

UNION OF INDIA

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v.

M/S PAM DEVELOPMENT PVT. LTD.  
(Civil Appeal No. 5618 of 2006)

FEBRUARY 18, 2014.

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**[SURINDER SINGH NIJJAR AND  
RANJANA PRAKASH DESAI, JJ.]**

*Arbitration and Conciliation Act, 1996: s.11(6) -  
Jurisdiction of arbitrator to entertain the dispute - Agreement  
for construction of Loco shed - Termination of contract -  
Arbitration application u/s.11(6) by respondent - Appointment  
of former judge as arbitrator - Full participation of appellant -  
Award by arbitrator - s.34 application by appellant for setting  
aside of award - Dismissed by High Court - On appeal, held:  
Although in the instant case, arbitration agreement provided  
for appointment of two arbitrators and an Umpire, however, in  
view of repeal of Arbitration Act, 1940 by Arbitration Act, 1996,  
the provision in the arbitration agreement for appointment of  
two arbitrators and an Umpire had become redundant -  
Appointment of former judge as arbitrator was not challenged  
by the appellant and, therefore, the same became final and  
binding - This apart, appellant failed to raise objection  
regarding lack of jurisdiction of the Arbitral Tribunal before the  
arbitrator - Appellant not only filed the statement of defence  
but also raised a counter claim against the respondent and,  
therefore, objection is deemed to have been waived in view  
of the provisions contained in s.4 r/w s.16 of the Arbitration  
Act, 1996 - s.16 provides that the Arbitral Tribunal may rule  
on its own jurisdiction and clearly recognizes the principle of  
kompetenz-kompetenz - s.16(2) mandates that a plea that the  
Arbitral Tribunal does not have jurisdiction shall be raised not  
later than the submission of the statement of defence - s.4*

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- A *provides that a party who knows that 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 shall be deemed to have waived his right to so object - High Court rightly held*
- B *that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise the plea before it for the first time - Doctrine/Principle - Principle of kompetenz-kompetenz.*

- C *Bharat Sanchar Nigam Limited and another versus Motorola India Private Limited (2009) 2 SCC 337: 2008 (13) SCR 445 - relied on.*

**Case Law Reference:**

- D **2008 (13) SCR 445** Relied on **Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5618 of 2006.

- E From the Judgment and Order dated 15.06.2005 of the High Court of Calcutta in APOT No. 643 of 2003.

P.P. Malhotra, ASG, Syed Tanweer Ahmad, Sonia Malhotra, Shreekant N. Terdal, Yasir Rauf for the Appellant.

- F Pranab Kumar Mullick, Soma Mullick for the Respondent.

The following Order of the Court was delivered

**ORDER**

- G 1. This appeal has been filed by the Union of India challenging the judgment and order of the Calcutta High Court dated 15th June, 2005 rendered in APOT NO.643 of 2003.

- H 2. We may notice here the bare essential facts, which would have a bearing on the legal controversy involved in the appeal.

3. On 19th October, 1992, the appellant entered into an agreement with the respondent for construction of Industrial Covered Electrical Loco Shed. Subsequently, according to the appellant, the agreement was terminated in terms of clause 64 of the General Conditions of Contract by which the agreement between the parties was governed. The twin reasons for termination of the contract were that the respondent initially delayed the commencement of the work and subsequently executed the work which was of inferior quality. Therefore, the appellant had to get the balance work completed from another contractor.

4. On 24th July, 1996, the respondent raised certain claims against the appellant.

5. On 30th September, 1996, the respondent demanded that the disputes be referred to arbitration.

6. Since the disputes were not referred to arbitration, the respondent approached the High Court of Calcutta under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act, 1996") for the appointment of a sole arbitrator. The High Court by its order dated 10th July, 1998 appointed Mr. Justice Satyabrat Mitra as the sole arbitrator. The learned arbitrator duly commenced the arbitration proceedings, in which the appellant fully participated. The appellant filed statement of defence. Upon completion of the arbitration proceedings, the learned arbitrator made the award on 25th January, 2002. The claims of the respondent were accepted and the award was rendered in favour of the contractor in the sum of Rs.1,29,89,768/-.

7. Aggrieved by the aforesaid award, the appellant filed an application under Section 34 of the Arbitration Act, 1996 before the High Court for setting aside the award. The learned single judge of the High court dismissed the aforesaid application of the appellant on 28th October, 2003.

A 8. Aggrieved by the aforesaid order, the appellant filed Intra-Court appeal before the Division Bench of the High court, which has also been dismissed by the impugned judgment dated 15th June, 2005.

B 9. The present appeal arises out of Special Leave Petition (Civil) No.20316 of 2005.

10. We have heard the learned counsel for the parties at length.

C 11. Mr. P.P. Malhotra, learned Additional Solicitor General, appearing for the Union of India, submitted that the High Court committed an error of jurisdiction by appointing a former judge of the High court as the sole arbitrator. The appointment of the sole arbitrator was against the contractual conditions which cannot be ignored. Therefore, the reference was before a  
D Arbitral Tribunal which had not been properly constituted. He also submitted that the arbitrator had no jurisdiction to entertain the claims with regard to certain excepted matters.

E 12. On the other hand, the learned counsel for the respondent has submitted that the appellant having participated in the proceedings before the learned arbitrator without any demur or objection cannot now be permitted to raise the objection with regard to the jurisdiction of the arbitrator at this belated stage. Learned counsel further submitted that in view  
F of express provision contained in Section 16 of the Arbitration Act, 1996, the Arbitral Tribunal is competent to rule on its own jurisdiction. He submits that pleas with regard to lack of jurisdiction of the learned arbitrator ought to have been raised not later than the submission of the statement of defence.  
G Learned counsel pointed out that no plea of lack of jurisdiction of the learned arbitrator was taken by the appellant in the statement of defence. Furthermore, the appellant also led evidence in defence. He also pointed out that the appellant, in  
H fact, categorically accepted the jurisdiction of the learned arbitrator by filing a counter claim in the proceedings. He

submits that, in such circumstances, the appellant had clearly waived its right to object to the constitution of the Arbitral Tribunal. Similarly, the plea of excepted matters was also never raised by the appellant during the entire arbitration proceedings. All claims have been decided on merits.

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13. We have considered the submissions made by the learned counsel for the parties.

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14. The arbitration agreement contained in clause 64 of the General Conditions of Contract is as under:

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"64(3)(a) ARBITRATION: Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to

3(a)(i) A Sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs.5,00,000/- (Rupees five lakhs) and in cases where the issues involved are not of complicated nature. The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

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3(a)(ii) Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) or all claims of Rs.5,00,000/- (Rupees five Lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature the General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

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3(a)(iii) It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/

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A Umpire and if for any reason, that is no possible, the matter  
 is not to be referred to Arbitration at all. 3(a)(iv) In cases  
 where the claim is up to Rs.5,00,000/- (Rupees five lakh),  
 the Arbitrator(s) compare so appointed, as the case may  
 be, shall give the award on all matters referred to arbitration  
 B indicating therein break-up of the sums awarded  
 separately on each individual item of disputes. In cases  
 where the claim is more than Rs.5,00,000/- (Rupees five  
 lakh), the Arbitrator(s)/Umpire so appointed, as the case  
 may be, shall give intelligible award (i.e. the reasoning  
 C leading to the award should be stated) with the sums  
 awarded separately on each individual item of dispute  
 referred to arbitration.

3(b) For the purpose of appointing two arbitrators as  
 referred to in sub-clause (a)(ii) above, the Railway will send  
 D a panel of more than three names of Gazetted Railway  
 Officers of one of more departments of the Railway to the  
 contractor who will be asked to suggest to the General  
 Manager one name out the list for appointment as the  
 contractor's nominee. The General Manager, while so  
 E appointment the contractor's nominee, will also appoint a  
 second arbitrator as the Railway's nominee either from the  
 panel or from outside the panel, ensuring that one the two  
 arbitrators so nominated is invariably from the Accounts  
 Department. Before entering upon the reference the two  
 F arbitrators shall nominate an Umpire who shall be a  
 Gazetted Railway Officer to whom the case will be referred  
 to in the event of any difference between the two arbitrators  
 Officers of the Junior Administrative grade of the Accounts  
 Department of the Railways shall be considered as of  
 G equal status to the Officers in the intermediate  
 administrative grade of other departments of the Railway  
 for the purpose of appointment as arbitrators."

15. A persual of clause 64 would show that in case of  
 H claims which are below Rs.5,00,000/- (Rupees five lakh), the

General Manager or a Gazetted Railway Officer nominated by him shall be the sole arbitrator. In case of claims of Rs.5,00,000/- (Rupees five lakh) and above, the Arbitral Tribunal shall consist of three arbitrators to be appointed in terms of clause 64(3)(b). Under clause 64(3)(b), the Railways will send a panel of more than three names of Gazetted Railway Officers from whom the contractor will be asked to suggest one name. The General Manager will appoint the second arbitrator on behalf of the Railways. The clause also provided that two arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer.

16. Since the Arbitration Act, 1940 had been repealed by the Arbitration Act, 1996 the provision in the arbitration agreement for appointment of two arbitrators and an Umpire had become redundant. Accordingly, the respondent requested the Railways to appoint the sole arbitrator. Since the Railways failed to appoint the arbitrator within 30 days of the receipt of the letter dated 30th September, 1996, the respondent moved the application under Section 11(6) of the Arbitration Act, 1996 for appointment of a sole arbitrator on 3rd January, 1997 before the High Court. As noticed above, by order dated 10th July, 1998, the High Court appointed Mr. Justice Satyabrata Mitra as the sole arbitrator. It is important to notice that this order dated 10th July, 1998 was not challenged by the appellant and, therefore, the same became final and binding. This apart, the appellant failed to raise any objection to the lack of jurisdiction of the Arbitral Tribunal before the learned arbitrator. As noticed above, the appellant not only filed the statement of defence but also raised a counter claim against the respondent. Since the appellant has not raised the objection with regard to competence/jurisdiction of the Arbitral Tribunal before the learned arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996.

17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16

A clearly recognizes the principle of kompetenz-kompetenz. Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that 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 shall be deemed to have waived his right to so object.

C 18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *Bharat Sanchar Nigam Limited and another versus Motorola India Private Limited* [(2009) 2 SCC 337]. Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows:

E 39. Pursuant to section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.

H 19. In our opinion, the obligations are fully applicable to the

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facts of this case. The appellant is deemed to have waived the right to object with regard to the lack of the jurisdiction of the Arbitral Tribunal. A

20. We, therefore, see no merit in the appeal and the same is hereby dismissed. B

No costs.

D.G.

Appeal dismissed.