

M/S GAS AUTHORITY OF INDIA LTD. AND ANR.

v.

M/S KETI CONSTRUCTION (I) LTD. AND ORS.

MAY 11, 2007

[G.P. MATHUR AND LOKESHWAR SINGH PANTA, JJ.]

Arbitration & Conciliation Act, 1996—Sections 16, 34, & 37—Arbitrator appointed by appellant passing an award against respondent—Petition by respondent before High Court to set aside the award on the ground of lack of jurisdiction—High Court allowing the petition—Correctness of—Held, object and scheme of the Arbitration Act is to secure an expeditious resolution of disputes—Plea of jurisdiction of an arbitrator must be raised before the arbitrator under section 16 of the Act and not under section 34 of the Act after the award is passed—On facts, no good reasons given by the respondent for setting aside the award of the arbitrator—Hence, the award of the arbitrator is valid in law.

Appellant no. 1 awarded four construction contracts to respondent no. 1. Certain disputes arose between the parties. Appellant no. 1 referred the dispute to an Arbitrator under the arbitration clause of the contracts who gave a 'no claim award'.

Respondent No. 1 filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 before High Court for setting aside the award of the arbitrator on the ground of jurisdiction. Respondent no. 1 contended that it had appointed an arbitrator under arbitration agreement before the appointment of the arbitrator is made by the appellant; and that the arbitrator appointed by it has already entered into reference. Appellant no. 1 contested the petition contending that it appointed the arbitrator first for settling the disputes relating to different contracts before the appointment of arbitrator is made by the respondent; that it challenged the appointment of the arbitrator by respondent no. 1 by sending a notice to the arbitrator of respondent no. 1 to desist from proceeding from arbitration; that respondent no. 1 never challenged the jurisdiction of the arbitrator appointed by the appellant under section 16 of the Act; and hence there is no ground to set aside the award of the arbitrator. Single Judge of the High Court dismissed the petition. A

A Division Bench of the High Court allowed the appeal preferred by Respondent no. 1 by directing the parties to appear before the arbitrator appointed by respondent no. 1 and proceed in accordance with law. Hence the appeal before this Court.

Allowing the appeal, the Court

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HELD: 1.1. The correspondence exchanged between the parties is not like evidence in a suit or trial where a piece of evidence given in a particular suit or trial cannot be read or taken into consideration in another suit or trial. The stand of the appellant right from the beginning was that all the disputes should be referred to a single arbitrator, which will be cost effective, economical and quick. The stand was very reasonable. There is material on record to show that a panel of three names had already been sent by appellant no. 1 to respondent no. 1 which was a sufficient compliance of the clause of the agreement. There is neither any such clause in the agreement nor there any requirement in law that for each of the contract, a separate panel ought to have been sent. The same panel could very well be utilized for resolving the disputes arising out of different contracts. In these circumstances, respondent no.1 was not at all entitled to nominate an arbitrator which it chose to do subsequently. There is nothing wrong on the part of the appellant when it intimated that a panel had already been sent earlier for appointment of a single arbitrator for resolution of all the disputes between the parties.

[Paras 13 and 14] [452-E-F-G; 453-D]

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1.2. The whole object and scheme of the Arbitration and Conciliation Act, 1996 is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the arbitral tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the arbitral tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided.

[Para 18] [457-E-F]

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1.3. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the arbitral tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(v) of the Act on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

H If plea of jurisdiction is not taken before the arbitrator as provided in Section

16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown. Though respondent no.1 had ample opportunity to appear before the arbitrator and raise a plea of jurisdiction to the effect that he had been wrongly appointed as arbitrator by appellant no.1, yet, it chose not to do so. This feature of the case weighs heavily against respondent no.1.

[Paras 19 and 20] [457-G-H; 458-A]

Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd., [2002] 3 SCC 388; *S.B.P. & Co. v. Patel Engineering Ltd.*, [2005] 8 SCC 618 and *Sundaram Finance Ltd. v. NEPC Ltd.*, AIR (1999) SC 565, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2440 of 2007.

From the Final Judgment and Order dated 07.12.2004 of the High Court of Delhi at New Delhi in FAO(OS) No. 374 of 2003.

Mohan Parasaran, ASG., Ghanshyam and Devendra Singh for the Appellants.

P.C. Markanda, Naresh Markanda, Rajesh Markanda and Ashok K. Mahajan for the Respondent.

The Judgment of the Court was delivered by

G.P. MATHUR, J. 1. Leave granted.

2. This appeal, by special leave, has been preferred against the judgment and order dated 7.12.2004 of a Division Bench of Delhi High Court by which the appeal filed by M/s Keti Construction (I) Ltd. - Contractor (Respondent No.1 herein) under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') was allowed and the judgment and order dated 20.10.2003 of a learned Single Judge by which the petition filed by respondent no.1 under Section 34 of the Act was dismissed, was set aside and the award given by the arbitrator (respondent no.2 in the present appeal) on 19.4.2000, was also set aside. It was further directed that Brig. Nardip Singh (Retd.) who was appointed by respondent no.1 shall proceed with the arbitration in accordance with law and give the award.

3. Gas Authority of India (GAIL, appellant no.1 herein) awarded four contracts for its project at Petro-Chemical Complex, Dibiyapur, District Etawah (U.P.) to M/s Keti Construction (I) Ltd., Indore (Contractor), which is arrayed

A as respondent no.1 in the present appeal. All the four contracts were awarded in the year 1995 and they related to construction of certain types of houses for GAIL Vihar Township, pre-mix bitumen carpeting and repair of roads in GAIL Vihar Colony, construction of external sewerage line and construction of certain residential quarters in UPPC Complex, Dibiyapur. Certain disputes arose between the parties regarding completion of the construction work in accordance with the design and cost of construction, etc. The contracts entered into between the parties contained arbitration clause. Appellant no.1 referred the dispute with regard to contract dated 28.9.1995 for arbitration to Justice N.N. Goswami (Retd.) who was formerly a Judge of Delhi High Court. The arbitrator gave a 'no claim award' on 19.4.2000. Respondent no.1 filed a petition under Section 34 of the Act in the Delhi High Court for setting aside the award. A learned Single Judge who heard the petition, after detailed discussion of the material on record, found that the petition was devoid of merits and accordingly dismissed the same by the judgment and order dated 20.10.2003. Respondent no.1 then preferred an appeal before the Division Bench of the High Court under Section 37 of the Act which allowed the same by the judgment and order dated 7.12.2004 and set aside the award of the arbitrator. It was further directed in the order that parties shall appear before Brig. Nardip Singh (Retd.) who had been nominated as arbitrator by respondent no.1 (contractor) and he shall proceed in accordance with law and give the award.

E 4. The principal ground on which the petition under Section 34 of the Act had been filed by respondent no.1 was that it had invoked the arbitration clause by sending a notice to appellant no.1 on 17.7.1999 and accordingly the appellant no.1 was required to send a panel of three names for arbitration within 30 days of receipt of notice. Since appellant no.1 did not respond to the notice and did not send a panel within 30 days, it forfeited its right to nominate a panel and thereafter respondent no.1 sent its own panel on 28.10.1999. Appellant no.1 again did not make any response and did not choose anyone from the panel nominated by respondent no.1 and accordingly it informed appellant no.1 on 10.12.1999 that it had selected Brig. Nardip Singh (Retd.) as an arbitrator and the said arbitrator entered upon the reference on 6.1.2000. Appellant no.1 appointed Justice N.N. Goswami (Retd.) as an arbitrator subsequently on 13.1.2000 which appointment was not valid being contrary to the terms of the agreement entered into between the parties. Respondent no.1 thus submitted that the appointment of Justice N.N. Goswami (Retd.) was invalid and the award given by him was liable to be set aside in view of H Section 34(2)(v) of the Act.

5. The petition was contested by the appellants on the grounds, *inter alia*, that appellant no.1 had already sent a panel of three names on 16.2.1999 in which the name of Justice N.N. Goswami (Retd.) was mentioned at serial no.1 and it was mentioned that disputes between the parties relating to all the contracts be resolved by the same arbitrator. In reply to the notice of respondent no.1, the appellants' advocate Mr. Sushil Chauhan had sent a reply on 31.7.1999 asking to choose any one from the said panel. This was again reiterated by a letter dated 15.11.1999 when respondent no.1 sent its own panel on 28.10.1999. The appointment of Brig. Nardip Singh (Retd.) as an arbitrator made by respondent no.1 which was communicated by its letter of 10.12.1999 was challenged by appellant no.1 by sending a letter dated 31.12.1999 and a letter was also sent in this regard to Brig. Nardip Singh (Retd.) to desist from proceeding with arbitration. It was further submitted that respondent no.1 did not challenge the jurisdiction of the arbitrator appointed by appellant no.1 in accordance with Section 16 of the Act. The contractor did not at all appear before the arbitrator appointed by appellant no.1, viz. Justice N.N. Goswami (Retd.) and did not submit any statement of claim. In these circumstances, there was no ground for setting aside the award made by Justice N.N. Goswami (Retd.) on 19.4.2000 and the petition under Section 34 of the Act filed by respondent no.1 was liable to be dismissed.

6. We have heard Mr. Mohan Parasaran, Additional Solicitor General for the appellant and Mr. P.C. Markanda, Senior Advocate for respondent no.1 and have perused the record.

7. Gas Authority of India (appellant no.1 herein) awarded four contracts to M/s Keti Construction (I) Ltd. (respondent no.1 herein) for various construction work at its Petro-Chemical Complex, Dibiyapur, District Itawah (U.P.) which were as follows :-

- “(A) Work Order No. CE/AUR/Ph-II Extn. B. Works/ 97A/95 dated 26.5.95: Balance work of construction of C-6 and D-2 Houses at GAIL Vihar Township, Dibiyapur;
- (B) Work Order No. CE/115/Auriaya/Gail/Gail Vihar Road Work/95 dated 10.2.95: Construction of premix bitumen carpeting and repairs of roads in Gail Vihar Colony and Compressor station;
- (C) Work Order No. CE/137/Auriaya/Ext/SER/95 dated 1.11.95: Construction of external sewerage line at UPPC Nagar, Dibiyapur; and

- A (D) Work Order No. CE/136/Auriaya/Housing/95 dated 28.9.95: Construction of residential quarters Type A-25 units, Type B-105 units, Type C-55 units for UPPC Complex, Dibiyapur.”

B 8. The dispute here pertains to contract no. (D) dated 28.9.1995. Clause 107 of the agreement, which is relevant for the controversy in dispute reads as follows :

C “107.1 All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the WORKS or the execution or maintenance thereof of this CONTRACT or the rights touching or concerning the WORKS or the execution effect thereof or to the rights or liabilities or the construction meaning operation or effect whether during or after completion of the CONTRACT or whether before or after determination, foreclosure or breach of the CONTRACT (other than those in respect of which the decision of any person is by the CONTRACT expressed to be final and binding) shall after written notice by either party to the CONTRACT to the other of them and to the Appointing Authority hereinafter mentioned be referred for adjudication to a sole arbitrator to be appointed as hereinafter provided.

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E 107.2. For the purpose of appointing the sole arbitrator referred to above, the Appointing Authority will send within thirty days of the receipt of the notice to the CONTRACTOR, a panel of three persons who shall all be presently unconnected with the organization for which the WORK is executed.

F The CONTRACTOR shall on receipt of the names, as aforesaid, select any one of the persons named to be appointed as a sole Arbitrator and communicate his name to the Appointing Authority within thirty days of receipt of names. The Appointing Authority shall thereupon without any delay appoint the said person as the sole arbitrator. If the CONTRACTOR fails to communicate such selection as provided above within the period specified, the Appointing Authority shall make the selection and appoint the selected as the Sole Arbitrator.

G If the Appointing Authority fails to send to the CONTRACTOR the panel of three names as aforesaid within the period specified, the CONTRACTOR shall send the Appointing Authority a panel of three names of persons who shall all be unconnected with either party. The

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Appointing Authority shall on receipt of the names as aforesaid select any one of the persons named and appoint him as the sole arbitrator. If the Appointing Authority fails to select the person and appoint him as the sole Arbitrator within 30 days of the receipt of the panel and inform the CONTRACTOR accordingly, the CONTRACTOR shall be entitled to appoint one of the persons from the panel as the sole arbitrator and communicate his name to the Appointing Authority.

If the Arbitrator so appointed is unable to or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed as aforesaid.

The WORK under the CONTRACT shall, however, continue during the Arbitration proceedings and no payment due or payable to the CONTRACTOR shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator may, from time to time, with the consent of the parties, enlarge the time for making and publishing the award.

The venue of the arbitration shall be New Delhi.

The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published, be paid half AND half by each of the parties. The costs of the reference and of the award including the fees, if any, of the Arbitrator shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof shall be paid and may fix or settle the amount of costs to be so paid.

The award of the Arbitrator shall be final and binding on both the parties.

Subject to aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder, and for the time being in force, shall apply to the arbitration proceedings under this clause."

A perusal of clause 107 would show that on a dispute being raised by the contractor, the appointing authority was required to send a panel of three

A names to the contractor and he was entitled to select anyone of them as sole arbitrator and to communicate his decision to the appointing authority within 30 days. Thereafter, the appointing authority was under an obligation to appoint the said person as sole arbitrator. However, if the appointing authority failed to send the panel of three names within the stipulated period, the contractor was given the option to send a panel of three names to appellant no.1, which was required to select anyone of them and communicate the said fact within 30 days.

9. The plea taken by respondent no.1 is that the completion certificate with regard to the work in dispute was issued on 24.1.1998 and it wrote several times for settling the accounts. It invoked the arbitration clause on 17.7.1999 by sending a letter to the appointing authority to send a panel but as there was no response, it sent its own panel of three names on 28.10.1999 and finally informed vide letter dated 10.12.1999 that it had nominated Brig. Nardip Singh (Retd.) as the arbitrator. Voluminous correspondence was exchanged between the parties and many such letters were placed on record before the learned Single Judge of the High Court. It appears that some dispute had been raised by respondent no.1 regarding balance work of construction of C-6 and D-2 numbers of houses at GAIL Vihar Township at Dibiyapur and a letter had been sent by it to appellant no.1 on 16.1.1999. A reply was given on behalf of appellant no.1 to respondent no.1 on 16.2.1999, relevant part of which reads as under :-

“Sir,

This has reference to your letter vide ref. no.IND.KT.44(6)/99 DATED 16/1/99, we would like to bring to your kind notice that you have not so far informed us the nature of disputes you want to refer for resolution by the Arbitrator.

However, in the meantime, we are suggesting you a panel of three persons to select one of them as Sole Arbitrator :

1. Mr. Justice N.N. Goswami Retd. Judge Delhi High Court
2. Dr. Avtar Singh Professor of Law
3. Mr. Harish Chandra Director General CPWD (Retd.) & Ex. Member UPSC

Further, it is suggested to appoint the same Arbitrator and to club

the Arbitration proceedings in both the matters so as to reduce on cost and time incurred in the said Arbitration. A

Accordingly, you are called upon to select any one of the above named persons as Sole Arbitrator in both the matters."

10. The evidence on record shows that in connection with the dispute with regard to all the four contracts several meetings had taken place in the office of GAIL also and in the office of their consultant, M/s C.P. Kukreja & Associates in which the representatives of respondent no.1 had participated. This fact is not in dispute that several meetings did take place to resolve the dispute regarding all the four contracts between the representatives of appellant no.1 and respondent no.1. The Senior Manager (Civil) of appellant no.1 sent a letter dated 15.11.1999 to respondent no.1 which has considerable bearing on the controversy in hand and, therefore, the same is being reproduced below :- B C

"Ref.:CE/GAIL/99

November 15, 1999

M/s Keti Constructions (I) Ltd.
31/6, Sneh Nagar, Main Road
Opp. Sapna Sangeeta Theatre
Indore (MP). D

SUBJECT : DISPUTES RELATING TO :

(A) WORK ORDER NO.: CE/AUR/PH-II EXTN. B. WORKS/97A/95 DATED 26.05.95. E

BALANCE WORK OF CONSTRUCTION OF C-6 AND D-2 NOS. OF HOUSES AT GAIL VIHAR TOWNSHIP, DIBIYAPUR;

(B) WORK ORDER NO. CE/115/AURIAYA/GAIL/ GAIL VIHAR ROAD WORK/95 DATED 10.02.95 F

CONSTRUCTION OF PREMIX BITUMEN CARPETING AND REPAIRS OF ROADS IN GAIL VIHAR COLONY AND COMPRESSOR STATION. G

(C) WORK ORDER NO. CE/137/AURIAYA/EXT/ SER/95 DATED 1.11.95:

CONSTRUCTION OF EXTERNAL SEWERAGE LINE AT UPPC NAGAR, DIBIYAPUR. H

A (D) WORK ORDER NO. CE/136/AURIAAYA/ HOUSING/95 DATED
28.9.95

CONSTRUCTION OF RESIDENTIAL QUARTERS TYPE A-25
UNITS, TYPE B-105 UNITS, TYPE C-55 UNITS FOR UPPC
COMPLEX, DIBIYAPUR. _____

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Dear Sir,

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Kindly recall various meetings held in our office and also in the office of Consultant, M/s C.P. Kukreja Associates in respect of *the above referred contracts and the disputes arising therefrom*, wherein it was agreed between us to settle the disputes amicably and through discussions. Despite this clear understanding, you had vide your letters dated 25.08.98 invoked Arbitration clause in respect of Work Order Nos. : (1) CE/AUR/PH-II/EXTN. B. WORK/97A/95 dated 26.05.95 relating to balance work of Construction of C-6 and D-2 number of houses at GAIL Vihar Township of Dibiyapur and (2) CE/115/AURIAAYA/GAIL/GAIL VIHAR ROAD WORK/95 dated 10.2.95 relating to construction of premix bitumen carpeting and repairs of roads in Gail Vihar Colony & Compressor Station.

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Subsequently, vide your letters dated 5.10.98 in respect of the above work orders, you submitted a panel of three Arbitrators asking us to select one of them to act as Sole Arbitrator on the above two cases. However, we responded to your communications vide our letters dated 16.02.99 and as per the terms of the contract suggested the following panel of three distinguished persons :-

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1. Mr. Justice N.N. Goswami (R) Judge Delhi High Court
2. Dr. Avtar Singh, (V) Prof. of Law, IIM, Lucknow.
3. Mr. Harish Chandra, Director General CPWD (Retd.) & Ex-Member, UPSC.

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You were requested to select any of them to act as Sole Arbitrator. However, no action has been taken by you so far and even the issues which seem to have been resolved by discussions have not been confirmed, keeping the matters pending unnecessarily.

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During our meetings, *we have suggested to you that all the disputes*

arising out of the above contracts which cannot be settled by mutual discussions, may be referred to a Sole Arbitrator selected by you from among the panel of distinguished persons mentioned above, so that the resolution of disputes by reference to Arbitration becomes cost effective, economical and quick.

In view of the above, you are requested once again to select any of the persons mentioned herein to act as a Sole Arbitrator *in all the above disputes.*

Assuring you of our best co-operation at all times.

Yours faithfully,

Sd/-

(P.K. Sarkar)
Sr. Manager (Civil)"

11. It may be noted that the above noted letter of 15.11.1999 was written by the Senior Manager (Civil) of appellant no.1 in connection with the disputes relating to all the four contracts, viz. (A), (B), (C) and (D). In this letter reference was made to the earlier letter dated 16.2.1999 sent by appellant no.1 and the same panel of three names in which name of Justice N.N. Goswami (Retd.) was at serial no.1 was reiterated. The last paragraph of the above quoted letter is very important where it was clearly mentioned that the dispute arising out of the four contracts which cannot be mutually settled may be referred to a sole arbitrator selected by respondent no.1 from amongst the persons mentioned in the panel so that the resolution of disputes by reference to arbitration becomes cost effective, economical and quick. Towards the end of the letter a request was made to respondent no.1 to select anyone of the persons mentioned in the said letter to act as sole arbitrator in all the above disputes, which means all the disputes relating to contract nos.(A), (B), (C) and (D). It is, therefore, clear that a panel of three names had been sent by the appellant to respondent no.1 on 16.2.1999 which was categorically reiterated in the letter dated 15.11.1999, sent by the Senior Manager (Civil) of Gas Authority of India Ltd. (appellant no.1) to respondent no.1. This letter was not confined to any particular contract but specifically referred to all the four contracts including the disputed contract no.(D) dated 28.9.1995. The stand of appellant no.1 was quite reasonable that if all the disputes were referred to a single arbitrator, the arbitration proceedings would be cost effective, economical and quick. After receipt of this letter dated 15.11.1999, wherein the

A earlier panel communicated vide letter dated 16.2.1999 had been reiterated, there was no occasion for respondent no.1 to appoint Brig. Nardip Singh (Retd.) as arbitrator by sending a communication to that effect subsequently on 10.12.1999. The stand of the appellant had been made very clear and explicit by the aforesaid two letters and it was not required to respond again specifically to the letter dated 28.10.1999 sent by respondent no.1 to select an arbitrator from the panel intimated by it. The stand of respondent no.1 to the effect that as the appellant did not respond to its letter dated 28.10.1999, it selected Brig. Nardip Singh (Retd.) by sending a communication on 10.12.1999 is, therefore, wholly unjustified.

C 12. There is contemporaneous evidence which shows that a number of meetings had taken place between the representatives of appellant no.1 and the representatives of respondent no.1, wherein effort was made to resolve the disputes without reference to arbitration and an understanding had been reached between the parties that unresolved disputes of all the four contracts shall be referred to a sole arbitrator to make the arbitration proceedings quick and cost effective. After respondent no.1 had sent the letter dated 10.12.1999 to the appellant that it had nominated Brig. Nardip Singh (Retd.) for the purpose of arbitration, the Senior Deputy Manager (Law) of appellant no.1 sent a letter to him on 31.12.1999 requesting him to desist from entering upon the reference or taking any further steps in view of the fact that in the meeting held between the representatives of the two organisations, it was clearly agreed that the matter shall be referred to a sole arbitrator and respondent no.1 was expected to select a name from the panel suggested by appellant no.1. The letter is self-eloquent and is being reproduced below :-

“December 31, 1999

F Brig. Nardip Singh
Chief Engineer, MES (Retd)
B-64, Sector 30
NOIDA

Dear Sir,

G Sub : *Letter by Keti Const. Ltd. IND/KTIL/908/99 dated 20.12.99 in the matter of construction of residential quarters of UPPC, Dibiyapur, Etawah, U.P.*

H This has reference to the captioned communication on the subject cited above.

M/s Keti Constructions have been awarded contracts by GAIL for execution of a number of its projects. In relation to some of which contracts including the contract in question now sought to be placed before you, certain disputes are alleged to remain outstanding, as per Keti Constructions. A

Keti Constructions made their requests for resolution of interse disputes with GAIL by reference to Arbitration, including in the contract in question. B

Upon receipt of these requests of Keti Constructions by GAIL, GAIL made suggestion for resolution of disputes by a Sole Arbitrator and sent to Keti Constructions a panel of three distinguished persons who may be appointed as Sole Arbitrator. Thereupon, Keti Constructions came forward for negotiations. During these discussions/negotiation, the representatives of Keti Const ructions were repeatedly suggested to refer all unresolved issues of various contracts to a Sole Arbitrator selected by them from amongst the panel suggested by GAIL. *Representatives of Keti Constructions agreed to our suggestion as it was less time consuming and GAIL in turn took liberal view on various issues with clear objective of resolving these disputes without reference to arbitration. These efforts yielded results and the requests for arbitration of Keti Constructions were withdrawn by them.* C D

As all these matters were between two organisations and *it was clearly agreed by the parties to refer unresolved disputes of all contracts to a sole arbitrator to make the arbitration proceedings quick and cost effective.* We would have expected Keti Constructions to have sent a name from the panel suggested by GAIL in accordance with the spirit of the discussions held and the principles accepted therein for resolution of interse disputes, which have been acted upon as aforesaid. E F

Unfortunately, Keti Constructions has unilaterally sought to nominate your goodself, despite the overwhelming record to the contrary. G

In this factual background we request you to desist from entering upon the reference or taking any further steps in pursuance to the captioned communication, keeping the cherished values you have maintained in high esteem all through your distinguished career in armed forces. H

A Assuring you of our best attention at all times.

Yours faithfully,

Sd/-

B (CH. HARNATH)
SR. DY. MANAGER (LAW)

CC to

Keti Constructions (I) Ltd.

31/6, Sneh Nagar, Main Road Opposite Sapna Sangeeta Theatre
INDORE 452 001 (M.P.)”

C 13. It may be noted that the four contracts (A), (B), (C) and (D) were
awarded on different dates in quick succession between 10.2.1995 and 1.11.1995
and related to various construction works in Petro-Chemical Complex, Dibiapur,
District Etawah (U.P.). The terms of the agreement have to be understood in
a broad commonsense manner. The material placed on record before the
learned Single Judge shows that the discussion which took place in the
meetings held between the representatives of appellant no.1 and representatives
of respondent no.1 were not confined to the dispute relating to a single
contract, but they related to disputes concerning all the four contracts. It will
not be proper to segregate or compartmentalize the correspondence exchanged
between the parties as if a particular letter was confined to a particular
contract alone. The correspondence exchanged between the parties is not like
evidence in a suit or trial where a piece of evidence given in a particular suit
or trial cannot be read or taken into consideration in another suit or trial. The
stand of the appellant right from the beginning was that all the disputes
should be referred to a single arbitrator, which will be cost effective, economical
and quick. There can be no doubt this stand was very reasonable. Appellant
no.1 had sent a panel on 16.2.1999, which was reiterated in the communication
dated 15.11.1999. In these circumstances, respondent no.1 was not at all
entitled to nominate Brig. Nardip Singh (Retd.) as an arbitrator which it chose
to do subsequently on 10.12.1999. We do not find anything wrong on the part
of the appellant when it intimated vide letter dated 15.11.1999 that a panel had
already been sent earlier on 16.2.1999 for appointment of a single arbitrator
for resolution of all the disputes between the parties.

H 14. According to the appellants, after respondent no.1 had sent the
notice dated 17.7.1999 invoking the arbitration clause, a reply thereto was
given on their behalf by Mr. Sushil Chauhan, Advocate, on 31.7.1999 wherein
it was mentioned as under :

"Ref: Your letter IND/KT/522/99 dated 17.7.99

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Pursuant to the discussions held on various occasions by you and my client, GAIL officials with regard to settlement of disputes and appointment of sole arbitrator, I am instructed by my client, Gas Authority of India Ltd. (GAIL) to call upon you to select the sole arbitrator from the names of three distinguished persons already suggested by my clients during discussions in response to your notices. Please take further necessary action."

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Respondent No.1 has seriously challenged the receipt of the letter dated 31.7.1999 sent by Mr. Sushil Chauhan. It has been urged that the said letter was not sent by registered post and was not received by them. We have, therefore, not taken into consideration the said letter. There is other material on record to show that a panel of three names had already been sent by appellant no.1 to respondent no.1 which was a sufficient compliance of the clause of the agreement. There is neither any such clause in the agreement nor there is any requirement in law that for each of the contract (A), (B), (C) and (D) a separate panel ought to have been sent. The same panel could very well be utilized for resolving the disputes arising out of the four contracts. In fact, as suggested on behalf of the appellant, it would have been more convenient, time saving and economical to have the same person as arbitrator in resolving the disputes between the parties with regard to all the contracts. The view to the contrary taken by the Division Bench of the High Court is clearly erroneous in law.

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15. Appellant no.1 sent a communication to Justice N.N. Goswami (Retd.) on 13.1.2000 appointing him as sole arbitrator for resolution of disputes relating to the contract in question and a copy of this letter was also sent to respondent no.1. Justice N.N. Goswami (Retd.) then entered upon the reference and sent notices to the parties on 11.2.2000 to appear before him on 6.3.2000. Respondent no.1, however, chose not to put in appearance before Justice N.N. Goswami (Retd.). On 28.3.2000, the arbitrator passed an order holding that his appointment as arbitrator was in accordance with the terms of the agreement, but in the interest of justice he would give another notice to respondent no.1. The relevant part of the order passed by him reads as under :

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"In terms of my order dated 6.3.2000, M/s Gas Authority have produced the complete file. On perusal of the file and after hearing Mr. Chauhan, *Prima facie* I am satisfied that my appointment as Arbitrator

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A is in accordance with the terms of Agreement between the parties. I would have proceeded further, but in the interest of justice I feel that one final notice be served on M/s Keti Constructions before publishing the Award.

B To come up on April 18, 2000 at 6.30 p.m. The parties may file their statements of claim before the next date of hearing.”

Since respondent no.1 did not appear on the date fixed, the arbitrator passed an order fixing 19.4.2000 as the next date of hearing. A no claim award was finally given by him on 19.4.2000.

C 16. Respondent no.1 did not at all appear before the arbitrator appointed by appellant no.1. Respondent no.1 neither filed any statement of claim nor raised any plea of jurisdiction before the arbitrator. Section 16 of the Act says that 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. In *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, [2002] 2 SCC 388 in para 21 a Constitution Bench of 5 learned Judges has ruled that if the arbitral Tribunal has been improperly constituted, it would be open to the aggrieved party to require the Arbitral Tribunal to rule on its own jurisdiction in view of Section 16 of the Act. It was also observed that the expression used in Sub-section (1) that the “Arbitral Tribunal may rule on any objections with respect to the existence or validity of the arbitration agreement” shows that the Arbitral Tribunal’s authority under Section 16 is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction and there is no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted. This decision has been partly overruled on another point by a larger bench of 7 learned Judges in *S.B.P. & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618, but the aforesaid view has not been dissented from or reversed. This will be evident from the conclusions arrived at by the larger bench which have been summarized in para 47 of the report and sub-para (ix) thereof reads as under :-

G “In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.”

H 17. It will be useful to take note of the preamble of the Arbitration and Conciliation Act, 1996 which reads as under :-

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985; A

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice; B

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980; C

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation; D

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations; E

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules; E

The Preamble of the Act makes it amply clear that the Parliament has enacted the Arbitration and Conciliation Act, 1996 almost on the same lines as the Model Law, which was drafted by United Nations Commission on International Trade Law. *In Sundaram Finance Ltd. v. NEPC Ltd.* AIR (1999) SC 565 it has been observed that the provisions of the Arbitration and Conciliation Act, 1996 should be interpreted keeping in mind the Model Law as the concept under the present Act has undergone a complete change. It will, therefore, be useful to take note of the corresponding provisions of the UNCITRAL Model Law. Article 16 of the Model Law, which corresponds to Section 16 of the Act, is being reproduced below : F G

UNCITRAL Model Law

“Article 16. *Competence to rule on own jurisdiction.*—

H

A (1) The Arbitral Tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For the purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

B

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

C

D (3) The Arbitral Tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the Arbitral Tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.”

E The commentary on the three paragraphs of the *Model Law* has been given under the headings A, B, C and D. Note 1 under heading A and Note 11 under heading D, which are relevant for the controversy in hand, are being reproduced below :

F “A. “Kompetenz-kompetenz” and separability doctrine, paragraph (1).

1. Article 16 adopts the important principle that it is initially and primarily for the Arbitral Tribunal itself to determine whether it has jurisdiction, subject to ultimate Court control (see below paras 12-14). Paragraph (1) grants the Arbitral Tribunal the power to rule on its own jurisdiction. Including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as “Kompetenz-kompetenz”, is an essential and widely accepted feature of modern international arbitration but, at present is not yet recognised in all national laws.

G

H D. Ruling by Arbitral Tribunal and judicial control, paragraph (3) [Corr.

to Section 16(5), (6)]

A

11. Objections to the Arbitral Tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision, in order to avoid possible waste of time and costs. However, in some cases, in particular, where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with partial or complete decision on the merits of the case. Article 16 (3), therefore, grants the Arbitral Tribunal discretion to rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits.

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C

So, the commentary on the Model Law which was drafted by UNCITRAL and has been adopted by many countries including India shows that where a party asserts that the arbitral tribunal has not been properly constituted or it has no jurisdiction, then such a plea must be raised before the arbitral tribunal right at the beginning and normally not later than in the statement of defence.

D

18. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the arbitral tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the arbitral tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

E

F

19. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the arbitral tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(v) of the Act on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.

G

H

20. Though respondent no.1 had ample opportunity to appear before

A Justice N.N. Goswami (Retd.) and raise a plea of jurisdiction to the effect that he had been wrongly appointed as arbitrator by appellant no.1, yet, it chose not to do so. This feature of the case weighs heavily against respondent no.1. The learned Single Judge has taken this fact as an additional ground for rejecting the petition filed by respondent no.1 under Section 34 of the Act and we are in agreement with the said view.

B

21. For the reasons discussed above, the appeal is allowed with costs throughout and the judgment and order dated 7.12.2004 of the Division Bench of the High Court is set aside. The judgment and order dated 20.10.2003 of the learned Single Judge dismissing the petition under Section 34 of the Act, which was filed by respondent no.1, is affirmed.

C

B.S.

Appeal allowed.