the provisions of New Act were not there.

53. The learned counsel for the petitioner then placed reliance on the decision in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., In this case also the question under consideration in the present was not considered, as it did not

arise for consideration before the Supreme Court in the facts of that case. None of the decisions cited at the Bar on behalf of the petitioner throw light on the question as to what shall be the position of law regarding the applicability of the provisions of Old and New Acts.

54. In the application u/s 34, New Act (Paper 4Ga), Institute has taken plea of limitation. It is made clear that petitioner Institute shall not be now permitted to raise plea of limitation or any other plea as preliminary issue to be decided separately.

55. Respondent No. 3 shall consider all the objections u/s 34, New Act (except the objection already raised in application 38/C2 and already decided).

56. Respondent No. 3 shall pass appropriate orders in exercise of its powers u/s 9(ii)(h) of New Act and ensure to secure the amount under "Award" so as to ensure expeditious payment to the successful party in future.

57. The writ petition is devoid of merits and deserves to be dismissed.