CASE NO.:
Appeal (civil) 7140 of 2004

PETITIONER:
Dharma Prathishthanam

RESPONDENT:
M/s. Madhok Construction Pvt. Ltd.

DATE OF JUDGMENT: 02/11/2004

BENCH:
CJI R.C. LAHOTI, G.P. MATHUR & P.P. NAOLEKAR

JUDGMENT:
J U D G M E N T

(Arising out of Special Leave Petition (C) No. 7835 of 2003)

R.C. LAHOTI, CJI.

Leave granted.

The appellant-Dharma Prathishthanam is a charitable institution. The respondent is a builder engaged in construction activity. In the year 1985, the appellant proposed to have a building constructed for which purpose it entered into a works contract with the respondent for the construction as per the drawings and specifications given by the appellant. We are not concerned with the correctness or otherwise of the allegations and counter allegations made by the parties which relate to the question who committed breach of the agreement. Suffice it for our purpose to say that disputes arose between the parties. Clause 35 of the agreement which is the arbitration clause reads as under:-

"Settlement of disputes shall be through arbitration as per the Indian Arbitration Act."

Obviously and admittedly the reference was to the Arbitration Act, 1940.

On 12th June, 1989 the respondent appointed one Shri Swami Dayal as the Sole Arbitrator. It appears that the respondent gave a notice to the appellant of such appointment having been made by the respondent but the appellant failed to respond. The respondent made a reference of disputes to the Arbitrator and the Arbitrator Shri Swami Dayal entered upon the reference. The record of the proceedings of the Arbitrator have neither been produced before the High court nor are they available before us. However, it is not disputed that the appellant did not participate in the proceedings before the Arbitrator. On 14th April, 1990 the Sole Arbitrator gave an award of Rs. 14,42,130.78p. with interest at the rate of 12 per cent per annum from 14th April, 1990 till realization in favour of the respondent against the appellant. The respondent filed an application in the Court under Sections 14 and 17 of the Act for making the Award a Rule of the Court. The notice under Section 14(2) of the Act was published in the Statesman , a daily English newspaper in its edition dated 6th December, 1991. the notice reads as under:-

"Notice to:
Dharma Prathishthanam A, 214, New Friends Colony, New Delhi \026 65.

Whereas Shri Swami Dayal the Arbitrator has filed the award dated 14.4.90 delivered by the said Arbitrator with Arbitration proceedings in Court in disputes inter se you respondent and petitioner for being made a rule of the Court. You are hereby called upon to file objections, if any, in accordance with law to the said award within 30 days of the Service of this notice.

And petitioner has filed an application I.A. No. 8446/90 under Section 17 of the Arbitration Act, 1940 on 20.9.91.

AND

Whereas it has been shown to the satisfaction of the Court it is not possible to serve you in the ordinary way, therefore, this notice is given by advertisement directing you to make appearance in Court on 20.2.92 at 11 a.m.

Take notice that in default of your appearance on the day before mentioned, the suit and I.A. will be heard and determined in your absence.

Dated this 18th day of November, 1991."

The appellant appeared in the Court on the appointed date i.e. 20th February, 1992. According to the appellant it gathered only on that date a copy of the Award dated 14th April, 1990. From 14th March, 1992 to 20th March, 1992 the Court was closed. On 21st March, 1992 the appellant filed objections to the Award. The objections have been dismissed without any adjudication on merits and only on the ground that the objection petition was filed beyond a period of 30 days from 6th February, 1991 i.e. the date of publication of notice in the Statesman. Having lost before the learned Single Judge of the High Court of Delhi (Original Side) as also in intra-court appeal preferred before the Division Bench, the aggrieved appellant has filed this appeal by special leave.

Though the initial submission of the learned counsel for the appellant has been that in the facts and circumstances of the case, the delay in filing the objection petition ought to have been condoned and the objection petition ought to have been held to have been filed within the period of limitation calculated from the date on which copy of the award was made available to the appellant without which the appellant could not have exercised its right to file objections and, therefore, subject to this Court feeling satisfied of the maintainability of the objection petition and its availability for consideration on merits, this Court may remand the objection petition for hearing and decision by the learned Single Judge on merits. However, we do not think that this exercise is at all called for, as we are satisfied that the Award given by the arbitrator is a nullity and hence the proceedings must stand terminated fully and finally at this stage itself. We proceed to record our reasons for taking this view.

An arbitrator or an Arbitral Tribunal under the Scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the Court is settlement of the dispute by a Tribunal of the own choosing of the parties.

Further, this was not a case where the arbitration clause authorized one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of essence in cases like the present one: firstly, the choice of the Tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the Arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The Law of Arbitration does not make the arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.

Arbitration Act, 1940 consolidates and amends the law relating to arbitration. According to Clause (a) of Section 2 of the Act, "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Under Section 3, "arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference. The First Schedule consists of 8 paragraphs incorporating implied conditions of arbitration agreements. Para 1 of the First Schedule which only is relevant for our purpose provides \026 " Unless otherwise expressly provided, the reference shall be to a sole arbitrator". The manner and method of choosing the sole arbitrator and making the reference to him is not provided. That is found to be dealt with in Sections 8, 9 and 20 of the Act.

The relevant parts of the provisions relevant in the context of a general clause merely providing for arbitration as in the present case, are extracted and reproduced herein :-

"Section 8 Power of Court to appoint arbitrator or umpire \026 (1) In any of the following cases, -
(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen;, concur in the appointment or appointments; or
(b) XXX XXX XXX
(c) XXX XXX XXX

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

[2] If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

Section 9 is irrelevant for our purpose as its applicability is

attracted to a case where an arbitration agreement provides for a reference to two arbitrators, one to be appointed by each party and procedure to be followed in such cases which is not a situation provided in by the agreement with which we are dealing.

Sections 8 and 9 are placed in Chapter II of the Act Section 20 finds place in Chapter III. According to Section 20 \026

Application to file in Court arbitration agreement \026

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court."

After noticing all the parties and affording them an opportunity of being heard, under sub-sections (4) and (5) \026

"(4) where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter, the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

In the background of the above said provisions, the question which arises for consideration is whether, in the light of a general provision as in clause 35, the respondent could have unilaterally appointed an arbitrator without the consent of the appellant and could have made a reference to such arbitrator again without the reference of disputes having been consented to by the appellant.

On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the

provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference \026 both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edition, p. 104) \026

"An Arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him;\005\005.". "He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants' agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."

A reference to a few decided cases would be apposite.

In Thawardas Pherumal and Anr. Vs. Union of India (1955) 2 SCR 48, a question arose in the context that no specific question of law was referred to, either by agreement or by compulsion, for decision of the Arbitrator and yet the same was decided howsoever assuming it to be within his jurisdiction and essentially for him to decide the same incidentally. It was held that \026

"A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of the Act and the recalcitrant party can then be ;compelled to submit the matter under sub-section (4). In the absence of either, agreement by both sides about the terms of reference, or an order of the Court under section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."

A Constitution Bench held in Waverly Jute Mills Co. Ltd. Vs. Raymond and Co. (India) Pvt. Ltd. (1963) 3 SCR 203 that \026

"An agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the

parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."

Again a Three-Judges Bench held in Union of India Vs. A.L. Rallia Ram (1964) 3 SCR 164 that it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate and in absence thereof the proceedings of the arbitrator would be unauthorized.

In Union of India Vs. Prafulla Kumar Sanyal [1979] 3 SCC 631, this Court observed that an order of reference can be either to an arbitrator appointed by the parties whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. If no such arbitrator had been appointed and where the parties cannot agree upon an arbitrator, the Court may proceed to appoint an arbitrator itself. Clearly one party cannot force his choice of arbitrator upon the other party to which the latter does not consent. The only solution in such a case is to seek an appointment from the Court.

In Banwari Lal Kotiya Vs. P.C. Aggarwal 1985 (3) SCC 255, the question of validity of a reference came up for the consideration of the Court in the context of the issue - whether an arbitrator could enter upon a reference which was not consensual. The Court explained the law laid down by this Court in Thawardas Perumal's case (supra) that though the reference to arbitrator has to be accompanied by consent of the parties but such consent is not necessarily required to be expressed at the time of making the reference if it is already provided by the agreement or is sanctioned by statutory rules, regulations or bye-laws. The Court held that the expression "arbitration agreement" is wider as it combines within itself two concepts \026 (a) a bare agreement between the parties that disputes arising between them should be decided or resolved through arbitration and (b) an actual reference of a particular dispute or disputes for adjudication to a named arbitrator or arbitrators. When the arbitration agreement is of the former type, namely, a bare agreement, a separate reference to arbitration with fresh assent of both the parties will be necessary and in the absence of such consensual reference resorting to Section 20 of the Arbitration Act will be essential.

The Constitution Bench in Khardah Company Ltd. Vs. Raymond & Co. (India) Private Ltd. AIR 1962 SC 1810 decided the issue from the view point of jurisdictional competence and held that what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement and where there is no such agreement there is an initial want of jurisdiction which cannot be cured even by acquiescence. It is clearly spelled out from the law laid down by the Constitution Bench that the arbitrators shall derive their jurisdiction from the agreement and consent.

Thus, there is ample judicial opinion available for the proposition that the reference to a sole arbitrator as contemplated by para 1 of the First Schedule has to be a consensual reference and not an unilateral reference by one party alone to which the other party does not consent.

We are also inclined to make a reference to a few decisions by High Courts.

In India Hosiery Works Vs. Bharat Woollen Mills Ltd. AIR 1953 Cal. 488, the Division Bench of the Calcutta High Court observed \026

"an arbitration agreement neither specifying the number of arbitrators, nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the Court, except where the operation of Rule 1 of the First Schedule is excluded.

XX XX XX

XX XX XX

Where, therefore, the agreement does not assign the right of appointment distributively to different parties in respect of different arbitrators, it is inherent in the agreement that the appointment of the arbitrator or of each of the several arbitrators must be by the consent of all parties. There may be an express provision to such effect, but even in the absence of any express provision, such a provision must be taken ;to be necessarily implied. It is for that reason that where the agreement does not specify the number of arbitrators, nor specifies the mode of appointment, the Court first takes the agreement as providing for reference to a single arbitrator by reason of the provisions of Rule 1 of Schedule I, then takes the mode of appointment intended necessarily to be appointed by consent of the parties and next, if it finds that the parties cannot concur in the appointment of an arbitrator, it appoints from itself."

[emphasis supplied]

The view was reiterated by another Division Bench of the same High Court in M/s. Teamco Private Ltd. Vs. T.M.S. Mani AIR 1967 Cal. 168.

M/s National Small Industries Corpn. Ltd. Vs. M/s. National Metal Craft, Delhi and others AIR 1981 Del. 189 is very close to the case at hand. An arbitration clause - longish one, in substance provided that on question, dispute or difference arising between the parties to the agreement, "either of the parties may give to the other notice in writing of such question dispute or difference and the same shall be referred to arbitration". One of the parties served a notice on the other appointing one 'K' as arbitrator to adjudicate upon the dispute. The notice ended by saying "you are hereby called upon to agree to the said reference in accordance with the arbitration agreement for the settlement of the said disputes." 'K' then commenced the arbitration proceedings. Following the Division Bench decision of the Calcutta High Court, the learned Single Judge of Delhi High Court held \026

"If the agreement merely provides, as here, that the dispute shall be referred to arbitration, the reference shall be made to a single arbitrator. If the agreement does not provide for the number of arbitrators and the mode of their appointment, it will be assumed to be one for reference to a single arbitrator by reason of para I of the First Schedule,

and the mode of appointment taken necessarily to be consent of parties, and if the parties do not concur in the appointment, as is the case here, the court will make the appointment".

[emphasis supplied]

Appointment of 'K' as arbitrator was held to be invalid because it was unilateral and was made without any application to the Court either under Section 8 or Section 20 of the Act.

A Division Bench of the High Court of Allahabad held in Om Prakash Vs. Union of India AIR 1963 All. 242 that a reference to arbitrator out of Court must be by both the parties together and cannot be by one party alone; failing the consent, the parties or either of them must approach the Court by making an application in writing.

Consent, of course, is of the very essence of arbitration said a Division Bench of Madras High Court in The Union of India Vs. Mangaldas N. Varma, Bombay AIR 1958 Mad. 296.

Failure to give consent or to appoint an Arbitrator in response to a notice for appointment of an Arbitrator given by the other party provides justification to the other party for taking action under sub-section (2) of Section 8 of the Act and then it is the Court which assumes jurisdiction to appoint an Arbitrator as held by High Court of Orissa in Niranjan Swain Vs. State of Orissa and Others AIR 1980 Ori. 142.

The view of the law taken by the several High Courts as above appeals to us and we find ourselves in agreement therewith.

In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside de hors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.

In Chhabba Lal Vs. Kallu Lal and Others AIR 1946 P.C. 72 their Lordships have held that an award on a reference pre-supposes a valid reference. If there is no valid reference, the purported award is a nullity.

On this point, there is near unanimity of opinion as amongst the High Courts of the country as well. Illustratively, we may refer to a few cases. In Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others AIR 1990 Bom. 45 (para 34), the Division Bench held that the Court has suo motu power to set aside an award on ground other than those covered by Section 30 such as an award made by arbitrators who can never have been appointed under Section 8, as such an award would undoubtedly be ab initio void and nonest. In Union of India Vs. South Eastern Railway AIR 1992 M.P. 47 and Rajendra Dayal Vs. Govind 1970 MPLJ 322, both Division Bench decisions, the High Court of Madhya Pradesh has held that in certain situations the Court may set aside an Award even without there being an application under Section 30 or even if the petition under Section 30 has not been filed within the period of limitation if the Court finds that the award is void or directs a party to do an act which is prohibited by law or is without jurisdiction or patently illegal. We need not multiply the number

of authorities on this point as an exhaustive and illuminating conspectus of judicial opinion is found to be contained in Law of Arbitration and Conciliation - Practice and Procedure by S.K. Chawla (Second Edition, 2004 at pp. 181-184) under the caption \026 "Whether the Court has suo motu power to set aside an Arbitral Award - " and the answer given in the discussion thereunder is in the affirmative.

Though it has been held in The Union of India Vs. Shri Om Prakash [1976] 4 SCC 32 that an objection on the ground of invalidity of a reference is not specifically covered by clauses (a), (b) and (c) of Section 30, yet it is included in the residuary expression "or as otherwise invalid" and could have been set aside on such an application being made. However, the above decision cannot be treated as an authority to hold that an award which is void ab initio and hence a nullity consequent upon an invalid appointment and an invalid reference in clear breach of the provisions contained in Sections 8, 9 and 20 of the Act, can still be held to be valid if not objected to through an objection preferred under Section 30 of the Act within the prescribed period of limitation.
Three types of situations may emerge between the parties and then before the Court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language then the parties and the Court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise.

Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them before hand; the consent is already spelled out and binds the parties and the Court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the Court and seek an order of reference to the arbitrator appointed by the parties.

Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference \026 both shall be by the consent of the parties. Where the parties do not agree, the Court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the Court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of Court for appointment of an arbitrator and an order of reference of disputes to him. It is the Court which only could have compelled the appellant to join in the proceedings.

In the present case, we find that far from submitting to the jurisdiction of the Arbitrator and conceding to the appointment of and reference to the Arbitrator-Shri Swami Dayal, the appellant did raise an objection to the invalidity of the entire proceedings beginning from the appointment till the giving of the Award though the objection was belated. In ordinary course, we would have after setting aside the impugned judgments of the High Court remanded the matter back for hearing and decision afresh by the learned Single Judge of the High Court so as to record a finding if the award is a nullity and if so then set aside the same without regard to the fact that the objection petition under Section 30 of the Act filed by the appellant was beyond the period of limitation prescribed by Article 119(b) of the Limitation Act, 1963. However, in the facts and circumstances of the case, we consider such a course to follow as a futile exercise resulting in needless waste of public time. On the admitted and undisputed facts, we are satisfied, as already indicated hereinabove, that the impugned Award is a nullity and hence liable to be set aside and that is what we declare and also do hereby, obviating the need for remand.

For the foregoing reasons, the appeal is allowed. The impugned Award given by the Arbitrator alongwith the appointment of the Arbitrator and reference made to him are all set aside as void ab initio and nullity. The respondent shall be at liberty to seek enforcement of his claim, if any, by having recourse to such remedy as may be available to him under law and therein pray for condonation of delay by seeking exclusion of time lost in the present proceedings. No order as to the costs.