(2007) 10 BOM CK 0031

In the Bombay High Court

Case No : Appeal No. 981 of 2001 in Arbitration Petition No. 432 of 1998

Mrs. Pushpa P. Mulchandani and Others APPELLANT

Vs

Admiral, Radhakrishin Tahiliani (Retd.) and Others RESPONDENT

Date of Decision : 04-10-2007

Acts Referred:

Arbitration Act, 1940 — Section 15
Arbitration and Conciliation Act, 1996 — Section 10, 15(1), 16, 17, 18

Citation : (2007) 10 BOM CK 0031

Hon'ble Judges : J.H. Bhatia, J;D.K. Deshmukh, J

Bench : Division Bench

Advocate : Kamal Bulchandani, S.K. Bulchandani and J.P. Shah, instructed by Kamal and Co, for the Appellant; D.J. Khambata and Riyaz Chagla, instructed by Mulla and Mulla and CB and C for Respondent No. 1, F.E. Devitre and Siraj Rustomjee, instructed by Federal and Rashmikant and G. Misquitoo, instructed by Eastly Lam and Co. for Respondents Nos. 4, 5, 6, 21 and 22, for the Respondent

Final Decision : Allowed

Judgement

D.K. Deshmukh, J.—By this Appeal, the Appellants challenge the order dated 22-6-2001 passed by the learned single Judge of this court in Arbitration Petition No. 432 of 1998. That Petition was filed u/s 34 of the Arbitration & Conciliation Act, 1996 (herein after referred to as "the Act") challenging the award dated 16th September, 1998 made by the sole-arbitrator. By her order dated 22-6-2001 the learned singe Judge dismissed the petition.

2. The facts that are relevant for deciding this Appeal are that the parties to this Appeal entered into an agreement dated 31st December, 1996. The parties to that agreement described themselves as share holders of James Engineering Co. Ltd. They noted that there are disputes amongst them and they appointed one Mr. J.C. Bhatia as the sole arbitrator. It was stated that the disputes have arisen between the parties to the agreement, who were share holders of Jayems Engineering Co. Ltd. in regard to the matters relating to the aforesaid company as also interpretation of the Will dated 15th May, 1966 left by late Mr. Kimatrai

Sanwalsingh Khushalani. It appears that initially the aforesaid company was the proprietary concern of the said Mr. Kimatrai Khushalani. The parties to the arbitration agreement were all related to him and that in the Will of said Mr. Kimatrao Khushalani there was provision made for distribution of his estate as also in relation to the affairs of the company. The parties to the agreement referred all the disputes and differences between them which were set out in schedule to the agreement to Mr. J.C. Bhatia, in whom the parties declared to have full faith and confidence. He was given full power and he was empowered to make an award without the presence of the legal representatives or the legal adviser. The learned arbitrator was given power to device his own procedure. He was also empowered to take services of auditors and chartered accountants etc. as he may find necessary. According to the agreement, he was to make an award within four months from the date of entering upon the reference. He was also not required to give any reason for the award that he would make. It was also provided that the arbitrator can proceed only on the documents and no oral evidence or oral submission will be necessary. In the schedule following twelve disputes were narrated, which were referred to the arbitrator:

Schedule

Disputes and differences referred to the Arbitration.

1. Did Mr. Kimatrai S. Khushalani by his will dated 15th May, 1966 dispose off the interest of all or any of the partners other than himself in Jayems Engineering Co. and if yes then could he have done so?

2. Has the testator willed the goodwill of his trading concerns to the Trust?

3.Can the tenancy of the premises be valued as a part of the Good will of the trading concerns?

4. Was it open to the Trustees to allow conversation of the Partnership business of Jayems Engineering Company into a Limited Company?

5. Were the Trustees under an obligation to furnish to the beneficiaries full information on the working of the trust and render accounts?

6. Can any of the beneficiaries resist the termination of the business of the Company?

7. Can any of the beneficiaries insist that if the company is to be wound-up then the assets of the Company should be returned to the corpus of the trust?

8. Can the Company''s business be valued distinctly from its Real Estate and/or its tenancy rights?

9. Can there be a equal Division of the Company''s assets and liabilities irrespective of the shareholding?

10. Can Ensemble division of the Company be purchased by Tarun Tahiliani and/ or Mrs. Gayatri Parikh in consideration for the share in the other divisions and if

yes what should be the fair value of Ensemble division?

11. On dissolution and/or winding up of M/s. Jayems Engineering Co. Ltd., including making up of accounts thereof and distribution of assets and liabilities and determining what is due and owing by one or other of the parties hereto to the other of them and how payable?

12. What should be the distribution as per the Will dated 15th May 1966 of late Mr. Kimatrai S. Khushalani and when should it be payable or distributable?

3. These disputes were decided by the arbitrator by his award dated 16-9-1998. In paragraph (5) of the award the arbitrator stated that in order to decide the issues referred to him he obtained valuation reports in respect of business of Jayems Engineering Co. including its Ensemble division, as an independent business. The learned arbitrator decided twelve issues that were referred to him as follows:

Issue No. 2- Yes- the testator willed the goodwill of his trading concerns to the Trust.

Issue No. 3-Yes- tenancy of the premises can be valued as a part of the Goodwill of the trading concerns.

Issue No. 4-Yes- it was open to the Trustees to allow conversation of the partnership business of Jayems Engineering Company into a Limited Company.

Issue No. 5-Yes- the Trustees are under an obligation to furnish to the beneficiaries full information on the working of the Trust and render accounts.

Issue No. 6-No- none of the beneficiaries can resist the termination of the business of the Company.

Issue No. 7-No- none of the beneficiaries can insist that if the Company is to be would up then the assets of the company should be returned to the Corpus of the Trust.

Issue No. 8- Yes- Company''s business can be valued distinctly from its Real Estate and/or its tenancy rights.

Issue No. 9- No - there cannot be an equal Division (distribution) of the Company''s assets and liabilities irrespective of the shareholding.

Issue No. 10-Yes- I do hereby Award and determine that Tarun Tahiliani and/or Mrs. Gayatri Parikh have the option to purchase Ensemble Division of Jayems Engineering Co. Ltd. in consideration for their respective shares in the other Division at or for the price of Rs. 135.00 Lakhs (Rupees One Hundred Thirty Five Lakhs) only plus payment of rent of Rs. 1,48,000/- (Rupees One lakh Forty Eight Thousand) only per month for the use of the following premises currently occupied by Ensemble in Great Western Building, 130-132 Shahid Bhagatsingh Marg, Fort, Mumbai 23.

(i) On the ground floor 2174 sq.ft.

(ii)On the first floor in the front portion 179 st.ft. And 178 sq.ft.

(iii)On the first Floor in the rear out house 416 sq.ft.

I have come to the conclusion that the total value of the interest of Tarun Tahiliani and Mr. Gayatri Parikh in Jayems Engineering Co. Ltd., is as follows Name Shares held Total Value

1. Tarun Tahiliani 319 Rs. 94,86,103/-

2. Mrs. Gayatri Parikh 320 Rs. 95,15,840/-

If Tarun Tahiliani and/or Mrs. Gayatri Parikh intent to exercise the said option, they would be required to do so within a period of six months from the date of this Award.

Issue No. 11- I hold that in the event of dissolution and/or winding up of M/s. Jayems Engineering Co. Ltd., accounts shall be made so that the realised value of assets as reduced by the liabilities of the Company can be distributed amongst the existing share holders of the Company in the ratio of their respective shareholding after adjusting the balances in their individual accounts in the books of the Company on the relevant date/s.

Issue No. 12- The Trust Property shall be divided amongst the legal heirs surviving at the end of the duration of the trust on the youngest grandchild of late Mr. Kimatrai S. Khushalani attaining the age of 18 years and the distribution shall be according to the provisions of Hindu Succession Act, 1956, pertaining to the Intestate Succession.

4. The present Appellants felt aggrieved by that Award. In particular, they were aggrieved by the decision of the arbitration of fixing the valuation of the Ensemble division of the Jayems Engineering Co. Ltd. at Rs. 1,35,00,000/- and also valuation of the shares of Jayems Engineering Co. Ltd. They were aggrieved by the decision of the arbitrator of giving option to Mr. Tarun Tahiliani and Mrs. Gayatri Parikh to purchase Ensemble division by paying only Rs. 1,35,00,000/-. They were also aggrieved by the decision that the valuation of the shares of Mr. Tarun Tahiliani and Mrs. Gayatri Parikh was fixed at approximately Rs. 94 lakh and Rs. 95 lakh respectively. The award was challenged by the Appellants by filing a petition u/s 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) on various grounds.

5. The learned single Judge considered those grounds and rejected them by the order impugned in this Appeal and dismissed the petition. Before us, the award and the order of the learned single Judge was assailed by the Appellants on several grounds. But the two principal ground that were urged before us were (i) that the award is vitiated for non-compliance with the provisions of Sub-section (3) of Section 24 of the Act by non-supply of copies of the valuation report on which the award is based and (ii) that the award has been made after

termination of the mandate of the arbitrator.

6. We propose to consider only these two challenges to the award.

7. So far as the first ground is concerned, the learned Counsel appearing for the Appellants submits that it is clear from the award that the award is based on two valuation reports obtained by the arbitrator. It is submitted that it is an admitted position that copies of these valuation reports were not made available to the Appellants during the pendency of the arbitration proceedings. They were not made available to the Appellants even during the pendency of the petition before the learned single Judge. The copies of the valuation reports became available to the Appellants for the first time during the pendency of this appeal. It is submitted that the provisions of Sub-section (3) of Section 24 of the Act requiring supply of copies of valuation reports by the Arbitrator to the parties is a mandatory requirement, and therefore the award made in violation of that mandatory requirement is vitiated and is liable to be set aside. Reliance is placed on the judgment of the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

8. On behalf of the Respondents, on the other hand, it is contended that non-supply of copies of the valuation reports does not vitiate the award considering the nature of power which is conferred by the agreement on the arbitrator. Generally, the reasons given by the learned single Judge in the judgment were reiterated. It was also contended that provisions of Sub-section (3) of Section 24 are not mandatory. It was contended that the Supreme Court held in its judgment in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, , that the provisions of Section 10 of the Act are capable of being waived and therefore, according to the Respondents even the right conferred by Sub-section (3) of Section 24 is also capable of being waived and that it has actually been waived as held by the learned single Judge.

9. So far as second ground is concerned, the learned Counsel appearing for the Appellants relied on Clause (5) of the arbitration agreement to claim that the award was to be made within four months from the date of entering upon the reference by the Arbitrator. According to him, if the letter written by the learned arbitrator himself is taken into consideration, then obviously the award has not been made within the period specified in the agreement. It is submitted that the mandate of the arbitrator had, therefore, come to an end much before the date on which the award was made.

10. The learned Counsel appearing for the Respondents, on the other hand, took us through the entire correspondence between the parties and submitted that the learned single Judge was absolutely justified for the reasons given by her in her judgment in holding that the term in the agreement fixing four months time from the date of entering upon the reference was varied by the parties and therefore, the mandate of the arbitrator was not terminated.

11. On behalf of the Respondents it is also urged that one Mr. Harish Melwani

was a party to the arbitration agreement. He was also party to the proceeding before the learned arbitrator, but he has not been joined as a party to the petition challenging the award, therefore, the petition was liable to be dismissed for non-joinder of necessary party.

12. From the rival submissions, it is clear that it is an admitted position that the copies of the valuation reports were not supplied to the Appellants during the pendency of the arbitration proceedings. They were also not supplied to the Appellants during the pendency of the proceedings before the learned single Judge. It is also an admitted position that the principal award made by the learned arbitrator is based on the valuation reports obtained by the learned arbitrator. Perusal of the award shows that in paragraph (5) of the award the learned arbitrator observed thus:

5. I state that to decide the issues referred to me, I have obtained valuation reports in respect of (i) the business of Jayems Engineering Co. Ltd. (including its Ensemble Division) and its interest in immovable properties by way of tenancies and (ii) of Ensemble Division as an Independent business.

13. Perusal of the above quoted paragraph makes it clear that for deciding the issues referred to the arbitrator, he obtained valuation reports in respect of Jayems Engineering Co. including its Ensemble division as also in relation to the interest of that company in Immovable properties by way of tenancies and he also obtained a valuation report of the Ensemble division of the Jayems Engineering Co. Ltd. as an independent business. Perusal of answers given to Dispute No. 10 referred to the arbitrator shows that it is only on the basis of the valuation reports of the Ensemble division as an independent Unit that the learned Arbitrator has held that Mr. Tarun Tahiliani and Mrs. Gayatri Parikh have to pay an amount at Rs. 1,35,00,000/- in order to become owners of Ensemble division and that except this valuation report, there is no other reason for fixing the amount at Rs. 1,35,00,000/- payable by the above said two persons as the value of the Ensemble division. By the award the learned arbitrator has held that the value of the shares held by Mr. Tarun Tahiliani and Mrs. Gayatri Parikh together in Jayems Engineering Co. is in excess of Rs. 2 crore only on the basis of the valuation reports obtained by the learned arbitrator. The result is for becoming the owners of the Ensemble division of the company, the above said two persons do not have to pay anything to the company, on the contrary, they will be entitled to receive an amount in excess of Rs. 60 lakh from the company towards the balance value of their shares in Jayems Engineering Co. Ltd. It is, thus, clear that valuation reports obtained by the arbitrator are not only relevant and material for the purpose of the award that is made by the learned arbitrator, but the valuation reports are the very foundation of the award.

14. Section 24 of the Arbitration Act reads as under:

24. Hearing and written proceedings- (1) Unless otherwise agreed by the parties, the arbitral Tribunal shall decide whether to hold oral hearings for the

presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials;

Provided that the arbitral Tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral Tribunal for the purposes of inspection of documents, goods or other property;

(3) All statements, documents or other information supplied to, or applications made to the arbitral Tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral Tribunal may rely in making its decision shall be communicated to the parties. Perusal of Sub-section (3) of Section 24 shows that, that provisions cast a duty on the arbitrator to communicate to the parties any expert report or documentary evidence on which the arbitral tribunal proposes to rely. The learned single Judge has considered the objections raised to the award on this ground in paragraphs 51, 52 & 53 of her judgment. In substance, the learned single Judge has held that by conferring on the arbitrator summary jurisdiction the Appellants have waived their rights to receive the valuation reports. Paragraphs 51, 52 & 53 of the orer reads as under:

51. In view of the contents of the arbitration agreement by which summary powers were given to the learned arbitrator, the parties at the time when they referred the matter to arbitration were aware of the fact that the subject matter of the arbitration proceedings involved valuation as the Petitioners have in their submissions made to the learned arbitrator stated that valuation should be carried out, for which purpose the Petitioners have also recorded an understanding to the effect that "no doubt, the arbitration will take help of accountant for valuation in regard to the "Ensemble". The Petitioners have, in their submissions, called upon the learned arbitrator as under:

In the light of the above, I have to request you to pass the award after obtaining such legal and accounting advise as you consider necessary.

This submission, therefore, records that the arbitrator was given the power to obtain legal and accounting advise and decide the issues referred to him. At no point of time did the Petitioners who were aware of the fact that the subject matter of the reference could not be decided within valuation requested the arbitrator to furnish the valuation report as the terms of reference empowered him to make his award after obtaining valuation and accounting advice as he may consider necessary. This was in accordance with the terms of the arbitration agreement and reference to arbitration. By virtue of the fact that the arbitration agreement gave the arbitrator the aforesaid power coupled with the fact that the Petitioners in their submissions also requested the arbitrator to obtain accounting advice, it is amply clear that the Petitioners had waived and contracted out their right to be shown a copy of the valuation report and cannot agitate the issue at this stage for challenging the award.

52. Though on behalf of the Petitioner reliance has been placed on Section 18 of the Arbitration & Conciliation Act, 1996 with regard to equal treatment which was to be given to the parties and full opportunity to the parties to present their case, so far as the Respondents are concerned, it is not the case of the Petitioners that the valuation report was given to the Respondents and the Petitioners were denied the same, for the valuation report has not been given either to the Petitioners or to the Respondents. hence by virtue of the powers given to the arbitrator, the non-furnishing of the valuation report by the arbitrator to the Petitioners cannot vitiate the award as to the Petitioners at no point of time had asked for the report and the terms of the submissions made by the Petitioners records that the Petitioners were aware of the fact that the arbitrator was required to seek accounting advice in order to decide the valuation of the "Ensemble Division", which was a subject matter of the reference.

53. It has been urged on behalf of the Respondents that Section 24(3) of the Arbitration and Conciliation Act is only one facet of the principles of natural justice, which the parties have chosen to contract out. It cannot be, therefore, urged on behalf of the Petitioners that the award is against public policy as the same is in contravention of Section 24(3) of the Arbitration and Conciliation Act. In the light of the various terms of the arbitration agreement by which the arbitrator was authorised to hear one party in the absence of the other, the arbitrator was authorised not to call for oral submission but was given discretionary and summary power, the Petitioners cannot be heard to say that the arbitrator has failed to comply with the provisions of Section 24(3) of the Arbitration Act and hence non-compliance was fatal to the award.

15. It is clear from what is observed by the learned single Judge that according to the learned single Judge, the Appellants by authorising the arbitrator to call for the valuation report and requesting him to call for valuation report had waived their rights to receive the copies of the valuation reports. The learned single Judge has also held that what is incorporated in Sub-section (3) of Section 24 of the Act is only a facet of the principles of natural justice and the Appellants have contracted themselves out of that right. The Supreme Court has considered the provisions of Section 24 of the Act in its judgment in ONGC v. Saw Pipes''s case (supra). The observations of the Supreme Court found in paragraphs 12 & 13 of that judgment, in our opinion, are relevant. They read as under:

12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is dehors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provisions of substantive law or the provisions of the Act.

13. The question, therefore, which requires consideration is- whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed u/s 24, 28 or 31(3), which affects the rights of the parties. Under Sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be- whether such award could be set aside. Similarly, under Sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn''t be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside u/s 34.

16. Perusal of the above quoted paragraphs from the judgment of the Supreme Court makes it clear that the Supreme Court calls the procedure laid down by Section 24 of the Act as mandatory procedure. In our opinion, one more aspect is required to be considered at this juncture. The Supreme Court has considered the question as to whether the observance of the principles of natural justice is mandatory and what is the consequence of non-observance of those principles, in its judgment in the case of Nawabkhan Abbaskhan Vs. The State of Gujarat, . The Supreme Court has held that when principles of natural justice are incorporated in the statute, compliance with this requirement becomes mandatory and an action taken in violation of those provisions is void. In our opinion, in view of this law laid down by the Supreme Court, the observations of the learned single Judge quoted above that because Section 24(3) incorporates only a facet of principles of natural justice and therefore, it is open to the parties to contract themselves out of that provision cannot be called legally correct.

17. As observed above, the Supreme Court in its judgment in the case of Saw Pipes (supra) has held that Section 24 incorporates mandatory procedural requirement. The general rule is that non-compliance of a mandatory requirement results in nullification of the act. The requirement which has been held to be mandatory by the Supreme Court is a procedural requirement. The settled rule is that while considering non-compliance with the procedural requirement, it has to be kept in view that such a requirement is designed to

facilitate the justice and further its end. The prejudice which would be caused to the parties because of non-compliance of that mandatory requirement incorporated in Sub-section 3 of Section 24 cannot be over stated. The prejudice is obvious. In our opinion, therefore, as observed above, merely by the arbitration agreement conferring summary power on the arbitrator and by absolving him of the necessity of giving the reasons in his award, it cannot be said that the Appellants had waived their right u/s 24(3) of the Act.

18. The settled law is that, generally, when the statute incorporates a requirement and also provides that an act done without complying that requirement would be invalid, then the requirement can be taken to be mandatory. If one looks at the provision of the Act, specially Section 34(2)(iii), it becomes clear that if Court finds that, before the arbitrator a party was not able to present his case, then the Court can set aside the award. Thus, in case an arbitrator in breach of the duty cast on him by Section 24(3) of the Act does not furnish copy of a report submitted by expert and bases his award on that report, if the court is satisfied that because of non-supply of the report prejudice is caused to the interest of the Petitioner, the award will liable to be set aside by the Court. It is probably for this reason that the Supreme Court has said that the requirement contained in Section 24(3) is a mandatory procedural requirement. Generally when a statutory requirement is mandatory though it may be procedural, inference of waiver of that requirement by a party cannot be drawn easily. So far as the subject of waiver of the rights of the parties is concerned, it is Section 4 of the Act which makes elaborate provision. Section 4 reads as under:

4. Waiver of right to object.- A party who knows that-

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

An analysis of the above quoted provision shows that so far as the provisions of the Act are concerned, it is only those provisions which the Act permits the parties to derogate can be waived. In other words, those provisions of the Act which the Act does not permit the parties to derogate cannot be waived. Perusal of various provisions contained in Part I of the Act shows that there are many provisions which the Act permits the parties to derogate and there are many provisions from which the parties can not derogate. For example, if one considers the period during which arbitration is pending, then as per the provision of the Act interim relief can be given by the Court u/s 9 of the Act and by the Arbitrator u/s 17. The parties can not by agreement exclude the jurisdiction of the Court u/s 9, whereas the parties can do so in relation to the jurisdiction of the arbitrator u/s 17. A comparison of the provision of Sub-section 1 of Section 24 with the provisions of Sub-sections (2) and (3) of that Section shows that the provision of Sub-section (1) are derogable, whereas provisions of Sub-sections (2) & (3) are not so derogable. Perusal of the provisions of Section 4 further shows that an inference of ''waiver of a right'' can be drawn because of failure of a party to raise an objection at appropriate stage. In any case, while rejecting the argument, that the Appellants were unable to present their case because of the failure of the arbitrator to supply copy of the valuation report, on the ground that the Appellants had waived their right to receive the copies of the valuation reports consideration of the provisions of Section 4 of the Act was necessary. Perusal of the order of the learned single Judge shows that finding about waiver of right u/s 24(3) of the Act by the Petitioner has been recorded without application of mind to the provisions of Section 4 of the Act. Therefore, in our opinion, the order of the learned single Judge is liable to be set aside.

19. So far as submissions made on behalf of the Respondents relying on the judgment of the Supreme Court in the case of Narayan Lohia''s , referred to above, that the provisions of Section 24(3) is capable of being waived is concerned, firstly we find that merely by conferring summary powers on the arbitrator absolving him from responsibility of giving reasons and even personal hearing, the Appellants cannot be said to have waived their right to receive the copies of the valuation reports obtained by the Arbitrator. Perusal of the judgment of the Supreme Court in Narayan Lohia''s case shows that the Supreme Court has held that the award made by the arbitral tribunal consisting of two members, though contrary to the provisions of Section 10 of the Arbitration Act, cannot be set aside because an objection to the jurisdiction of the arbitral tribunal was not raised as required by the provisions of Section 16 of the Act, and the Supreme Court relying on the provisions of Section 4 & Section 16 of the Act has held that an objection to the jurisdiction of the tribunal is deemed to have been waived by the parties. In so far as provisions of Section 24(3) are concerned, if the arbitrator relies on an expert report or other documents in his award, without supplying copies thereof to the parties, the parties will come to know of it only when they receive the award. There is no provision in the Act, which enables the parties to raise an objection to the non-supply of an expert report before the arbitrator, after the award is made. The fact that expert opinion has been relied on would come to the knowledge of the parties only after a copy of the award is received and by the time the party receives the copy of the award, in view of the provisions of Section 32 the mandate of the arbitrator would already be terminated. In our opinion, therefore, the submissions made on behalf of the Respondents, based on the judgment of the Supreme Court in Narayan Lohia''s case have no substance.

20. Perusal of the judgment of the learned single Judge shows that in paragraph 54 the learned single Judge has observed that though the grievance is made by the Appellants that the copies of the valuation reports were not given to them they have not challenged the valuation report, and therefore, according to her

there is no substance in the submission made on behalf of the Appellants in relation to non-supply of copies of the valuation reports. In our opinion, these observations suffers from non-application of mind. While making those observations, the learned single Judge forgot that when the proceedings were pending before her, the Appellants did not have the copies of the valuation report and therefore, in the absence of being supplied copies of the valuation report, they could not have challenged the valuation given in the valuation reports.

21. So far as the second ground on which the award is challenged namely that by the time the award was made, the mandate of the arbitrator had come to an end is concerned, that aspect of the matter has been considered by the learned single Judge in detail in paragraphs 74, 75 & 76 of her order. Paragraphs 74, 75 & 76 reads as under:

74. It is urged on behalf of the Petitioners that the award is vitiated and is non est by reason of the same being beyond time. In the petition as filed, it has been contended on behalf of the Petitioners that to the best of their knowledge no consent has been accounted for making the award beyond time. Reliance has been placed on behalf of the Petitioners on Clause (5) of the arbitration agreement which provides that the arbitrator shall make and publish his award within four months from the date of entering upon the reference. Therefore, according to the Petitioners u/s 15(1)(b) of the Arbitration and Conciliation Act, 1996 the mandate of the arbitrator terminated as he did not give his award within four months of entering upon the reference which was entered upon by the letter dated 14-1-1997 and the award was passed on 16th September 1998 and that the arbitrator had, therefore, become functus officio and not entitled to pass the award.

75. On that count reliance is placed on behalf of the Petitioners upon the following rulings:

i) Patanjal and Another Vs. Rawalpindi Theatres (P) Ltd., ;

ii) Associated Engineering Co. Vs. Government of Andhra Pradesh and another, ;

iii) Mathulla Mathulla Vs. Thomas George and Another, ;

iv) Hari Krishna Wattal Vs. Vaikunth Nath Pandya (Dead) by Lrs. and Another, ;

It is urged on behalf of the Petitioners that the arbitrator has in the award stated that consent has been given in writing by the parties to make and publish the award. No such writing has been disclosed and therefore, the integrity of the arbitrator is questionable. Though the Petitioners have contended that to their knowledge no consent has been given to make the award beyond time, the Respondents have relied upon the letters addressed by each of the Petitioners who are parties to the arbitration agreement authorising the arbitrator to make his award within whatever reasonable period they deemed fit. The letters are dated 24-6-1997 and 21-7-1997. When confronted with these letters, the Petitioners have in their rejoinder admitted that they had sent consent letters, but they contended that the consent is of no avail as when the consent were sent, the time period had already expired.

76. In the course of the arguments, it is urged on behalf of the Petitioners that the Respondents have not given their consent. However, so far as the Respondents are concerned they have participated in the proceedings. No doubt, they have not produced consent letters, but after consent was given by the Petitioners, written submissions were exchanged, meetings were held before the arbitrator. At no stage did the Petitioners aver that the Respondents have not given their consent and, therefore, the arbitrator was not entitled to proceed with the arbitration. On the contrary, in the rejoinder submissions filed by the Petitioners which is dated 11-1-1998, the Petitioners called upon the arbitrator to give his award. It is, therefore, crystal clear that the parties had given their consent to the extension of time to make the award. Having proceeded with the arbitration, proceedings without demur, without any protest after having given their consent, it is not open for the Petitioners to contend that no consent was given and, therefore, the award becomes time barred. The authorities relied upon do not support the Petitioners as regards the facts of the present case.

22. After having heard the learned Counsels for both sides and after having gone through the record, we find that the view that has been taken by the learned single Judge on this aspect is a possible view and therefore, in our opinion, no exception can be taken to the finding recorded by the learned single Judge in this regard.

23. One more aspect urged on behalf of the Respondents is that one Mr. Harish Melwani was a party to the arbitration agreement and also participated in the arbitration proceedings , but was not joined as a Respondent in the Arbitration Petition, therefore, the Arbitration Petition was liable to be dismissed for non-joinder of necessary party. Perusal of the record, however, shows that role of the said Harish Melwani was that he was second holder in relation to certain shares held by his wife. By the award it is not contemplated that he ceases to hold any shares or that his shares are transferred and consequence of the award is that part of the property of the company gets transferred. Mr. Melwani being the second holder of the shares, his interest cannot be said to be adversely affected by any order that may have been made by the learned single Judge. Considering the status of Mr. Melwani, at the best he can be called as a proper party, but by no stretch of imagination it cannot be said that he is a necessary party. Therefore, in our opinion, petition did not suffer from non-joinder of necessary party.

24. It was submitted on behalf of the Respondents that only that part of the award which is based on the valuation reports, which were not supplied to the Appellants should be set aside.

25. Now, for considering this aspect of the matter, first reference has to be made to the provisions of Section 34 of the Act. Section 34 of the Act reads as under:

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 subjected 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 decisions 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 decisions 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) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(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. 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 within 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.

Perusal of the above provisions shows that under Sub-section 1 of Section 34, an application to the court against the arbitral award can be made only for setting aside such award in accordance with Sub-section (2) and Sub-section (3). Perusal of Sub-section (2) shows that power is conferred on the court only to set aside an award. Perusal of proviso to Clause (iv) of Sub-section 2 of Section 34 shows that in case the Court finds that part of the award made by the learned arbitrator deals with dispute not contemplated by or not falling within the terms for submission to arbitrator, or it contains decision on matters beyond the scope of submission to arbitration, if the decision on matters submitted to the arbitration can be separated from those not so submitted, then only that part of the arbitral award can be set aside. Thus, power to set aside only part of the award is conferred on court by Section 34 only in one contingency which is to be found in Clause (iv) of Sub-section (2) of Section 34 of the Act. Section 15 of the Arbitration Act, 1940 in terms conferred power on the court to modify the award. The Arbitration Act, 1996 does not have any provision similar to the provisions of Section 15 of the Act, 1940. But, 1996 Act has the provisions in Section 34(4), which empowers the court to remit the award to the arbitrator to enable him to cure the defect because of which the award may be liable to be set aside. Thus, from perusal of Section 34 of the Act it appears that while examining the award if the Court finds that the arbitrator in the award has dealt with the matters not submitted to arbitration, then the Court has to make an inquiry to find out whether it is possible to segregate the other part of the award, which was within the jurisdiction of the arbitrator and if the Court finds that it is possible so to do, then the court can set aside only that part of the award which according to the Court was beyond the jurisdiction of the arbitrator, because it was not submitted to arbitration. In all other cases, if the Court finds that only a part of the award is affected by illegality which is pointed out to the court, the court cannot itself modify the award, but if a party to the petition applies to the court in exercise of its power under Sub-section 4 of Section 34, the Court can direct the arbitral tribunal to resume the proceedings and take such action to eliminate the ground for setting aside the award. In such situation, the arbitral tribunal on resumption may be able to delete that part of the award which the Court finds to be invalid or illegal and make suitable modification in the award. It, thus, appears that while exercising jurisdiction u/s 34, the court can modify the award only in one situation which is to be found in Clause (iv) of Sub-section 2 of Section 34. In all other cases if the Court finds that only part of the award is affected, then in case the party makes an application, the court can adopt the course of action contemplated by Sub-section 4 of Section 34 and only option available to it would be to set aside the award. We find that the following observations of the Supreme Court in its judgment in the case of McDermott International Inc. v. Burn Standard Co. Ltd. and Ors. JT 2006 (11) SC 376 clearly indicate that this is the course of action sanctioned by law. In paragraph 55 of the above referred judgment the Supreme Court has observed thus:

55. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness, intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the Arbitrators, violation of natural justice, etc. The court cannot correct errors of the Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court''s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

26. It is, thus, clear that if the Court finds that the award is vitiated because of violation of principles of natural justice, or such other reasons which cannot be called as "adjudication" on merits, the Court can set aside the award and if the award is set aside for such reasons, it is open to the parties to invoke the arbitration Clause again and initiate arbitration proceeding. In our opinion, in this regard reference can be made to the provisions of Sub-section 4 of Section 43. They read as under:- 43(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

When the award is set aside for the reasons other than merits, then it is open to the parties to the arbitration agreement, if arbitration agreement survives, to invoke the arbitration agreement and to have the matter referred to arbitration. In other contingencies they can adopt other remedy that may be available to them and in that situation, either for adopting any other remedy or in initiating arbitration, the period spent during the earlier arbitration is liable to be excluded while computing the period of limitation. In our opinion, the decision of various courts either on Arbitration Act, 1940 or the Acts which were in the field before that, while considering whether the Court has the power to modify the award in a petition filed u/s 34 cannot be considered because under those enactments power was positively conferred on the court to modify the award. It is further to be seen here that Arbitration Act, 1996 has repealed the Arbitration Act, 1940. Arbitration Act 1940 had a specific power conferred on the court to modify the award. While enacting 1996 Act, the Parliament has chosen not enact that provision. In our opinion, the intention of the Legislature, therefore, was clear not to confer on the court power to modify the award. It is now well settled that scheme of Arbitration Act, 1996 is clear departure from the scheme of 1940 Act.

In 1940 Act, power was conferred on the court itself to modify the award. In 1996 Act, as observed above, the scheme is that the power is conferred on the court to modify the award only in one situation found in Clause (iv) of Section 34(2), and in all other situations the court, if an application is made by the party, has to follow the course of action contemplated by Sub-section 4 of Section 34 or in the absence of any application set aside the award and leave the parties to their own remedy. In our opinion, one more principle has to be taken into consider. The court before 1996 Act came into force, under the Arbitration Act had power to modify an award. While framing 1996 Act, the Legislature was conscious of the power of the court under 1940 Act to modify the award. While enacting 1996 Act, the Legislature has chosen to confer power on the court to modify the award only in one contingency found in Clause (iv) of Section 34(2), and therefore, in our opinion, it will have to be held that the Legislature has denied power to the court to modify the award in all other situations.

27. The Arbitration Action 1940 and the Arbitration Act, 1996 are two legislations enacted by the same Legislature on the same subject. Therefore, the use of different language in the later statute as was used in the earlier statute on the same subject is suggestive of the intention of the Legislature that the language so used in the later statute is used in the different sense than in the earlier one. Change of language in the later statute on the same subject is suggestive that the change was deliberately made. Brett, J. in Dickerson v. Fletcher (1873) LR 9 CP 1 has observed thus:

Where two statutes dealing with the same subject-matter use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other. If one uses distinct language, imposing a penalty under certain circumstances and other does not, it is always an argument that the Legislature did not intend to impose a penalty in the later, for where they did so intend they plainly said so.

Similarly, it was stated by Cockburn, C.J. in R. v. Price (1871) LR 6 QB 411 that,

When the Legislature, in legislating in pari materia and substituting certain provisions in that Act for those which existed in the earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive.

In relation to consideration of question of construction to be placed on the amending Act in its judgment in the case D.R. Fraser & Co. Ltd. v. Minister of National Revenue AIR 1949 Pc 120, it has been observed,

When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately.

It is, thus, clear while considering the decision based on the provisions of 1940 Arbitration Act, the change in the language adopted by the Legislature while enacting 1996 Act has to be taken into consideration. The schemes of the 1940

Act and the 1996 Act are totally different and therefore, it would be hazardous to base interpretation of the provisions of 1996 Act on the judgments rendered by the court under 1940 Act. Placing of such a construction would result in denying efficacy to the changes that have been deliberately made by the Legislature while enacting 1996 Act.

28. It is further to be seen here that though the learned Counsel appearing for the Respondents urged before us that only a part of the award should be set aside, before us no submissions were made to show how and in what manner the valid portion of the award can be segregated from the invalid portion and how the portion which remains, would still be valid and executable award.

29. Taking overall view of the matter, therefore, in our opinion, the award and the order of the learned single Judge are vitiated and are liable to be set aside.

30. In the result, therefore, the Appeal succeeds and is allowed. The order impugned in the Appeal is set aside. Petition filed u/s 34 of the Arbitration Act by the Petitioners is granted in terms of prayer Clause (a). No order as to costs.

