

(2005) 01 KAR CK 0018

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 1785 of 2002

Krishna Bhagya Jala Nigam Limited and Another

APPELLANT

Vs

G. Harischandra Reddy and Another

RESPONDENT

Date of Decision : 28-01-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16 (2), 34, 37, 37 (1) (b), 4
Contract Act, 1872 — Section 15

Citation : (2005) 2 KarLJ 409

Hon'ble Judges : S.R. Nayak, J; Ram Mohan Reddy, J

Bench : Division Bench

Advocate : Preeti Dayanand and D.S. Naik, for the Appellant; K.G. Raghavan, for Dua Associates for Respondent-1, for the Respondent

Final Decision : Dismissed

Judgement

Ram Mohan Reddy, J.—This miscellaneous first appeal preferred by Krishna Bhagya Jala Nigam Limited u/s 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short, the "Act") is directed against the Order dated 15-12-2001 passed in Arbitration Case No. 1 of 2001 on the file of the Civil Judge (Senior Division), Bijapur, dismissing the petition filed u/s 34(2)(a)(v) of the Act, of the appellant, to set aside the award dated 25-6-2000, published on 14-11-2000, of the sole Arbitrator.

2. Briefly stated, the facts leading to the filing of this appeal, are.--

For the purpose of brevity, the appellant is referred to as "KBJNL" and the 1st respondent as the "claimant", while the 2nd respondent as the "Arbitrator".

3. By an agreement bearing No. 41 of 1993, dated 27-11-1993, entered into between KBJNL and the claimant, a Civil Contractor, work of construction of headwork under Mulawad Lift Irrigation Scheme from Almatti reservoir near Bluti, estimated to cost of Rs. 6,48,82,762/- being 11.6% above the estimated rates, was entrusted to the claimant, stipulating a period of 36 months for its

completion i.e., on or before 26-11-1996. In the course of execution of the said work, KBJNL entrusted to the claimant, certain extra works connected therewith, specifying the rates under two supplementary agreements dated 7-11-1998; 11-6-1996 Ex. Rule 8 and Ex. Rule 15 respectively. The claimant having not completed the works entrusted, within the time stipulated, KBJNL extended the time for its completion upto 31-12-2003. Although the original period of 3 years was revised to 10 years, the delay in completion of the works entrusted was attributed to KBJNL, who, having accepted the reasons for the delay, extended the time. The claimant raised disputes said to have arisen out of the works entrusted under the agreement and the rates stipulated in the supplementary agreements, calling upon the Chief Engineer in terms of Clause 29 of the contract, to act as an arbitrator, by letter dated 23-3-1998 Ex. C1. The Chief Engineer rejected the request of the claimant, by communication dated 26-3-1998 Ex. C. 2, on the ground that the contract did not provide for arbitration, which impelled the claimant to file CMP No. 26 of 1999 u/s 11 of the Act, which was disposed of by Order dated 10-9-1999, of this Court, directing the Chief Engineer to Act as Arbitrator and permitting the claimant and KBJNL to file claim and counter-claim, respectively, before the Arbitrator.

4. The Company Secretary of KBJNL, by letter dated 12-11-1999 addressed to the Arbitrator, the 2nd respondent herein, informed him to act as a sole Arbitrator and on receipt of the letter of claim by the claimant, to take action, and that the Executive Engineer, KBJNL would represent the case on behalf of KBJNL in the arbitration proceeding. The Arbitrator, on receipt of the letter, entered reference and fixed 10-12-1999 as the date for appearance of the parties. The claimant, having brought to the notice of the Arbitrator, the additional claims put forth by him, in his letter dated 3-12-1999, the Arbitrator directed him to include the same in the claim statement to be filed on or before 31-12-1999, to which the KBJNL was required to file its counter-statement by 20-1-2000 and rejoinder, if any, by 31-1-2000.

5. The claimant originally put forth six claims and thereafter, five additional claims. KBJNL having understood the claims and the scope of controversy filed its counter-statement, while, in addition, the claimant filed a rejoinder statement. The Arbitrator, after marking the documents produced by both the parties, received written arguments and proceeded to pass an award after considering the material placed on record, allowing certain claims of the claimant and rejecting a few of them by award dated 25-6-2000, published on 14-11-2000. Being aggrieved by the said award, KBJNL filed a petition u/s 34(2)(a)(v) of the Act numbered as A.C. No. 1 of 2001 before the Court below which came to be dismissed by the Order impugned in this appeal.

6. Sri D.S. Naik, learned Counsel for the appellant would contend that Clause 29 of the agreement having been interpreted and held to be "not an Arbitration Clause", the proceedings before the Arbitrator is vitiated and one without jurisdiction. Learned Counsel would further contend that the proceedings before

the Arbitrator for want of Arbitration agreement, cannot be cured by appearance of the parties, even if there is protest or consent, since consent cannot confer jurisdiction and, therefore, the order is without jurisdiction and a nullity.

7. It was next contended that the appellant's representative in the arbitration proceedings, though having not raised the plea of non- adjudication of additional claims, under the supplementary agreements Exs. Rule 8 and Rule 15, had in fact pointed out to the same in the course of proceedings, and hence it is to be construed as a plea of want of jurisdiction u/s 16(3) of the Act. Elaborating further, the learned Counsel would contend that the plea of "no arbitration clause", though not raised in the counter-statement, having objected to the same even before the initiation of the proceedings in CMP No. 26 of 1999, ought to be taken as having raised the said plea and cannot preclude the appellant to the remedy u/s 16(6) of the Act, on the grounds indicated in Section 34 of the Act. The finding of the Court below that the appellant having failed to raise the plea under Sub-section (2) of Section 16 of the Act, had waived its right to object, disentitling the remedy under Sections 34 and 37 of the Act, is characterised as an erroneous construction of Section 4 of the Act. In addition, it was contended that the Arbitrator was biased by allowing the claimant to raise additional claims rendering the arbitration proceedings a nullity. As regards the merits of the claim, it was contended that the Arbitrator exceeded his jurisdiction in awarding rates in excess of and in clear violation of the terms of the supplementary agreements Exs. Rule 8 and Rule 15, as also, the rates proposed by the Chief Engineer in Ex. Rule 13, in respect of the additional claim No. 2, it was contended that the award is based on hypothetical considerations which is impermissible and hence, perverse. With regard to the award of Rs. 22,114.82 per MT as against the claim of Rs. 35,000/- per MT, as set out in additional claim No. 4, it was contended that it is one without any basis and is an outcome of erroneous comprehension of relevant facts, which on the contrary ought to have been rejected in toto. As regards claim No. 5 for interest at 24% p.a. on the monies due, it was contended that though the claim was not put forth in the letter dated 3-12-1999, Ex. C. 67, but the same was introduced for the first time as an afterthought, on commencement of the arbitration proceedings and therefore, the award of interest at the rate of 18% p.a. is in violation of Sub-section (7) of Section 31 of the Act.

8. Sri K.G. Raghavan, learned Counsel for the 1st respondent would contend that the appellant having not raised the plea that Clause 29 of the agreement was not an arbitration clause, either before the arbitration, u/s 16 or before the Court below u/s 34, should not be permitted to raise that plea for the first time before this Court. It was further contended that Clause 29 of the Contract is in fact an arbitration clause. It was further contended that the appellant having consented to arbitration of the disputes by the Chief Engineer and having participated in the proceedings by submitting itself to the authority of the Arbitrator, it cannot be heard to say that there is no arbitration agreement. Elaborating on the said contention, Sri Raghavan would refer us to the contents of the Order dated

10-9-1999 in CMP No. 26 of 1999 and the letter dated 12-11-1999 addressed to the Chief Engineer by the appellant to demonstrate the consent of KBJNL, for Arbitration of the disputes by the Arbitrator. According to the learned Counsel, the consent for appointment of the Chief Engineer as arbitrator would tantamount to a fresh agreement between the parties u/s 7(4) of the Act. It was submitted that Section 16 of the Act is not a procedural provision but a substantive provision incorporating the principles of Kompetenz-Kompetenz. That a conjoint reading of Section 16 and Section 4 of the Act, it is contended, the appellant is estopped from challenging the jurisdiction of Arbitral Tribunal to adjudicate on the claims and its conduct constitutes a waiver. Sri Raghavan would next contend that the Arbitral Tribunal on the first date of hearing directed the claimant to include additional claims and since the parties having joined in the contest after having understood the scope of controversy, without raising any objection to the arbitrability of the disputes, coupled with the conjoint reading of Sections 16, 24 and 4 of the Act, the appellant is estopped from challenging the jurisdiction of the Arbitral Tribunal to adjudicate on the additional claims. Learned Counsel would further contend that the claimant was required to urge all claims before the Arbitral Tribunal in order to prevent multiplicity of proceedings. In addition, learned Counsel Sri Raghavan would contend that the appellant having failed to raise the plea of competence of the Arbitral Tribunal to arbitrate on the claims, on the ground that Clause 29 was not an arbitration clause, in the petition u/s 34 of the Act, it cannot be permitted to raise the same in this appeal. Lastly, Sri Raghavan would contend that since the award and the order impugned is well-merited, not calling for interference, as the scope of judicial intervention in arbitration awards being limited, this Court cannot reappreciate the evidence even if it is possible to take another view.

9. Learned Counsels for the parties have placed reliance on several decisions of this Court, other High Courts as well as that of the Supreme Court, which we will refer to in the course of discussion on the points for determination.

10. Having heard the learned Counsels for the parties and perused the award of the Arbitrator, the order of the Court below, impugned herein, as also the documents and pleadings, the following questions arise for determination in this appeal:

I. Whether the appellant could be permitted to raise the contention that Clause 29 of the contract is not an arbitration clause and due to want of jurisdiction of the Arbitral Tribunal to adjudicate upon the claims, the award is a nullity?

II. Whether the exchange of statement of claim and the defence in CMP No. 26 of 1999, in which the claimant alleged existence of an agreement and was not denied by the appellant, herein, would constitute an arbitration agreement under Sub-section (4) of Section 7 of the Act?

III. Whether in the absence of a plea that the Arbitrator was biased, either in the CMP No. 26 of 1999, or the Arbitral Tribunal, nor before the Civil Court, the

appellant could be permitted to raise the said plea in this appeal?

IV. Whether the appellant could be permitted to raise the plea that the additional claims being beyond the terms of the agreement and for want of jurisdiction, the award suffers from a jurisdictional error, without having raised the said plea before the Arbitral Tribunal?

V. Whether the award is not a reasoned award and the order impugned suffers from the vice of non-consideration of material on record?

Point No. I:

11. In order to appreciate the contentions of the parties, it is necessary to refer to certain facts of the case. The claimant by his letter dated 23-3-1998 Ex. C. 1 raised disputes arising out of the contract between the parties, which were sought to be resolved by a process of arbitration by the Chief Engineer as Arbitrator, invoking Clause 29 of the contract. The said claim was rejected by the communication dated 26-3-1998, Ex. C. 2. In a proceedings u/s 11 of the Act, instituted by the claimant, numbered as CMP No. 26/1999, this Court in its order dated 10-9-1999 recorded a categorical statement made by the appellant, which reads thus:

"On behalf of the respondent it is pointed out that it was only a misunderstanding on the part of the Chief Engineer and that is ready to act as an Arbitrator".

In view of the said statement, the 2nd respondent was appointed as a sole Arbitrator, while rejecting the plea of bias of the Chief Engineer raised by the claimant herein and directed the Arbitrator to act fairly and reasonably. In the said Order, the parties were permitted to file their respective claims and counter-claims before the Arbitrator.

12. In compliance of the Order in CMP No. 26 of 1999, the appellant, by letter dated 12-11-1999 addressed to the Chief Engineer, requested him to act as a sole Arbitrator, receive the claim statement and extend a reasonable opportunity to the parties, while informing the Arbitrator that the Executive Engineer concerned would represent the case on its behalf.

13. It is uncontroverted that the appellant did not raise objections to the jurisdiction of the Arbitrator on the basis that Clause 29 of the Contract was not an arbitration clause, nor as regards the authority of the Arbitrator to adjudicate on the additional claims introduced by the claimant. A perusal of the statement of objections filed before the Arbitrator by the appellant discloses a keen contest on the merits of the additional claim only. The written arguments submitted by the parties before the Arbitrator does - not disclose either the plea of validity of Clause 29 as an arbitration agreement or the arbitrability of the additional claims.

14. In the aforesaid admitted facts, the first casualty is the plea of the appellant that its representative, i.e., the Executive Engineer not being a legally trained

person could not raise legal pleas u/s 16 of the Act. The appellant having known the competence of its representative, ought to have made arrangements to be represented by legal Counsel or by a legally trained person. The appellant's decision, to be represented by the Executive Engineer, being voluntary and having filed its statement of objections as well as written arguments, it is too late in the day to contend that its representative was not a legally trained person, who could have raised legal pleas.

15. The next contention that the Chief Engineer in his reply dated 26-3-1998, Ex. C. 2, having taken the plea that Clause 29 is not an arbitration agreement, ought to be considered as plea under Sub-section (3) of Section 16 of the Act, is without merit. The appellant's unequivocal statement recorded in the Order dated 10-9-1999 passed in CMP No. 26 of 1999, together with the contents of the letter dated 12-11-1999 of the appellant addressed to the Arbitrator, discloses the consent extended by the appellant to appoint the Chief Engineer as the Arbitrator and his jurisdiction to decide the disputes. In CMP No. 26 of 1999, in which the appellant was the Contesting respondent, it did not raise the objection that Clause 29 of the Contract was not an arbitration clause. In our considered opinion, this ground pales into insignificance.

16. It is no doubt true that the question as to whether Clause 29 of the agreement is an arbitration clause is no longer *res Integra*, having been answered in the negative by his Lordship R.V. Raveendran, J., as he then was, in *Mysore Construction Company Vs. Karnataka Power Corporation Limited and Others*, following a host of decisions of the Apex Court.

17. However, in identical circumstances a co-ordinate Division Bench of this Court in the case of *Executive Engineer and Others Vs. Bharath Engineering Service Technocrats and Company*, (MFA No. 1466 of 1998 connected with MFA Nos. 1467 and 1468 of 1998, DD: 12-9-2003), having referred to several decisions of the Supreme Court observed thus:

"From the above pronouncements, it is clear that once the parties have participated in the arbitration proceedings without taking any objection, they cannot turn round to contend that there was no arbitration clause. Suffice it to say that both the parties having accepted that there was an arbitration agreement and proceeded on the said basis, the Department cannot be allowed to urge that the arbitration clause did not in law constitute a valid arbitration agreement".

The appellant both by words and conduct having extended its consent to the appointment of the Arbitrator to decide the disputes, without offering any opposition, although such an appointment could not have been lawfully done without the appellants consent and having induced the Chief Engineer to do that which the Chief Engineer had no jurisdiction under the contract to decide the disputes, the appellant cannot question the legality of the act it had so sanctioned, to the prejudice of the claimant who had given faith to the said

words and the fair inference drawn by the appellant's conduct.

18. At this stage, it is appropriate to examine Section 16 of the Act:

"16. Competence of Arbitral Tribunal to rule on its jurisdiction.--(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an Arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the Arbitral proceedings.

(4) The Arbitral Tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The Arbitral Tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the Arbitral Tribunal takes a decision rejecting the plea, continue with the Arbitral proceedings and make an Arbitral award.

(6) A party aggrieved by such an Arbitral award may make an application for setting aside such an Arbitral award in accordance with Section 34".

19. The aforesaid provision clearly stipulates a challenge to the jurisdiction and the authority of the Arbitral Tribunal; Sub-section (2) provides for raising a plea that the Arbitral Tribunal does not have jurisdiction, though the same is required to be done along with the statement of defence and a party shall not be precluded from raising such a plea merely because he appointed an Arbitrator or participated in his appointment. Sub-section (3) provides that a plea that the Arbitral Tribunal is exceeding the scope of its authority should be raised as soon as the matter alleged to be beyond authority, is raised during the proceedings. Under Sub-section (4) the Arbitral Tribunal is vested with the power to admit a later plea if it considers the delay justified. Under Sub-section (5) it is imperative for the Arbitral Tribunal to decide a plea of lack of jurisdiction as a preliminary issue. It is for the Arbitral Tribunal alone which should decide the matter and continue with the proceedings. If it rejects the plea, and makes an award, the aggrieved party may make an application u/s 34 for setting aside the award.

20. In the instant case, the appellant did not raise the plea of lack of jurisdiction

of the Tribunal, in its defence. The objections were only with regard to the merits of the claims put forth by the claimant. Even if such a plea was not taken in defence, it was open for the appellant to challenge the award on the said ground u/s 34 of the Act. It is not disputed that the plea of lack of jurisdiction was not taken by the appellant either in CMP No. 26 of 1999 before this Court or before the Arbitrator nor before the Court below.

21. In identical fact situation, a Co-ordinate Division Bench of this Court in *Karnataka State Road Transport Corporation v. M. Keshava Raju*, MFA No. 3683 of 2000, DD: 27-8-2003 wherein one of us S.R. Nayak, J. speaking to the Bench observed thus:

"27. In the light of the above authoritative pronouncement of the Apex Court, at this distance of time, it will be totally unjust, improper and totally prejudicial to the interest of the award-holder to permit such plea being raised. Although Sub-section (2) of Section 16 contemplates that, the plea with regard to jurisdiction may be raised by a party even after submission of statement of defence, in order to entertain such plea, the respondent shall show sufficient and satisfactory cause, to raise such plea at a belated stage. In the instant case, there is total lack of explanation offered by the appellant for not raising the jurisdictional plea either before the Arbitrator or before the Civil Court".

22. The aforesaid observations were following the decisions of Calcutta High Court in the cases of *Radheshyam Kedia Vs. Srinivas Pandit and another*, ; *Sarkar Enterprise Vs. Garden Reach Shipbuilders and Engineers Ltd.*, and the decision of the Supreme Court in the cases of *P.V. Subba Naidu and Others Vs. Government of A.P. and Others*, ; *Paradip Port Trust and Others etc. Vs. Unique Builders etc.*, ; *Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company*, ; *State of Rajasthan Vs. Puri Construction Co. Ltd. and Another*, ; *Sudarsan Trading Co. Vs. Government of Kerala and Another*, ; *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, ; *U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd.*, ; *K.R. Raveendranathan Vs. State of Kerala and Another*, and *State of Rajasthan and Another Vs. Nav Bharat Construction Co.*, .

23. The important fact that needs to be noticed is that the appellant though challenged the award by filing an application u/s 34 of the Act conspicuously did not raise the plea that there was no arbitration clause, although such a ground was available to it and the challenge to the award was made well-within the period of limitation prescribed in Section 34 of the Act. Having not raised the plea that Clause 29 of the Contract is not an arbitration agreement, in the application u/s 34 of the Act, within the period of limitation, the appellant cannot be permitted to raise the plea at this distance of time without even setting out reasons justifying such omission both before the Arbitrator as well as the Court below.

Point No. II:

24. We now proceed to consider the contention of the 1st respondent claimant as to whether the exchange of statement of claim and defence in CMP No. 26 of 1999 would tantamount to existence of an agreement alleged by one party and not denied by the other, which could be construed as an arbitration agreement. Clause (c) of Sub-section (4) of Section 7 of the Act encompasses such a contingency:

"7(4) An arbitration agreement is in writing if it is contained in--

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other".

25. The appellant by letter dated 26-3-1998 Ex. C. 2 denied the existence of an arbitration agreement. But, in CMP No. 26 of 1999, the appellant agreed to appoint the Chief Engineer as the Arbitrator to arbitrate on the disputes. Nothing prevented the appellant from contesting the said claim in the CMP proceedings, on the ground that Clause 29 was not an arbitration agreement and that the claimant's remedy was to approach the Civil Court. In this view of the matter, the statement made by the appellant by which the Chief Engineer was appointed as an Arbitrator can be said to be one made under Clause (c) of Sub-section (4) of Section 7 of the Act. In almost identical fact situation, in the case of Krishna Bhagya Jal Nigam Limited v. Mysore Construction Company and Anr. CMP No. 31 of 2000, DD: 14-7-2000, his Lordship Raveendran, J., as he then was, considering the fact that the KBJNL, in the said case had not contested the claim that there was no arbitration agreement but had agreed to appoint an Arbitrator, held that it tantamounted to an arbitration agreement as envisaged under Clause (c) of Sub-section (4) of Section 7 of the Act.

26. Learned Counsel for the claimant referred to several decisions of the Apex Court, in support of his contention that Clause 29 of the Contract is an arbitration agreement. We do not, however, propose to consider the said question in view of several authoritative pronouncements of the Supreme Court that it is not within the legitimate power of the Court to undertake the interpretation of the contract between the parties and more so, in the view that we have taken, supra.

Point No. III:

27. There is considerable force in the contention of Sri K.G. Raghavan, learned Counsel, that there is no merit in the plea of the appellant that the Arbitrator was biased. The challenge, on the ground of justifiable doubts as to the Arbitrator's independence or impartiality is to be made before the Arbitrator, is a derivative of a conjoint reading of Sections 12 and 13 of the Act. If the plea is rejected, the only remedy available to the aggrieved party is to make an application to set aside the award u/s 34 of the Act. The same is the view of a learned Single Judge of the High Court of Bombay in the case of Ritiku Imports Trade Private Limited v. Savitri Metals Limited and Anr. (1999)2 ARB.L.R. 405 BOM. The Three Judges Bench of the Apex Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, , while dealing with a challenge to the composition of

the Arbitral Tribunal, observed thus:

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

28. At paragraph 18 of the judgment, it is was further held:

"18. Even other wise under the said Act the grounds of challenge to an Arbitral award are very limited. Now an award can be set aside only on a ground of challenge under Sections 12, 13 and 16 provided such a challenge is first raised before the Arbitral Tribunal and has been rejected by the Arbitral Tribunal".

(emphasis supplied)

29. The plea that the Arbitrator was biased was actually taken by the claimant in CMP No. 26 of 1999 and this Court negatived the same in its Order dated 10-9-1999 while directing the Chief Engineer to "act as a sole Arbitrator fairly and reasonably". The plea of the appellant that the Arbitrator was biased- was not taken either before this Court in CMP No. 26 of 1999 or the Arbitral Tribunal nor before the Civil Court as required under Sections 12 and 13 of the Act. The appellant having participated in the proceedings before the Arbitrator, admittedly without demur acquiesced in the appointment of the Chief Engineer, the appellant cannot be permitted to raise the said plea in this appeal.

30. It is no doubt true that an order without jurisdiction is a nullity and the procedural law of waiver or estoppel are held to be not attracted, as laid down by the Apex Court in Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., , it is beyond cavil of doubt that an initial want of jurisdiction cannot be cured by acquiesced as held by the Apex Court in Khardah Company Limited v Raymon and Company (India) Private Limited AIR 1962 SC 1810 , as also in the case of Union of India (UOI) Vs. A.L. Rallia Ram, and in the case of Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., . The aforesaid judgments and other decisions relied upon by the appellant in support of the contention that notwithstanding the failure to raise the plea of jurisdiction of the Arbitrator, under Sub-sections (2) and (3) of Section 16, the same can be raised in an application u/s 34 of the Act are not in dispute. But in the facts and circumstances of this case as noticed supra, these judgments have no application.

Point No. IV:

31. It is no more in dispute that the appointment of an Arbitrator in exercise of power tinder Section 11 does not envisage a reference of claims of the parties to the Arbitrator. CMP No. 26 of 1999 filed by the claimant, was disposed of by order dated 10-9-1999 of this Court, directing both the parties to file their claim and counter-claim before the Arbitrator. Pursuant thereto, claimant by letter dated 31-12-1999 Ex. C. 67 made additional claims A-1 to A-5 on which adjudication was sought and in respect of which the Arbitrator in the proceedings dated 10-12-1999 Ex. C. 5, directed inclusion of all additional claims in the

statement of claims. Though the appellant was entitled to object to such inclusion, if it wanted to do so u/s 16, admittedly, did not advance the plea of jurisdiction of Arbitral Tribunal over the said claims before the Tribunal, itself, but however, contested the additional claims on its merits.

32. For the purpose of clarity, the original six claims relate to the first extension period between 16-11-1996 and May 1999, while the additional claims are in respect of the subsequent period from June 1999 upto the date of completion of the works, entrusted. The finding of the Court below that u/s 16, the appellant having not objected to the inclusion of the additional claims, it not open to be questioned in an application u/s 34, is characterised as perverse. The contentions advanced on behalf of the appellant are two-folds: Firstly, that in the counter-statement there is an implied objection to the additional claims falling under supplementary agreement and hence not adjudicable as disputes arising under the terms of Original Agreement No. 41 of 1993, not referred to arbitration. Secondly, that there can be no waiver u/s 4 disentitling the appellant to the remedy u/s 34 of the Act.

33. It is a settled position of law, that one of the objects of the Act is to minimise the role of Courts in Arbitral proceedings. The award can be set aside by the Courts only on the grounds envisaged in Section 34 of the Act. In view of the authoritative pronouncement of the Supreme Court in Narayan Prasad Lohia's case, the grounds of challenge under the Act being very limited, the award can be set aside only on the ground set out under Sections 12, 13 and 16 provided such a challenge is first raised before the Arbitral Tribunal and rejected by the Tribunal. If no such objection is raised, the party should be deemed to have waived its right to object.

34. In Karnataka State Road Transport Corporation's case, one of us S.R. Nayak, J. considering the scope and ambit of Section 4 of the Act, regarding waiver of right to object, observed thus:

"Section 4 narrates the circumstances in which the party, who knowingly fails to object the non-compliance of any non-mandatory provision of Part I or any requirement under the arbitration agreement by the other party, is deemed to have waived his right to object. This section is based on general principles such as "estoppel" or "venire contra factum proprium". It is intended to help the Arbitral process function efficiently and in good faith. If there is non-compliance of any non-mandatory provision of Part I or of any requirement of the arbitration agreement by a party to an arbitration agreement of which the other party to the agreement though has the knowledge of such non-compliance but does not object without undue delay, or if a time-limit is provided for stating that objection and no objection is taken within that period of time, such a party later on can neither raise objection about that non-compliance of any provision of Part I nor or any requirement of the arbitration agreement since such party shall be deemed to have waived its objection. Though, in order to apply the doctrine of waiver by invoking Section 4, the first condition is that the non-compliance must

be of non-mandatory provision of Part I or of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, Sub-sections (2) and (3) of Section 16 are one of such mandatory provisions. Section 16(2) of the Act provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 16(3) of the Act provides that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the Arbitral proceedings".

35. Applying the well-established principles enunciated by the Supreme Court and the words of Benjamin N. Cardozo that an Arbitrator has to exercise a discretion, informed by tradition, methodised by analogy, disciplined by system and subordinated to "the primordial necessity of order in social life", we are of the considered view that the appellant having not raised the plea u/s 16 was deemed to have waived its right to object and therefore cannot be permitted to raise the plea that the additional claims were beyond the terms of the agreement. Having regard to the discussions made by the Court below at paragraphs 44 to 59 of the order impugned, no exception can be taken to the finding of the Court below. Point No. IV is answered in the negative.

Point No. V:

(On the Merits of the claims)

36. Claim No. 1.--Is for payment of revised workable rates for quantities of work done beyond the contract period. It is not in dispute that the claimant was directed to carry out the work beyond the contract period since the delay in the execution of the work was attributable to KBJNL. The appellant admits that the proposals for the payment of revised workable rates for the quantities of work executed beyond the period were, in fact, worked out on the directions of the higher authorities and submitted to the Technical Supervisory Committee. The Arbitrator in the course of recording of his findings has framed the following three points for determination:

"The points to be examined and to be decided under this claim are:

Point 1 Whether the delay in the execution of work is due to the delays and defaults committed by the respondent and whether the claimant is entitled for payment of revised workable rates for the work done beyond the contract period?

Point 2 Whether the supplemental agreement entered into by the claimant is valid and binding and whether the claimant has right to claim revised workable rates as demanded by him?

Point 3 What are revised rates that are to be paid to the claimant for the quantities of work executed beyond the contract period i.e., during the extended period?"

37. The Arbitrator while placing reliance on the letter, Ex. Rule 13 of the Chief Engineer of KBJNL, accepting the reasons for the delay, answered point 1 in the affirmative. While recording the findings on point 2, the Arbitrator, in great elaboration, has discussed the material on record. The claimant laid stress on the letter Exhibit Rule 13 of the Chief Engineer recommending payment of rates based on KBJNL SR (Dam and Allied Works), while the Finance Director accorded sanction for a rate for below what was recommended and payment made after insisting and securing an undertaking, though under protest, from the claimant in terms of the Supplemental Agreement. The Arbitrator recorded a finding that the Supplementary Agreement was vitiated on account of coercion, falling u/s 15 of the Contract Act, following the observations of his Lordship P. Verikatarama Reddi, J., as he then was, speaking to a Division Bench of the High Court of Andhra Pradesh in the case of Superintending Engineer, Irrigation Department and Another Vs. Progressive Engineering Co. and Others, .

38. The findings of the Arbitrator on point 3 is based on consideration of the relevant materials on record, the nature of work entrusted to the claimant under the contract, the fact that the SR of 1996-97 was not revised, coupled with the Technical Advisor Committee's (Irrigation Projects) proceedings, Exhibit C. 86, approving escalation at the rate of 10% for every year.

39. The findings of the Arbitrator over the aforesaid points for determination and the award of 10% over the rates applicable for the first extension period i.e., from December 1996 to May 1999, cannot be said to be either perverse or unjustified.

40. Claim No. 2.--Is for payment of workable rates for the extra items and quantities in excess of the tender quantities plus 25%. The Arbitrator having taken great care in working out the details of workable rates, keeping in mind Clause 13 of the Contract, a specific provision to be strictly followed while fixing rates in accordance with the schedule of rates of the division, prevalent at the time of execution, no exception can be taken to the award of rates at KB JNL SR 1996-97 plus the tender premium for the years upto completion i.e., 31-12-2003.

41. The Arbitrator took into consideration the claim of the contractor in his letter dated 1-6-1995 Exhibit C. 12, that his men and material were kept idle, which fact was admitted by the Superintending Engineer, as reflected in the letter dated 3-7-1995, Exhibit C. 13 of the Chief Engineer, also indicating that Rs. 42,000/- per day was the idling charges incurred by the claimant. The award of idling charges for the period from 1-2-1994 to 17-12-1994 and from 1-6-1995 to 31-12-1995 while excluding the period from 18-12-1994 to 31-5-1995 and from 1-1-1996 to 12-11-1996, in our opinion is just and reasonable.

42. Claim Nos. 4 and 5 being compensation for loss of overheads and loss of profits respectively are rejected, hence there is no need to consider the same. Claim No. 6 is for payment of interest at the rate of 24% p.a. from the due date till payment. The appellant having delayed the decision to pay and deprived the

claimant of the use of the amounts legitimately entitled to, the award of interest at 18% p.a., on claim Nos. 1 to 3 in accordance with Clauses (a) and (b) of Sub-section (7) of Section 31 of the Act, cannot be said to be either excessive or illegal. Interest is allowed on claim No. 1 for the period from 1-6-1999 to 25-6-2000 the date of the award and on claim No. 2 for the period from 31st March of the relevant years i.e., 31-3-1997 upto 25-6-2000, while in respect of claim No. 3, it is from 1-1-1996 to 25-6-2000. Future interest at 18% p.a. from the date of award till payment, cannot be said to be exorbitant, in the facts and circumstances.

43. Additional claim No. A1 is for payment of revised workable rates for the quantities of work done beyond the first extension period. The Arbitrator, on the material on record, held that the appellant did not dispute the fact that it was responsible for the delay in execution of the work beyond the first extension period. The contention that by the Supplementary Agreement the rates for the said work could not be revised, in our opinion was rightly rejected, in view of the finding recorded while considering claim No. 1, *supra*. Keeping in mind the increase in the cost of inputs during the period beyond 1999, award of 10% weightage over and above the KBJNL SR rates, cannot be characterised as perverse.

44. The additional claim No. A2, for 50% in addition to KBJNL SR rates, towards additional quantity of earth work - embankment and extra items of zip rap and encoursed rubble stone masonry, was allowed, in part, by awarding the rates at KBJNL SR of 1996-97 plus the tender premium as per Clause 13 of the Agreement. The Arbitrator concluded that the Supplementary Agreement fixing unilateral rates for extra work ignoring Clause 13 of the original contract, obtained from the claimant under the threat to withdraw the work entrusted, amounted to coercion, following the judgment in *Superintending Engineer's case*, coupled with the fact that the words "canal embankment" was used instead of "Dam embankment", to reduce the rates. The award of KBJNL (Dam and Allied Works) SR for 1996-97 plus tender premium of 11.06%, while rejecting the claim for an additional suitable percentage to cover the rise in prices during the subsequent years, cannot be said to be misdirected in law.

45. The additional claim No. A3 for extra lead charges of sand is rejected, hence there is no need to consider the same.

46. The additional claim No. A4, for equitable rates for the excess quantity of steel reinforcement is based on the admitted fact that 1068 M.T. of steel was increased to more than 2000 M.T. due to changes made in the designs and drawings which also included deployment of additional men, machinery and materials, at considerable extra cost. The Arbitrator taking into consideration Clause 13 of the agreement and the rates worked out by the Chief Engineer in Ex. Rule 13 based on relevant schedule of rates, and applying due correction to the tender premium calculations, awarded Rs. 22,114.82/- per M.T. as against a claim of Rs. 35,000/- per M.T. The said finding in our opinion cannot be faulted.

47. The claim for payment of interest on amounts awarded claim Nos. A1 to A4 is made in claim No. A5, for three period i.e., pre-arbitration, pendente lite and future interest, at 24% p.a. The Arbitrator, for the very same reasons as set out in the award of interest against claim No. 6, allowed this claim at the rate of 18% p.a. We do not find any weighty reason to interfere with the said finding.

48. The scope of judicial intervention in Arbitral awards was considered by the Supreme Court in the case of Searsole Chemicals Limited and observed thus:

"When the Arbitrators have applied their mind to the pleadings, the evidence adduced before them and the terms of the contract, we do not think, it is within our scope to reappraise the matter as if this were an appeal, and it is clear that where two views are possible - the view taken by the Arbitrators would prevail".

49. On a fair consideration of the material on record we are of the opinion that the award and the order impugned are well-merited, fully justified, not calling for a different conclusion in our hands and interference in the verdict. Accordingly, we answer point No. V in the negative.

For the reasons set out supra, in the facts and circumstances of the case, no weighty or substantial grounds are made out, hence the appeal stands dismissed. However, with no order as to costs.